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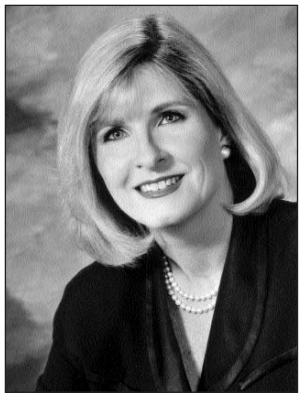
Welcome from the Chair



As a relative newcomer to public service, it is indeed an honor to serve as the Chair of the New York State Bar Association's Committee on Attorneys in Public Service. The Committee was created, little more than a year ago, to address the needs and concerns of NYSBA members employed in government and public service work. This new *Journal* is the result of collaborative efforts with Albany Law School's Government Law Center, and is perhaps the most important, tangible product of the Committee to date. We are pleased to work in partnership with the GLC which, under the leadership of Patty Salkin, has provided the impetus and work to produce the *Government, Law and Policy Journal*.

The Committee's intent is to represent attorneys in all areas of public service. We recognize that the organized bar has not always been responsive to the needs of public service attorneys, and as a result, the number of public service attorney members has been low. With the establishment of this Committee and the publication of this *Journal*, I believe that the tide has turned and that the New York State Bar Association is extending a special welcome and strong encouragement to all of us to participate. In turn, I believe it is our responsibility as public service attorneys to become actively involved. We can no longer afford to sit back and refuse to participate if we wish the organized bar to acknowledge us as full-fledged members of the profession and the co-equals of attorneys in private practice. Now, more than ever, is the time to become active in bar associations.

A copy of the Committee's Mission Statement is printed in this *GLP Journal*. As we work towards meeting the needs and interests of attorneys in public service, it is our goal to serve as a "bridge" for public service attorneys to the various substantive sections and committees of the bar association. We urge you to get actively involved in the workings of the Association, through NYSBA committees as well as the 25 sections, so that the views and expertise of public service attorneys are recognized throughout the organization. As a committee rather than a section, our committee membership is limited, but be assured that the committee is dedicated to working with all appropriate NYSBA entities to further the interests of public service attorneys and to making bar association membership more relevant. I encourage each of you to become an active participant in the New York State Bar Association. Bar association involvement is a lot like voting in a general election, if you haven't voted, you forfeit your right to complain about the outcome. Now is the time for all of us to participate!

The members of our Committee are listed in this *Journal*; it might be a good idea to peruse the list and identify a member with whom you have a work relationship or personal connection—someone to contact about your ideas for potential activities, the Committee, the *Journal*, a future web site, possible CLE programs, etc. If you would like to contribute to the *Journal*, contact the Editor-in-Chief, Vincent Bonventre, or the Associate Editor, Rose Mary Bailly, at Albany Law School.

I would like to thank New York State Bar Association President Thomas O. Rice, his predecessor, James C. Moore, and the NYSBA Executive and Finance Committees for providing us with the support, both moral and financial, to establish the Committee and to produce this fine publication. In particular, I want to express appreciation to Kathryn Grant Madigan, the chair of the Membership Committee, who led the Association's movement to determine how the NYSBA could better meet the needs and interests of government attorneys. I have fondly referred to Kate Madigan as our Committee's "Fairy Godmother," since Kate spearheaded the research and advocacy that eventually led to the Committee's formation. Kate's dedication to inclusion of government attorneys within the organized bar has been an inspiration. For those in public service who may not be active members of the NYSBA or other bar associations, we should view Kate's efforts as an example of the impact one member can have, and the potential that we each possess.

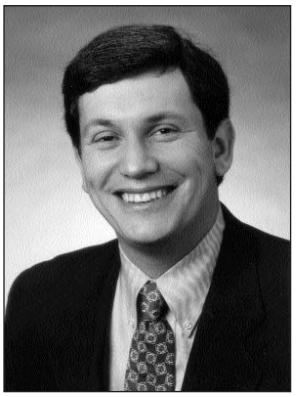
Let's hope that this is the beginning of a long tradition of partnership and inclusion of government lawyers within the New York State Bar Association and all bar organizations, an asset that must be invested, not wasted!

Tricia Troy Alden,
Chair of the Committee on
Attorneys in Public Service

Tricia Troy Alden is an Assistant County Attorney for Suffolk County. She formerly served as part of the Attorney General's Executive Staff as Assistant Attorney General in Charge of Recruitment and Legal Education.

The Growing Stature of Public Service Attorneys

By Henry M. Greenberg



Welcome to the *Government, Law and Policy Journal*. Seemingly all new publications boast that their premier issue coincides with an historic change. Often this betrays conceit. By good fortune, however, the *Journal*'s appearance comes at just such a moment—a time of historic change in the way the legal profession views attorneys in public service. Here's why.

- Public service attorneys (of which I am proud to be one) represent about 15% of the lawyer population in New York State.
- We are employed at all levels of government: federal, state and local.
- We work in government law firms of all sizes: in the offices of the governor, the Attorney General, legislatures, agencies, United States Attorneys, district attorneys, county attorneys and corporation counsels.
- We enforce laws and regulations governing public health, taxes and the environment.
- We count among our number criminal prosecutors and public defenders alike.
- We decide cases as administrative law judges and hearing officers.
- We serve the court system as law clerks and court administrators.
- We defend the government against law suits.
- We counsel agencies, boards and officials.
- We draft statutes and regulations.

