NYSBA WINTER 2011 | VOL. 25 | NO. 1

Municipal Lawyer

A publication of the Municipal Law Section
of the New York State Bar Association

A Message from the Chair

Patricia Salkin

In the first quarter of 2011 the Municipal Law Section has been quite active in a number of reform initiatives and we have remained at the cutting edge of law practice and law reform in many important areas.

In January, executive committee members Daniel Spitzer of Hodgson Russ in Buffalo and Bernis Nelson of the City of Newburgh organized an outstanding CLE program for the Section's Annual Meeting in New York City. Despite the snow, our Section members proved hearty and we had a packed house at the New York Hilton. Topics discussed included the opportunities and pitfalls with the use of social networking sites by municipalities and municipal attorneys (this session addressed so many great issues including personnel issues, ethical concerns and open meetings law and FOIL); the challenges presented and the obligations that exist to provide affordable housing in light of the recent Westchester County settlement with HUD; understanding and surviving the financial crisis with tips for municipalities; and a federal and state case law update on recent developments of interest to municipal attorneys. Our next CLE program will take place in October at the Gideon Putnam Hotel in Saratoga Springs, NY and this will be a joint meeting with the Environmental Law Section. Ken Bond and Lisa Cobb are busy at work putting this program together on behalf of the Section. Watch the next issue of the *Municipal Lawyer* for more details, and please contact Ken or Lisa if you have suggestions for program topics and speakers.

The Section was also pleased to have played a large role in NYSBA President Stephen Younger's task force on Government Ethics. The task force, which I had the privilege of co-chairing with former U.S. Attorney for the Southern District of New York, Michael Garcia, focused on four areas: disclosure, honest services fraud, due process and structureand municipal ethics. Mark Davies, the co-chair of our Section's ethics committee, served as chair of the municipal ethics efforts. Other Section members who participated as task force members included: Stephen

Inside

Acquario, James Cole, Linda Kingsley, Steven Leventhal and John Mancini. In addition, other section members served as members of the municipal ethics working group. The full task force report was adopted as submitted by the State Bar House of Delegates at the end of January, and hopefully a bill will be introduced in the 2011 Legislative session to address the recommendations pertaining to municipal ethics.

In response to Governor Cuomo's calls for a property tax cap and the appointment of a mandate relief redesign team to examine local mandates, the Municipal Law Section appointed a special committee on mandate relief to work quickly during the month of February to develop recommendations for submission to the Governor's team. The effort, co-chaired by Michael Kenneally and Sharon Berlin, produced an excellent report that addresses and eloquently expresses concerns with mandates such as disability benefits for law enforcement and firefighters (GML 207-c and GML 207-a), the Wicks Law (GML 101), the funding of public pensions, the prevailing wage law (Labor Law 220) and the Triborough Amendment to the Taylor Law (Civil Service Law 209-a.1(e)).

Special thanks to Natasha Phillip who has agreed to work on membership initiatives for the Section, and we welcome in June a new member to our Executive Committee, Sung Mo Kim from the New York City Conflicts of Interest Board. Sung will be leading our technology committee. On behalf of the Section, we extend a sincere thank you to outgoing executive committee member Jennifer Siegel McNamara, whose active participation and leadership, including the organization of the 2010 Annual Meeting, contributed greatly to the Section and provided value to our membership.

Patricia Salkin

From the Editor

Cities, beset by high unemployment, population declines and middle class flight which have eroded property values, depleted their tax bases and threatened their future competitiveness and economic stability, have enacted or considered the adoption of local preference hiring legislation as a solution to these problems. Typically, such legislation requires that a specific percentage of the workforce on public contracts be comprised of city residents. These local hiring requirements are intended to ensure high quality employment opportunities to the city's labor pool, especially low-income residents and other disadvantaged workers.

Notwithstanding the noble purposes for these laws, there are significant obstacles to their enforcement. Successful challenges to local preference hiring legislation have been mounted under the Privileges and Immunities clause of the Federal Constitution.[1] Residential preference hiring would also appear to run afoul of New York State's competitive bidding laws.

In *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*,[2] the Supreme Court held that a Camden local law requiring 40% of employees on City construction projects to be city residents, discriminated against non-residents' fundamental interest in employment by private contractors on public works projects in other states. This finding of discrimination did not, in and of itself, invalidate the local law. Discrimination under the Privileges and Immunities Clause, in a proper case, may be justified where substantial reasons exist for the difference in treatment and the degree of the discrimination bears a close relationship to those reasons. Without a sufficient record before it, the Supreme Court remanded the case to the New Jersey courts to evaluate the city's justifications for the law.

To survive a Privileges and Immunities challenge to a local preference hiring law, the municipality must demonstrate that: (1) non-residents are a particular source of the evil that the legislation is designed to address; and (2) the discrimination bears a close relationship to the economic conditions in the municipality that necessitated the enactment of the local law.

Applying the tests articulated by the Supreme Court, a Massachusetts Federal District Court invalidated a City of Worcester ordinance that required any project for public work funded by the City and costing more than $25,000 to provide jobs to city residents equal to at least 50% of the total workforce of the project.[3] While the City's economic justifications for the law may be substantial, the Court remained unconvinced that non-residents are the particular source of the evils which the law was enacted to address.[4]

Intrastate discrimination, as opposed to interstate discrimination, may avoid a conflict with the Privileges and Immunities Clause. For example, the City of Cleveland adopted a local law requiring that residents of the City perform 20% of the total construction work hours performed on public contracts by Ohio residents. Thus, a contractor could recruit a workforce comprised of non-residents of the State of Ohio and not be subject to the local law. Accordingly, there was no discrimination found against non-residents. Conversely, if a contractor wanted to use any Ohio workers, 20% of the total construction work hours of those Ohio residents would have to be performed by Cleveland residents.[5]

Even assuming a local law could survive a Privileges and Immunities challenge, it may be preempted by New York State's competitive bidding laws. General Municipal Law Section 103 provides for the award of contracts for public work to the lowest responsible bidder and is intended to preempt local legislation in this area. The predominant purposes of Section 103 are to protect the public fisc by requiring competitive bidding and to prevent favoritism, improvidence, fraud and corruption in the awarding of public contracts.

New York courts have struck down efforts to condition the award of public contracts on the achievement of social policy goals that are not directed to objectives within the intent of General Municipal Law Section 103. In *Associated Builders and Contractors, Inc. v. Rochester*,[6] the Court of Appeals invalidated a City of Rochester ordinance providing a preference to contractors whose employees participate in a state-approved apprenticeship program. In *Council of the City of New York v. Bloomberg*,[7] New York City's equal benefits law, prohibiting city agencies from contracting with contractors who fail to provide their employees' domestic partners with employment benefits equal to those provided to employee spouses, was also held to be preempted by the state's competitive bidding laws. Indeed, the State Comptroller has specifically opined that local hiring preferences are prohibited in the same manner.[8] An amendment to Section 103 would appear to be necessary to overcome this obstacle.

In this issue of the *Municipal Lawyer,* the Honorable Richard A. Dollinger, Judge of the New York State Court of Claims, has examined the issue of prosecution of public corruption offenses in the wake of the United States Supreme Court's recent decision in *United States. v. Skilling*. Judge Dollinger reviews the history of prosecution of public officials for "honest services fraud."

In her Message from the Chair, Patricia Salkin discusses the Section's annual meeting program and its initiatives on government ethics and mandate relief.

Julia Davis, Director of Financial Disclosure and Special Counsel at the New York City Conflicts of Interests Board, has written about the role of the municipal attorney where a municipal employee is the subject of a public integrity criminal law investigation.

Henry Hocherman and Noelle Crisalli of Hocherman Tortorella and Wekstein present their quarterly review of land use cases highlighting recent decisions on zoning protest petitions, the application of the balancing test for area variances, and the ability of municipalities to create tribunals to adjudicate land use violations.

Finally, Darrin Derosia of the New York State Department of State summarizes new state laws of interest to municipal practitioners.

Lester D. Steinman

Endnotes

1. U.S. Const. Art. IV, Sec. 2. The Privileges and Immunities Clause provides that "The citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several States."
2. 465 U.S. 208 (1984).
3. *Utilities Contractor Association of New England, Inc. v. City of Worcester,* 236 F.Supp.2d 113 (D. Ct. Ma. 2002).
4. *Id.*
5. *City of Cleveland v. State of Ohio*, 508 F3d 827(6th Cir. 2007).
6. 67 N.Y.2d 854 (1986).
7. 6 N.Y.3d 380 (2006).
8. 1991 Op. St. Compt. 52.

Lester D. Steinman is Counsel to the firm of Wormser, Kiely, Galef & Jacobs LLP in White Plains.

Honest Services, Public Corruption and Prosecution of Municipal Officials: Public Integrity Prosecutions in the Wake of *United States v. Skilling*

Honorable Richard A. Dollinger

Introduction

Four state senators are either convicted of public corruption or under indictment.[1] Several Assembly members are indicted, tried and convicted.[2] A governor resigns when faced with a criminal investigation.[3] A second governor is charged with a serious ethics violation, violations of state law and fined more than $62,000.[4] A comptroller pleads guilty to a felony and resigns.[5]

It has been a tough two decades for New York elected officials.[6] With further changes in the political winds, there may be even more difficult times ahead for public officials at all levels.[7] The swirling winds that may influence the future include renewed Congressional initiatives to expand public corruption prosecutions by federal prosecutors, a narrowing of the application of the recent Supreme Court determination in *Skilling v. United States*, changes in federal and state public corruption laws and the use of local ethical rules to justify public corruption prosecutions.[8]

For public officials and their attorneys, the watchword is simple: when private interests, public officials and the government's business intersect, extreme caution is advised.[9] This article will discuss the foundation for those prosecutions, examine the recent Supreme Court decision in *Skilling v. United States* and its impact on public corruption prosecutions by federal and state prosecutors in New York, the ripple impact of *Skilling* on public officials' conduct, and state and federal initiatives to expand the scope of these public corruption prosecutions.

Prosecutions for Honest Services Fraud

Corruption prosecutions have sources in both federal and state law. Federal law prohibits bribery and similar offenses by state and federal officials at all levels of government.[10] New York's bribery-related statutes include the crimes of receiving a reward for official misconduct, giving unlawful gratuities and receiving unlawful gratuities.[11] However, the major weapon to fight public corruption in the arsenal of prosecutors has been the federal "honest services" wire fraud statute.[12] Enacted in the early 20th century as a restriction on mail order fraud, the statue was used intermittently during the first half of the century to prosecute those who use the mail or wires "to engage in a scheme to defraud."[13]

As the prosecutions continued, the phrase "scheme to defraud" was transformed and broadened:

> This doctrine of the deprivation of honest and faithful services has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage, often by taking bribes. Such actions may not deplete the fisc; indeed…they may have enriched it, but they are nonetheless frauds since the public official has been paid to act in breach of his duties.[14]

In essence, the federal courts added a gloss to the statute: not only did it apply to public officials engaged in common law bribery transactions—the old-fashioned "quid pro quo"—but the language also encompassed public officials who used their positions for private gain in violation of their fiduciary duty to the public that elected them. The broad use of the "honest services" crested in the late 1970s with *United States v. Mandel*,[15] in which the former governor of Maryland was convicted in a scheme to aid the state's horse racing industry. The indictment alleged that the governor concealed his interests in the racing industry, which was aided by bills passed by the state legislature and signed into law by him. Mandel was convicted at trial under the "honest services" statute, even though there was no proof that he accepted any bribes.

By 1982, all the Courts of Appeal had embraced this "honest services" theory of fraud. The Courts held that the public's loss of "intangible rights" could provide the "scheme to defraud" necessary to support a wire fraud conviction. Public officials, in the eyes of the federal courts, had an "intangible fiduciary duty to their public" and, if violated, they could be prosecuted. As the Supreme Court noted:

> Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term

> "scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights.[16]

McNally and Its Aftermath—"Honest Services II"

The tsunami of convictions under the "honest services" wire fraud statute hit a roadblock when the Supreme Court examined a case involving the Kentucky insurance commissioner, who farmed out state insurance contracts to various companies, which through a series of related transactions, farmed business back to companies controlled by the commissioner.[17] In the trial, there was no evidence that the award of the insurance contracts was at anything less than fair market value or that the Commonwealth paid any additional price for the insurance or could have secured more comprehensive insurance through other carriers. Instead, the only argument before the jury was that scheme violated the rights of Kentucky citizens to "have the Commonwealth's affairs conducted honestly."[18] The Supreme Court struck down the conviction, holding that "honest services" did not apply to "intangible property" ("the right to have services conducted honestly"). The Court added that Congress needed to speak "more clearly" before the Court would embrace the "honest services" doctrine as a basis for public corruption convictions.[19]

The decision put the brakes on federal prosecutors—but only momentarily. Congress, not satisfied with the Court's restrictive view, almost immediately amended 18 U.S.C. § 1346, adding:

> For purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.[20]

The lower federal courts, reading the history of the amendment—Congress enacts broad statute, the Supreme Court curtails its reach, suggesting it needed clear guidance from Congress and then Congress immediately replies, seemingly intending to restore the statute's former reach—picked up where they left off. As the Second Circuit later noted, "The [revised] statute superseded *McNally* and reinstated the line of cases preceding it."[21]

During the next two decades, federal prosecutors obtained hundreds of convictions under the Congressionally reasserted "honest services" theory. The critical dispute in the expanse of these cases involved two issues: did the government need to prove that a public official used his office for private gain to justify a conviction and did the proof necessary to establish the "fiduciary duty" require evidence of a violation of state law? The circuit courts split on both questions. Some circuits required evidence of "private gain" to sustain a conviction.[22] Others said it was unnecessary.[23] Some circuits held that the "fiduciary duty" proof to establish "honest services" required evidence that a public official had violated some state law or regulation.[24] Others, expanding the reach of the statute further, applied a "common-law-like" duty to the public officials to conduct their affairs honestly.[25] As an example, in *United States v. Jefferson*,[26] the court, in upholding the conviction of a Congressman, cited numerous circuit court cases for the proposition that, even without evidence of a violation of any state or federal law, a public official has an "affirmative duty to disclose material information to the public employer."[27]

Sorich, Scalia and *Skilling*

Meanwhile, the Supreme Court awaited a second chance to review the "honest services" doctrine. *United States v. Sorich* involved a classic Chicago political corruption case. To avoid civil service, the defendants created a shadow hiring scheme, filled out sham interview forms and hired politically connected persons. In their defense, they argued there was "no private gain" and no public harm: the perpetrators received nothing more and the public got public work done. In upholding the convictions, the Seventh Circuit said that there was no need for private gain: "private gain means 'illegitimate gain' which will usually go to the defendant, but not always."[28] The Supreme Court denied certiorari but Justice Scalia, in dissenting from the denial of certiorari, piped in:

> Section 1346 is nothing more than an invitation for the federal courts to develop a common law of unethical conduct…it is unfair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail…it seems…quite irresponsible to let the current chaos prevail.[29]

In 2010, the Court got its "second" chance: three cases were granted certiorari. In *United States v. Skilling*,[30] the Fifth Circuit had upheld the conviction of a former Enron officer, who violated his duty as a private company's employee by engaging in certain profitable transactions that he failed to disclose to his employer and its shareholders. In *United States v. Black*,[31] a media baron was convicted of "honest services fraud" because he failed to disclose to his shareholders $5.5 million in non-competition fees designed to shield the income from taxes by the government of Canada. Finally, in *United States v. Weyhrauch*,[32] the defendant was a lawyer and state legislator in Alaska, when the state was considering changing the method of taxing

oil production. The defendant sought a job with a company which was lobbying for changes in the tax and he gave the company information about the legislation as it progressed. But, he never took any money and did all these actions only "with an understanding that the company would hire him in the future to provide legal work."[33] The Ninth Circuit, in response to a pretrial motion, held that the undisclosed conflict of interest could "support an inference of a *quid pro quo* arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work" and therefore, the government could "proceed on its theory that [the defendant] committed honest services fraud by failing to disclose a conflict of interest or by taking official actions with the expectation that he would receive future legal work for doing so."[34]

