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A Message from the Chair

Robert B. Koegel

Robust attendance and audience participation characterized our Section's Annual Meeting in New York last January. We thank our program chairs, Les Steinman and Carol Van Scoyoc, who developed the topics and corralled the speakers, as well as the speakers themselves, and you, the attending Section members.

I'd like to continue a subject we broached at our meeting: Section committees. Please don't stop reading this. I hate committees, too. But there are good reasons for engendering a strong committee system within our Section.

Few of us delve deeply into all areas of municipal practice. Whether we appear before or advise municipal bodies, most of us concentrate on specific substantive areas of law, or have our preferences. Our Section committees foster easy communication among practitioners with similar interests and knowledge. Once you start talking to one another, you'll be surprised how many times you'll say or hear, "Hey, that's happened to me, too."

The range of topics for our Section programs comes from meetings of our Executive Committee. There is heavy input from our committee chairs.

The deeper our committees are, the more likely we are to select topics and put on programs that you will feel are both vibrant and informative. And we certainly appreciate speakers from our own ranks.

We all write for a living. It's not uncommon to encounter a factual situation or new legal development that sparks our interest. Often we let it go. Committee participation provides a framework to push forward with expressing a view. If you take the time to write a good article or comment, it will be published here. Just take a look inside at the opportunities awaiting you.

The State Bar Association regularly solicits our Section's opinion on pending legislation. We circulate bills to Executive Committee members and committee chairs. We'd like to circulate this information to committee members. That way, our committee members could learn more about proposed changes in the law, and our Section comments to the State Bar would be more reflective of our Section as a whole. Our comments do make a difference, and you can be a part of that.

We have eight substantive and procedural committees. Each is chaired by a diligent, friendly attor-

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ney. Contact information for all of the committees is set forth at the end of this issue (see page 22). Please carefully consider getting involved in one or more of these committees or, if the interest is there, starting a new one.

You'll make our Section better and frankly, you'll get much more out of your Bar Association membership.

Robert B. Koegel

From the Editor

As Section Chair Robert Koegel mentioned in his column, the Municipal Law Section's recently completed Annual Meeting program was a huge success. Attracted by the diversity of topics—e.g., tax certiorari, condemnation, ethics, labor and employment law, flow control and the use of video surveillance cameras on public streets—and six CLE credits including 2.5 hours of ethics credits, 117 participants, more than 10% of the entire Section membership, attended.

Highlighting the ethics presentations, a spirited debate took place regarding the restrictions on a lawyer's ability to contact municipal board members on behalf of a client in connection with a land use matter where the board having jurisdiction is represented by counsel (Disciplinary Rule 7-104(A)(1)). The application of this "No Contact Rule" to communications with municipal land use boards is addressed by Adam L. Wekstein, Esq., of Hocherman, Tortorella & Wekstein, LLP in this issue of the *Municipal Lawyer.* In his article, Mr. Wekstein reviews a recent opinion of the New York State Bar Association Committee on Professional Ethics (Opinion 812) which provides guidance on the weighing of the competing ethical and constitutional interests inherent in the context of communications by a developer's counsel with individual planning board members during the land use process.

A second ethics panel at the Annual Meeting discussed the use and abuse of official vehicles. At issue was a public employee's proper use of a government vehicle and under what circumstances the public employee may use a government vehicle for personal purposes. It is expected that this topic will be the subject of an article in an upcoming issue of the *Municipal Lawyer.*

Continuing with the ethics theme, the current issue of the *Municipal Lawyer* includes the third installment of a series of articles on "Enacting a Local Ethics Law" by Mark Davies, Esq., Executive Director of the New York City Conflicts of Interest Board. In the final installment, Mr. Davies discusses the composition and structure of a local ethics board and the four primary functions essential to its effectiveness: training and education, legal advice, disclosure and enforcement.

Avoiding conflicts of interest is the focus of an article I have included on the principles governing recusal and abstention by planning board members. The article also addresses the impact of abstention on the board's voting requirements and the consequences that stem from a planning board member's failure to recuse him or herself when the member's objectivity has been compromised.

Finally, it is my pleasure to congratulate Mark Davies, a member of the Section's Executive Committee, on receiving the Excellence in Public Service Award from the New York State Bar Association. The award recognizes Mark's dedication to public service, professional integrity and leadership in the field of municipal ethics.

Lester D. Steinman

Save the Dates!!!!

Municipal Law Section

Fall Meeting

October 10–12, 2008

The Otesaga Hotel, Cooperstown

Application of the "No Contact Rule" to Municipal Land Use Boards

By Adam L. Wekstein

Introduction

Under New York State ethical rules and, for that matter, throughout the country,[1] a lawyer's ability to contact another party regarding a matter in which that party is represented by counsel is quite circumscribed. The so-called "No Contact Rule" is embodied in New York by Disciplinary Rule 7-104(A)(1),[2] which reads as follows:

> A. During the course of the representation of a client a lawyer shall not:
>
> (1) communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

DR 7-104(A)(1) applies to both litigated and non-litigated matters.

Application of the No Contact Rule to attorney communications with a local land use board or members thereof, when such boards are typically represented by counsel, can be problematic both for attorneys representing applicants for development approvals and those representing a board. Little ethical guidance has emerged from the courts or ethics committees in New York State as to the contours of the No Contact Rules vis-à-vis planning boards, zoning boards of appeals and municipal legislative bodies. Uncertainty exists because while application of the No Contact Rule is somewhat straightforward to matters involving parties who are natural persons and a little less so when it comes to corporate entities, it is far more complicated when the party that is putatively represented by counsel is a board, commission, official or employee of the government. Among other things, the complications arise because the ability of an attorney to communicate on behalf of his client with the government regarding a proposed development or zoning proposal is certainly encompassed within and protected by the fundamental right of citizens under the First Amendment to the United States Constitution to petition the government.[3] A developer is not stripped of such constitutional rights merely because he or she has hired a lawyer to advance his or her interests.

Although it would perhaps be simplest to vindicate First Amendment rights by employing a rule which allows attorneys free and unfettered access to municipal officials,[4] New York does not adhere to such an approach. Rather the State effectively balances such rights and the need for access to the government against the purposes to be served by the No Contact Rule.[5] The balancing is accomplished through application of the plain terms of DR 7-104(A)(1) with the understanding that an attorney may be "authorized by law" to communicate with a public official or board pursuant to the First Amendment.

Ethics Opinion 812 (5/3/07) ("Opinion 812"), issued last year by the New York State Bar Association Committee on Professional Ethics (the "Committee"), provides much needed, although necessarily incomplete, guidance regarding the weighing of the competing ethical and constitutional interests in the context of communications by a developer's attorney with individual members of a municipal planning board. It did not involve a matter in litigation, but rather, normal communications during the course of the land use review process.

Purpose and General Application of the No Contact Rule

The Court of Appeals has indicated that the No Contact Rule is designed to embody principles of fundamental fairness. It has stated that the Rule's purpose is:

> to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact. . . . By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.[6]

The ethical considerations, which are part of New York's Code of Professional Responsibility, reinforce the theoretical basis for the rule by stating that "the legal system functions best when persons in need of legal advice or assistance are represented by their own counsel."[7]

On its face, regardless of the nature of the parties, the No Contact Rule requires inquiry into: (1) whether the individual with whom an attorney wishes to communicate is a "party" to a matter; (2) whether the party is represented by counsel; (3) whether the matter about which the attorney wants to communicate is the subject of such representation; and (4) (if the answers to items (1), (2) and (3) are in the affirmative), does any law authorize the attorney to contact the unrepresented party?