In short, we enforce . . . we prosecute . . . we defend . . . we judge . . . we counsel—and those are just a few of the things we do. Despite the diversity of our practices, moreover, we stand on common ground. The tie binding us all is that we are collectively engaged in the highest calling afforded by our profession: to preserve and protect the public. As Louis Brandeis liked to say, we are "the peoples' lawyers."

Yet, even though we represent a large segment of the legal profession, even though the work we do is vitally important, all too few of us belong to any bar associations. In fact, public service lawyers historically have been underrepresented in bar associations. This has had unwelcome consequences for all concerned.

While we have much in common with our colleagues in the private sector, there are areas in which our needs are very different from private practitioners. And all too often, our needs have gone unmet by bar associations.

So, too, bar associations have suffered. For too long they were unable to fully represent the wide spectrum of the profession. How could they, when public service attorneys—with our unique perspectives—were largely unheard, our talents untapped?

To address these problems, the New York State Bar Association recently created the Committee on Attorneys in Public Service. The Committee's job—pure and simple—is to advance our interests, to serve as a statewide advocate in our quest for excellence, fairness and justice. The Committee works to enhance the relevance of all of NYSBA's services for public service attorneys.

The *Journal* you are reading epitomizes everything the Committee seeks to accomplish. It is of, by and for public service attorneys. Designed to fill a void—the absence of a professional publication devoted exclusively to legal and policy issues affecting the public bar—the *Journal* will prove to be an invaluable resource.

Now, of course, I have only given you an overview of the Committee's work. But what is most important for you to know about the Committee is that public service attorneys now have a home within NYSBA—a place where their concerns will be heard and action taken.

Thus, public service attorneys are at long last beginning to receive the professional recognition and respect they deserve. A historic change indeed, and because of it we are able to present to you the premier issue of this *Government, Law and Policy (GLP) Journal*. We hope you enjoy it.

Henry M. Greenberg, vice-chair of the NYSBA Committee on Attorneys in Public Service, is General Counsel to the New York State Department of Health. His previous government positions include law clerk to Chief Judge Judith Kaye and Assistant U.S. Attorney, Northern District New York.

Editor's Foreword

Welcome to the inaugural issue of the *Government, Law and Policy Journal*. This joint effort of the New York State Bar Association's Committee on Attorneys in Public Service and Albany Law School's Government Law Center will be devoted to that wide spectrum of public law and policy issues that comprise the work of lawyers in government and government-related public service, as well as other legal and policy matters that are of particular interest to them. As public sector attorneys well know, these law and policy issues are also the most fascinating and fundamental. These issues are the ones that attorneys, public or private, read and think about, discuss on and off the job and often have strong feelings about: government ethics, public health and safety, criminal justice, civil service, education, consumer protection, the environment—just to name a few.

Beyond this purpose to focus on such matters, the aim of the *GLP Journal* is to do so in a way that is scholarly, and yet timely, topical, lively, and accessible. Articles are not only well-researched, referenced and thoughtful,they are also relatively brief and very readable—i.e., interesting, informative, thought provoking and quickly read and digested. In short, the *Journal* is intended to be both enlightening and enjoyable.

We believe this first issue fits that bill. Dedicated to the theme of government-lawyer ethics, the offerings reflect the breadth and importance of the field, and do so by examining some of the most critical—and timely—matters. As a bonus, some of the articles, when taken together, provide a veritable CLE on the content and background of government ethics law in New York.

Jeffrey Rosenthal examines the difficulty of identifying the government lawyer's client, and Paul Shechtman tackles the question of confidentiality for public sector lawyers who advise government officials. Edward Lazarus takes issue with the criticism that a book such as his *Closed Chambers* represents a dangerous and unethical threat by a former law clerk to necessary judicial secrecy, and Erwin Chemerinsky proposes an outline for a clerk's code of ethics. Patricia Salkin surveys the special responsibilities of government lawyers generally, and Sara Osborne explores pro bono as an additional opportunity for attorneys in government to provide public service.

Joseph Bress and Richard Rifkin, respectively, look at the early years of enforcing New York's Ethics in Government Act and of the possibilities for its future improvement. Donald Berens presents a primer on state ethics rules under the Public Officers Law, and Mark Davies and Jennifer Siegel identify the sources and content of ethics regulations for municipal attorneys throughout the state and in New York City.

This journal could only be produced, let alone inaugurated, with the cooperation and assistance of many contributors. In addition to the authors, individuals representing the New York State Bar Association, the Committee on Attorneys in Public Service and Albany Law School were essential to this enterprise. Tricia Alden and Hank Greenberg, the committee's chair and vice chair, were enthusiastic from the outset and provided the encouragement, guidance and backing that made this publication a possibility. Patricia Wood of the Bar Association staff was indispensable in every organizational and administrative detail; getting to publication would have been infinitely more confusing and trying without her. At Albany Law School, Patty Salkin, Director of the Government Law Center, was tireless, and her font of ideas inexhaustible; and Kate Hedgeman, our student editor, contributed invaluably to the editing process. Finally, my Associate Editor, Rose Mary Bailly, was at least an equal partner in the entire process; her editing, good judgment, long hours and optimism helped make this production a pleasure. And collectively, we are grateful to the officials of the Bar Association for their confidence and support.