After hearing argument in all three cases, the Court wrote extensively only on *Skilling*, holding that its constitutional function was only to "construe not condemn" the Congressional amendment. [35] While the Court acknowledged that the new statute sought to incorporate the pre-*McNally* "honest services" case law, the Court held that the amendment only incorporated the "solid core" of *McNally* bribery/kickback schemes:

> The *McNally* case itself, which spurred Congress to enact Section 1346, presented a paradigmatic kickback fact pattern.[36]

The Court majority frowned on the "undisclosed conflicts of interest" prosecutions, implying but without explicitly mentioning, the core allegations in *United States v. Weyhrauch* and dozens of other prosecutions. The Court described these cases as "relatively infrequent," adding that there was "no consensus on which schemes qualify," numerous "intercircuit inconsistencies" and therefore, Congress's amendment was not intended to reach "this amorphous category of cases."[37]

Importantly, the Court left open a door for Congress to speak again, and perhaps this time, to speak even "more clearly" than Congress had in 1987. In footnote 44, the Court directed that if the Congress wants to criminalize "undisclosed self-dealing by a public official," it must utilize "sufficient definiteness and specificity to overcome due process concerns." The government's argument that a crime occurs when an individual's action furthers a public official's own undisclosed financial interests while purporting to act in the interest of those to whom he owes a fiduciary duty leaves "too many unanswered questions."[38] In simple terms, the Supreme Court majority concluded that Congress could not leave these central issues of criminal culpability to prosecutors and jurors: instead, Congress needed to specify these restrictions and definitions to meet constitutional requirements.[39]

"Honest Services" in the Wake of *Skilling*

To date, the net impact of *Skilling* on "honest services" prosecutions has been varied: in some cases, indictments were dismissed. In others, the courts sustained convictions and indictments as prosecutors changed legal theories away from "intangible rights" and "honest services" to the core-*McNally/Skilling* theories: bribes and kickbacks.[40]

At least one circuit court has narrowly construed *Skilling* only to end "undisclosed" conflict of interest cases. In *United States v. Milovanovic*,[41] the court reinstated an indictment in a commercial driver's license fraud/bribery case and held the honest services charge could go forward without proof of a fiduciary duty by the defendants to any government and no proof of "damages to the money or property of the victim." The Court focused on the word "honesty" in the mail fraud statute: the "gravamen of the harm prohibited by the statute is dishonesty in providing services where the victim, the government in this case, was entitled to have the services performed honestly."[42]

Public Officials and Attorneys as Targets in the Wake of *Skilling*

What remains indisputable, in the post-*Skilling* environment, is that public officials and their attorneys will be at the forefront of "honest services" wire fraud prosecutions.[43] Earlier efforts to prosecute attorneys, who benefitted privately from their public offices, would appear to be minimally impacted by the decision in *Skilling*. For example, in *United States v. Potter*,[44] conspiracy charges against gambling officials were sustained when the proof showed that they overpaid a law firm of which the then-speaker of the state House of Representatives was a member to influence the lawyer's official work as a House member. The Court held that this overpayment was "a heartland quid pro quo" sufficient to sustain the conspiracy charges.

A second possible exposure of attorneys and their public official clients under the new age of public corruption post-*Skilling* cases arises in *Hope for Families and Community Services v. Warren*.[45] In this case, the "honest services" wire fraud claims served as the predicate offense for a civil claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[46] The civil claim for damages was premised on undisclosed conflicts of interest against a private attorney, retained by a county sheriff to draft certain bingo rules. The complaint alleged that the attorney drafted bingo rules that favored one operator in Alabama which was also represented by the same attorney. The Court held that *Skilling* "doomed" claims based on self-dealing and undisclosed conflicts of interest resulting in personal gain to third parties and granted summary judgment to dismiss the claims against the attorney. While granting a reprieve to counsel in this case, the complaint in this

case suggests that private litigants may use "honest services" as a weapon in civil litigation against lawyers and public officials involved in conflicts of interest, especially in instances in which private parties are rivals in competing for public contracts and benefits.[47] The use of a civil RICO claim with its "enterprise" liability and use of "conspiracy" claims expands the scope of those who may be subject to criminal charges for "influence peddling."[48]

Influence, Stream of Benefits and Campaign Contributions as Aspects of Honest Services Wire Fraud and Other Crimes

A trio of pre-*Skilling* cases should serve as a further warning to public officials and their attorneys because they articulate evolving theories of public corruption that seemingly survive *Skilling* and may impact otherwise seemingly legal conduct. In *United States v. Urciuoli*,[49] a private party provided a job for a state senator at a hospital subsidiary and the senator/employee used that job to oppose bills that were against the hospital's interest and to lobby insurance companies to benefit the hospital. Despite *Skilling*, the First Circuit upheld that prosecution under the "honest services" doctrine, holding that the conduct was akin to the "core *McNally* kickback cases." This post-*Skilling* case suggests that an undisclosed conflict of interest in which the public employee is paid by a third-party to aid its private interest may still be the basis for an "honest services" wire fraud conviction. In addition, the Court noted that a jury could infer a deprivation of honest services even if the senator only provided "general support in exchange for money."[50]

In *United States v. Gamin*,[51] the Second Circuit held that the government was not required to prove a direct link between a benefit received and a specific act the defendant performed, so long as the government proved that the public official received benefits in exchange for his agreement to perform specific official acts or to do so as the opportunities arose.[52] This "stream of benefits" form of bribery was cited with apparent approval by the Supreme Court majority in *Skilling*.[53]

What should unsettle attorneys and those with close ties to public officials is that the "stream of benefits" can include "free meals, entertainment and golf" and, at least under a broader reading of *Gamin*, campaign contributions.[54]

The *Gamin* court's close examination of the linkage between campaign contributions and public corruption is a precautionary tale for attorneys and public officials. The court in *Gamin* went out of its way to clarify jury instructions regarding the distinction between bribery, legal lobbying and campaign contributions. The line between these three activities, set forth in the district court charge to the jury and affirmed by the circuit court in *Gamin*, is subtlety drawn. The distinction between the generalized "goodwill" sought through legal lobbying or the cultivating of a relationship in campaign contributions set forth in *Gamin* and the "general support in exchange for money"—which the First Circuit described as criminal conduct in *United States v. Urciuoli*[55]—may be increasingly difficult to draw, although criminal culpability may depend on where the line falls.

A second precautionary note for attorneys and their public official clients comes in *United States v. McNair.* [56] In *McNair*, the Eleventh Circuit held an "honest service" fraud charge could be sustained even without an allegation of a *quid pro quo*. In *United States v. Nelson*, the district court, citing the Second Circuit opinion in *United States v. Gamin*, held that the traditional "quid pro quo" bribery allegations were not necessary to support an "honest services" or a federal bribery indictment (18 U.S.C. § 666) in the post-*Skilling* milieu. The Court held that a bribery/honest services fraud scheme was complete if the government could demonstrate an exchange of a benefit to the official "for his promise to perform official acts or to perform such acts as the opportunities arose."[57]

In short, the federal courts, while acknowledging that *Skilling* is the death knell for undisclosed conflict of interest honest services indictments, have elected to continue to give broad meaning to the federal bribery statute.[58] There is no requirement that the public official, upon taking a benefit, agree to provide a specific act, but just agree to provide help on an "as needed" basis in the future. In addition, the holding in *Nelson* also sends a more nuanced message because the Court noted that a payment to a public official could be considered a bribe even though the public official's public duties were limited and no actual votes, favorable to the bribe giver, occurred because the public official and recipient of the gratuity "exercised influence" over the governing public entity.[59] In sum, a public official who "exercises influence" (a supervisor over a town-board, a chairman of a public authority over the authority representatives) may be subject to a bribery accusation if he accepts payments from a third-party that may have business before the public body in the future.[60] The decisions in *McNair* and *Nelson* suggest that bribery may be found if the giver of the bribe intends to corruptly influence the public official, even if the public official denies that he accepted the benefit with the intent to be influenced.[61]

As a practical matter, a public official indicted for bribery under this test will find little solace in *Skilling*: if a bribe giver states that he gave a benefit with the intent to "corruptly influence" the public official and the briber had business before the government entity over which the official "exercised influence," the recipi-

ent will find it difficult to rebut the inference that the benefit—a gratuity of any type—was something other than a bribe.

A final warning of the ambiguous line between unlawfully rewarding a public official and campaign contributions results from the intertwined lines of reasoning in the "favors and benefits" cases. In *Hub City Sold Waste Services v. City of Comptom*,[62] the Court, reviewing campaign contributions under California's election laws, concluded that campaign contributions, made "close in time" to a public action and which constituted "a substantial portion of a public official's campaign funds" could be interpreted by the jury as evidence that the public official "stood to benefit" from public action.[63] In New York, the federal courts held that campaign contributions could be considered a "benefit" sufficient to establish bribery if the individual public officials "agreed to be influenced by campaign contributions."[64]

The Concept of Duty After *Skilling*: Old and New Federal Initiatives

While the courts have grappled with the issues of "duties of public officials" in the context of "honest services" fraud, Congress had, prior to *Skilling*, already set new ethical standards for its members, employees and those attempting to influence them. The Honest Leadership and Open Government Act of 2007 ("HLOGA") includes "revolving door" restrictions on former members and their employees, prohibits gifts from lobbyists to Members of Congress if the gifts violate Senate or House rules, increases disclosure by lobbyists including disclosure of "bundled" contributions to candidates, requires disclosure by lobbyists of campaign contributions and payments to presidential libraries, inaugural committees and entities controlled by a member of Congress, and denies retirement benefits to members of Congress convicted of crimes related to their official duties.[65] The statute has only once been utilized for a prosecution to date.[66] However, this statute could easily be the template for similar state restrictions and, as *United States v. Ring* demonstrates, violations of the HLOGA rules can lead to "honest services" mail fraud prosecutions.[67]

The decision in *Skilling* also triggered a round of new legislative initiatives. In Washington, Senator Patrick Leahy, the chair of the Senate Judiciary Committee, introduced S.49 during the 2010 session. The bill would add the phrase "anything of value" to the honest services mail fraud statute in an attempt to restore the "undisclosed conflict of interest" reach of 18 U.S.C. 1346.[68] Chairman Leahy said: "I would hope we could all agree that undisclosed self-dealing by public officials and corporate executives is not acceptable, so we should figure out the best way to fill in those gaps."[69] Senator Leahy's bill would also increase the scope of the federal program bribery statute, which may prove, if enacted, to be an even stronger weapon in the prosecutor's quiver. Federal prosecutors have utilized 18 U.S.C. § 666(2) ("the federal program-bribery statute") to prosecute officials who give or offer "any thing or things of value to any person with intent to influence or reward an agent of an organization, state or any agency thereof." Senator Leahy's bill would lower the dollar threshold for federal-program bribery and expand the language to include "any thing of value."

As *Skilling* spells the demise of "undisclosed conflict of interest" prosecutions, it may trigger greater application of "federal-program" bribery cases under 18 U.S.C. § 666(a)(2). Under that statute, anyone who demands or solicits "anything of value from any person" with intent to "influence or reward" any person in any state or local government commits bribery, if that government has received benefits in excess of $10,000 from the federal government. The statute, applied against judges and attorneys, has already generated debate among the federal courts over the question of the linkage between the prohibited activity and the federal assistance.[70] This statute, with its wide-ranging "intending to influence or reward" language applies to local governments who receive more than $10,000 in federal assistance, which presumably could include any form of federal assistance.

Skilling's Impact in New York and New York's Anti-Corruption Laws

The *Skilling* outcome may also directly impact several high profile cases in New York. In *United States v. Bruno*,[71] the former Senate Majority Leader was convicted of two counts of "honest services" mail fraud and acquitted on six other charges. His conviction was based on two transactions: his acceptance of a $200,000 payment from a business colleague for consulting which he allegedly never did and the $80,000 "gift horse," an apparently nearly worthless steed sold for that price to a business associate. The case is on appeal, with Bruno arguing that because he was tried on the "honest services fraud" theory, his entire conviction should be vacated and retrial denied. The government argues that while he was tried on a now-discredited theory, the actual conduct on which the jury reached a guilty verdict—the payments for work not done and the excess payment for the "gift horse"—are examples of the core-*McNally* "kickback schemes" and hence, he should be retried on that theory.

Skilling will have less impact on two other federal prosecutions of well-known New Yorkers. Assemblyman Anthony Seminerio was indicted and pled guilty to accepting bribes. The federal court refused to vacate the conviction based on *Skilling* because it was a bribe-taking case.[72] However, *United States v. Seminerio* does

hold a warning for attorneys and would-be middle men in dealing with government. Seminerio, according to the indictment, took cash payments from parties with business before the state. He set up meetings, initiated discussions with state officials regarding projects that benefited the payor but, there was no evidence that he ever voted for any projects to benefit the payor, and yet his conviction was affirmed.

Similarly, the prosecution of former New York City Police Commissioner Bernard Kerik should remain unaffected by *Skilling*: in his case, the defendant used his position as commissioner to vouch for other parties in matters before government agencies, while he was accepting payments from those parties. His conviction was upheld under the kickback theory even though there was no evidence that he had violated any statutory duty of the Commissioner. As the Court noted:

> It is unlikely that Congress intended to permit an official to receive surreptitious payments and in exchange, use his official status—with all of its access and influence—to steer the direction of government business as long as that official did not abuse his official enumerated duties.[73]

Skilling's narrow reading of the federal "honest services" statute may also push more prosecutions back into the hands of state prosecutors. In that respect, New York's bribery law has been infrequently utilized in public corruption cases, possibly because its reach is limited by statutory language that requires a "mutual understanding" that a gift or payment is intended for a specific act by a public official.[74] Given the limited reach of the primary bribery statute, New York's public corruption actions, both at the state and federal level, have utilized the bribery-related crimes—giving unlawful gratuities and receiving unlawful gratuities—as predicates for public corruption actions by both state and federal prosecutors.[75] The language in these statutes does not require any "mutual agreement" by the giver and recipient. These crimes are "intent" crimes: if the giver intends to have the public officials violate their duties or the officials take the reward for violating their duties, then the statute is violated.[76]

Importantly, the critical issue in these state-law-based prosecutions mirrors a dispute at the heart of the Supreme Court's analysis in *Skilling*: is there a duty of public officials and their attorneys to refrain from performing certain actions that may benefit them in their private capacities?[77] Recent federal cases and similar opinions in New York clearly suggest, even in the wake of *Skilling*, that the definition of "duty" will be broadly applied by courts at all levels.[78] The federal courts have found the "duty" in an attorney's compliance with the Code of Professional Responsibility. In *United States v. Scanlon*, the court held that an attorney's breach of the Code of Professional Responsibility by failing to make disclosures to his clients of a kickback scheme from a professional consulting firm could sustain a conviction under the now restricted federal "honest services" statute.[79]