The first question, whether a person is a party in a matter, comes into play when the individual with whom the attorney wants to communicate is associated in some fashion with a corporation, other entity, or governmental agency that is a party.[8] *Niesig* delineates those employees, officials or representatives of a corporation who are considered to be the party for the purposes of DR-7-104(A)(1) in the following passage:

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos"), are imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.[9]

Niesig makes clear that the standard is formulated in this manner to eliminate the unfair advantage that would result from the extraction of concessions and admissions which would bind the corporation, by prohibiting counsel from communicating with employees who have "speaking authority" for the corporation or who are "so closely identified with the interests of the corporate party as to be indistinguishable from it."[10]

Niesig explains the correct employment of its test as follows:

> [i]n practical application, the test we adopt thus would prohibit direct communication by adversary counsel 'with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation' . . . This test would permit direct access to all other employees, and specifically—as in the present case—it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued.[11]

Application of the No Contact Rule to the Government

Niesig's test applies with equal vigor to governmental entities.[12] Accordingly, under the rule, if the employee or official of a governmental agency does not have the power to bind that agency, his or her actions cannot be imputed to the agency for the purposes of liability and he or she is not implementing advice of counsel, then the employee is not a party and the restraints of the No Contact Rule do not apply.

As such, a governmental employee whose only role in a matter is as a witness to salient events would not be a party.[13] A leading treatise on New York law discusses the issue as follows:

> adverse counsel's informal contact with agency employees who do not have management status is not contrary to the prohibition, since an extension of the term 'party' to include all employees would bar access to a vast number of potential witnesses and permit the government agency to insulate such witnesses from interviews except through costly discovery procedures.[14]

Under such principles, the court in *Gilbert* found that an employee of the New York State Department of Transportation (the "DOT"), which was a defendant in an action asserting that icy road conditions resulting from DOT negligence caused an accident, who was interviewed only as to his knowledge of the road conditions, was not a party.[15] Conversely, in a matter involving a municipal legislature or land use board, a member of that board or legislative body would normally be a party, as he or she is part of a board vested with binding decision-making authority.

In addition to the question of who constitutes the "party," three issues which commonly arise in applying the No Contact Rule to communication with governmental entities are: (1) determining if (and when) a governmental body or employee is represented by counsel; (2) assessing whether the matter about which the communication is occurring is the same matter on which the government is being represented; and (3) deciding if the communication is otherwise authorized by law, such as by the First Amendment.

Ascertainment of when, in fact, a governmental entity is represented by counsel is more difficult than it would appear at first blush. A municipality, normally,

and the State, always, are represented by counsel. For example, the State's lawyer is the New York State Attorney General,[16] with a city being represented by its corporation counsel.[17] However, authority suggests that under DR 7-104(A)(1) legal representation of a governmental unit generically may not necessarily equate to representation of that governmental unit on a specific matter. For example, in *Schmidt v. State, supra*, the lawyer for the DOT contended that the claimant's attorney violated the No Contact Rule by interviewing certain DOT employees. Therein, the claimant, who had filed a notice of intention to file a claim, but had received no formal notification that any attorney was appearing on behalf of DOT, alleged that DOT had improperly maintained a traffic signal, causing an automobile accident. DOT asserted that the communication of the claimant's lawyer with DOT employees was impermissible because DOT was represented by the Attorney General. After noting that it was undisputed that the DOT employees were parties,[18] the decision framed the central issue to be determination of when the governmental party was, in fact, represented by a lawyer. *Schmidt* recognized that the State is always represented by the Attorney General, but went on to state that "if a governmental party were always considered to be represented by counsel for purposes of [DR 7-104(a)(1)], the free exchange of information between the public and the government would be greatly inhibited."[19] Ultimately, *Schmidt* held that the State was not represented by counsel in the matter.

As alluded to above, another issue regarding regulation of attorney communication with governmental parties arises where a single party is represented by an attorney on multiple related matters before a given agency; does the No Contact Rule apply to some or all of the matters? For example, in Opinion 652, the Committee reviewed an instance in which an administrative body was represented by counsel both with respect to enforcement proceedings against a party and that party's related application for a permit. The question raised was whether the party's attorney could contact agency officials in connection with proposed regulations that were directly related to the subject of the enforcement proceedings (including the amount of potential fines) and the permit application. The Committee determined that the agency's representation by an attorney in the enforcement and permitting matters did not constitute representation with respect to the related rulemaking. Therefore, it found that the party's attorney was entitled to communicate with the agency's in-house attorneys and technical specialists involved in the rulemaking process.

The final question is whether a lawyer's communication with a specific governmental entity is "authorized by law" under DR 7-104(A)(1) based on, among other things, the First Amendment. That inquiry is the crux of the Committee's Opinion 812.

Application of the No Contact Rule to a Planning Board—Opinion 812

Opinion 812 considered whether the in-house attorney of a real estate development company was allowed to communicate privately and informally with members of a municipal planning board that was reviewing the developer's pending application for approval of a shopping center, and, in particular, with those board members who were favorably disposed to the application. The facts addressed in Opinion 812 were as follows: The proposed development was undergoing site plan and subdivision review, as well as associated environmental review under the State Environmental Quality Review Act ("SEQRA"),[20] by a seven-member municipal planning board.[21] As the process progressed, it became clear that the majority of the board opposed the project.[22] Also evident from Opinion 812 was that the board as a whole was represented by outside counsel retained specifically in connection with review of the application.[23] Therefore, no question existed as to whether the planning board was represented by counsel. In fact, the planning board's attorney expressly objected to any *ex parte* communications with individual members of the planning board and instructed the attorney for the developer to restrict communications to written submissions addressed to the planning board secretary for distribution to the entire board.[24]

The applicant's attorney represented to the Committee that he was not seeking to provide the board members with legal advice or assistance.[25] Based on the applicant's representations, the Opinion recognized that the separate communications were:

> confined to the provision and receipt of factual information and discussion of state and local environmental and land use issues and policies and are intended to ensure[s] that supportive members of the planning board have the information they need to counter the opposition's efforts to derail the project and are able to share facts and strategies with the developer. The developer thus seeks to create an even playing field with [m]embers of the public who oppose the project [and who] communicate and strategize with like-minded members of the planning board, without going through the board's legal counsel.[26]

In responding to the inquiry of whether the No Contact Rule foreclosed the developer's attorney from continuing to speak with individual members of the board over the objections of the board's attorney, Opinion 812 addressed the threshold issue of whether the members of the planning board were parties. The Committee did not find this issue to be particularly difficult and noted that under the No Contact Rule, pursuant to the *Niesig* test, only government officials with authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy, are parties. The Committee stated, "Here, as a planning board is invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it, the *Niesig* 'party' test is satisfied."[27]

Turning to the central issue before it, the Committee noted that in an earlier decision[28] it had opined that where a public body is involved, there is an exception to the No Contact Rule "based on the 'overriding public interest [which] compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them.'"[29] The Committee stated the view that "literal application of the 'no-contact' rule must be tempered by constitutional considerations where the First Amendment right to petition the government is implicated—is shared by most authorities."[30]

In reaching the conclusion that the developer's attorney was authorized to communicate with planning board members, Opinion 812 relied on, and to a large degree adopted the approach of, an American Bar Association Ethics Opinion—Opinion 97-408 (the "ABA Opinion")—which interpreted Model Rule 4.2,[31] the functional equivalent of DR 7-104(a)(1).[32] Opinion 812 recognized the inherent "'tension between a citizen's right of access and the government's right to be protected from uncounselled communications by an opposing party's lawyer'" as set forth in the ABA Opinion. Opinion 812 resolved the "inherent tension" by allowing unconsented contact, subject to specified limitations. Its conclusion reads as follows:

> Absent the application of state or local ordinances that prohibit or regulate the practice, and subject to the qualifications set forth in this opinion, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending SEQRA, site plan and subdivision determinations *provided*: (a) the proposed communications solely concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.[33]

Employing this approach, Opinion 812 advised that the proposed communications with the planning board members were protected by the First Amendment and not prohibited by DR 7-104(A)(2), but required the applicant to give reasonable advance notice of the communications to the board's counsel.[34] Notably, it did not appear that the Committee premised its ruling on the fact that the board members being contacted were favorable to the position advocated by the applicant's attorney,[35] but rather on the policy considerations favoring free access to governmental agencies.