Vincent Martin Bonventre

Vincent Martin Bonventre, Editor-in-Chief of the *GLP Journal*, is Professor of Law at Albany Law School. He previously served as law clerk to Court of Appeals Judge Matthew Jasen and Judge Stewart Hancock, and as Judicial Fellow under Chief Justice Warren Burger. He is editor of *State Constitutional Commentary*, published annually by the Albany Law Review.

Rose Mary Bailly, Associate Editor of *GLP Journal*, is the Coordinator of the Aging Law and Policy Program at the Government Law Center of Albany Law School. She serves on the Board of Editors of the *New York State Bar Journal* and is Contributing Author of *McKinney's Practice Commentaries* on Mental Hygiene Law.

Introduction: The Front Line of Public Trust

By Patricia E. Salkin

It is said that there is no higher calling for lawyers than service to the public. From the lawyers who give a few years to this calling, to those who dedicate their careers to government and public service, there is one special tie that binds: the awesome responsibility of upholding the public trust and safeguarding the integrity of government. Although the ethical conduct of New York's legal profession as a whole is regulated by the Code of Professional Responsibility, public service lawyers must wade through a seeming morass of additional ethics rules, regulations and considerations. In addition to the numerous "self-regulation" considerations that government lawyers face (e.g., following the Code of Professional Responsibility, the Public Officers Law, agency rules and regulations, applicable opinions of regulating entities and case law), government lawyers are often called upon to assist other public servants in choosing the most ethical course of conduct. Furthermore, many government lawyers serve as policy makers, placing the profession in a special position of authority, trust and responsibility when it comes to promoting and upholding integrity in government. Lastly, lawyers are leaders, and when functioning in a position of leadership, government lawyers must set an example, must assist in articulating a vision and must play a critical role in ethics education.

This essay briefly explores the various roles played by government lawyers as specifically related to ethics issues. It likely raises more issues than it answers. Hopefully, it challenges attitudes reflecting disinterest or unimportance about the field of government ethics, demonstrates the cutting edge issues and opportunities in the government ethics arena, and helps to make the case for professional organizations, such as the new Committee on Attorneys in Public Service, to insure that government lawyers have their own forum to discuss the unique and at times exciting challenges of professionalism and ethics that face them.

The Ethical Conduct of Government Lawyers

While all lawyers in New York are subject to the Code of Professional Responsibility,[1] when lawyers enter government service, they subject themselves and their conduct to applicable government statutes and laws regulating the conduct of government employees. This is true whether employed at the federal,[2] state[3] or local[4] level. Although this would seem straightforward and identifies a path of laws that might appear easy to follow, the fact remains that simply following these laws and rules can at times be a challenge.

The ethics challenges can be at times frustrating. For example, what happens when a provision in the Code of Professional Responsibility and a provision in the Public Officers Law seem to conflict? Are government lawyers still bound to follow the Code of Professional Responsibility first and foremost? Or must the Code yield to the ethical requirements contained in the Public Officers Law? When in conflict, where is a government lawyer to turn to resolve the dilemma?

The confusion over where to go for guidance on an ethics question where the lawyer is employed by the State of New York and the question involves a potential for conflict between the Code of Professional Responsibility and the Public Officers Law illustrates difficulties that are immediately apparent. The State Ethics Commission is charged with interpretation of Public Officers Law for executive branch employees,[5] and the Legislative Ethics Committee interprets this same law as it pertains to legislative employees.[6] Even after the appropriate entity is identified, the problem remains that both of these offices have limited jurisdiction to interpret only the Public Officers Law, not the Code of Professional Responsibility. Hence, in response to a legal ethics inquiry made to one of these entities, the analysis offered in an opinion may be limited to applicable provisions in the Public Officers Law. Moreover, whereas the opinions of the State Ethics Commission are made public, distributed to the ethics officers of each state agency and now made available on-line,[7] the opinions of the Legislative Ethics Committee are neither published nor routinely made available to the public.

The State Bar Committee on Professional Responsibility also has limited jurisdiction to interpret provisions of the Code of Professional Responsibility as they relate to any lawyer, whether employed in the public, private or non-profit sector. Therefore, that committee would likely not reconcile an interpretation of the Code of Professional Responsibility with a provision in the Public Officers Law. The opinions of that committee are published and made widely available for public consumption through the State Bar Association's website, publications of the Association and press releases that are often reprinted in other law-related newsletters and sources of information.

Who, then, is resolving conflicts that arise between the two sets of laws? In all likelihood that will fall to the judiciary. For example, in one recent Louisiana case, a former government lawyer and agency head appealed to that state's high court asking the court to specifically rule on the question of whether the more restrictive revolving door provision in the state's ethics law applied or whether the less restrictive provision in the state's Rules of Professional Conduct for lawyers applied.[8] In this closely watched case, the court held: "By enacting an ethics code which applies to all public officials and employees, the legislature was not attempting to regulate the practice of law for attorney public servants. The legislature was acting under a constitutional mandate to ensure a high ethical standard for present and former public servants. The ethics code provisions act on attorneys in their primary role as citizens."[9] The court concluded that both the Rules of Professional Conduct as well as the state adopted code of ethics for public servants applied, and that provisions in the state ethics code would prevail so long as they did not impede the court's authority to regulate the practice of law.[10] Although we have not had this nor similar conflicts addressed squarely by the Court of Appeals, it is reasonable to assume that where a government law or regulation is more restrictive, it will likely apply to government lawyers.