The New York courts have reached similar holdings. The combination of the *Velella* and *Seminerio* indictments sends a strong warning message in New York—violations of "rules of ethics,""codes of conduct" or the attorneys' Code of Professional Responsibility will satisfy the duty requirements in New York's bribery-related statutes. In *People v. Gordon*,[80] the Second Department upheld a bribery conviction against a former Assemblywoman and rejected the argument that she violated no express law of New York and that there was no legally defined duty that she violated. The Second Department followed the logic of both *Seminerio* and *Velella*: violations of the Code of Ethics in New York's Public Officers Law provided a basis for the criminal conviction.[81] The Court held that the Code, while not containing any criminal sanctions, imposed a "mandatory duty of conduct" on legislators and a violation of the Code, combined with proof of a "reward" for such a violation, will sustain a conviction.[82] Significantly, when read in conjunction with the *Velella* indictment, the message from *People v. Gordon* seems clear: any benefit conveyed to a public official—even an indirect payment to a public official's equity law partner, for example,—which violates the statutory Code of Ethics in the Public Officers Law, can result in criminal prosecution.[83]

In a further extension of this principle, the Court of Appeals also recently upheld the conviction of a supreme court justice when the evidence demonstrated the judge was bought meals and drinks, received cash, engaged in *ex parte* communications and, as an ultimate prize, received two boxes of cigars in exchange for legal advice during *ex parte* communications.[84] The judge was indicted for receiving a reward "for having violated his duty as a public servant."[85] He challenged the indictment, arguing that there was no statutory "duty" to avoid *ex parte* communications or refrain from other conduct. The government alleged that Rules of Judicial Conduct, regulatory rules enacted by the court system, prohibited the conduct and the Rules set forth the "duty" sufficient to sustain the charges.[86] The Court, in reinstating charges under the indictment, held that violation of the Rules of Judicial Conduct could be a predicate for the conviction. The Court of Appeals noted that the concept of duty was left intentionally vague by the Legislature: it held that the duty could come from the Rules of Judicial Conduct or from live testimony from a lay witness or expert, an internal or informal body of rules or "other indicia of a defendant's knowledge of wrongdoing."[87]

The *Garson* holding regarding the nature of a public duty means that any "body of rules" or even a "code of conduct" could provide the predicate for a bribery-related prosecution if the giver intended a gift to influence the public official to violate those rules and either the state or federal government can initiate such a prosecution.[88] The combination of the prosecutions in *People v. Gordon*, *People v. Velella* and *United States v. Seminerio* clearly suggests that public officials and their attorneys may violate state law if they violate any relevant Codes of conduct and receive any benefit, direct or indirect. If the "stream of benefits" analysis by the Second Circuit in *Gamin* is overlaid on the principles evolved from these cases, it may be that any gifts or campaign contributions that result in any benefit to the giver, and are intended to improperly influence public officials, may be the basis for a public corruption prosecution. Furthermore, just an agreement to participate in a "stream of benefits" exchange for public favors may lead to conspiracy charges under New York law.[89]

While Washington ponders legislative changes in the wake of *Skilling*, similar initiatives are under way in New York. Former Senator Eric T. Schneiderman and Manhattan District Attorney Cyrus R. Vance, Jr. proposed a new law designed to aid the fight against political corruption.[90] The bill defines the duties of the "faithful public servant," increases penalties for bribes, prohibits gifts to public officials if the person has knowledge that the gift violates the legislative rules, requires lobbyists to certify on a semi-annual basis that they are familiar with the state-lobbying rules and requires further disclosure by those who have actions pending before the government of gifts or campaign contributions within five years to the officeholder or his or her political committee. These disclosures would presumably carry criminal sanctions: certainly, a failure to abide by these disclosure/ethical rules could be the basis for state or federal prosecutions under the doctrines enunciated in *People v. Gordon* (violation of state laws as predicate to state felony bribery charges), *United States v. Seminerio* (violation of state law as predicate for federal wire fraud conviction), *United States v. Ring* (proof of the requisite criminal intent to commit honest services fraud may rely on violations of HLOGA) or *United States v. Ganim* (violation of state laws as predicate to federal honest service wire fraud claims).[91]

Conclusion

Both the state and federal governments are seeking to restore prosecutors' authority to bring criminal prosecutions for those who violate their fiduciary duty to the public. Federal prosecutors will continue to look over the shoulder of local public officials. As one court said in describing the involvement of federal prosecutors in local corruption, "maybe it is the federal government's business because corruption may not be curable within the very governments that are corrupt."[92] As the First Circuit noted,

> It is common knowledge that powerful legislative leaders are not dependent on their own votes to make things happen. The honest services that a legislator owes to citizens fairly include his informal and behind-the-scenes influence on legislation.…We have held that favors, such as lunches, golf games, and sports tickets, may be modest enough and sufficiently disconnected from any inferable improper quid pro quo that a factfinder might conclude that only business friendship was at work, or at least nothing more than a warm welcome was being sought by the favor giver. The line between permissible courting and improper use of gifts to obtain behind-the-scenes influence by an official is not always an easy one to draw, but one draws close at one's peril.[93]

Finally, while public officials and their attorneys remain the prime targets for corruption prosecutions, the narrow reading of "undisclosed conflict of interests" as a predicate for "honest services fraud" in *Skilling* will not dissuade prosecutors from seeking indictments against private citizens who breach duties to others. Both Jeffrey Skilling and Conrad Black were private citizens: no government officials were included in their indictments. A private citizen or attorney can be charged with a conspiracy to commit honest services wire fraud even if no public official is charged.[94] In *United States v. Rybicki*,[95] the Court upheld the mail fraud and wire fraud convictions of two private lawyers who were giving illegal payments to insurance claims adjusters with the intent of inducing the adjusters to expedite the settlement of certain clams. The court defined the "scheme or artifice to deprive another of the intangible right to honest services" in relation to private actors as a:

> scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepre-

sentation made or omission of information disclosed to the employer or other person.[96]

Under these cases, anyone who has a "fiduciary duty" to another could face honest services wire fraud charges. Attorneys, who have that duty defined by their profession, would seem to be likely targets of federal prosecutions if they breach that duty and use the wires to perpetuate any fraud on their clients, even without a connection to any government or elected official.

With anti-corruption crusades in prosecutors' offices near and far, inspired local prosecutors seeking broader remedies from "corruption conscious reform-minded" legislators and courts that are seeking to rein in corruption through broad readings of criminal statutes, public officials and their attorneys in New York need to be wary when they mix public business and private gain and trade campaign contributions and gifts for influence in any context for the foreseeable future. The Supreme Court's decision in *Skilling v. United States*, striking down an over-broad view of the "honest services" statute, may do little to shield those who engage in public corruption in its wake.

Endnotes

1. Senator Vincent Leibell, III pled guilty to obstruction of justice and tax evasion charges in December, 2010. *United States v. Leibell*, Ind. No.: CR 10 (S.D.N.Y. 2010). Senate Majority Leader Joseph L. Bruno was convicted of wire fraud in 2010. *United States v. Bruno*, 2010 U.S. Dist. Lexis 24518 (N.D.N.Y. 2010). His case is now on appeal to reverse the convictions and deny any retrial. Brief of Defendant-Appellant in *United States v. Bruno,* Appeal, No. 10-1885, United States Court of Appeals for the Second Circuit, December 23, 2010. Senator Guy J. Velella pled guilty to conspiracy in 2004 and was sentenced to a year in prison and stripped of his license to practice law. *In re Velella,* __ A.D. 3d __ (2d Dep't 2004). Former Senator Pedro Espada has been indicted for tax fraud and "looting" a not-for-profit entity which he ran in the Bronx. *Tax Charges to be Added in Espada Case*, New York Times, January 7, 2011.

   State senators seem to be a particularly popular target across the nation. *United States v. Ford,* 560 F.3d 420 (6th Cir. 2009) (state senator convicted during "Operation Tennessee Waltz" for taking a bribe that included among other things a $70,000 Rolex watch); *United States v. Montoya*, 945 F. 2d 1068 (9th Cir. 1991) (conviction during FBI investigation of California legislature); *United States v. Panarella*, 277 F.3d 678 (3rd Cir. 2002) (state senator's conviction upheld when undisclosed employer paid him consulting fees and he voted in favor of the undisclosed employer's interest in violation of state law).

2. Former Assembly Speaker Mel Miller was indicted for mail fraud and convicted but his conviction was overturned in 1992. *United States v. Miller*, 997 F. 2d 1010 (2d Cir. 1993). Former Brooklyn Democratic Leader Clarence Norman was convicted for Election Law violations and falsifying business records. *People v. Norman*, 40 A.D. 3d 1128 (2d Dep't 2007). Assemblyman Anthony Seminerio was convicted of taking bribes. *United States v. Seminerio*, 680 F. Supp. 2d 523 (S.D.N.Y. 2010). Assemblywomen Diane Gordon was convicted of bribe taking. *People v. Gordon*, 72 A.D. 3d 841 (2d Dep't 2010). In 2003, Assemblywoman Gloria Davis pled guilty to taking bribes. *Ex-Legislator gets 90 days in Bribery Case,* New York Times, March 19, 2003. The lawyer involved in her case also pled guilty to attempted bribe receiving, received a conditional discharge but was disbarred. *In re Jenkins*, 309 A.D. 2d 186 (1st Dep't 2003).

3. Governor Eliot Spitzer resigned in the face of potential charges related to a prostitution ring. *Spitzer resigns, Cites Personal Failing*, New York Times, March 12, 2008.

4. Governor David A. Paterson was fined by the Commission on Public Integrity for violating the New York Public Officers Law. *Paterson Fined $62,125 Over World Series Tickets,* New York Times, December 20, 2010.

5. Comptroller Alan Hevesi pled guilty to influence peddling charges related to the state's pension system. *Ex-state Controller Alan Hevesi pleads guilty to felony corruption charge in pension fund scandal,* New York Daily News, October 7, 2010.

6. *See With Arrests of Legislators, Hard Questions about Power, Perks and Temptations,* New York Times, July 16, 2008 (naming as those charged with crimes as including Assembly members Roger Green, Clarence Norman, Brian McLaughlin, Anthony Seminerio, Gloria Davis, and Diane Green, Senators Kevin Parker, Ada Smith—both for charges related to assault—and Senator Velella).

   These investigations may also be related to public officials' pensions, which have already been vigorously investigated by then Attorney General now Governor Andrew Cuomo and resulted in payments by law firms involved in the pension system. *Cuomo Eyes 12 Upstate Attorneys in Pension Scandal,* Newsday, April 23, 2010; *Law Firms Settle With New York AG Over Alleged Pension Fund Abuses,* New York Law Journal, June 19, 2008 (highlighting a $500,000 fine paid by a law firm as part of the Attorney General investigation). Public officials pensions may be swept into these pension investigations. *See Convicted Pols such as Guy Velella, Joe Bruno and Alan Hevesi Get Fat Pensions*, New York Daily News, September 1, 2010.

7. Local officials in New York are also often targets of federal probes. *United States v. Margiotta*, 688 F. 2d 108 (2d Cir. 1982) (conviction of Nassau County GOP leader for fraud involving insurance commissions on municipal properties). New York's corruption probes are non-partisan. *See*, *Former Democratic Leader Admits a Bribery Attempt*, New York Times, February 7, 2001(bribery plea of Paul W. Adler, Rockland County Democratic Chair, for attempted bribery and tax evasion). *See also In re Purdy*, 287 A.D. 2d 220 (2d Dep't 2001) (town attorney in Haverstraw disbarred after pleading guilty to honest services wire fraud for "pushing proposals through the Town approval process" in exchange for bribes).

8. 130 S. Ct. 2896 (2010). Federal public corruption indictments have increased by 30 per cent since 2002 and convictions increased by 25 per cent. In 2007, there were over 2,556 pending cases involving the FBI. Those convicted include 177 federal officials, 158 state officials and 360 local officials. *See* Abrams, *The Distance Imperative: A Different Way of Thinking About Public Corruption Investigations/Prosecutions and the Federal Role*, 42 Loy. U. Chi. L.J 207 (Winter, 2011), n.82.

9. Prosecutors have been targets of the federal bribery statues. *United States v. Villafranca*, 260 F. 2d 374 (5th Cir. 2001) (conviction of drug prosecutor for fixing cases); *United States v. Carmichael*, 232 F.3d 510 (6th Cir. 2000) (prosecutor convicted of extortion from a book maker). Judges are not exempt either. *United States v. Walker*, 348 Fed. Appx. 910 (5th Cir. 2009) (judges convicted for accepting bribes to direct money to bail bondsmen); *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (conviction for guaranteeing loans for judges who heard an attorney's cases).

10. 18 U.S.C. § 666.

11. N.Y. PENAL LAW §§ 200 *et seq.*

12. 18 U.S.C. § 1341. The mail and wire-fraud statutes criminalize the use of the mails and wires in furtherance of "any scheme

or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. § 1341 (mail-fraud statute); 18 U.S.C. § 1343 (wire-fraud statute). 18 U.S.C. § 1346 defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

13. For a history of the "honest services" mail fraud statute during its century of use, *see McNally v. United States*, 483 U.S. 350, 356-60 (1987).

14. *United States v. Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976).

15. *United States v. Mandel*, 602 F. 2d 653 (4th Cir. 1979) (*en banc*).

16. *Skilling v. United States*, 130 S. Ct. at 2896, 2926 (2010).

17. *McNally v. United States*, 483 U.S. 350 (1987).

18. *Id.* at 353.

19. *Id.* at 360.

20. The one line amendment was added to the Anti-Drug Abuse Law of 1988. There was no legislative debate, no legislative history, no hearings and none of the other relevant enactment materials that would permit the courts to decipher the exact scope of the new statute intended by Congress. *See United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly, J., dissenting).

21. *Rybicki v. United States*, 354 F.3d 124, 136-137 (2d Cir. 2003) (*en banc)*.

22. *See United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008) (patronage dispensers, convicted of honest services fraud, claimed that they did not personally profit from patronage appointments and the City of Chicago suffered no loss); *United States v. Turner*, 465 F.3d 667 (6th Cir. 2006) (honest services need not be premised on private gain).

23. *United States v. Inzuna*, 580 F.3d 894 (9th Cir. 2009) (bribes of city council members related to a "strip club" ordinance and the proof included receipt of campaign contributions but no private gain required); *United States v. Panarella*, 277 F.3d 678 (3rd Cir. 2002) (state senator's conviction upheld when undisclosed employer paid him consulting fees and he voted in favor of the undisclosed employer's interest, in violation of state law).

24. *See United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997); *United States v. Murphy*, 323 F.3d 102 (3rd Cir. 2003).

25. *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008); *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008) (9th Circuit decision, reversed by the Supreme Court and eventually modified; *United States v. Weyhrauch*, 623 F.3d 707 (9th Cir. 2010)); *United States v. Sawyer,* 85 F.3d 713 (1st Cir. 1996); *United States v. Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995).

26. 2009 U.S. Dist. LEXIS 69525 (E.D. Va. 2009).

27. *Id.* at 13, *citing United States v. Sawyer*, 85 F.3d 713,724 (1st Cir. 1996) and *United State v. Mandel*, 591 F. 2d 1347, 1363(4th Cir. 1979), *rev'd on other grounds* 602 F. 2d 653 (4th Cir. 1979).

28. *United States v. Sorich*, 523 F.3d 702, 709 (7th Cir. 2008).

29. *Sorich v. United States*, 129 S. Ct. 1308 (2009) (Scalia, J. dissenting). Criticism of the broad reach of the honest services statute easily predates the Supreme Court's consideration of *Skilling*. As one jurist noted two decades before *Skilling* was decided:

> Of course, we should all hope that public affairs are conducted honestly and on behalf of the entire citizenry. Nevertheless, we should recognize that a pluralistic political system assumes politically active persons will pursue power and self-interest. Participation in the political process is not limited to the pure of heart. Quite frankly, I shudder at the prospect of partisan political activists being indicted for failing to act "impartially" in influencing governmental acts. Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions. Where Congress has not passed legislation specifying particular acts by the politically active as criminal, our reliance rather should be on public debate, a free press and an alert electorate. In a pluralistic system organized on partisan lines, it is dangerous to require persons exercising political influence to make the kind of disclosure required in public offerings by the securities laws.