Opinion 812 also included several potentially significant limitations. For example, it declined to rule on whether the type of communications being reviewed might violate any other local or state ordinance or ethics code, and stated that it was not addressing the propriety of *ex parte* communications with "an adjudicatory governmental body, such as a zoning board of appeals, which present different considerations."[36] It also recognized that the "precise parameters of the constitutional right to petition" were beyond its authority.[37] Finally, Opinion 812 cautioned that an attorney may not deliberately elicit information that is protected by attorney-client privilege or which constitutes attorney work product and, perhaps most importantly, that "the inquirer should cease contact with a planning board member if the member so requests."[38]

Observations Regarding Opinion 812

Opinion 812 provides needed guidance as to the application of the No Contact Rule to the land use practice, but certainly leaves a number of questions open. It elucidates that even if a planning board attorney (or, it is respectfully submitted, an attorney for a municipal legislative body) does not consent to communication with board members by an applicant's attorney, the latter is still free to engage in such contact so long as the municipal attorney is afforded advance notice of the communication. The advance notice gives the municipal attorney an opportunity to provide substantive advice to the client before any meeting occurs, or to counsel the board member not to communicate at all with an applicant's attorney. Of course, an applicant's attorney must refrain from engaging in discussions with a board member in the event the board member asks that the contact cease.

Although Opinion 812 ultimately eschews any attempt to define with precision the scope of communications for which the protections of the First Amendment outweigh the purposes of the No Contact Rule,

the subject matter of the unconsented communications with planning board members that was found to be appropriate in Opinion 812 is quite broad. As noted above, the communications included the exchange of factual information, discussion of environmental and land use issues and policies, and even strategy with friendly board members. Such communications provided friendly board members with information needed to assist in their debate with members who opposed the project. It is evident, therefore, that Opinion 812 recognized that a wide range of communications between an applicant's attorney and planning board members is acceptable without consent of the board's attorney.

Dealing, as it does, with informal contacts with individual board members, Opinion 812 would seem to have few, if any, implications for a letter formally written to a land use board as a whole, regarding a matter being reviewed. It is submitted that such a form of communication is at the heart of the type of speech protected by the First Amendment and does not pose the same risks of imperiling the purposes of DR 7-104(A)(1) as would behind-the-scenes discussions with individual board members, and, therefore, should not be subject to a requirement of consent by the municipal board's attorney or, in the author's view, even to the advance notice requirement.[39] It should also be recognized that provisions of the Town Law, Village Law, General City Law and SEQRA, among others, mandate opportunities for public comment with respect to various land use approvals.[40] Consequently, it is hard to imagine that communications made formally to the entire land use board by an applicant's attorney in the context of the statutorily provided opportunities for comment would not, for the purposes of DR 7-104(A)(1), be authorized by law.[41] Of course the Freedom of Information Law, Article 6 of the Public Officers Law, also authorizes certain types of direct communications with governmental entities such as municipalities and their agencies, boards and commissions.[42]

Whether the guidance provided by Opinion 812 applies in the same fashion to contact with a municipal legislature considering zoning or land use regulations is not answered by Opinion 812. Nonetheless, attorney comment on proposed legislation would have to be considered core political speech under the First Amendment[43] and/or authorized by the state enabling legislation provided for the enactment of zoning, so it would be difficult to imagine that the No Contact Rule would restrict formal communication to the legislative body as a whole. It is also doubtful that a principled basis exists to make guidelines under the No Contact Rule applicable to informal communication by an attorney to individual local legislators regarding pending land use measures, which would be more restrictive than those set forth in Opinion 812 for communications with planning board members.

At least one aspect of Opinion 812 is misleading. It states that if communications are "directed at governmental officials who do not have authority to take or recommend action" or "are communications that are intended to secure factual information relevant to a claim (for example, mere witness to government misconduct)," they are fully subject to the No Contact Rule as they do not implicate the First Amendment.[44] Such a statement, however, begs the question whether such communication is proper. As discussed above, those officials who lack authority to bind a party (or whose actions cannot be imputed to the party for the purpose of liability) are not normally considered to be parties at all under the No Contact Rule.[45] Consequently, such officials are non-parties who are "fair game" for *ex parte* contact. The question of whether the communication with such officials is justified by the constitutional guarantee of free speech should be irrelevant.

Presumably technical staff members who assist planning and zoning boards—such as the municipal engineer, the municipal planner and the municipal environmental consultant—would not usually be parties for the purposes of DR 7-104(A)(1). Such municipal employees normally do not play a policy-making role or have the independent ability to approve development or bind the municipality with respect thereto. If such officials act in a typical capacity, an attorney representing an applicant should be able to contact them directly without notifying the municipality's counsel. Such a stance is consistent with the administrative imperatives which often require the attorney representing an applicant to discuss the procedural and technical requirements for the various application materials and environmental submissions with municipal staff on an ongoing and prompt basis.

Endnotes

1. For example, Rule 4.2 of the American Bar Association's Model Rules of Professional Responsibility states the following:

   > In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

2. 22 N.Y.C.R.R. § 1200.35.
3. Arguably, it would also "turn the governmental process into an administrative nightmare" if the No Contact Rule were rigorously applied to interdict communications between lawyers and public officials. *See* Goldstein, *Contacting an Adversary's Employees: A Breach of Legal Ethics*, 65 N.Y.S.B.J. 22, 26 (March/April 1993).
4. A number of jurisdictions utilize precisely such an approach and make the No Contact Rule wholly inapplicable to attorney communications with governmental entities, apparently to protect First Amendment rights. For example, California's

rules of professional conduct expressly state that the No Contact Rule "shall not prohibit . . . [c]ommunications with a public officer, board, committee, or body . . ." California Rules of Professional Conduct, Rule 2-100(C)(1). The standard in the District of Columbia states, "This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's clients . . ." District of Columbia Rules of Professional Conduct § 4.2(d). (Under the District's rules, however, the lawyer is required to disclose his or her identity, identify his or her client, and tell the witness that his or her interests may be adverse to those of the governmental agency by which the witness is employed); *See* Utah State Bar Ethics Opinion Committee, Opinion No. 115 (5/20/93) (finding that "because the Utah and United States Constitutions guarantee all private citizens access to government, all communications, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted" and that "a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney . . .").

5. *See, e.g.*, New York City Bar Ethics Opinion 1991-4 (8/21/91).
6. *Niesig v. Team I*, 76 N.Y.2d 363, 370, 559 N.Y.S.2d 493, 496 (1990) (citations omitted).
7. EC 7-18. Although this article is primarily concerned with contact with municipal officials in the land use area, it should be noted that in the different context of litigation against a governmental entity, violation of DR 7-104(A)(1) leads to disciplinary action rather than to suppression of evidence obtained in violation thereof. Absent some constitutional, statutory or decisional authority mandating suppression, evidence obtained through unethical means is still admissible and applies to information obtained in contravention of the No Contact Rule. *Heimanson v. Farkas*, 292 A.D.2d 421, 422, 738 N.Y.S.2d 894, 894 (2d Dep't 2002); *Stagg v. New York City Health and Hospitals Corporation*, 162 A.D.2d 595, 596, 556 N.Y.S.2d 779, 780 (2d Dep't 1990); *Tabbi v. Town of Tonawanda*, 111 Misc. 2d 641, 444 N.Y.S.2d 560 (Sup. Ct., Erie Co. 1981).
8. Former employees of an entity which is involved in a matter are not parties and, therefore, lawyers are not foreclosed from contacting them directly, but, nonetheless, the attorney should warn them not to reveal any privileged information. *See Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506, 511-512, 836 N.Y.S.2d 527, 529-530 (2007) (noting *Niesig* acknowledged that *ex parte* interviews with former employees are neither unethical nor illegal).
9. *Niesig*, 76 N.Y.2d at 374, 559 N.Y.S.2d at 498.
10. *Id. See Schmidt v. State*, 279 A.D.2d 62, 66, 722 N.Y.S.2d 623, 626 (4th Dep't 2000), *lv. denied*, 731 N.Y.S.2d 623 (4th Dep't 2001) (quoting *Niesig* as stating "'[b]y preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(a)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.'"). Moreover, at least in the litigation context, the definition of "party" in *Niesig* is intended to strike "a balance between protecting unrepresented parties from making imprudent disclosures, and allowing opposing counsel the opportunity to unearth relevant facts through informal discovery devices, like *ex parte* interviews, that have the potential to streamline discovery and foster prompt resolution of claims." *Muriel Siebert & Co., Inc.*, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530.
11. *Niesig*, 76 N.Y.2d at 375, 559 N.Y.S.2d at 498-499.
12. *See New York State Bar Association, Committee on Professional Ethics Opinion 652* (8/27/93) ("Opinion 652"); *Gilbert v. State*, 174 Misc. 2d 142, 662 N.Y.S.2d 989 (Ct. Cl. 1997).
13. *See Neisig*, 76 N.Y. 2d 374-375, 559 N.Y.S. 2d 498-499.
14. 7 N.Y. Jur. 2d, *Attorneys at Law*, § 381.
15. *Gilbert v. State*, *supra* note 12.
16. Executive Law § 63.
17. Second Class Cities Law §§ 200-201.
18. *Schmidt*, 279 A.D. 2d at 65, 722 N.Y.S.2d at 625.
19. *Id.*
20. "SEQRA" collectively refers to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617.
21. Opinion 812 at 1.
22. *Id.*
23. Opinion 812 at 2.
24. *Id.*
25. *Id*.
26. *Id.* [bracketed material in original].
27. Opinion 812 at 3.
28. N.Y. State 404 (1975).
29. Opinion 812 at 3.
30. *Id*.
31. The commentary to Rule 4.2 of the American Bar Association's Model Rules for Professional Responsibility (the ABA's version of the No Contact Rule), states that "communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government."
32. Opinion 812 at 4.
33. Opinion 812 at 5 (italics in original).
34. Opinion 812 at 4-5.
35. Just over two decades prior to the issuance of Opinion 812, in New York State Bar Ethics Opinion 404 (8/13/75) ("Opinion 404"), the Committee reached a similar outcome regarding the right of a petitioner's lawyer to contact members of a board of education who voted with the minority regarding the board's action. In Opinion 404, the Committee legitimized the communications, but appeared to have placed great significance on the fact that those members of the board of education who the attorney was contacting were actually favorable to the position the attorney was taking on behalf of his client. The Committee framed the issue as "whether an individual member of a public body must be considered an adverse party in regard to a decision he opposed." The reasoning for its conclusion was set forth in the following passage:

    > The overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. Minority members of a public body should not for the purposes of DR 7-104(A)(1) be considered adverse parties to their constituents whom they were selected to represent.

    The author submits that the question of whether the municipal official who an attorney wishes to contact is favorable or opposed to the position being advocated should be irrelevant to the proper application of DR 7-104(A)(1).
36. Opinion 812 at 5. The author submits that the possible distinction of zoning boards of appeal from other land use boards posited by Opinion 812 is without sound basis because such boards, like planning boards, have been held to be quasi-administrative/quasi-legislative, rather than quasi-judicial. *See Pietrzak & Pfau Associates v. Zoning Board of Appeals of Town of Walkill*, 34 A.D.3d 818, 827 N.Y.S.2d 84 (2d Dep't 2006) ("'municipal land use agencies like the Zoning Board are

quasi-legislative, quasi-administrative bodies . . . '(citation omitted)"); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103-104 (2d Dep't 2005), *lv. denied*, 6 N.Y.3d 890, 817 N.Y.S.2d 624 (2006) and 7 N.Y.3d 708, 822 N.Y.S.2d 482 (2006) (recognizing that municipal land use agencies like the Zoning Board are "quasi-legislative, quasi-administrative" bodies and holding that judicial review of a determination by a zoning board of appeals is not subject to the "substantial evidence" test, which is only applicable to actions taken by a quasi-judicial body, but rather, governed by the "arbitrary and capricious" standard, which applies to other administrative proceedings). They are not "adjudicatory" in the true sense of that term.

37. Opinion 812 at 5.

38. *Id.*

39. Nothing in this article is intended to suggest that it is a wise course of action for an applicant's attorney to attempt to excise, selectively or wholly, the municipal attorney from the review process. A constructive relationship between the applicant's attorney and the board's attorney, in which the latter is kept abreast of the applicant's submissions and the progress of the application, normally benefits the applicant and hopefully facilitates a process that progresses in a rational fashion. It is most strongly suggested that the attorney for a land use board should be provided copies of all correspondence submitted by the applicant's attorney when they are submitted to that board.

40. *See, e.g.,* Town Law §§ 267-a, 274-a, 274-b, 276; Village Law §§ 7-712-a, 7-725-a, 7-725-b, 7-728; 6 N.Y.C.R.R. 617.9(a).

41. It should be noted that the ABA Opinion expressly finds that when a lawyer representing a private party intends to communicate with a governmental official with authority to take or recommend action in a matter in controversy, he or she should provide the government's attorney with advance notice of the communication to allow the latter to advise the official regarding whether to communicate with the lawyer—a finding that the ABA Opinion indicated applies with respect to oral and written communications to governmental officials. The example the ABA Opinion uses, however, involves a lawyer attempting to communicate with a committee of a city counsel to discuss potential settlement of litigation. While the advance notice requirement makes sense in such a context, the author of this article respectfully submits that it should not be applied where a lawyer is simply making comments on behalf of his or her client, as a member of the public, with respect to proposed legislation or regulations.

42. *See, e.g., Fusco v. City of Albany*, 134 Misc. 2d 98, 101-102, 509 N.Y.S.2d 763, 766 (Sup. Ct., Albany Co. 1986).

43. The question of the restrictions imposed by potentially applicable lobbying rules on communications by a lawyer with local legislators is beyond the scope of this article.

44. Opinion 812 at 5.

45. *See* Opinion 652, *supra*; *Gilbert v. State*, *supra* note 12; 2 N.Y. Jur.2d, *Attorneys at Law* §381, *supra* note 14.

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Enacting a Local Ethics Law—Part III: Administration

By Mark Davies

The previous issues of the *Municipal Lawyer* contained the first two parts in this three-part series discussing the enactment of a local ethics law. The first part dealt with the code of ethics. The second part focused on disclosure. This third and final part will address administration, the third pillar upon which an effective local ethics law must rest.

This article will thus discuss the composition and structure of a local ethics board and its four primary functions: training and education, legal advice, disclosure, and enforcement. If an ethics law is to be effective, the ethics board must exercise all four of those functions.

Appointment and Structure of Ethics Board

The single most important characteristic of an ethics board consists of its actual and perceived independence. An ethics board that is controlled, in reality or in perception, by the municipality's chief executive officer or governing body will garner little respect, either from those subject to its jurisdiction or from the public or media. Consequently, its advice and enforcement decisions will be viewed as suspect. As a result the board will fail in its mission to promote both the reality and the perception of integrity in government. Thus, its independence lies at the heart of the ethics board.

Three factors, in particular, create independence in an ethics board:

- The process of appointing and removing board members;
- The required qualifications for board members; and
- The absence of control of the board or board members by any other municipal official or body.

Each of these factors is considered below.

First, board members should be appointed by the chief executive officer with the advice and consent of the governing body. Split appointments, such as appointments by the chief executive and the majority and minority leaders of the governing body, risk politicizing the appointment process and creating constituencies among board members. To prevent inaction from blocking appointments to the board, the law should provide for the governing body to make the appointment if the chief executive officer fails to act and vice-versa. Furthermore, board members should be appointed for a set term, preferably staggered and overlapping the term of the chief executive officer, and should be removable only for cause after a due process hearing. Under no circumstances should ethics board members serve at the pleasure of the chief executive officer, a situation that would make them little more than his or her pawns.

Second, Gen. Mun. Law § 808(3) to the contrary notwithstanding, no member of the ethics board should have any other position with the municipality or with any other municipality of which that municipality is a part. Thus, a county official should not sit on the ethics board of any municipality within the county. Appointing a municipal official to the ethics board discourages complaints and requests for advice, out of fear that any information given to the board will make it back to the complainant/requester's superiors. Note that, as the Attorney General has concluded, a local government may enact a local law establishing the composition of a local ethics board that is inconsistent with Gen. Mun. Law § 808(3).[1]

In addition, ethics board members should be prohibited from holding any political party office, from running for any elective office, from participating in any election campaign (except for giving a contribution, which should be minimal if given to a campaign in the municipality), from appearing on behalf of any other person before any agency of the municipality (e.g., as an attorney or architect), from lobbying any agency of the municipality, or from entering into a contract with the municipality. Prohibiting a majority of the members of the board from belonging to the same political party may help preserve the political diversity of the board, of particular importance perhaps where the municipality's elected officials are drawn overwhelming from a single political party, but such a requirement may impede the selection of the best candidates for the board. So, too, a requirement that certain professions, such as clergy or lawyers or educators, be represented on the board may prevent the appointment of the most qualified board members. Indeed, the independence and quality of the board's members will prove to be the single greatest factor in the board's success, especially since, in all but the largest municipalities, the board will have no paid staff. The ethics law may thus profitably contain precatory language such as "members [of the ethics board] shall be chosen for their independence, integrity, civic commitment and high ethical standards."[2]

Ethics board members should receive no compensation, even a per diem, to preserve both the reality and the perception of their independence.