Even more frustrating may be the situation for administrative law judges. Are these judges subject to the Code of Judicial Conduct as well as to the Public Officers Law? In New York, the opinions on point suggest inconsistent application of the Code of Judicial Conduct.[11] For those administrative law judges who are also lawyers, layer the Code of Professional Responsibility on top of this, and then add any applicable agency adopted code of ethics for administrative law judges[12] for a daunting legal analysis.

Government lawyers subject themselves to additional ethics rules and regulations. It is a constant challenge since these ethics laws are fluid and change over time. A required course in law school ten years ago no longer provides a sufficient base of knowledge in the field of ethics for government lawyers.[13] Public service lawyers need ongoing opportunities for education and training. The State Ethics Commission offers an intensive outreach program for education and training on the Public Officers Law. For state agency attorneys, the Commission has recently become an accredited provider for continuing legal education. The articles in this *Journal* provide a sampling of myriad ethics laws and issues. Additional courses and resources geared to government lawyers on a regular basis to reexamine applicable provisions of the Code of Professional Responsibility, the Code of Judicial Conduct, and other non-Public Officer Law ethics issues that might arise could be a helpful compliment to the efforts of the State Ethics Commission. Mandatory continuing legal education provides a good opportunity for public service lawyers to focus on this area.

In addition to interpreting these rules for purposes of self-regulation within the legal profession, government lawyers are also called upon to consider ethics questions that affect non-lawyer public service personnel.

Government Lawyers as Counsel

In the public sector, few state government attorneys, other than those employed by the Department of Law, ever litigate a case in court or negotiate a settlement for their client. The vast majority of government lawyers provide advice and counsel. Ethics is one area where counseling is often needed. This role puts government lawyers on the front line of safeguarding the public trust in the actions of our government officials and public servants. It forces government lawyers to interpret the language and spirit of the Public Officers Law and any other applicable rules, opinions or decisions to provide advice about the most appropriate course of conduct in a given situation.

In the public sector, giving advice on ethics laws can equate to "tough love." The Public Officers Law is merely an outline of minimum requirements to ensure some basic level of appropriate conduct. This law, like most others, cannot foresee, and therefore does not cover, every situation that might arise. It pushes government lawyers to consider scenarios beyond the black letter law. When the statute and other guidance fail to address a situation, the attorney must weigh the best interests of the people of the state with the proposed action, keeping in mind the goal of avoiding even the appearance of impropriety. The government lawyer may be faced with the difficult task of convincing a public official that even though the law does not prevent a particular course of conduct (e.g., it is a "gray area"), nonetheless the fact that the proposed course of conduct will take place within the public sector necessitates other considerations.

A government lawyer's ability to represent a client zealously[14] in the public sector may be affected by other ethical considerations, some of which are explored elsewhere in these pages. For example, identifying the "client(s)" of government lawyers is a legal and policy challenge. Sorting through the questions that arise once the client is identified, specifically, when and under what circumstances a conversation between a government lawyer and a public sector client may be privileged and confidential is uncertain and can be frustrating.

State and local ethics officials find that, by and large, government officials are good, decent, honest people who truly desire to serve the people and to "do

the right thing." If this is true, then why, like lawyers, are government officials so often the brunt of ethics jokes? Why, anecdotally do so many citizens articulate such low expectations of conduct by politicians and government employees? The legal profession spends a great deal of time through the organized bars engaging in projects to enhance the image of lawyers. What should government lawyers and other officials be doing to enhance the image of the public sector workforce, especially since this impression is directly related to citizenry's belief, trust and support of government? One approach that has been suggested is encouraging pro bono service, a possibility that raises its own unique questions in the public sector. This issue is considered more fully in another article.

Government Lawyers as Policymakers

The fact that so many lawyers in government function as policymakers places a great deal of ethics responsibility and opportunity upon the shoulders of government lawyers, both in terms of crafting the language of the laws and in so doing, leading the way towards meaningful reform. The 1987 Ethics in Government Act was perhaps, "The most wide-ranging political reform in the history of our state government. . . ."[15] Enacted in large part as a reaction to an ethics scandal in New York City, the Act should be viewed as the start of a good faith effort to restore public trust and integrity in government. It should properly be considered as one means, but certainly not as the end of this goal. Government lawyers are major players in the executive and legislative branches' efforts to modernize, reshape and amend such laws.

Reform in the area of ethics laws is needed no matter how good a law might have been when first enacted. Times change, community standards change, and new situations not initially contemplated arise. For example, in the case of the Ethics in Government Act, there has been criticism of the onerous financial disclosure forms all policy makers are required to complete and file with the State Ethics Commission;[16] the reach of the jurisdiction of the State Ethics Commission was the subject of an opinion rendered by the Court of Appeals;[17] and the application of the revolving door provisions has been seriously called into question where a change in administration[18] brought about the privatization of certain government functions.[19] In addition, the Temporary State Commission on Local Government Ethics, created as part of the 1987 ethics law reforms, was mysteriously left to sunset under its legislation.[20]

Admittedly, the statute does have loopholes and fails to cover certain situations that may not have been contemplated at the time of enactment. Furthermore, the law has been interpreted to preclude certain activities that could in fact be viewed as in the best interests of the state.[21] Reform may be appropriate. For some, the necessity may not yet be so great as to warrant reform. Perhaps it is the fortunate absence in the state of a major government ethics scandal in recent years. Or, perhaps it is the politics of ethics law reform, concerns about opening a can of worms, and of subjecting government as a whole to potential criticism yet another time.