United States v. Margiotta, 688 F. 2d 108, 141-142 (2d Cir. 1982) (Winter J., dissenting).

30. 554 F.3d 529 (5th Cir. 2009).

31. 530 F.3d 596 (7th Cir. 2008).

32. 548 F.3d 1237 (9th Cir. 2008).

33. Significantly, Alaska law did not require Weyhrauch to disclose the conflict of interest he faced in discharging his duties while negotiating for future employment with a company affected by pending legislation The government argued that the evidence should nonetheless be admitted because proof that a legislator knowingly concealed a conflict of interest may be used to support an honest services fraud conviction even if state law does not require disclosure of the conflict of interest. *United States v. Weyhrauch*, 548 F.3d at 1240.

34. *United States v. Weyhrauch*, 548 F.3d at 1246.

35. *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010).The Supreme Court in *Skilling v. United States*, while analyzing the "honest services" statute, also spent more than half its majority opinion discussing juror prejudice and the impact of such prejudice on changes of venue, which legal historians may eventually view as the more important issue resolved in *Skilling*.

36. *Skilling v. United States*, 130 S. Ct. at 2930.

37. *Id*.

38. *Skilling v. United States*, 130 S. Ct. at 2933, n.44. The Court in *Skilling* suggested that to make an "undisclosed conflict of interest" a criminal offense, Congress needs to specify:

> (a) How direct or significant does the conflicting financial interest have to be?
>
> (b) To what extent does the official action have to further that interest in order to amount to fraud?
>
> (c) To whom should the disclosure be made and what information should it convey?

United States v. Skilling, 130 S. Ct. at 2930. The court added: "These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context." In the wake of this footnoted advice from the Court, one commentator noted, drafting a self-dealing "honest services" statute "of sufficient definiteness and specificity to overcome due process concerns" is no easy task. New York State Bar Association, *Task Force on Government Ethics, Report of Subcommittee on Theft of Honest Services*, January 2010, p. 52.

39. Justice Scalia, who sounded the charge against the "honest services' doctrine in *Sorich*, wrote a separate opinion suggesting that the statute be declared unconstitutional on "vagueness" grounds, commenting: "I would…reverse Skilling's conviction on the basis that it provides no 'ascertainable standard' for the conduct it condemns." *Skilling v. United States*, 130 S. Ct. 2940 (Scalia, J., dissenting) (citations omitted).

40. *See e.g., United States v. Saladino*, 2010 U.S. Dist. LEXIS 81642 (D.C. Or. 2010) (attacking fraud charges under the general federal fraud statute, 18 U.S.C. § 371); *United States v. Cantrell*,

2010 U.S. App. LEXIS 17021 (7th Cir. 2010) (the classic kickback case when a public official directs contracts to an entity from which he profits); *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010) (limiting *Skilling* and holding that the potential for loss of public money was sufficient to justify a mail fraud conviction of the former Mayor of Newark, New Jersey); *United States v. Conti*, 2010 U.S. Dist. LEXIS.11811 (W.D. Pa. 2010) (*Skilling* has no impact on traditional mail fraud cases); *United States v. Saladino*, 2010 U.S. Dist. LEXIS 81642 (D. Or. 2010); *United States v. Hoeffner,* 626 F.3d 857 (5th Cir. 2010) (distinguishing between "undisclosed conflict of interest" and "concealment of the fraud" in sustaining post-*Skilling* "honest services" fraud charges); *United States v. Olivieri*, 2010 U.S. Dist. LEXIS 111798 (S.D.N.Y. 2010) (allowing evidence of an undisclosed conflict of interest to be admitted as part of an alleged kickback scheme); *United States v. Belt*, 2010 U.S. Dist. LEXIS 101421 (W.D. La. 2010) (refusing, post-*Skilling* to dismiss an indictment that charged an undisclosed scheme, in which a sheriff's family profited from a jail telephone service); *United States v. Ryan*, 2010 U.S. Dist. LEXIS 134912 (N.D. Ill. 2010) (declining to vacate conviction of former Governor for "honest services" fraud, identifying the scheme as a kickback). In the two cases remanded by the Court, the defendants found little to celebrate. In *United States v. Black*, 625 F.3d 386 (7th Cir. 2010), the Court dismissed the "honest service" conviction but upheld a pecuniary fraud and obstruction of justice charge. In *United States v. Weyhrauch*, 623 F.3d 707 (9th Cir. 2010), the circuit court precluded the government from offering evidence to "a knowing concealment of a conflict of interest" but allowed the district court to determine whether the evidence would "be otherwise admissible" or if the remaining allegations were viable without that proof. *Id*.

41. 627 F.3d 405 (9th Cir. 2010).

42. *Id.* at 21.

43. *See, e.g.*, *United States v. Ferriero*, 2010 U.S. Dist LEXIS 78111(D.N.J. 2010) (vacating a conviction where an attorney had failed to disclose his role in a company that contracted with the borough).

44. 463 F.3d 9 (1st Cir. 2006).

45. 2010 U.S. Dist.. LEXIS 66873 (D. Ala. 2010).

46. The honest service mail fraud statute has been used by federal prosecutors as a predicate for RICO indictments. These criminal cases involve a multitude of defendants engaged in enterprises to conduct mail fraud and the charges often involve conspiracies to engage in mail fraud. *United States v. Maricle*, 2010 U.S. Dist. LEXIS 131226 (E.D. Ky. 2010) (while dismissing the "honest services" convictions under *Skilling*, the court held, in a "vote buying" case, that the evidence of the acts alleged in the honest services charges were still relevant to prove the existence of a conspiracy and that any spillover into other charges was harmless error).

47. *See also Resource N.E. of Long Island, Inc. v. Town of Babylon*, 80 F. Supp. 2d 52 (E.D.N.Y. 2000) (the campaign contribution as "bribery" and "honest services" wire fraud were predicates for a civil RICO claim).

48. *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006) (conspiracy to violate "honest services"); *United States v. Scanlon*, 2010 U.S Dist. LEXIS 126451 (D.D.C. 2010). In *Resource N.E. of Long Island, Inc. v. Town of Babylon*, 80 F. Supp. 2d 52 (E.D.N.Y. 2000), the Court concluded that the test for an "enterprise" existed when a "a group of people associated together for a common purpose of engaging in a course of conduct." *Proctor & Gamble Co. v. Big Apple Industrial Building Inc*., 879 F. 2d 10, 15 (2d Cir. 1989). The court also sustained the conspiracy aspects of the RICO claim.

49. 613 F.3d 11 (1st Cir. 2010).

50. 613 F.3d at 14-15.

51. 510 F.3d 134 (2d Cir. 2007). The Court opinion in *United States v. Gamin* was authored by then-circuit-court-now-Supreme Court Justice Sonya Sotomayor.

52. The case also holds another warning for public officials and their attorneys: Gamin was convicted of tax evasion for failing to report the undisclosed payments as income, a fate shared by former Senator Leibell.

53. *Skilling v. United States*, 130 S. Ct. at 2934. In citing *United States v. Ganim*, 510 F.3d 134, 147-149 (2d Cir. 2007), the Court also referenced with approval other statutes that broadly define the scope of kickbacks. *See* 41 U.S.C. § 52(2) ("The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].")

54. *See, United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998); *United States v. Ring*, 628 F. Supp. 2d 195 (D.D.C. 2009). In *United States v. Ring*, a "gift" of tickets to a basketball game were part of the charges for "honest services" wire fraud. *United States v. Ring*, 628 F. Supp. 2d at 203.

55. 613 F.3d at 14-15.

56. 605 F.3d 1152, 1188 (11th Cir. 2010) (bribery and honest services charges against county officials sustained in pre-*Skilling* analysis). *See also United States v. Nelson*, 2010 U.S. Dist LEXIS 118363 (M.D. Fla. 2010).

57. *United States v. Nelson*, 2010 US. Dist LEXIS 118363, p. 8, *citing United States v. Gamin*, 510 F.3d at 142.

58. *Id* at p. 8.

59. *Id*. at p. 10, n.5.

60. *United States v. McNair*, 605 F.3d at 1168-69.

61. A simple denial by the recipient that the gratuity was a "gift" and not a bribe will often be unavailing as a defense. *United States v. Carter*, 721 F.2d 1514, 1532 (11th Cir. 1984) (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953, (1978) (direct evidence of an agreement is unnecessary: proof of such an agreement may rest upon inferences drawn from relevant and competent circumstantial evidence). To hold otherwise "would allow [defendants] to escape liability…with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money." *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir.), *cert. denied*, 506 U.S. 919 (1992).

62. 112 Cal. Rptr. 3d 647 (2d Dist. 2010).

63. *Id.* at 660. The Court noted:

> The fact that persons or entities make campaign contributions to officials who favor a particular position or who support the donor does not prove illegality. But illegality is proven if there is an understanding that a payment is made in anticipation of political favor or on account of favors given, and then only if the political act was made on account of the payment or agreement to pay. This may be, but rarely is, shown by direct evidence of a scheme to repay an official's award of a public contract through campaign contributions made by the contracting entity.

HUB City Solid Waste Services Inc. v. City of Compton, 112 Cal. Rptr. 3d 647, 659 (2d Dist 2010).

California and other states have grappled with the line between campaign contributions and bribery. *See, Woodland Hills Residents Ass'n. v. City Council of Los Angeles*, 23 Cal.3d 917 (1979); *State v. Agan*, 384 S.E. 2d 863 (Ga. 1989) (campaign contributions constituted bribery under Georgia law); *see also United States v. Triumph Capital Group, Inc*., 544 F.3d 149 (2d

Cir. 2008) (defendant acquitted of charges related to campaign contributions given to influence state pension investments but the indictment went to the jury); *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009), *vacated*, *remanded* 2010 U.S. LEXIS 5529 (2010) (governor convicted for accepting contribution to education fund campaign).

While these cases originate in California under its tighter election laws, the logic regarding the impact of campaign contributions in "influencing" public actions may drift east and New York's public officials may find this logic advocated by prosecutors seeking to transform contributions into unlawful inducements to public action under the bribery-related statutes.

64. *Resource N.E. of Long Island, Inc. v. Town of Babylon*, 80 F. Supp. 2d 52 (E.D.N.Y. 2000) (the campaign contribution as "bribery" was a predicate for a civil RICO claim).

65. Pub. L. 11-81, 121 Stat. 735, September 14, 2007.

66. *United States v. Ring*, 628 F. Supp. 2d 195 (D.D.C. 2009).

67. "It is clear that HLOGA and § 1346 do not address government corruption in the same way. [The defendant] Ring emphasizes how HLOGA prohibits lobbyists from 'mak[ing] a gift or provid[ing] travel' to a legislator if the lobbyist knows that House or Senate rules prohibit the legislator's acceptance of the gifts. 2 U.S.C. § 1613(a). By contrast, as discussed, §§ 1343 and 1346 do not criminalize such activity; they criminalize the use of interstate wires to execute gift-giving schemes that seek to corruptly induce favorable official action in exchange for the gifts, or that conceal an official's material conflict of interest created by the receipt of those gifts." *United States v. Ring*, 628 F. Supp 2d at 217 (citations omitted).

68. Hearing on Public Corruption Prosecution Improvements Act, S. 49, Senate Committee on Judiciary, 110th Congress, September 29, 2010 (comments of Sen. Patrick Leahy).

69. Alabama Republican Senator Jeffry Sessions, while arguing for caution in redrafting the statute, nonetheless suggested that there was a legitimate role for federal prosecutors in local corruption cases, noting: "…a dramatic limitation on the ability of the federal government to prosecute clear criminal acts by state and local officials would be bad policy for the country." Hearing on Public Corruption Prosecution Improvements Act, S. 49, Senate Committee on Judiciary, 110th Congress, September 29, 2010 (comments of Sen. Jeffrey Sessions).

70. See *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (even though state of Mississippi received substantial federal assistance, nonetheless, the bribe-taking judges were not directly linked to any federally assisted program to justify a conviction); *contra United States v. Massey*, 89 F.3d 1433(11th Cir. 1966) (bribery in federal program case when a lawyer bought lunches for a judge and appointments of public defenders by the bribed judge triggered the federal-program bribery statute); *United States v. Redzic*, 2010 U.S. App. LEXIS 26291 (8th Cir. 2010) (statute applied to Missouri defendant who rigged driver's tests because the state as his employer received more than $10,000 in federal-assistance). The theory of bribery utilized in *United States v. Whitfield* was cited with approval by the Supreme Court majority in *United States v. Skilling*, 130 S. Ct at 2394.

71. 2009 U.S. Dist. LEXIS 74278 (N.D.N.Y. 2009).

72. *United States v. Seminerio*, 2010 U.S. Dist. LEXIS 92881 (S.D.N.Y. 2010).

73. *United States v. Kerik*, 615 F. Supp 2d 256 (S.D.N.Y. 2009).

74. N.Y. PENAL LAW § 200; *People v. Bac Tran*, 80 N.Y. 2d 170 (1992) (a "mere hope" of favorable government intervention is not enough to sustain a conviction, there must be an "agreement or understanding" that the bribe would produce an intended result). Justice Richard Simons dissented in *People v. Tran*, arguing that the majority "makes bribery of a public official hinge upon the *mens rea* of the bribe-receiver, not the bribe-giver" and added "the Legislature could hardly have intended that citizens are free to offer cash to public officials just so long as the officials do nothing to prompt the offer." *People v. Tran*, 80 N.Y. at 181(Simons J., dissenting).

75. The related crimes include:

(a) rewarding official misconduct in the second degree (N.Y. PENAL LAW § 200.20) (knowingly conferring a benefit upon a public servant for having violated his duty as a public servant);

(b) receiving a reward for official misconduct in the second degree (N.Y. PENAL LAW § 200.25 (soliciting or accepting a benefit from another for having violated his duty as public servant"); and,

(c) receiving and giving unlawful gratuities (N.Y. PENAL LAW §§ 200.30, 200.35).

The rewarding or receiving a reward for official misconduct are Class E felonies: the offering or receiving gratuities are Class A misdemeanors. Prosecutions have been apparently few: there have been fewer than a dozen case citations under any one of the four sections during the last four decades.

76. In one celebrated case, the defendant's financing of a flop movie, promoted by a co-conspirator's family member, was considered sufficient to justify a charge of rewarding official misconduct. *People v. Morris*, 28 Misc 3d 1215(A) (Sup. Ct. N.Y. Cty. 2010)

77. New York's bribery-related statutes all contain the word "duty." *See* N.Y. PENAL LAW § 200.20 (conferring a benefit for a violation of duty); § 200.25 (soliciting or accepting a benefit for a violation of duty). Therefore, in any criminal prosecution, the prosecution will be looking to some legislative or regulatory definition of the scope of the "duty of the public official" to the public. Any violation of that "duty" could justify a state prosecution and, if the perpetrator uses the federal wires (telephone, cell phones, etc), the same conduct could constitute a federal offense under *Skilling* and 18 U.S.C. §§ 1341, 1346.

78. Importantly, there is no direct New York statute that relates to non-disclosure of a conflict of interest. The Martin Act, which is often cited as a fraud deterent statute, does encompass undisclosed conflicts of interest in securities regulation. N.Y. GBL 352-c(6). *People v. Morris*, 28 Misc 3d 1215(A) (Sup. Ct. N.Y. Cty 2010).