Finally, the municipality should consider providing for a guaranteed budget for the ethics board, to prevent the unseemly situation where the board, needing, for example, an investigator, stenographer, or attorney for an investigation, must seek funding from the very persons it may be investigating. Since enforcement actions will be few and far between in most municipalities, a budget guarantee of 1/100 of 1% of the net total expense budget of the municipality should prove sufficient. Thus, a $20 million municipal expense budget would yield an ethics board budget of $2,000, enough to conduct a modest investigation, provided that much of the legal work is provided pro bono.

Only the largest municipalities, those having perhaps 10,000 employees or more, will be able to afford paid staff for the ethics board. Ethics boards in other municipalities will need to rely on the board members themselves (not an unreasonable burden in most municipalities, since the amount of work will be relatively minimal) or on volunteer consultants, particularly pro bono counsel, to assist in drafting opinions and to supervise investigations and prosecute enforcement cases, or on other municipal staff, particularly clerical staff. To avoid concerns about confidentiality, the ethics law should authorize the board to draw such municipal staff from a relatively independent department of the municipality (almost certainly *not* the municipal attorney), which will vary from municipality to municipality, and should expressly prohibit such borrowed staff from revealing any ethics board business to anyone outside the ethics board.

To further protect the ethics board's integrity and reassure officials and citizens that their confidences will be kept, the work of the board should be protected to the greatest extent permissible under the state Open Meetings and Freedom of Information laws.[3]

Training and Education

Ethics boards tend to scrimp on educating municipal officials about the ethics law, perhaps because ethics boards are, by their very nature, reactive rather than proactive. Requests for advice must be answered; complaints must be investigated; annual disclosure statements must be filed and reviewed. But training requires affirmative action by the board. Also, most ethics board members are neither professional trainers nor teachers.

Yet ethics training is perhaps the single most important responsibility of the ethics board. One cannot obey the ethics law unless one knows that it exists and what it means. For that reason, the ethics law should specifically mandate that the ethics board provide ethics training and education to municipal officials and should also require that municipal officials receive periodic (preferably annual) ethics training. Indeed, one municipal ethics ordinance subjects high-level officials to a $500 fine if, within 120 days of assuming their position and every four years thereafter, they fail to attend an ethics education seminar offered by the ethics board.[4]

Most ethics boards lack the time and resources to conduct live training for every officer and employee of the municipality, although that approach remains the ideal. Since, however, live training offers the most effective ethics training tool, it should be employed to train those officials most at risk of conflicts of interest, namely, all elected officials, all agency heads and deputy and assistant agency heads, all other high-level officials, and those who exercise discretionary authority involving purchases, contracts, licenses, and permits. One would note that this group largely reflects the group of officials who should file annual disclosure statements, as discussed in Part II of this series.

Ethics training must be interesting and fun. When officials sleep through a training session, they learn little. Game software offers one cheap, easy, and lively ethics training option. Moreover, the point of training is not to transform municipal officials into ethics experts, but rather to alert them to potential problems. For example, the New York City Conflicts of Interest Board distributes a one-page ethics guide that simply highlights, in rather broad strokes, common ethics issues, such as accepting a gift from someone doing business with the City, and cautions the public servant to seek advice before engaging in such conduct. The mantra should always be: Ask before you act.

Such a brief ethics guide—and even the code of ethics if it reflects the principles laid out in the first article in this series—can be distributed annually to each municipal official with his or her paycheck (the entire ethics law need not be distributed; just the ethics code itself or a plain language summary). The annual disclosure form, as discussed in Part II, should also require that the filer review, before filing, the code of ethics or a summary of it. The ethics board should also develop some short, plain-language leaflets, in the form of FAQs, which can also be posted on the ethics board's page on the municipality's website (if any) and distributed widely. A poster about the ethics code and how to contact the ethics board to lodge a complaint or request advice or training should also be posted in each municipal facility, right alongside EEO materials. The municipality can also create a video, perhaps in the form of a dialogue between a clueless official and an earnest ethics counselor, which can be shown to new officials and periodically to current ones for whom live training is not available. The video need not entail a professional production; the work of a video

enthusiast in municipal government will suffice, and the video can also be posted on the ethics board's page on the municipality's website (if any).

Officials should be encouraged to offer suggestions for other, creative means of presenting ethics education, and even to participate in their creation. If, for example, the municipality's workforce contains a talented cartoonist or rapper, perhaps he or she would wish to create an ethics comic book or poster series or ethics rap. Ethics education should be subject to only three limitations: Is it accurate? Is it interesting? Is it tasteful?[5]

Legal Advice

An ethics board must also give legal advice on the ethics law. Indeed, providing cover for officials unjustly accused of unethical conduct constitutes one of the most important functions of an ethics board. And the advice it gives must be not only accurate but also quick, clear, and confidential. Nothing frustrates an official more than being precluded from taking an action because the ethics board has failed to act promptly. In the ethics arena, advice delayed is advice denied. An ethics board that fails to give prompt advice will soon observe that officials prefer to risk a possible investigation rather than face interminable delays at the hands of the board. Indeed, one of the most critical duties of the ethics board lies in providing prompt answers to ethics questions. When the novelty or complexity of a question does not require a written request and answer, oral advice must be available, usually within 24 hours, although a quicker response may occasionally be required, for example, when a zoning board member learns at the last minute that the applicant for a use variance is a major customer of her employer. As a general rule, written advice should be available only in response to a written (including email) request.

Both requests for advice and responses to those requests should be confidential to the fullest extent permitted by the Freedom of Information Law, lest municipal officials be discouraged from seeking advice out of fear that their request will become known to others. Where the advice addresses a question of interest to officials generally, then the board should transform the response into a formal advisory opinion, making sure to delete such information as would reveal the identity of the requester.[6]

The ethics law should empower the ethics board to grant waivers from the code of ethics (except where the conduct or interest at issue would violate Article 18). Waivers offer a necessary escape valve where a provision of the code of ethics prohibits conduct that in fairness ought not to be prohibited and that in fact does not constitute a conflict of interest in any meaningful sense. In addition, waivers protect the municipality itself against an application of the ethics code that in fact harms the municipality, for example, by preventing it from placing a trusted employee in a key position with a critical but troubled social services agency. Since waivers may be conditioned upon other actions, such as recusal, waivers offer an ethics board a means by which to turn what would otherwise be a no answer into a yes—and can also help the ethics board avoid ruling on close questions. Waivers ensure that an independent body, namely the ethics board, examines and authorizes what would otherwise be a violation of the ethics code, attaching any appropriate conditions. For that reason waiver power should never be lodged in a legislative body.

Any waiver statute should specify the standard for granting waivers. The New York City standard has worked well: the ethics board may grant a waiver if, after written approval by the head of the agency or agencies involved, the board finds that the interest or conduct "would not be in conflict with the purposes and interests of the city."[7] Note that the New York City statute authorizes that city's ethics board to grant a waiver only after the appropriate agency head has first approved the waiver request. Such a requirement helps ensure not only that the waiver request accurately states the facts but also that granting the request would not work to the detriment of the municipality. Furthermore, since waivers permit what is in effect a violation of the code of ethics, they must be public, to enable the public to assess the validity of the facts upon which the waiver is based and to police compliance with any conditions upon which the waiver is granted. The request for the waiver, however, like any advice request, should remain confidential, for the reasons discussed above.[8]

Disclosure

The second article in this series discussed at length drafting disclosure provisions for the local ethics law. This present discussion focuses on administration of those provisions.