When it is timely to re-examine the ethics laws, it will be the government lawyers on the front line, debating the merits, drafting the language, and negotiating the bills. This is an awesome responsibility. Once again, the public trust is in the hands of government lawyers. This responsibility creates opportunities in the political arena to help shape better laws by crafting solutions to the problems already identified, and by foreseeing potential issues before they arise.

Government Lawyers are Leaders

By their nature, lawyers are leaders. Leadership comes with responsibility. In the case of government lawyers, it is a responsibility to the public and to the government. To lead, a lawyer must communicate and educate others about the law. Govern-ment lawyers must themselves be knowledgeable about ethics laws covering the profession and public sector employees, and they must share this information with colleagues, associates and others in the workplace. A good working knowledge requires constant learning. This might include keeping abreast of opinions from the State Ethics Commission (e.g., by periodically checking the website of the Ethics Commission[22]); being aware of ethics laws and issues that arise in other jurisdictions, and joining organizations that can provide current ethics information on a regular basis.[23]

Leaders do not wait to be asked to lead—they "just do it." Government lawyers might offer proactive seminars on ethics for public sector employees. They might consider developing short courses and offering them to those who are willing to listen (and convincing others that they should spend time refreshing their recollection on ethical considerations). Leaders are creative. Government lawyers should be innovative in their educational approach. Newspaper articles about ethics situations in other jurisdictions could be clipped and circulated "FYI" throughout the office, a subtle way of keeping ethics considerations in the forefront of employee's minds. An annual review of ethics issues and questions that have arisen in an office could be scheduled, and agency rules and regulations could be examined for possible reform.

Conclusion

At the turn of the century there is perhaps no greater responsibility and challenge confronting public sector lawyers in New York than that of upholding the

public trust and integrity in government, through personal conduct, through counseling others in the public sector on the appropriate course of conduct, and by leading the way for education and appropriate reform. A keen sense of awareness of the unique and diverse ethics issues facing the public sector, combined with a proactive leadership strategy to foster a good reputation for government officials and for government is demanded of every government lawyer. In the final analysis, the public trust is in the hands of government lawyers everyday. It is our responsibility to keep it, to nurture it and to never wash it away.

Endnotes

1. N.Y. Judiciary Law, Preliminary Statement, Code of Professional Responsibility.
2. 18 U.S.C. §§ 202-209; Exec. Order 11222; and 5 C.F.R. pt. 735.
3. N.Y. Pub. Officers Law §§ 73, 73-a, 74.
4. N.Y. Gen. Mun. L. Art. 18.
5. N.Y. Exec. L. § 94.
6. N.Y. Legislative L. § 80.
7. http://www.nysba.org/opinions.html.
8. *Midboe v. Comm'n on Ethics*, 646 So.2d 351 (1994).
9. *Id.* at 360.
10. *Id.*
11. See, Heverly, ed., *Manual for Administrative Law Judges and Hearings Officers*, ch. 2, NYS Department of Civil Service (forthcoming 1999).
12. For example, in New York the Workers Compensation Board has adopted a Code of Conduct for its administrative law judges.
13. Consider recent activities including amendments to the Code of Professional Responsibility in New York and the American Bar Association's current Ethics 2000 initiative to modernize the Model Rules of Professional Conduct (http://www.abanet.org/media/mar98/ethi2000.html).
14. See New York Code of Professional Responsibility DR 7-101.
15. Mario Cuomo, The New York Idea: An Experiment in Democracy, 191 (1994).
16. Government Law Center of Albany Law School, Ethics in Government: Too Much or Too Little: Conference Proceedings (1996).
17. *Flynn v. New York State Ethics Commission*, 87 N.Y.2d 199 (1995).
18. Government Law Center, *supra*, note 16.
19. *Id.*
20. See, *Temporary State Commission on Local Government Ethics: Final Report*, 21 Fordham Urb. L.J. 1 (Fall 1993).
21. For example, Op. 94-4 of the State Ethics Commission interprets the revolving door provision as it relates to one department's desire to privatize certain clerical functions.
22. http://www.dos.state.ny.us/ethc/ethics.html.
23. For example, the New York State Bar Association and its many sections and committees including the new Committee on Attorneys in Public Service and the Municipal Law Section, the American Bar Association's Section on State and Local Government or the Division on Public Sector Lawyers, the International Council on Government Ethics Laws, the Council of State Governments and the American Society for Public Administration.

Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. She teaches government ethics, regularly lectures on the subject, and is editor of *Ethical Standards in the Public Sector*, recently published by the American Bar Association.

Everyday Ethics: A Practical Guide to Ethics in New York State Government Under the Public Officers Law

By Donald P. Berens, Jr.

Introduction

Ethical: *adj. [from Greek ethos character]*

Conforming to accepted professional standards of conduct

Ethereal: *adj. [from Greek aithos fire]*

Relating to the regions beyond the earth

- Webster's Dictionary[1]

Most human beings, including lawyers, aspire to attain their higher natures, both in their own eyes and in the estimation of others. Most lawyers, including government lawyers, have a sense of the mundane difficulties of achieving such fulfillment, both for themselves and for their clients. Most government lawyers, including this author, value practical legal advice, both defining the objective and showing the route to reaching it. Guidance about the ethical is more valuable than speculation about the ethereal.