79. 2010 U.S Dist. LEXIS 126451 (D.D.C. 2010). *See also United States v. Ring*, 628 F. Supp 2d 195 (D.D.C. 2009) (violations of congressional rules can, when combined with "inherently dishonest acts" such as "misrepresentation or intentional non-disclosure," be predicates for honest service charges); *But see United States v. Leslie*, 2010 U.S. Dist. LEXIS 81800 (D. La. 2010) (honest services and bribery charges dismissed because "government alleges nothing more than failure to follow the state ethics code, an allegation best left to state prosecutors and state courts").

80. 72 A.D. 3d 841 (2d Dep't 2010).

81. N.Y. PUB. OFF LAW § 73.

82. *People v. Gordon*, 72 A.D. 3d at 842.

83. See also *United States v. Seminerio*, 2010 U.S. Dist. LEXIS 92881 (S.D.N.Y. 2010) (Code of Ethics was the basis for the duty owed by a public official). New York courts have given the word "benefit" a broad reading: it can include more than financial gain and can encompass political or other types of advantage. *People v. Feerick*, 93 N.Y. 2d 433, 447 (1999), citing *People v. Hochberg*, 62 A.D. 2d 239 (3d Dep't 1978) (decision of a candidate not to run for office conferred a personal advantage under statute). However, the definition of benefit may be tempered by *People v. Blumenthal*, 55 A.D. 2d 13 (1st Dep't 1976), in which the Court held that an Assemblyman who "had the power to help achieve a result" and did, in fact, obtain a

license for a constituent and eventually was paid a legal fee by a third-party who prospered from the license did not receive an unlawful benefit in violation of Section 200.25 of the Penal Law. The Court made no reference to the New York Public Officers Law and its Code of Ethics.

84. *People v. Garson*, 6 N.Y. 3d 604 (2006).

85. N.Y. PENAL LAW § 200.25.

86. *See*, 22 NYCRR 100.3(B)(6).

87. *People v. Garson*, 6 N.Y. 3d at 612. In his dissent, then Judge George Bundy Smith noted that the preamble to the Rules of Judicial Conduct expressly states that the Rules are not designed or intended as a basis for criminal prosecutions. *People v. Garson*, 6 N.Y. 3d at 624 (*Smith, J. dissenting)*. However, the majority rejected that suggestion, concluding that the Rules simply set the standard for conduct and the receipt of the "reward" gives rise to the prosecution. 6 N.Y. 3d at 617.

88. In another sobering warning to attorneys, the gratuity giver in *People v. Garson*, the benefited attorney who gave the gifts and participated in the *ex parte* communications and got other referrals from the judge, pled guilty to giving unlawful gratuities and was disbarred. *In re Siminovsky*, 19 A.D. 3d 94 (2d Dep't 2005).

89. *See e.g.*, *People v. Feldman*, 7 Misc. 2d 794 (Sup. Ct. Kings Cty. 2005) (conspiracy claims against public officials related to extortion charges in a judicial election in which candidates were told to use a certain election vendor or lose the party's political nomination).

90. *See, Public Corruption Prevention and Enforcement Act* (S. 7707 Schneiderman/Kellner). The actual language of the proposed Public Corruption Prevention and Enforcement Act (S. 7707 Schneiderman/Kellner) may not be as persuasive as the jobs of the two authors: one is the New York County District Attorney whose office has prosecuted numerous public officials and the other is New York's new Attorney General.

91. The New York State Bar Association has also released a report from its Task Force on Government Ethics, recommending a series of state initiatives to address honest services. New York State Bar Association, *Task Force on Government Ethics, Report of Subcommittee on Theft of Honest Services*, January 2010. The report is to be debated by the House of Delegates. The report advocates for new unlawful gratuity statutes and a ban on "self dealing" by public officials. *Id.*

92. *United States v. Milovanovic*, 2101 U.S. App. LEXIS 24712 at p. 15 (9th Cir. 2010). As the Second Circuit has noted, "caution is required when dealing with the federalization of state offenses." *Porcelli v. United States*, 404 F.3d 157, 159 n.4 (2d Cir. 2005). *See also United States v. Margiotta*, 688 F. 2d 108, 141-142 (2d Cir. 1982) (Winter J., dissenting).

93. *United States v. Potter*, 462 F.3d at 17 (citations omitted). Accord *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996) (if free meals, entertainment and golf were intended to influence public officials to treat a lobbyist's interest preferentially, then honest services fraud may be established).

94. *United States. v. Ring*, 628 F. Supp. 2d at 210, *United States v. Potter*, 463 F.3d 9, 16 (1st Cir. 2006).

95. 354 F.3d 124, 127 (2d Cir. 2003) (*en banc*).

96. *Id.* at 141-42 (footnote omitted). *See, also*, *United States v. Williams*, 441 F.3d 716 (9th Cir. 2006) (self-employed insurance broker and licensed financial planner who misused a power of attorney from a vulnerable elderly client convicted of "honest services" wire fraud).

Honorable Richard A. Dollinger is a Judge of the New York State Court of Claims.

Public Integrity Criminal Law for the Municipal Attorney

By Julia Davis

You are an attorney with Municipal City's law department and your supervisor calls you with an urgent assignment: Joe Public Servant has been contacted by law enforcement, and you need to advise him and the office how to address the matter. A lawyer who usually defends the municipality in civil cases, but who is now faced with representing a public servant who is being criminally investigated, may be entering a completely new field of law. He or she must know the possible offenses and applicable procedures to represent the client effectively; this article will address these issues.[1]

Threshold Issues

The municipal attorney would likely be faced with the issue of representing a public servant in a criminal matter during the investigatory stage of the proceeding: municipal attorneys do not generally represent individual public servants once criminal charges are filed. Before undertaking any substantive action concerning an investigation conducted by law enforcement, however, the municipal attorney must ensure that representation of the individual public servant is proper and appropriate.[2] Complicating any analysis of whether representation should be afforded the public servant is that the possible outcome of an investigation into "white collar" crimes is rarely known at its initial stages, especially if the investigation is conducted by an entity with both criminal and non-criminal jurisdiction.[3] Therefore, the municipal attorney must consider the respective positions of both the municipal agency and individual employees of that agency when confronted with such an investigation. To the extent possible at the commencement of the matter, the municipal attorney must perform due diligence to insure that the interests of the public servant are aligned with those of the municipality.

As in civil matters, so, too, in criminal investigations, the municipal attorney's ultimate client is the municipality itself, and any representation of an individual public servant cannot conflict with that of the municipal client. In civil cases, the municipal attorney may represent an employee of an agency for matters "arising out of any alleged act or omission which [the municipal attorney] finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred."[4] However, the duty to provide this representation does "not arise where such civil action or proceeding is brought by or on behalf of the city or state or an agency of either."[5] Similarly, a municipal attorney could not represent a public servant if the public servant's conduct was beyond the scope of his or her employment, or in conflict with the municipality or any municipal agency. The commencement of an investigation, absent the filing of formal charges, is unlikely to establish that the public servant's conduct was outside the scope of his or her employment or office. The municipal attorney would be well advised, however, to continue to consider this threshold issue as the investigation progresses to insure that the interests of both the public servant and the municipality remain aligned as the facts unfold. Until a decision is made that either there is a conflict between the interests of the public servant and those of the municipality or that the public servant was acting outside the scope of his or her employment or office, having a municipal attorney represent the individual public servant would be advantageous to the municipality and would protect its interests.

Initial Stages

A municipal attorney may first become involved in a criminal matter when the subject public servant has been invited to speak to the law enforcement entity investigating the case. It is imperative to first ask what office has contacted the client and in what context. As with any legal matter, an attorney needs to know whom to contact—for example, to request that the investigators speak to the attorney and not the client and possibly to negotiate the date and time of the client's appearance. In the area of criminal investigations, however, different law enforcement entities are often subject to different governing rules, and the municipal attorney must be aware of the rules, especially procedural ones, which apply to the office that has contacted the public servant.

A prosecutor's office may reach out to schedule an appearance before a grand jury and may issue a subpoena to insure that appearance. In that case, the public servant is likely to be treated as a witness, and not as a subject or target of the grand jury proceeding,

because, absent specific circumstances, a witness in state criminal proceedings is afforded immunity and must waive that immunity if he or she is a target of the grand jury proceeding.[6] Once that immunity has been waived, the witness is entitled to the presence of an attorney in the grand jury.[7]

The more difficult case arises when a prosecutor calls to request that the public servant appear for an interview. Is the public servant the target or subject of the inquiry? Will there be an agreement as to the parameters of the interview and the use of any information disclosed during the interview? If there is any uncertainty about the public servant's role in or criminal liability for the matter, it might be advisable to meet with the prosecutor with the understanding, reduced to writing, that use of the information disclosed will be limited and not directly used to prosecute the client, commonly referred to as a "proffer" or "queen for a day."[8] Attorneys and their clients must weigh many issues, however, before determining that a proffer is advantageous for the client: the criminal exposure of the public servant, the use in impeachment of any statements made in a proffer, the chance of a perjury prosecution if false statements are made, and the strength of the prosecutor's case, to name a few examples.

The law enforcement office that has reached out to the public servant may be a local investigatory body, such as an inspector general or department of investigation. These entities often have jurisdiction over public servants that requires them to cooperate with those offices.[9] Failure to cooperate with these authorities may result in disciplinary proceedings or even loss of the public servant's job.[10] The decision on how to proceed if such an entity has contacted the client may raise the issue of the relationship between the inspector general and the prosecutor. For example, an inspector general cannot confer immunity from criminal prosecution so, if sought, it must be requested of the prosecutor. In addition, there may be an issue of the inspector general sharing information to which he or she has an absolute right with a prosecutor's office that might not have the same authority, or whether there are issues of compulsion with respect to evidence obtained as a result of the investigatory agency's jurisdiction.[11]

General Criminal Provisions

Once acquainted with the investigating office and the procedures by which it operates, the municipal attorney must research the applicable law to determine what charges may be under investigation.[12] Crimes of a general nature that are applicable to everyone, such as larceny[13] or forgery[14] or perjury,[15] are likely to be familiar to all attorneys. The municipal attorney would be well advised, however, not to overlook those categories of crimes; although they are general in nature, they often contain provisions that specifically address public servants. For example, the definition of larceny by extortion contains a specific subdivision addressing public servants. A person obtains property by extortion:

> when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will…**use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.** (Emphasis added.)[16]

In addition, while the public servant may be charged with the crime of larceny to which any individual is subject, he or she alone may be charged with defrauding the government if there has been an ongoing course of conduct to obtain property from the state or a political subdivision "by false or fraudulent pretenses, representations or promises" and the property obtained is valued in excess of one thousand dollars.[17]

While, like larceny, most charges concerning false written statements can be brought against any individual,[18] at least one such offense requires that the person charged be a public servant. The crime of issuing a false certificate can be brought only against a public servant:

> A person is guilty of issuing a false certificate when, **being a public servant authorized by law to make or issue official certificates or other official written instruments**, and with intent to defraud, deceive or injure another person, he issues such an instrument, or makes the same with intent that it be issued, knowing that it contains a false statement or false information. (Emphasis added.)[19]

Bribery and Related Offenses

When one thinks of public corruption cases, bribery is often the first charge that comes to mind. In New York State, bribery charges separately address the individual offering the bribe and the public servant receiving the bribe.[20] However, all bribery charges require proof that the benefit is conferred on the public servant "upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby

be influenced."[21] The public servant need not actually perform the act agreed upon; the agreement alone suffices.

Absent evidence of an agreement that the public servant's discretion was to be influenced, the public servant may still be criminally liable for his or her conduct. The charge of receiving reward for official misconduct in the second degree renders a public servant guilty when he or she "solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant."[22] As with the crime of bribery, here, too, separate charges exist for the individual conferring the reward and the public servant receiving it.[23]

The specific facts of a case may increase the degree of the crime of bribery or rewarding official misconduct or receiving reward for official misconduct charged. For example, if the bribe was given or received so that the public servant will be "influenced in the investigation, arrest, detention, prosecution or incarceration of any person for the commission or alleged commission of a class A felony" concerning controlled substances[24] or an attempt to commit any such class A felony, the charge is raised to the first degree.[25] Similarly, if the reward was given or received "for having violated [the]…duty as a public servant in the investigation, arrest or detention, prosecution or incarceration of any person for the commission or alleged commission of a class A felony" concerning controlled substances or an attempt to commit any such class A felony, the charge is again raised to the first degree.[26] There are also specific charges for bribes given and received "upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office."[27]

A public servant may argue that, even if he reached an agreement with the person conferring the bribe, reward, or gratuity, he did not have the ability or authority to do what was agreed. However, when charged with bribe receiving, receiving reward for official misconduct, or receiving unlawful gratuities (discussed below), a public servant's protestation that he did not have the ability to accomplish what he allegedly promised to do will not serve as a defense to the charges.[28]

Other Penal Law Offenses Specific to Public Servants

In addition to being familiar with those categories of crimes that apply to both public servants and all others, the municipal attorney must also be aware of penal code provisions that apply only to public servants. Perhaps the most common of these provisions, and the one that generally fits any state public corruption case,[29] is the crime of official misconduct.[30] This offense encompasses both a public servant's committing an unauthorized exercise of his or her official duties and refraining from performing a required act of office (or an act inherent in the nature of the office). Therefore, the public servant may be charged either with committing an act or with failing to perform an act if he or she intends "to obtain a benefit or deprive another person of a benefit."[31] Accordingly, depending on the facts presented, the public servant's claim "But I didn't do anything!" might serve not as a denial of criminality but as an admission of culpability.

Regardless of whether the public servant has or has not committed an unauthorized act, he or she may not accept any unauthorized payment for his or her public service. Any "tip" to a public servant is illegal: "a public servant is guilty of receiving unlawful gratuities when he solicits, accepts or agrees to accept any benefit for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation."[32]

Non-penal Code Provisions

Research into possible charges should not be limited to the Penal Law; the municipality's local laws may contain provisions that create criminal liability, for both general conduct and specific acts. For example, the New York City Charter provides that:

> any council member or other officer or employee of the city who shall willfully violate or evade any provision of law relating to such officer's office or employment, or commit any fraud upon the city, or convert any of the public property to such officer's own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit such office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.[33]

The Charter further provides that "[any] officer or employee of the city or of any city agency who shall knowingly make a false or deceptive report or statement in the course of duty shall be guilty of a misdemeanor and, upon conviction, forfeit such office or employment."[34] Violations of the conflicts of interest law, Chapter 68 of the Charter, shall also render a person guilty of a misdemeanor and, upon conviction, require forfeiture of the public office or employment.[35]

New York City's financial disclosure law subjects a public servant to a misdemeanor conviction for "any intentional and willful disclosure of confidential information that is contained in a report filed in accordance with this section, by a city officer or employee or by any other person who has obtained access to such a report or confidential information contained therein.[36] It also subjects a public servant to a misdemeanor conviction for any intentional violation of the law, "including but not limited to failure to file, failure to include assets or liabilities, and misstatement of assets or liabilities."[37] For example, former New York City Police Commissioner Bernard Kerik was convicted in a prosecution brought by the Bronx District Attorney's Office for violating the City's conflicts of interest and financial disclosure laws when he accepted, and failed to report on his financial disclosure report, gifts from persons seeking City business.[38] Laws addressing the jurisdiction of individual municipal agencies may also contain provisions that render certain conduct an unclassified misdemeanor, and they should be researched before any substantive meeting with a law enforcement official is held or any action in defense of the client is taken.

Procedural Issues

In addition to researching the applicable law, the municipal attorney must also research whether there are specific procedural rules that apply to the public servant client or that might affect the public servant's case. For example, in New York State, there is an extended statute of limitations for criminal prosecution of public servants. The statute of limitations in criminal cases is generally five years for felonies, two years for misdemeanors, and one year for petty offenses.[39] However, those periods are extended by five years in the case of misconduct by a public servant: a prosecution may be brought "any time during the defendant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable…."[40] The municipal attorney should be mindful of this extension.