Administering disclosure requires the ethics board to:

- Obtain the transactional, applicant, and annual disclosure statements;
- Review the statements for possible conflicts of interest;
- Maintain the statements on file;
- Impose penalties on those persons who fail to file a required statement or who file late, incomplete, or inaccurate statements; and
- Make the disclosure statements available for public inspection.

Each of these duties is addressed below.

Apart from ensuring, as part of its ethics training program, that municipal officials and applicants are aware of the requirements for transactional and applicant disclosure, the ethics board need not take any specific actions to collect transactional and applicant disclosure statements. They are simply filed by the discloser when the need arises.

Annual disclosure, on the other hand, necessitates the establishment of a distribution and collection system. In smaller municipalities, some central authority, such as the municipality's director of personnel, will identify those individuals required to file an annual disclosure statement under the ethics law. In larger municipalities, that function will usually be performed by each agency head or his or her designee. The list or lists, which include each filer's name, agency, position, and employee (preferably not social security) number, are then sent to the ethics board for review. If the list appears complete, the ethics board returns it to the municipal staff member who will distribute the blank disclosure forms to the filers. Since neither the lists of filers nor the blank forms are confidential, any municipal official may distribute the forms. In most municipalities, the ethics board will enlist the aid of a municipal staff member in photocopying the blank disclosure forms. Alternatively, the form may simply be converted into an Adobe Acrobat form, posted on the municipality's website, and completed online, as many municipal forms now are, although most ethics boards will still prefer hard copy submission of completed disclosure statements. To prevent disputes, each filer should be required to sign for the receipt of the blank disclosure form and to file his or her completed disclosure statement in person, not by mail. At the time of filing, the disclosure statement should be date stamped on its first page, and a receipt should be given to the filer (which can simply be a copy of the date stamped page); the official accepting the filing also logs the receipt onto the list of filers.

If the form contains confidential information (the form proposed in Part II of this series does not), then provision must be made to secure the completed disclosure statements in a filing cabinet accessible only to the ethics board. Confidential information in a form will also necessitate that public viewing copies be made of completed disclosure statements before they are viewed by anyone other than the ethics board. If the form contains no confidential information, then the disclosure statements can simply be housed in the municipal clerk's office and made available there. In any event, assuming the ethics board has no staff other than an official in another municipal agency, an ethics board member should review each disclosure statement for possible conflicts of interest. In most municipalities, the number of filers will be relatively small.

The ethics law must provide for penalties for failure to file or for failing a late, incomplete, or false statement. Otherwise, annual disclosure will become a chimera, as has happened in some municipalities around the state. Article 18 provides for a maximum fine of $10,000; a lesser maximum fine may suffice, but it must be substantial, certainly in excess of $1,000. The ethics law must authorize the ethics board to impose such fines. Penalties should also exist for failure to file a required transactional disclosure or applicant disclosure statement, including statements required by Gen. Mun. Law §§ 803 and 809, discussed in Part II of this series.

Annual, transactional, and applicant disclosure statements must be made available for public inspection. Indeed, it is the public, in particular the media, upon whom an ethics board must rely to ferret out most potential conflicts of interest. While some ethics laws authorize the ethics board to grant specific requests of filers to keep certain information in disclosure reports confidential, such requests should be granted only for reasons of security or safety. Pursuant to the 1987 Ethics in Government Act, upon the sunsetting of the Temporary State Commission on Local Government Ethics on December 31, 1992, its "power, duties, and functions" devolved upon local ethics boards (or upon the local governing body if the municipality had no ethics board).[9] Since the Commission was exempt from the state Freedom of Information Law and the Open Meetings Law, local ethics boards would likewise appear to be exempt from those statutes *in the case of annual disclosure only*.[10] Article 18, however, expressly mandates that annual disclosure statements be made available to members of the public upon request.[11] Transactional and applicant disclosure statements must be made available under FOIL.[12]

Finally, the local ethics law should provide a retention schedule for disclosure statements. Determining the length of the retention period requires the balancing of several factors, including the statute of limitations for misconduct in public office; the need to retain annual disclosure reports for a reasonable period of time in order to facilitate an inquiry into allegations of conflicts of interest or other wrongful conduct; the necessity or desire to conform the retention rule to existing municipal or state retention policies; the concern of the filer that the information not be available indefinitely; and the practical benefits of a fixed retention period, tied to a date certain, allowing the municipal record keeper to manage its space efficiently. In view of those factors, a retention period in excess of six years would seem unnecessary.[13]

Enforcement

An ethics law that fails to provide effective enforcement merely raises expectations that it cannot

meet, eventually engendering less, not more, confidence in the integrity of local government and increasing public cynicism. Such an ethics law is, therefore, often worse than no ethics law at all. So, too, an ethics board that lacks the power to investigate, on its own initiative, possible instances of conduct that violates the ethics code will soon be regarded as a toothless tiger—or as one reporter put it: toothless and useless. In particular, the ethics board should have the power to impose civil fines. The maximum amount of those fines probably matters little, provided that it appears significant to the public, certainly in excess of $1,000. In the largest municipalities, the maximum might range up to $25,000 for a single instance of a violation of the ethics code. Other penalties should include debarment, voiding of contracts obtained in violation of the ethics law, damages, disgorgement of ill-gotten gain, injunctive relief, and disciplinary action. While the ethics board may recommend such other penalties, it should not impose them. Where a municipal governing body simply is not ready to grant an ethics board the power to impose civil fines, the ethics law must at the very least authorize the ethics board to make a public finding of a violation with a recommendation to the governing body of a penalty.[14] That public finding and referral will, one hopes, place political pressure on the governing body to take appropriate action. Although Article 18 does not address enforcement of municipal ethics laws, apart from the annual disclosure provisions. . . . discussed above, the Attorney General has concluded "that a local government by local law may provide for enforcement of violations of local ethics regulations through the imposition of fines and initiation of proceedings for equitable relief."[15]

Before turning to the enforcement process, one should first review the purpose of enforcement: to educate officials about the requirements of the ethics law, to demonstrate that the municipality takes that law seriously, and to deter other unethical conduct. Thus, the purpose of ethics enforcement, just like the purpose of ethics laws generally, lies in the prevention of unethical conduct. Indeed, enforcement proves to be the most powerful ethics education tool. A finding of a violation of the code of ethics brings the code to life in a way that no other educational tool can. For that very reason, such findings of a violation must always be public—always. That requirement does not prevent the ethics board from short-circuiting a full-blown investigation and enforcement action in appropriate cases by sending a confidential letter to the accused public official, stating that (and why) the facts alleged, if true, would appear to violate the ethics law and cautioning the official against engaging in such conduct in the future, at least without first obtaining advice from the ethics board. Since the official in such a case has not received a due process hearing, the board may not inform anyone else—not the public, the official's superior, or the complainant—of the letter's contents or even existence; to be sure, the official may distribute the warning letter on the street corner if he or she so desires.

According to the Attorney General, "a city, or any other local government, by local law may grant to its board of ethics the authority to conduct investigations [whether upon receipt of a complaint or upon the ethics board's own initiative], subpoena power and enforcement power."[16] To ensure both the reality and the perception of the integrity of the enforcement process, the ethics board must fully control its investigations and must, therefore, possess subpoena power; the authority to commence investigations on its own initiative, without waiting for a complaint; the ability to draw upon investigative, legal, and prosecutorial resources, both municipal and private; the power to hold fact-finding hearings or to appoint a hearing officer; and, as noted, the authority to make findings of a violation, impose civil fines, and recommend other penalties.

The enforcement process typically involves an investigation, a confidential notice by the ethics board to the respondent that reasonable cause exists to believe he or she violated the ethics law; a response by the official or his or her attorney or union or other representative; the ethics board's consideration of the response and either dismissal, a confidential warning letter (discussed above), or the sustaining of the finding of probable cause followed by the service of a formal petition upon the respondent; the respondent's answer to the petition; a due process fact-finding hearing held by the ethics board, a member of the board, or a hearing officer designated by the board, followed, in the latter two cases, by a report and recommendation to the full board; submission of final briefs by the respondent and, if applicable, by the prosecutor; consideration by the ethics board of the results of that fact-finding hearing and the final briefs; and a final decision and order by the ethics board. At any point before the issuance of the final order, the respondent may agree to enter into a negotiated disposition (settlement) with the ethics board.