In that spirit, I offer this article—perhaps the first of a series—in which I will try to provide a balanced view of the important ethics standards set forth in Public Officers Law §§ 73, 73-a and 74. I aim to be nuanced and accurate, but brief and clear, with sensitivity to the purposes of the statutes, but with flexibility to deal with the realities of individual cases.

There is too much to cover in one article. Indeed, the New York State Ethics Commission has in 11 years published over 250 formal advisory opinions and has issued an even greater number of unpublished informal opinions. Separate articles might be devoted to the history and purpose of New York State ethics laws, the structure and function of the Commission, financial disclosure, conflicts of interest, outside activities, gifts and honoraria, post-employment restrictions and the enforcement procedures used by the Commission. This article will simply highlight the most prominent provisions of the statutes.

Coverage

"To create a public scandal is what's wicked."

- Moliere[2]

The provisions of Public Officers Law (POL) §§ 73, 73-a and 74 cover the four statewide elected officials, state executive branch officers and employees, the 211 members of the legislature, legislative employees and

certain political party chairpersons. They do not cover judges or judicial branch employees. The Legislative Ethics Committee administers the POL provisions applicable to members of the legislature and legislative employees. The Ethics Commission administers those provisions applicable to about 250,000 persons, consisting of most state executive branch officials, officers and employees, including members, officers and employees of public benefit corporations, public authorities and commissions at least one of whose members is appointed by the governor. The officers, members and directors of boards, councils, commissions, public authorities and public benefit corporations, who are uncompensated or receive no more than *per diem* compensation, are not subject to the requirements of POL § 73.[3] For simplicity, unless the context requires more precision, I will use the term "state employee" or "employee" to refer to officers and employees of the executive branch of the state and of those public benefit corporations, public authorities and commissions covered by any of the ethics provisions of the POL.

Conflicts of Interest

"No man can serve two masters."

- Matthew 6:24[4]

Conflicts of interest for state employees are governed by statute, in terms which are sometimes specific and other times general, and by regulation.

POL § 73 specifically forbids state employees to receive or enter into any agreement for compensation for services to be rendered in any matter before any state agency, where the compensation is to be dependent or contingent upon any action by the agency regarding any license, contract, ruling or other benefit.[5]

The law forbids full-time state employees to receive or enter into any agreement for compensation for the appearance or rendition of services by the employee or another against the interest of the state in relation to any case before the Court of Claims.[6]

The statute forbids state employees, any firms of which they are members, or any corporation of which

10% or more of the stock is owned or controlled by such an employee, to sell any goods or services worth over $25 to any state agency unless pursuant to contract let after public notice and competitive bidding.[7]

The law forbids state employees to receive certain gifts.[8] This will be discussed in some detail below.

The law forbids state employees, other than in the proper discharge of official duties, to receive or enter into any agreement for compensation for the appearance or rendition of services by the employee or another in relation to any matter before a state agency in connection with:

1. The purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from, to or with any such agency;
2. Any proceeding relating to rate making;
3. The adoption or repeal of any rule or regulation having the force and effect of law;
4. The obtaining of grants of money or loans;
5. Licensing; or
6. Any proceeding relating to a franchise provided for in the Public Service Law.[9]

Nothing in the Public Officers Law, any other law or disciplinary rule shall be construed to prohibit any firm, association or corporation of which a state employee is a member, associate, retired member, of counsel or shareholder from appearing, practicing, communicating or otherwise rendering services in relation to any matter before a state agency, where the state employee does not share in the net revenues resulting therefrom.[10] However, a state employee who is a member, associate, etc. of a firm, etc. which is appearing or rendering services in connection with any of the six sorts of matters listed in the immediately preceding paragraph shall not orally communicate as to the merits of the matter with the agency concerned.[11]

In addition to the specific prohibitions of POL § 73, there are general rules and standards set forth in POL § 74.

The general rule with respect to conflicts of interest forbids a state employee to have any interest, financial or otherwise, direct or indirect, or to engage in any business or transaction or professional activity or to incur any obligation of any nature which is in substantial conflict with the proper discharge of the employee's duties in the public interest.[12]

The general standards include the following:

1. No state employee should accept other employment which will impair the employee's independence of judgment in the exercise of his or her official duties.[13]
2. No state employee should accept employment or engage in any business or professional activity which will require disclosure of confidential information gained by reason of the employee's official position.[14]
3. No state employee should disclose confidential information acquired in the course of official duties nor use such information to further his or her personal interests.[15]
4. No state employee should use or attempt to use an official position to secure unwarranted privileges or exemptions for the employee or others.[16]
5. No state employee should engage in any transaction as agent of the state with any business entity in which the employee has a financial interest that might reasonably tend to conflict with the proper discharge of official duties.[17]
6. A state employee should not by conduct give reasonable basis for the impression that any person can improperly influence the employee or unduly enjoy favor in the performance of official duties, or that the employee is affected by kinship, rank, position or influence of any party or person.[18]
7. A state employee should abstain from making personal investments in enterprises which he or she has reason to believe may be directly involved in decisions to be made by the employee or which will otherwise create substantial conflict between the employee's duty in the public interest and his or her private interest.[19]
8. A state employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that the employee is likely to be engaged in acts that are in violation of his or her trust.[20]
9. No full-time state employee, no firm or association of which such an employee is a member, and no corporation substantially owned or controlled directly or indirectly by such an employee, should sell any goods or services to any person which is licensed or whose rates are fixed by the state agency in which the employee serves.[21]

Outside Activities

> *"He who hunts two hares leaves one and loses the other."*
>
> ***- Japanese Proverb***[22]

In addition to the specific statutory restrictions on conflicts of interest, the Executive Law requires the Ethics

Commission to promulgate regulations governing the outside activities of state employees.[23] Highlights of the resulting regulations follow.