Conclusion

A municipal attorney representing a public servant in a law enforcement investigation should be aware that the public servant may be subject to different laws, both substantive and procedural, than the general public. Understanding these laws and the jurisdiction of the entity conducting the investigation will assist the municipal attorney in representing the client effectively.

Endnotes

1. This article serves as an introduction to the topic discussed and does not purport to be exhaustive concerning all the issues that might arise for the situation addressed.
2. This article assumes that the subject matter of the investigation relates to the public servant's employment or office; the municipal attorney would not be involved in any investigation into the public servant's personal actions or conduct.
3. For example, municipal investigators, such as inspectors general, often have jurisdiction to investigate not only potential crimes but also fraud, mismanagement, or conflicts of interest; the latter investigations may result in civil proceedings and penalties or public reports. *See, e.g.,* New York City ("NYC") Charter § 803.
4. *See, e.g.*, General Municipal Law ("Gen. Mun. Law") § 50-k (2) (discussing New York City and its corporation counsel).
5. Gen. Mun. Law § 50-k (2).
6. Criminal Procedure Law ("CPL") § 190.40(2) (a witness giving evidence in a grand jury proceeding receives immunity unless it is waived, the evidence provided is "not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive," or it consists of records produced pursuant to a subpoena duces tecum and the witness "does not possess a privilege against self-incrimination with respect to the production of such evidence").
7. CPL § 190.52 (1). The attorney "may advise the witness, but may not otherwise take part in the proceeding." CPL § 190.52 (2).
8. *See, generally*, Wisenberg, Solomon, Queen For A Day: The Dangerous Game of Proffers, Proffer Agreements and Proffer Letters, http://library.findlaw.com/2005/Feb/21/138691.html (retrieved January 31, 2011) (although this article discusses proffers in the context of federal prosecutions, the general concepts apply to state proceedings). Attorneys generally outline in hypothetical form what the subject will say before a proffer is scheduled.
9. *See, e.g.,* New York City Charter § 1128 (full cooperation with the commissioner of investigation is required, and interference with an investigation may result in sanction of suspension or removal from office); section 4 (c) of New York City Mayoral Executive Order No. 16 (1978) ("NYC Exec. Order No. 16") ("Every office or employee of the City shall cooperate fully with the Commissioner [of the Department of Investigation] and the Inspectors General. Interference with or obstruction of an investigation conducted by the Commissioner or an Inspector General shall constitute cause for removal from office or employment or other appropriate penalty.").
10. *See, e.g.,* NYC Charter § 1128 (a).
11. *See, e.g.*, Section 4 (b) of NYC Exec. Order No. 16. *See also Kastigar v. United States*, 406 U.S. 441 (1972).
12. The assumption is that there has been a preliminary conversation during which the municipal attorney has learned, at the least, both a general idea of the subject matter of the investigation and the relevant facts.
13. Penal Law ("P.L.") § 155.00 et seq.
14. P.L. § 170 et seq.
15. P.L. § 210 et seq.
16. P.L. § 155.05 (2)(e)(viii).
17. P.L. § 195.20 (defrauding the government).
18. Penal law provisions addressing falsifying business records, tampering with public records, and offering a false instrument for filing all commence with "a person is guilty of …" and do not contain any restrictions as to the class of persons who may

be charged. *See, e.g.,* P.L. §§ 175.05 (falsifying business records in the second degree); 175.10 (falsifying business records in the first degree); 175.20 (tampering with public records in the second degree); 175.25 (tampering with public records in the first degree); 175.30 (offering a false instrument for filing in the second degree); and 175.35 (offering a false instrument for filing in the first degree).

19. P. L. § 175.40.
20. *Compare* P.L. § 200.00 (bribery in the third degree) *with* P.L. § 200.10 (bribe receiving in the third degree).
21. *See., e.g.,* P.L. §§ 200.00 (bribery in the third degree), 200.03 (bribery in the second degree), 200.04 (bribery in the first degree), 200.10 (bribe receiving in the third degree), 200.11 (bribe receiving in the second degree), and 200.12 (bribe receiving in the first degree).
22. P.L. § 200.25.
23. *Compare* P.L. § 200.20 (rewarding official misconduct in the second degree) *with* P. L. § 200.25 (receiving reward for official misconduct in the second degree).
24. *See* P.L. §§ 220.21 (criminal possession of a controlled substance in the first degree), 220.18 (criminal possession of a controlled substance in the second degree), 220.43 (criminal sale of a controlled substance in the first degree), and 220.41 (criminal sale of a controlled substance in the second degree).
25. P.L. §§ 200.12 (bribe receiving in the first degree), 200.04 (bribery in the first degree).
26. P.L. §§ 200.27 (receiving reward for official misconduct in the first degree), 200.22 (rewarding official misconduct in the first degree).
27. P.L. §§ 200.45 (bribe giving for public office), 200.50 (bribe receiving for public office).
28. P.L. § 200.15 (2) ("It is no defense to a prosecution pursuant to the provisions of this article that the public servant did not have the power or authority to perform the act or omission for which the alleged bribe, gratuity or reward was given").
29. Although bribery may be the crime that first comes to mind when one thinks of a public corruption case, the crime of official misconduct, in the author's opinion, applies in more cases.
30. P.L. § 195.00.
31. P.L. § 195.00. Note that, unlike other crimes that concern officials, this charge does not require the involvement of any other individual.
32. P.L. § 200.35 (receiving unlawful gratuities). As with the other charges discussed above, there are separate charges for giving and receiving unlawful gratuities. *Compare* P.L. § 200.30 (giving unlawful gratuities) *with* P. L. § 200.35 (receiving unlawful gratuities).
33. NYC Charter § 1116 (a).
34. NYC Charter § 1116 (b).
35. NYC Charter § 2606 (e).
36. New York City Administrative Code ("Ad. Code") § 12-110 (g)(3). The penalty also includes grounds for discipline, including removal from office.
37. NYC Ad. Code § 12-110 (g)(2).
38. *See* http://bronxda.nyc.gov/information/2006/case47.htm (retrieved January 31, 2011).
39. CPL § 30.10 (2).
40. CPL § 30.10 (3)(b).

Julia Davis serves as Director of Financial Disclosure and Special Counsel at the New York City Conflicts of Interest Board, the ethics board for the City of New York. She previously served as an assistant district attorney in Kings County, a principal court attorney to an Acting Supreme Court Justice, and an inspector general at the New York City Department of Investigation. The views contained in the article are the author's and do not necessarily reflect the opinion of the author's current or former employers.

2010 New York State Legislative Update

By Darrin B. Derosia

Chapter 1

Misappropriating Government Property or Services for Private Gain

Expands the prohibitions in the Public Officers Law to including using one's official position to misappropriate governmental property or services for non-governmental purposes. Also, amends the Penal Law to expand the felony of defrauding the government to include using property, services, or resources of the government (including local governments) for private purposes, where the value of the property or services exceeds $1,000.

Chapter 7

Non-Residential Wind and Solar Net Metering

Eliminates the peak load limitation on the size of non-residential solar and wind electrical generating equipment eligible for net metering. By eliminating the peak load limitation of the 2008 net metering legislation, this law seeks to encourage investment in wind and solar energy generation systems.

Chapter 16

Electronic Filing of Wetlands Regulatory Maps

Authorizes the DEC to file freshwater wetlands regulatory maps in electronic form, when requested by local governments. This is helpful by providing legitimacy to the electronic format of the maps for all purposes.

Chapters 40, 43, and 44

Open Meetings Law

Chapter 40 directs public bodies to hold their meeting in an "appropriate facility" that accommodates members of the public who wish to attend.

Chapter 43 provides that open meetings of a public body shall be allowed to be recorded, photographed, broadcast, or webcast; also allows the public body to adopt rules to provide that such recording or broadcast be done in an orderly and non-disruptive manner.

Chapter 44 relates to enforcement and provides that if a court determines that a public body violated the Open Meetings Law, it may declare an action taken in violation of the law void, and/or require the members of public body in violation to attend training by the Committee on Open Government.

Chapters 50 and 56

State Aid to Local Governments

The 2010-11 state budget eliminated AIM funding for New York City and reduced AIM payments to other local governments by either 2% or 5% of 2009-10 budget levels.

Chapters 50 and 56

Aid for Municipalities with Video Lottery Terminals

The 2010-11 budget reduces by 10% the state aid received by sixteen municipalities, which is intended to help offset some of the costs associated with being a host community for VLTs. Aid for the City of Yonkers stayed at prior levels.

Chapter 55

Transportation Aid

The 2010-11 state budget maintained Consolidated Highway Improvement Program (CHIPS) funding at 2009-10 levels, providing a total of $363 million in 2010-11 for the CHIPS capital program.

Chapter 56

Procurement Reform

The 2010-11 state budget increased the threshold, from $10,000 to $20,000, at which municipal purchase contracts are subject to competitive bidding requirements. It also authorized municipalities to require electronic bid submission for technology contracts.

Chapter 56

County Tax Collection

Authorizes counties to enter into agreements with other local governments, including school districts, for the county to collect real property taxes, either exclusively or on a shared basis with the local government. If the county collection of property taxes will result in the abolishment of an elected tax collection officer, a referendum provision is included.

Chapter 56

Dog Licensing

Amends the Agriculture and Markets Law so that the responsibility of licensing dogs lies with municipalities and the State is no longer involved. Municipalities must adopt a local law to implement the change and establish appropriate fees.

Chapter 59

Excelsior Jobs Program

The budget established a new Excelsior Jobs Program to replace the Empire Zones Program. The new program includes tax incentives to businesses in targeted industries that create and maintain a set number of new jobs in New York for five years. Annual Excelsior Program costs are capped at $50 million per year for new entrants, for a total of $250 million per year when the program is fully phased-in over a five-year period.

Chapter 97

Absentee Ballots

Amends the Election Law to allow requests to the board of elections for an absentee ballot to be in the form of a letter, or a fax that includes the address, phone number, and fax number from which the request is sent, or other written instrument.

Chapter 99

Electronic Waste and Recycling

Sets forth a comprehensive system for the collection, handling, recycling, or reuse of electronic equipment in order to minimize the direct environmental and public health consequences that result from the improper handling and disposal of electronic waste.

Chapter 104

Ballots for U.S. Citizens Out of the Country

Amends the Election Law by implementing changes in voting provisions for military personnel and US citizens living abroad. Conforms to Federal Law by providing for types of ballots and for applying by fax or e-mail.

Chapter 107

Prior Approval of Health Insurance Premiums

Grants the Insurance Department approval authority over changes in health insurance premiums before they become effective. The process includes public notification of requested premium rate adjustments, the opportunity for public comment, and public notification of the final premium determination.

Chapter 154

FOIL

Grants authority to an agency to deny access to records if allowing the access would jeopardize the capacity of an entity that has shared information with the agency to guarantee the security of its information technology assets.

Chapter 164

Election Procedures

Amends the Election Law to clarify the duties of election inspectors and election day procedures, and conforms statutory provisions to the exclusive use of electronic ballot scanner voting machines.

Chapter 319

Model Zoning and Planning Guidelines

Sets forth that the NYS Office of the Aging shall prepare and make available to local governments model zoning and planning guidelines that allow accessory senior citizen units in areas zoned for single residential housing in order to foster age-integrated communities and senior housing.

Chapter 324

Notification to Multiple Family Dwellings of Pesticide

Requires notification to occupants of multiple family dwellings prior to a commercial lawn application of a pesticide.

Chapter 364

Liquor License Revocation

Establishes a clear legal standard—a sixth incident, disturbance, or complaint within a 60 day period—for determining when a licensed premise has become a focal point for police attention and thereby subject to revocation of the liquor license.

Chapter 365

Electronic Tax Receipts

Authorizes municipalities to pass a local law providing for taxpayers to receive receipts for payment of taxes electronically if the taxpayer elects such delivery.

Chapter 366

Extension of Tax Exemption for Certain Renewable Energy Systems

Extends an existing law that allows local governments and school districts the option to provide a

property tax exemption for property containing wind, solar, and farm waste energy systems and certain renewable energy generating systems and to negotiate payments in lieu of taxes to 2015.

Chapter 379

False Claims Act

Conforms the State Finance Law to the Federal False Claims Act by strengthening protection for whistleblowers and making technical corrections for local government enforcement actions and private civil actions to recover fraudulent payments and overpayments made by local governments to suppliers of goods and services.

Chapter 389

Availability of Surety Coverage

Allows reciprocal insurers to offer surety coverage to public officials for the faithful performance of official duties. Surety bonds had been excluded from the list of eligible coverage that could be provided by a municipal or school district insurance reciprocal.

Chapter 427

Priority of Judgment Creditors

Amends the CPLR such that a state court judgment awarding ownership interest in real property shall be deemed entered and docketed on the day immediately preceding the date of such determination for the purpose of establishing the priority against a judicial lien on such property created by the filing of a bankruptcy petition.

Chapter 433

The State Smart Growth Public Infrastructure Policy Act

Enacts a new Article 6 of the Environmental Conservation Law, establishing the State Smart Growth Public Infrastructure Policy Act, which requires state agencies that approve, fund, or support infrastructure projects in "municipal centers" to do so in a manner consistent with smart growth criteria, in order to preclude "sprawl" development. Also provides for the creation of a "Smart Growth Advisory Committee" in listed state agencies.

Chapter 460

Prohibition on Police Quotas

Amends the Labor Law to prohibit any express or implied threat to an employee or any penalty for failing to reach a quota on issuing a number of tickets or summons for various violations of state or local law, including traffic and parking violations.

Chapter 472

Historic Property Rehabilitation Tax Credit

Amends the Tax Law to make technical amendments that impact the implementation of the historic property rehabilitation tax credit.

Chapter 491

Peace Officer Training Mandate

Requires a local government to file an annual list of peace officers with DCJS, and significantly increases the hours of training required for a peace officer, to a maximum of 180 hours.

Chapter 505

Polling Place Accessibility

Requires each polling place to be accessible to persons with disabilities, and requires the county board of elections to conduct an access survey for all polling places prior to designation as such and to submit it to the state board of elections.

Chapter 512

Election Districts

Amends the Election Law to vest exclusively in the county board of elections, rather than local governing boards, the authority to create, alter, or consolidate election districts.

Chapter 522

Subdivision Approval

Authorizes the planning board in a town to extend time of conditional approval of a final plat, for periods of 90 days, without limitation.

Chapter 552

Standardization of Building Codes

Directs the State Fire Prevention and Building Code Council to examine, study, and evaluate state and local codes for the purpose of recommending standardization to facilitate and encourage installation of wind and solar energy generating systems.

Some vetoes worth noting:

Veto No. 6714

Legislative Approval of Agreements with Indian Tribes

Would have eliminated the validity of agreements between the state and Indian tribes that are not approved by the State Legislature.

Veto No. 6727

Proceeds from the Sale of Community Garden Lands

Would have required municipalities to create an account for community garden purposes, to be funded with 10% of the proceeds from the sale, transfer, or lease of property that was used as a community garden.

Veto No. 6730

Health Insurance Continuation for Employees on Occupational Injury Leave

Would have required public employers to continue health insurance coverage for an employee incurring an occupational injury.

Veto No. 6720

Expansion of Disability Discrimination Provisions

Would have expanded the protections against disability discrimination by public entities and required additional accommodation, which would have exceeded those of the Federal Americans with Disabilities Act.

Veto No. 6740

Environmental Impact Assessment Form

Would have explicitly required the DEC to "periodically" update the model environmental assessment form used by agencies to determine whether projects may have a significant impact on the environment, pursuant to the SEQRA. The bill would also have provided that the periodic update of the form "shall ensure the consideration of changes and emerging issues in environmental protection."