The reason that many ethics laws require both a notice of reasonable cause and a subsequent formal petition, if the reasonable cause is sustained, lies in the desire to afford officials every possible opportunity to rebut accusations of unethical conduct.[17] The notice of reasonable cause should always be confidential, even from the complainant, lest the official suffer significant damage to his or her career as a result of an unfounded accusation. If, however, the official's response to that notice does not convince the board that no basis for the accusation exists, then the petition should probably be public, to reassure the complainant and the public that the matter is being handled fairly and expeditiously.

As with legal advice, so, too, with enforcement matters, confidentiality of all non-public documents and proceedings remains a paramount concern. Nothing can destroy the reputation of an ethics board quicker than a breach of confidentiality, even an inadvertent one. A leak from an ethics board constitutes a serious violation of the ethics code and grounds for removal of the offending individuals from office or employment.

Many smaller municipalities will not be able to employ, even pro bono, a prosecutor to conduct or supervise the investigation and prosecute the case, or outside counsel to advise the board and draft the final order. However, a prosecutor and a separate counsel can facilitate the enforcement process, ameliorate the burden that enforcement can impose on ethics board members, and avoid any appearances of unfairness that may arise when the board itself acts as both prosecutor and adjudicator. Indeed, once the board has sustained probable cause and issued a petition, a wall should be erected between the investigator/prosecutor and the board, and *ex parte* communications between them should cease.

The foregoing process and procedures for enforcement of the ethics law should be set forth in that law and the duly adopted rules of the ethics board.

Conclusion

This three-part series of articles has sought to lay out the underpinnings and content of an effective municipal ethics law. Such a law, as discussed in the first article, rests upon three pillars: a clear and comprehensive code of ethics; a sensible disclosure system; and effective administration, including ethics training and education, legal advice, regulation of disclosure, and enforcement by an independent ethics board. The absence of any of these pillars will ultimately topple the entire ethics system. Thus, the immutable rule for creating an ethics system is this: Do it right or don't do it at all.

With that caveat in mind, however, the enactment of a first-rate ethics law and the establishment of a first-rate ethics board requires nothing more than good faith and hard work. In the end, the result should prove more than worth the effort.

Endnotes

1. 1986 Op. N.Y. Att'y Gen. 100 (Informal Op. No. 86-44), relying upon Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). Note: This opinion does not apply to municipalities that are not local governments (counties, cities, towns, and villages). *See* Mun. Home Rule Law §§ 2(8) (defining "local government"), 10(1)(i), 10(1)(ii)(a)(1).
2. N.Y.C. Charter § 2602(b).
3. Pub. Off. Law §§ 84-90 (Freedom of Information Law) and §§ 100-111 (Open Meetings Law).
4. Chicago Municipal Code § 2-156-145.
5. *See generally* Joel Rogers, *Communicating Ethics to Municipal Employees*, NYSBA/MLRC Municipal Lawyer, Winter 2005, at 12 (*available* on the Section's website http://www.nysba.org/municipal, in Municipal Lawyer Ethics Columns under Ethics for Municipal Lawyers).
6. *See, e.g.*, Exec. Law § 94(15); N.Y.C. Charter § 2603(c)(3). *See generally* Steven G. Leventhal & Susan Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential*? NYSBA/MLRC Municipal Lawyer, Spring 2004, at 22 (*available* on the Section's website at http://www.nysba.org/municipal, in Municipal Lawyer Ethics Columns under Ethics for Municipal Lawyers).
7. N.Y.C. Charter § 2604(e).
8. Waivers, and indeed the adoption of municipal ethics laws generally, are discussed at greater length by Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 of Patricia E. Salkin & Barbara F. Smith, Ethics in Government—The Public Trust: A Two-Way Street (NYSBA 2002).
9. 1987 N.Y. Laws ch. 813, § 26(c).
10. Gen. Mun. Law § 813(18). Note that the Committee on Open Government does not agree with this conclusion. *See* Op. Comm. on Open Gov't, Jan. 3, 1997.
11. Gen. Mun. Law § 813(18)(a)(1). *See also* Op. Comm. on Open Gov't, July 18, 1995, and Jan. 3, 1997. The same result would obtain under FOIL. See Pub. Off. Law §§ 86(4) and 87(2), discussed in the foregoing opinions of the Committee on Open Government.
12. Pub. Off. Law §§ 86(4), 87(2).
13. *See, e.g.*, 53 RCNY § 1-10 (setting a six-year retention period for annual disclosure reports filed with New York City's ethics board) and the Statement of Basis and Purpose in the Notice of Adoption of that rule.
14. *See* N.Y.C. Charter § 2603(h)(3) (so providing in the case of members and staff of the New York City Council). Note, however, that the provision has not yet been employed because thus far Council members and staff prosecuted by the City's ethics board have entered into settlements with the Board, resulting in recommendations by the Board that no further action by the Council be taken.
15. 1993 Op. N.Y. Att'y Gen. 1022 (Informal Op. No. 93-14), relying upon Mun. Home Rule Law § 10(4)(b). Note: This opinion does not apply to municipalities that are not local governments (counties, cities, towns, and villages). *See* Mun. Home Rule Law §§ 2(8) (defining "local government"), 10(4)(b).
16. 1991 Op. N.Y. Att'y Gen. 1135 (Informal Op. No. 91-68), relying on Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). Note: This opinion does not apply to municipalities that are not local governments (counties, cities, town, and villages). *See* Mun. Home Rule Law §§ 2(8), 10(1)(i), and 10(1)(ii)(a)(1).
17. *See, e.g.*, Gen. Mun. Law § 813(12); N.Y.C. Charter § 2603(h); Exec. Law § 94(12) (state officials).

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Recusal and Abstention from Voting: Guiding Principles

By Lester D. Steinman

Counsel to planning boards are often asked to address whether board members should recuse themselves from consideration and voting on an application or abstain from voting on an application. Set forth below are general principles which may be helpful in advising planning board members regarding the propriety of recusal or abstention in a particular case.

I. Abstention from Voting

Discharging the duties of a planning board member requires a member to vote on all applications that come before the board, assuming no conflict of interest or appearance of impropriety exists requiring recusal.[1] Indeed, a persistent refusal to vote on applications could constitute grounds for removal from office.

Applicants before the planning board have the burden of proof to support their applications. Thus, where a planning board member determines that the record contains insufficient information to satisfy the legislative criteria for granting a permit or approval, that member should vote to deny the application. Where a member has missed certain meetings on an application, the member should review the minutes and/or recordings of those meetings and discuss the issues with other board members at a public meeting to enable the board member to make an informed decision when voting on the application.[2]

In *Taub v. Pirnie*,[3] the board member in question had been a resident of the village for twenty-five years, a zoning board member for twelve years and a village trustee and was fully familiar with the neighborhood in question and its zoning problems. Before voting on the application, the member had thoroughly discussed the arguments presented at the public hearing with other members. The fact that the member in question neither attended the public hearing nor read the hearing minutes was not outcome determinative. Rather, it was sufficient that the member had the opportunity to make an informed decision by virtue of his knowledge of the neighborhood and familiarity with the issues raised at the public hearing.

Failure to vote is not a benign act of neutrality toward an application. Rather, abstention has significant consequences for the planning board's decision making. Every motion or resolution adopted by the planning board requires the affirmative vote of a majority of all the members of the board.[4] An abstention is not an affirmative vote in favor of the application,[5] and, to the extent that it cannot be counted as an affirmative vote, its effect is akin to a negative vote for purposes of compliance with statutory majority voting requirements.[6]

II. Recusal Based upon Conflicts of Interest

Where a member of the planning board has a conflict of interest affecting the consideration of an application, that member must recuse him or herself from participating in any discussion of the matter and from voting on that matter.[7] Conflicts of interest may be defined by statute,[8] local law [municipal code of ethics][9] or common law. Planning board members should familiarize themselves with the provisions of these rules.