No head of a state department, individual who serves as one of the four statewide elected officials, individual who serves in a policy-making position or member or director of a public authority (other than a multistate authority), public benefit corporation or commission at least one of whose members is appointed by the governor shall serve as an officer of any political party or political organization or as a member of any political party committee including political party district leader (however designated) or member of the national committee of a political party.[24]

No individual who serves in a policy-making position on other than a nonpaid or *per diem* basis, or who serves as one of the four statewide elected officials, shall hold any other public office or public employment for which more than nominal (usually $4,000 per year) compensation is received without, in each case, obtaining prior approval from the Ethics Commission.[25] Nor shall such an individual engage in any private employment, profession or business or other outside activity from which more than nominal compensation is received or anticipated without, in each case, obtaining prior approval from the Ethics Commission.[26] If such an individual receives or anticipates more than $1,000 but less than $4,000 annual compensation from an outside activity, the prior approval of a proper authority is required, usually from the head of the employing agency; the Ethics Commission reviews such applications from the four statewide elected officials and agency heads.[27] No such individual shall serve as a director or officer of a for-profit corporation or institution without, in each case, obtaining prior approval from the Ethics Commission.[28]

The boards, councils, commissions, public authorities and public benefit corporations whose officers, members or directors are subject to the financial disclosure requirements of POL § 73-a but are not subject to the requirements of POL § 73 by virtue of their uncompensated or *per diem* compensation status, shall adopt a code of ethical conduct covering conflicts of interest and business and professional activities, including outside activities, of such officers, members or directors both during and after their public service with such entities.[29]

Gifts

> *"We sincerely hope and expect that Government employees cannot be bought for a lunch."*
>
> ***- Donald E. Campbell***[30]

The New York statute provides that no state employee shall, directly or indirectly, solicit, accept or receive any gift having a value of $75 or more under circumstances in which it could reasonably be inferred that the gift was intended to influence the employee, or could reasonably be expected to influence him or her, in the performance of official duties or was intended as a reward for any official action by the employee.[31]

The Ethics Commission has interpreted the law applicable to gifts. A gift includes any thing of value in any form. Gifts are valued at fair market value, that is, retail cost of purchase. Reciprocity, either offered or actual, does not reduce the value of a gift; for example, an employee's promise to buy the second lunch, even if fulfilled, does not reduce the value of the first lunch provided by the donor. Gifts will be aggregated during any 12-month period, so the $75 threshold may not be evaded by splitting gifts.[32]

Gifts of $75 or more from any of certain sources are impermissible. Any of the following individuals or nongovernmental entities is a disqualified source.

1. One which is regulated by, or regularly negotiates with, appears before other than in a ministerial matter, does business with or has contracts with the state agency with which the state employee is affiliated.
2. One which lobbies or attempts to influence action or positions on legislation or rules, regulations or rate making before the state agency with which the state employee is affiliated.
3. One which is involved in litigation adverse to the state, with the state agency with which the state employee is affiliated, and no final order has been issued.
4. One which has received or applied for funds from the state agency with which the state employee is affiliated, including participation in a bid on a pending contract award, at any time during the previous year up to and including the date of the proposed or actual gift.
5. One which seeks to contract with a state agency other than the agency with which the state employee is affiliated when the employee's agency is to receive the benefits of the contract.[33]

The following gifts are permissible.

1. An invitation to attend occasional personal, family or private events or functions with no or a de minimus nexus to the state, where the state employee receives only that received by other invitees.
2. Any thing given by a person or entity with a family or personal relationship with the state employee when the circumstances make it clear that it is the personal relationship, rather than the recipi-

ent's state position, that is the primary motivating factor.

3. Unsolicited advertising or promotional material of little intrinsic value.
4. Presents which are modest, reasonable and customary, given on special occasions, such as marriage, illness or retirement.
5. Awards and plaques which are publicly presented in recognition of state service or non-job-related service to the community.
6. Meals received when a state employee serves as a participant or speaker in a job-related professional or educational program, and meals are made available to all participants.
7. Modest items of food and refreshments, offered other than as part of a meal.
8. An invitation to a statewide elected official or to a state agency head to attend a function or event in his or her official capacity sponsored by any person or organization.
9. Under certain circumstances, a state employee may receive or accept meals, entertainment or hospitality valued at $75 or more from a disqualified source; such a gift is permissible when the appearance, attendance, presence or participation of the state employee is for a state agency purpose and related to his or her official duties; however, under no circumstances may travel or lodging be included.[34]

Gifts, even those under $75, might violate the Code of Ethics applicable to state employees.[35]