Veto No. 6791

Excused Lateness or Absence for Employees Responding to Emergencies as a Volunteer

Would have required private sector employers to excuse absences or late arrivals to work by those employees responding to an emergency as a volunteer.

Veto No. 6772

Law Revision Commission Review of Local Government Statutes

Would have directed the Law Revision Commission to make recommendations to the Legislature regarding revisions to the General City Law, the Town Law, the County Law, the Village Law, the General Municipal Law, the Local Finance Law and any related statutes, to remove or amend unnecessary, duplicative, overlapping, or outdated statutory provisions.

Veto No. 6755

Local Historian Reporting

Would have required local governments to register their local historians with the state historian and the Office of Cultural Education.

Veto No. 6779

Seagrass Protection Act

Would have given the NYS DEC broad authority over the protection and enforcement of coastal and marine activities that threaten seagrass, including restrictions on mechanically powered fishing gear and use of chemicals in certain areas.

Veto No. 6838

Expansion of Prevailing Wage Law

Would have broadened the scope of the prevailing wage law as it relates to contracts by public agencies for building service work. Also would have expanded the definition of "service work" to include contract work by a third party. Would have also created additional reporting requirements and criminal penalties for willful violations.

Darrin B. Derosia is an associate counsel in the NYS Department of State.

Thanks and appreciation is given to the New York State Conference of Mayors and The New York State Association of Towns for collaboration and materials made available.

Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

As has been the case almost since the beginning of the economic downturn, this quarter's cases bring little by way of precedent-shattering law. Instead, to the extent that they teach us something, they provide a gloss on things we already knew and perhaps some enlightenment on things we might have taken for granted. *Ferraro v. Town Board of Town of Amherst*[1] simply repeats the well-established rule that the 100-foot buffer which defines the properties which may file a petition pursuant to Town Law Section 265, and thus invoke the supermajority provision of that section, extends from the boundary of the lands being rezoned rather than from the boundary of the property in which those lands are included. What makes this case somewhat interesting is the fact that the 100-foot buffer (101 feet in this case) was created defensively by the Respondent (proponent of the challenged rezoning) after the original rezoning petition was made the subject of a Section 265 petition by nearby landowners. The Fourth Department applied the strict letter of the law, notwithstanding that the 101-foot buffer was created after the fact, solely for the purpose of circumventing the statute, and resulted in a zone line that did not follow a property line.

Switzgable v. Board of Zoning Appeals of the Town of Brookhaven[2] again states a clearly established rule: that a zoning board of appeals must strictly apply the ubiquitous statutory balancing test when ruling upon an application for an area variance. In this case, the practitioner is reminded that a zoning board of appeals has no more right to tip the balance in favor of an applicant than it does to tip it in favor of those opposing the variance, and that the balancing test can no more be ignored in granting a variance than in denying one.

Stoffer v. Department of Public Safety of the Town of Huntington[3] tells us that a municipality may not create its own tribunal to adjudicate land use violations, since in New York, that role has been reserved to the courts. The case is interesting in that, by your writers' observation, a number of municipalities have delegated the task of adjudicating wetlands violations (and are imposing fines on account of those violations) to planning boards or to conservation boards, a practice which they will now have to revisit.

Finally, in *Petersen v. Incorporated Village of Saltaire*,[4] the Second Department held that a village board was justified in holding an official meeting outside the village limits. The Village of Saltaire is on Fire Island; the meeting in question was held in Manhattan and broadcast by video conference hookup to the Village Hall. Trivial as this decision may seem, it raises an interesting question in that the decision turns upon the fact that the Village Law does not require (as it once did) that Village Board meetings be held within the Village, and that it permits (but does not require) video conferencing. Reading the decision one wonders if the court, in emphasizing the letter of the Village Law, did not subvert the spirit of the Open Meetings Law.

I. Protest Petitions: Who Is Entitled to File a Petition Under Town Law §265(1)(c)

In *Ferraro v. Town Board of Town of Amherst*,[5] the Fourth Department held that petitioners' protest of the rezoning of a parcel of property did not implicate the supermajority vote requirement of Town Law §265 since the proponent of the rezoning preserved a buffer of 101 feet between the area to be rezoned and the petitioners' properties. The Court further held that the rezoning of the subject property was not inconsistent with the Town's comprehensive plan.

The property that was the subject of dispute in *Ferraro* is comprised of two parcels located generally to the south of the University of Buffalo's North Campus and to the north of Maple Road in the Town of Amherst (the "Property"). Petitioners are the owners of residential properties in a residential neighborhood located south of Maple Road and across from the Property. The owners of the Property and their agent, referred to as the Benderson respondents in the decision, sought to have the Property rezoned to permit a variety of uses including commercial uses, condominiums, and a hotel. In furtherance of that goal, the Benderson respondents petitioned the Amherst Town Board for a rezoning of the entire Property.[6] In response to the Benderson respondents' rezoning application, the petitioners protested the rezoning implicating the requirement that the Town Board approve the rezoning application by a supermajority vote.[7] In response to petitioners' protest, the Benderson respondents amended their rezoning ap-

plication to provide a 101-foot buffer along the Property's Maple Road frontage which would retain the existing zoning classification. The Town Board voted 4-3 to approve the rezoning application and rezoned the portion of the Property outside of the 101-foot buffer along Maple Road, holding that the rezoning was "generally consistent" with the Town's comprehensive plan.[8]

Petitioners in this hybrid declaratory judgment action/Article 78 proceeding challenged the Town Board's approval of the rezoning on the grounds that: (1) the Town Board was required to adopt the rezoning of the property by a supermajority vote because petitioners protested the rezoning and were the owners of more than 20 percent of the property directly across the street from the Property,[9] and (2) the rezoning was not consistent with the Town's comprehensive plan.[10]

The first issue to be resolved in this case was whether the distance set forth in Town Law §265(1)(c)[11] (one hundred feet from the street frontage opposite the property subject to the rezoning) defining who may file a protest petition implicating the supermajority vote requirement on a rezoning petition should be measured from the boundary of the area to be rezoned itself or the parcel of property of which the area to be rezoned is a part. Here the petitioners argued that the latter should be the rule and the Town and Benderson respondents argued that the former was the proper interpretation.

The Fourth Department, affirming the decision of the lower court and relying on the language of the statute and its legislative history, agreed with the Town and the Benderson respondents and held that pursuant to Town Law §265(1)(c) the supermajority vote requirement is only implicated if the protest petitioners own property within the qualifying distance of the area to be rezoned, not of the larger property.[12] This decision is clearly supported by the plain language of the statute and the 2006 decision of the Court of Appeals in *Eadie v. Town Board of the Town of North Greenbush*,[13] which held that pursuant to Town Law §265(1)(b) the '"one hundred feet' must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part."[14] Based on this interpretation, the Court held that Section 265(1)(c) was not applicable here because the Benderson respondents were providing a 101-foot buffer between the area to be rezoned and Maple Road which would maintain its existing zoning designation.[15]

The Court also dismissed the petitioners' claim that the rezoning should be annulled because it was not in accordance with the Town's comprehensive plan, a finding with which the dissent vigorously disagreed.[16] In order for the petitioners to have been successful on this challenge, it was their burden to show a "clear conflict" between the proposed zoning designation and the comprehensive plan; if it is "fairly debatable" whether the proposed rezoning is consistent with the comprehensive plan, the rezoning should be upheld.[17] Here, the Court, showing substantial deference to the Town Board's determination, held that it was "'fairly debatable' whether the proposed rezoning is consistent with the overall Plan"[18] notwithstanding the fact that the proposed rezoning clearly conflicted with the Town comprehensive plan's contemplated use of the Property, since the plan was designed to be flexible and provide only a generalized guide to future development. Therefore, the Court held that the petitioners failed to meet their burden of showing that there was a clear conflict between the overall plan (rather than the site-specific plan for the Property) and the rezoning.[19]

II. Zoning Boards of Appeals Must Apply the Statutory Area Variance Standard When Deciding Applications for Area Variances

Although recent Appellate Division decisions have repeatedly reaffirmed that courts will defer to a decision of a zoning board of appeals to grant or deny an area variance when the board applies the statutory area variance standard and its decision is reasonable,[20] in *Switzgable v. Board of Zoning Appeals of the Town of Brookhaven*,[21] the Court reminds us that where the Board fails to properly apply the balancing test or its application of the test is unreasonable, the Board's determination will be reversed. This is so even when the Board deviates in the direction of relaxing, to an applicant's benefit, the applicable standards.

In *Switzgable*, respondent Edward Lewis ("Lewis") was the owner of property in the Town of Brookhaven. He made an application to the respondent Zoning Board of Appeals for eight area variances, all of which were granted. Petitioners, presumably neighboring property owners, brought the instant Article 78 proceeding challenging the grant of the variances. The Supreme Court, Suffolk County granted the petition to the extent that it annulled one of the variances granted, but denied the balance of the petition. All parties appealed—the Board and Lewis appealing the annulment of the variance and the petitioners appealing the dismissal of the petition as to the remaining seven variances.[22]

The Appellate Division, Second Department affirmed the Supreme Court's annulment of one of the variances granted and reversed the lower court and annulled the remaining seven variances. In so holding, the Court reasoned that the Board's decision was arbitrary and capricious because it relied on the fact that there were comparable structures in the neighborhood—which the Court found to be either nonconforming or illegally built by Lewis—as the grounds to support the variances, which was improper under

the Town's Code.[23] Moreover, the Court held that the Board's failure to apply the statutory area variance standard to the application was a fatal flaw in its review of Lewis's application. On that point, the Court stated that:

> the Board failed to engage in the requisite balancing test, disregarding evidence that granting the variances would have an adverse impact upon the physical or environmental conditions in the neighborhood, which is part of the Fire Island National Seashore.… The Board disregarded evidence from neighbors with personal knowledge regarding detriment to the area, as well as their feasible suggestions as to how the benefit sought by Lewis could be achieved by methods other than the requested area variances.
>
> In addition, under the circumstances of this case, the Board should have given more weight to the factor of self-created hardship.… In light of the fact that Lewis was a member of the Pines Zoning Advisory Committee, and did not deny that, over a period of years, he built illegally on his property with complete disregard for the zoning laws, his hardship was entirely self-created and supported denial of the variances. Notably, he can fully enjoy the property without building an addition to the residence, or building additional decks and fences.[24]

This case and the several other recent cases cited at endnote 20 reinforce the firmly established law that a zoning board of appeals must apply the statutory area variance standard when reviewing an area variance application. Beyond that, it demonstrates that the balancing test is intended to protect not only an applicant but the community as well, and that a zoning board of appeals has no more power to disregard the balancing test in favor of granting an application than it does in favor of denying one.

III. Municipalities May Not Create Tribunals to Adjudicate Land Use Violations

In *Stoffer v. Department of Public Safety of the Town of Huntington*,[25] the Second Department held that a town (with certain limited exceptions) may not create a separate body to adjudicate land use violations since the authority to adjudicate land use violations is vested with the Unified Court System.

The subject of the dispute in *Stoffer* was the Town of Huntington's accessory apartment law. Pursuant to that law, residents who wished to have an accessory apartment on their property were required to obtain a permit. A condition of the issuance of an accessory apartment permit was that the owner had to agree to allow periodic inspections of his or her property to confirm the property's compliance with building and fire codes.[26] Violations of the Town's accessory apartment law were reviewed by the Town's Accessory Apartment Bureau ("AAB") and a violation could result in the revocation of the permit.[27]

The Stoffers, the petitioners in this case, were the owners of a single-family home for which they possessed an accessory apartment permit. In November of 2007 the Stoffers were issued a violation for allegedly unlawfully using their property as a kennel and were told that if they did not remediate the situation and permit an inspection of their property they would be referred to the AAB for possible revocation of their accessory apartment permit.[28] The Stoffers refused to allow an inspection of the property as required under the accessory apartment law and therefore were notified that a hearing had been scheduled to consider the revocation of their accessory apartment permit.[29] A hearing officer of the AAB held a hearing at which the Stoffers' violation of the search provision of the accessory apartment law was considered, and revoked the Stoffers' accessory apartment permit on the grounds that they refused to comply with the law by failing to allowing a warrantless inspection of their premises. The hearing officer further informed the Stoffers that they were required to notify their tenant to vacate the premises and to schedule a "removal inspection" within 45 days.[30]

The Stoffers commenced this Article 78 proceeding challenging the determination by the AAB on the grounds, among others, that: (1) the provision of the accessory apartment law which required a search of the property was unconstitutional, and (2) the AAB did not have jurisdiction to adjudicate violation of the Town's Code.[31]

The Supreme Court, Suffolk County granted the petition and annulled the hearing officer's determination on the grounds that "the Court of Appeals' decision in *Sokolov v. Village of Freepor*…prohibited the Town 'from conditioning the continued use of an accessory apartment…upon the requirement that [the owners] consent to a warrantless search of the premises.'"[32] Because the court annulled the AAB's decision on this ground, it did not reach the question of whether the Town could authorize the AAB to adjudicate zoning violations.[33]

The respondents in the Article 78 proceeding appealed, arguing that the accessory apartment permit is

a privilege, not a right, and therefore the Town could require property owners with an accessory apartment permit to consent to a periodic inspection of their property.[34] In response, Petitioners agued that the warrantless search provision of the ordinance was unconstitutional. Alternatively, the Petitioners urged the Court to consider, among other things, their argument that the Town could not authorize the AAB to adjudicate zoning violations.[35]

The Appellate Division held that before it could consider the constitutionality of the search provision, it first had to address the question of whether the AAB could be granted the authority to adjudicate land use violations. It ultimately affirmed the Supreme Court's decision to annul the hearing officer's determination, but on the grounds that the AAB did not have the authority to adjudicate land use violations.[36]

In so holding, the Court reasoned that the New York State Constitution (Art. VI, §30) and, pursuant to its authority under the State Constitution, the New York State Legislature, have granted the authority to adjudicate land use violations exclusively to the courts.[37] Further, the Court held the Town could not exercise its authority under the Municipal Home Rule Law's home rule powers to delegate the authority to adjudicate land use violations to a municipal tribunal because the State Constitution limits a local government's power to interfere with the Legislature's authority to define the jurisdiction of the courts.[38] The Court also reasoned that even if the State Constitution could be read to allow a municipal government to create a tribunal to adjudicate land use violations, the Legislature has expressly prohibited municipalities such as the Town of Huntington (which has a population of approximately 200,000 people) from creating such tribunals since General Municipal Law Article 14-BB, §380 expressly permits municipalities of a certain population size (between 300,000 and 350,000 people) to establish an administrative tribunal for the purposes of code enforcement, preempting this area of law. The Court reasoned that if Huntington were permitted to create such a tribunal, General Municipal Law §380 would be rendered a nullity.[39] Because the Court held that the determination of the hearing officer was invalid based upon a lack of jurisdiction, it did not reach the question of whether the mandatory search provision of the Town's accessory apartment law was unconstitutional.[40]

IV. A Village Board of Trustees May Hold a Meeting and Public Hearings Outside of the Village

In *Petersen v. Incorporated Village of Saltaire*,[41] the Second Department held that the Village Board of Trustees (the "Board") could hold a public meeting and hearing outside of the Village limits since the Village Law does not require meetings of the Board to be held within the Village and the Board's meeting complied with the Open Meetings Law.