Courts have held public officials to a high standard of conduct and have invalidated certain actions which, while not violative of the literal provisions of GML Article 18 or a local code of ethics, are tainted by the votes of members which "violate the spirit and intent of the statute, are inconsistent with public policy or suggest self interest, partiality or economic impropriety."[10] For example, in *Zagoreos v. Conklin*,[11] the court annulled the votes of two zoning board members, who were employees of the applicant, to grant variances on a controversial application to convert oil burning generating units into coal burning units. In *Tuxedo Conservation and Taxpayers Ass'n v. Town Board of the Town of Tuxedo,*[12] a town board member who was an officer of an advertising firm was disqualified from voting on a zoning application by a subsidiary of one of the firm's clients. Also, in *Conrad v. Hinman*,[13] the Court annulled a village board vote to grant a rezoning application where the deciding vote was cast by the co-owner of the property that was the subject of the rezoning petition.

Whether a member has a disqualifying conflict of interest "requires a case-by-case examination of the relevant facts and circumstances."[14] "Public officials must perform their duties solely in the public interest, and avoid circumstances which compromise their ability to make impartial judgments on any basis other than the public good."[15]

Indeed, where circumstances, viewed objectively, could reasonably be deemed to compromise a member's impartiality, avoidance of even the appearance of impropriety is essential to maintaining public confidence in the integrity of government.[16] Thus, the Attorney General has opined:

> 'It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial.' *Matter of Byer v. Town of Poestenkill*, 232 A.D.2d 851, 852-53 (3d Dep't 1996). Thus, where a public official is uncertain about whether he should undertake a particular action due to an actual or potential conflict, he must recuse himself entirely from the matter in question unless he procures an advisory opinion from a local ethics board that concludes otherwise. *See* Op. Atty. Gen (Inf.) No. 98-38; *see also* Op. Atty. Gen. (Inf.) No. 99-21 (recusal requires the official in question to avoid 'taking any actions with respect to that matter.')[17]

Often, conflicts of interest arise out of familial relationships [recusal of planning board chairman required where his son had a pending employment application with the attorney for the applicant before the planning board];[18] prejudgment of the issues attendant to a specific application;[19] opposition to an application as a neighbor [often a neighbor acts out of their own self-interest and concerns about their own property values and families and may not be capable of measuring the merits of an application in light of the overall public interest];[20] or ongoing business relationships [where two board members were employed by the applicant, the board members must recuse themselves because "the likelihood that their employment . . . could have influenced their judgment is simply too great to ignore."].[21] However, not every private business relationship between an applicant and a board member is sufficient to require recusal. For example, in *Ahearn v. Zoning Board of Appeals of the Town of Shawangunk*,[22] the fact that one zoning board member had purchased insurance from an applicant and the spouse of another zoning board member had received a Christmas gift for teaching the applicant's daughter piano lessons was deemed to be so insubstantial that no common law conflict or appearance of impropriety was created when those members voted to grant the applicant a special use permit to construct a planned unit development.

Nor is recusal required where the interest of the member in the matter under review is not a personal or private one, but rather "an interest he has in common with all other citizens or owners of property" in the community.[23] Thus, where most of the property in a village met the acreage requirement for reclassification to a cluster residence floating zone under a proposed zoning amendment, village board members who owned qualifying property were not disqualified from voting on that zoning amendment.[24] Similarly, in *Segalla v. Planning Board of the Town of Amenia*,[25] the court refused to annul the vote of a planning board member to adopt a new master plan where the value of that member's property and the value of nearly every other property owner in the town would be similarly affected by the adoption.

Where recusal is required, the board member in question must refrain from deliberating and voting on the application or matter:

> We have stated that members with conflicts of interests must recuse themselves from participating in any deliberations or votes concerning the application creating the conflict. Op. Atty. Gen. (Inf.) No. 90-38. The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interests should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interests, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.[26]

Obviously, this article cannot address every potential situation in which recusal and/or abstention becomes an issue. However, by adhering to the general principles which guide those decisions, planning board members will be better able to discharge their responsibilities.

Endnotes

1. *See Cromarty v. Leonard*, 13 A.D.2d 275, 216 N.Y.S.2d 619 (2d Dep't 1961), *aff'd.* 10 N.Y.2d 915 (1961).
2. *See Taub v. Pirnie*, 3 N.Y.2d 188 (1957), holding that even where a board member has not attended the public hearing and not read the transcript, he may nevertheless vote on an application

where he has the means available to him to make an informed decision.

3. *Id*.
4. Village Law § 7-718(17); Town Law § 271(16); General City Law § 27(17).
5. *See Rockland Woods, Inc. v. Village of Suffern*, 40 A.D.2d 385, 340 N.Y.S.2d 513 (2d Dep't 1973).
6. *Cf. Pinnacle Consultants Ltd. v. Leucadia National Corporation,* 94 N.Y.2d 426 (2000).
7. 1995 Op. Atty. Gen. 2.
8. Article 18 of the General Municipal Law contains provisions of law pertaining to conflicts of interest arising out of direct or indirect financial interests of municipal officers and employees in contracts with their municipality. For purposes of Article 18, "contract" is defined broadly to include any "claim, account or demand against or agreement with a municipality, express or implied." GML § 800(2). With certain exceptions, a municipal officer or employee is deemed to have an interest in the contract of a spouse, minor children and dependents and an entity of which the person is an officer, member or employee. GML § 800(3). Such interest is prohibited, with myriad exceptions [GML § 802], where the officer or employee, individually, or as a member of a board, has the power or duty to negotiate, prepare, authorize or approve the contract or authorize or approve payment or audit bills or claims under the contract, or appoint an officer or employee who has any of those powers or duties. GML § 801. Regardless of whether the interest is prohibited, the officer or employee having an interest in a contract with his or her municipality must publicly disclose that interest, in writing, to the governing body of the municipality. GML § 803. Applicants for a broad spectrum of land use permits and approvals must identify the name, nature and extent of the interest of any municipal officer or employee in the application. GML § 809. A willful and knowing violation of Article 18 constitutes a misdemeanor. GML § 805.
9. Local codes of ethics typically establish standards of conduct to ensure that municipal officers and employees maintain high standards of morality and faithfully discharge their duties, regardless of personal consideration, in an independent and impartial manner. A board of ethics is established to render advisory opinions to municipal officers and employees requesting same regarding their own conduct. Among other sanctions, a knowing and willful violation of the code of ethics constitutes a violation punishable by fine and could result in disciplinary action.
10. 1991 Op. Atty. Gen. 48.
11. 109 A.D.2d 281, 491 N.Y.S.2d 358 (2d Dep't 1985).
12. 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).
13. 122 Misc. 2d 531, 471 N.Y.S.2d 521 (Sup. Ct., Onondaga Co. 1984).
14. *Parker v. Town of Gardiner Planning Board,* 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992), *lv. denied*, 80 N.Y.2d 76 (1992).
15. 2002 Op. Gen. 8; *see Tuxedo, supra* note 12 at 325 ["It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."].
16. 2002 Op. Atty. Gen. 8; *Tuxedo, supra* note 12 ["The test to be applied is not whether there is a conflict, but whether there might be]."
17. 2002 Op. Atty. Gen. 8.
18. 1989 Op. Atty. Gen. 50.
19. 1988 Op. Atty. Gen. 60.
20. 1988 Op. Atty. Gen. 59.
21. *Zagoreos, supra* note 11.
22. 158 A.D.2d 801, 551 N.Y.S.2d.392 (3d Dep't 1990), *lv. denied*, 76 N.Y.2d 706 (1990).
23. *Tuxedo, supra* note 12.
24. *See Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 344 (1975).
25. 204 A.D.2d 332, 611 N.Y.S.2d 287 (2d Dep't 1992).
26. 1995 Op. Atty. Gen. 2.

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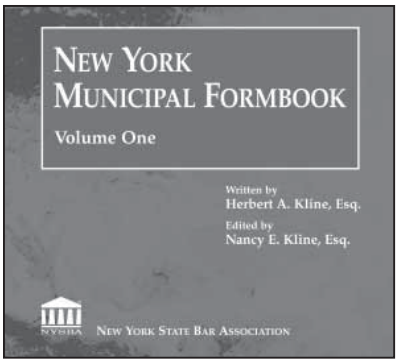

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