In *Petersen*, owners of homes in the Fire Island Village of Saltaire commenced an Article 78 proceeding to compel the Board to conduct all public meetings and public hearings within the boundaries of the Village.[42] By way of background, the Village of Saltaire is a small, seasonal community on Fire Island. It is inaccessible by car and must be accessed via ferry. However, during the winter months, ferry service is limited and, at times, unpredictable based on the weather. In February of 2006, the Village adopted legislation authorizing the Board to conduct official meetings outside of the Village limits under certain circumstances.[43] Pursuant to this authority, on February 3, 2009 the Board conducted a public meeting and public hearing in a conference room in midtown Manhattan. The meeting was simultaneously broadcast via two-way videoconferencing at the Village Hall allowing for full participation by members of the public. Petitioners took issue with this process and brought the instant Article 78 proceeding in the nature of mandamus to compel the Village Board to meet within the Village.[44]

It is well-established law that in order to be granted the remedy of mandamus to compel, "the petitioner's right to performance [must be] 'so clear as to admit of no doubt or controversy.'"[45] Although the Supreme Court, Suffolk County agreed with petitioners that they had a clear legal right to compel the Village Board to meet within the Village limits, the Second Department disagreed.[46]

In so holding, the Second Department held that because the Village Law does not require Village Board meetings to be held within the Village, the absence of such a requirement should be read to permit the Board to meet outside the Village boarders, citing the most wondrous of all Latin rules—"'expressio unius est exclusio alterius,' which means the expression of one thing implies the exclusion of others[.]"[47] In support of that holding the Court reasoned that although a prior version of the Village Law required the Board to meet within the confines of the Village, the current version of the Village Law eliminated that requirement. The Court viewed this omission by the Legislature as intentional and would not read it back into the statute.[48] Finally, the Court pointed out that the Open Meetings Law expressly permits videoconferencing as a method of holding public meetings.[49] That fact, along with the lack of requirement in the Village Law that the Board meet within the boundaries of the Village, confirmed the Second Department's reversal of the Supreme Court's decision and the dismissal of the petition.

Endnotes

1. *Ferraro v. Town Board of Town of Amherst*, 2010 WL 5395786 (4th Dep't December 30, 2010).
2. *Switzgable v. Board of Zoning Appeals of Town of Brookhaven*, 911 N.Y.S.2d 391 (2d Dep't 2010).
3. *Stoffer v. Department of Public Safety of the Town of Huntington*, 77 A.D.3d 305 (2d Dep't 2010).
4. *Petersen v. Incorporated Village of Saltaire*, 77 A.D.3d 954 (2d Dep't 2010).
5. *Ferraro v. Town Board of Town of Amherst*, 2010 WL 5395786 (4th Dep't December 30, 2010).
6. *Id.* at *1.
7. *Id.*; *see* Town Law §265(1)(c).
8. *Ferraro*, 2010 WL 5395786 *1.
9. *Id.*
10. *Id.* at 2.
11. Town Law §265(1)(c) provides as follows:

    > [Zoning] regulations, restrictions and boundaries may from time to time be amended. Such amendment shall be effected by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is the subject of a written protest, presented to the town board and signed by:
    >
    > ***
    >
    > (c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.
    >
    > The provisions of the previous section relative to public hearings and official notice shall apply equally to all proposed amendments.

12. *Ferraro*, 2010 WL 5395786, *1.
13. *Eadie v. Town Bd. of Town of North Greenbush* , 7 N.Y.3d 306, 314 (2006).
14. *Eadie*, 7 N.Y.3d at 314.
15. *Ferraro*, 2010 WL 5395786, *1. Petitioners also argued that they were the owners of property within the qualifying distance to file a protest petition since the driveway leading to the project off of Maple Road would also require a rezoning; however, the Town's Building Commissioner held that no rezoning of the driveway was required and the petitioners did not appeal that determination. *Ferraro*, 2010 WL 5395786, *2.
16. *Ferraro*, 2010 WL 5395786, *2-7.
17. *Id.* at 2.
18. *Id.*
19. *Id.*
20. *See, e.g., Russo v. City of Albany Zoning Board of Appeals*, 910 N.Y.S.2d 263 (3d Dep't 2010) (upholding denial of area variances where the board applied the statutory area variance standard and its decision had a rational basis); *Petikas v. Baranello*, 910 N.Y.S.2d 515 (2d Dep't 2010) (to the same effect); *Korzenko v. Scheyer*, 909 N.Y.S.2d 673, 674 (2d Dep't 2010); *Matejko v. Board of Zoning Appeals of Town of Brookhaven*, 77 A.D.3d 949 (2d Dep't 2010); *Mary T. Probst Family Trust v. Zoning Board of Appeals of Town of Horicon*, 2010 WL 5113005 (3d Dep't December 16, 2010); *Goldberg v. Zoning Board of Appeals of City of Long Beach* 2010 WL 5095316 (2d Dep't December 14, 2010) (upholding grant of area variances).
21. *Switzgable v. Board of Zoning Appeals of Town of Brookhaven*, 911 N.Y.S.2d 391 (2d Dep't 2010).
22. *Switzgable*, 911 N.Y.S.2d at 392-393.
23. *Id.*; Town of Brookhaven Code §85-29.1[B][2]("No nonconforming use of neighboring lands, structures or buildings in the same district and nonpermitted use of lands, structures or buildings in other districts shall be considered grounds for the issuance of a variance.").
24. *Switzgable*, 911 N.Y.S.2d at 392-393 (internal citations omitted).
25. *Stoffer v. Department of Public Safety of the Town of Huntington*, 77 A.D.3d 305 (2d Dep't 2010).
26. *Id.* at 308.
27. *Id.* at 309-310.
28. *Id.* at 309.
29. *Id.*
30. *Stoffer,* 77 A.D.3d at 310.
31. *Id.* at 310-311.
32. *Id*. at 311(citing *Sokolov v. Village of Freeport,* 52 N.Y.2d 341 (1981)).
33. *Stoffer,* 77 A.D.3d at 311.
34. *Id.*
35. *Id.* at 312.
36. *Id*.
37. *Id.* at 313-315 (citing New York State Constitution Article VI, §30, Uniform District Court Act §203; various sections of the Criminal Procedure Law, and Town Law §135[1]).
38. *Stoffer,* 77 A.D.3d at 316 (citing New York State Constitution Article IX, §3(a)(2)).
39. *Stoffer*, 77 A.D.3d at 316-317.
40. *Id.* at 318.
41. *Petersen v. Incorporated Village of Saltaire*, 77 A.D.3d 954 (2d Dep't 2010).
42. *Id.* at 954.
43. *Id.* at 954-955.
44. *Id.* at 955.
45. *Id.* (*citation omitted*).
46. *Id.* at 954.
47. *Petersen*, 77 A.D.3d at 956.
48. *Id.*
49. *Id.* at 957; *see* Public Officers Law §102.

Henry M. Hocherman is Second Vice President of the Municipal Law Section of the New York State Bar Association and Chair of that Section's Land Use Committee. He is a partner in the law firm Hocherman Tortorella & Wekstein, LLP of White Plains, New York. Mr. Hocherman is a 1968 graduate of The Johns Hopkins University and a 1971 graduate of Columbia Law School, where he was a Forsythe Wickes Fellow and a Harlan Fiske Stone Scholar.

Noelle V. Crisalli is a member of the Land Use Committee of the Municipal Law Section of the New York State Bar Association and is an associate in the law firm Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the *Pace Environmental Law Review* and an Honors Fellow with the Land Use Law Center.

2010 *Municipal Lawyer* Index of Articles

Title	Author	Issue/Year	Page
Land Use Law Case Law Update	Henry M. Hocherman and Noelle V. Crisalli	Vol. 24, No. 1 (Winter 2010)	5
The New York City Council's Approach to Ensure Compliance with Conflicts of Interest Laws in the Discretionary Funding Process	Elizabeth Fine and James Caras	Vol. 24, No. 1 (Winter 2010)	13
Wireless Facilities, Zoning and the FCC's "Shot Clock" Ruling	Daniel M. Laub	Vol. 24, No. 1 (Winter 2010)	18
2009 New York State Legislative Update	Darrin B. Derosia	Vol. 24, No. 1 (Winter 2010)	23
Land Use Law Case Law Update	Henry M. Hocherman and Noelle V. Crisalli	Vol. 24, No. 2 (Spring 2010)	5
Making *Garcetti's* "Practical Inquiry" into Public Employee Free Speech Rights	Douglas E. Gerhardt	Vol. 24, No. 2 (Spring 2010)	10
Piercing the Veil of a Plaintiff's Factual Allegations	Lalit K. Loomba	Vol. 24, No. 2 (Spring 2010)	14
Property Rights and the Constitution	Michael H. Donnelly	Vol. 24, No. 3 (Summer 2010)	5
Recent Amendments to the Open Meetings Law	Camille Jobin-Davis	Vol. 24, No. 3 (Summer 2010)	15
The Legislative History of New York's Conflicts of Interest Law for Municipal Officials	Ivy Chiu and Mark Davies	Vol. 24, No. 3 (Summer 2010)	17
Land Use Law Case Law Update	Henry M. Hocherman and Noelle V. Crisalli	Vol. 24, No. 3 (Summer 2010)	24
Appointment to Positions in New York State's Civil Service	Harvey Randall	Vol. 24, No. 4 (Fall 2010)	5
How Not to Draft an Ethics Law	Mark Davies	Vol. 24, No. 4 (Fall 2010)	13
Model Green Building Ordinance Proposed for Adoption by New York Municipalities	Michael B. Gerrard and Jason James	Vol. 24, No. 4 (Fall 2010)	19

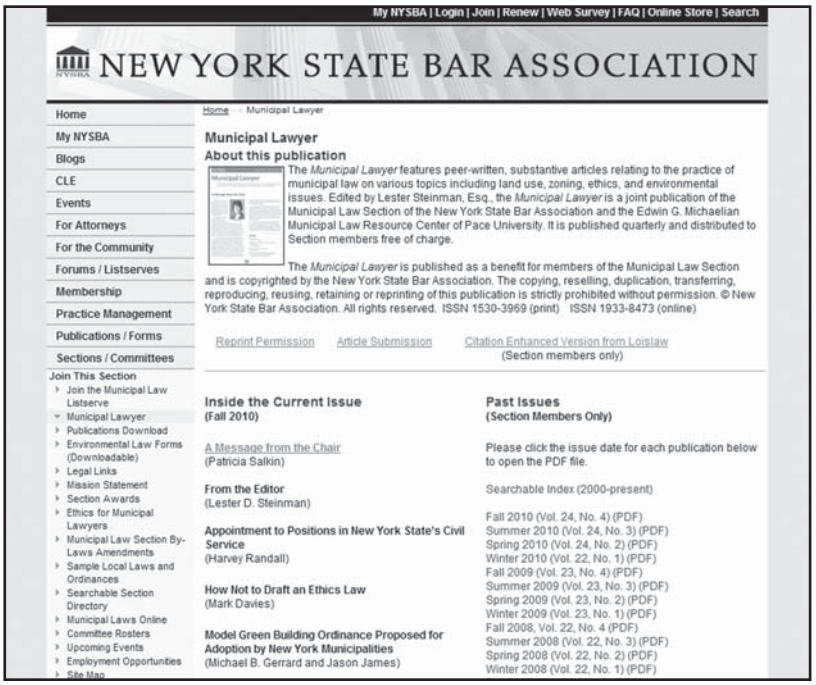
Your key to professional success…
A wealth of practical resources at www.nysba.org

- **Downloadable Forms organized into common practice areas**
- **Free legal research from Loislaw.com**
- **Comprehensive practice management tools**
- **Forums/listserves for Sections and Committees**
- **Ethics Opinions from 1964 – present**
- **NYSBA Reports – the substantive work of the Association**
- **Legislative information with timely news feeds**
- **Online career services for job seekers and employers**
- **Learn more about the Lawyers Assistance Program at www.nysba.org/lap**

The practical tools you need. The resources you demand. Available right now.

Our members deserve nothing less.

The *Municipal Lawyer* is also available online



Go to www.nysba.org/MunicipalLawyer to access:

- Past Issues (2000-present) of the *Municipal Lawyer**
- *Municipal Lawyer* Searchable Index (2000-present)
- Searchable articles from the *Municipal Lawyer* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be a Municipal Law Section member and logged in to access

Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

For more information on these and many other resources go to www.nysba.org

Section Committees and Chairs

The Municipal Law Section encourages members to participate in its programs and to contact the Section Officers (listed on the back page) or Committee Chairs for information.

Bylaws
Owen B. Walsh
Owen B. Walsh, Attorney at Law
34 Audrey Avenue
P.O. Box 102
Oyster Bay, NY 11771-0102
obwdvw@aol.com

Employment Relations
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Mark Davies
NYC Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
mldavies@aol.com

Steven G. Leventhal
Leventhal & Sliney, LLP
15 Remsen Ave.
Roslyn, NY 11576-2102
Sleventhal@ls-llp.com

Green Development
Daniel A. Spitzer
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
dspitzer@hodgsonruss.com

Land Use and Environmental
Henry M. Hocherman
Hocherman Tortorella & Wekstein, LLP
One North Broadway, Suite 701
White Plains, NY 10601
h.hocherman@htwlegal.com

Membership
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
ATLEVIN@MSEK.COM

Municipal Finance and Economic Development
Kenneth W. Bond
Squire, Sanders & Dempsey LLP
30 Rockefeller Plaza, 30th Floor
New York, NY 10112
kbond@ssd.com

Legislation
A. Joseph Scott III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207-2986
ascott@hodgsonruss.com

Darrin B. Derosia
New York State Department of State
One Commerce Plaza, Suite 1120
99 Washington Avenue
Albany, NY 12231-0001
darrin.derosia@dos.state.ny.us

Technology
Howard Protter
Jacobowitz & Gubits LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586-2029
hp@jacobowitz.com

NEW YORK STATE BAR ASSOCIATION
MUNICIPAL LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Publication—Editorial Policy—Subscriptions

Persons interested in writing for the *Municipal Lawyer* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Municipal Lawyer* are appreciated.

Publication Policy: All articles should be submitted to me and must include a cover letter giving permission for publication in the *Municipal Lawyer*. We will assume your submission is for the exclusive use of the *Municipal Lawyer* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Municipal Lawyer* has the appropriate permission to reprint the article.

For ease of publication, articles should be e-mailed or sent on a disk or CD in electronic format, preferably Microsoft Word (pdfs are not acceptable). A short author's biography should also be included. Please spell check and grammar check submissions.

Editorial Policy: The articles in the *Municipal Lawyer* represent the author's viewpoint and research and not that of the *Municipal Lawyer* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscription: The *Municipal Lawyer* is available by subscription to law libraries. The subscription rate for 2011 is $125.00. For further information contact the Newsletter Department at the Bar Center, newsletters@nysba.org.

Publication Submission Deadlines: On or before the 1st of March, June, September and December each year.

Lester D. Steinman
Editor-in-Chief

MUNICIPAL LAWYER

Editor-in-Chief
Lester D. Steinman
Wormser, Kiely, Galef & Jacobs LLP
399 Knollwood Rd.
White Plains, NY 10603
Lsteinman@wkgj.com

Executive Editor
Ralph W. Bandel

Section Officers

Chair
Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
psalk@albanylaw.edu

First Vice-Chair
Howard Protter
Jacobowitz & Gubits, LLP
P.O. Box 367
158 Orange Avenue
Walden, NY 12586
hp@jacobowitz.com

Second Vice-Chair
Frederick H. Ahrens
Law Office of Thomas W. Reed III PLLC
P.O. Box 1540
Corning, NY 14830

Secretary
Henry M. Hocherman
Hocherman Tortorella & Wekstein, LLP
One North Broadway, Suite 701
White Plains, NY 10601
h.hocherman@htwlegal.com

ISSN 1530-3969 (print) ISSN 1933-8473 (online)