Honoraria and Reimbursement for Travel Expenses

> *"It is a dangerous thing to accept gifts: for two days after come requests."*
>
> ***- Henry Cardinal Manning***[36]

The Ethics Commission regulates the receipt of honoraria and reimbursement for travel expenses.[37] An honorarium includes a payment to a state employee for services not related to the employee's official duties which is made as a gratuity, award or honor, for example, for delivering a speech, writing an article or attending a conference.[38] It also includes a payment made to or on behalf of a state employee for travel expenses incurred but not related to the employee's official duties.[39] Payment in lieu of an honorarium to a state general fund, rather than to a state employee, for services related to the employee's official duties is permissible and is regulated separately.[40] Reimbursement for travel expenses related to the employee's duties is also regulated separately.[41]

A state employee may not accept an honorarium for services rendered for or on behalf of a disqualified source. Nor may such an employee accept reimbursement for travel expenses from a disqualified source. A disqualified source is an individual who, or an organization, or any of its officers or board members, which:

1. Is regulated by, or regularly negotiates with, appears before other than in a ministerial matter, does business with or has contracts with, the employee or the state agency employing the state employee; or
2. Attempts to lobby or to influence action or positions on legislation or rules, regulations or rate-making before the employee or the state agency employing the state employee; or
3. Is involved in litigation adverse to the state, with the employee or the state agency employing the state employee, and no final order has been issued; or
4. Has received or applied for funds from the state agency employing the state employee at any time during the previous year up to and including the date of the proposed receipt of the honorarium.[42]

A state employee may accept an honorarium if all of the following conditions are met:

1. It is not to be received for services rendered for or on behalf of a disqualified source; and
2. The service for which it is offered is not part of the employee's state duties; and
3. State personnel, equipment and time will not be used to prepare for delivery of a speech or to render a service for which the honorarium is to be received; and
4. The state agency employing the state employee does not pay the travel expenses of the employee and the sole purpose of the travel was to perform the service for which the honorarium is offered; and
5. The service for which the honorarium is offered is not performed during the employee's state work day or, if during the work day, the employee charges accrued leave (other than sick leave) to perform the service.[43]

State employees may accept reimbursement for travel expenses related to the employee's official duties if all of the following conditions are met:

1. The employee files a prior written request; and
2. The travel is for a state agency purpose or the travel will increase the employee's knowledge which would benefit the agency; and

3. The proper authority approves reimbursement pursuant to the regulation; and
4. The expenses, if not reimbursed, could be paid by the agency according to its procedures; and
5. The reimbursement would be at a rate not greater than the agency would pay under its travel rules unless otherwise specifically approved by the proper authority; and
6. The reimbursement for food and lodging at the destination is provided for no longer than the employee is reasonably required to be there and is only for the employee; and
7. The reimbursement is not received from a non-governmental disqualified source.[44]

There are required procedures to seek approval of and report honoraria and reimbursement of travel expenditures.[45]

Certain academic employees of the State University and City University of New York are exempt from the limitations on the receipt of honoraria and reimbursement for travel expenses to the extent that the publication of books and articles, delivery of speeches or attending meetings or conferences are within the employee's academic discipline.[46]

Post-Employment Restrictions

"Nice work if you can get it, and you can get it if you try."

- Ira Gershwin[47]

There are two so-called "revolving door" restrictions on former state employees: the two year bar and the lifetime bar.

The two year bar provides that no person who has served as a state employee shall within two years after the end of such employment appear or practice before the state agency or receive compensation for any services rendered by such former employee in relation to any case, proceeding, application or other matter before such agency.[48]

The lifetime bar provides that no person who has served as a state employee shall after the end of such employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any services rendered by such former employee in relation to any case, proceeding, application or transaction with respect to which the former employee was directly concerned and in which he or she personally participated during the period of state employment, or which was under his or her active consideration.[49]

These revolving door restrictions do not apply to non-policy-making employees whose state employment was terminated from January 1995 to April 1999 because of economy, consolidation or abolition of functions, curtailment of activities or other reduction of the state work force.[50] Nor do they apply to persons carrying out duties as an elected official or employee of a federal, state or local government or one of its agencies.[51] Nor do they apply to certain former temporary state employees performing routine clerical, mail, data entry or other similarly ministerial tasks.[52] The restrictions do not apply to former state employees who render services, certified as required, to address a state agency's Y2K problem.[53] Finally, the revolving door restrictions do not apply to persons engaged in certain litigation activities, other than the provision of legal representation, provided that the Attorney General has certified that the services are rendered on behalf of the Attorney General's client and that the former employee has expertise, knowledge or experience which is unique or outstanding or which would otherwise be generally unavailable at comparable cost to the client.[54]

The Ethics Commission has devoted many opinions to revolving door issues, including:

- For the two year bar, what is the employee's former state agency, particularly where a large agency has quasi-independent constituent parts, where the employee was lent to another agency, or where there has been a reorganization?[55]
- For both bars, what is the meaning of "appear," "practice," "communicate" or "otherwise render services" before a state agency or in relation to a matter?[56]
- For both bars, what may the former employee's current law partners or other colleagues do which the former employee may not?[57]
- For the lifetime bar, what constitutes a single "case, proceeding, application or transaction?"[58]
- For the lifetime bar, what involvement in a matter makes it one with respect to which the employee "was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration"?[59]

Financial Disclosure

"Whatever one may think of the intrusiveness of financial disclosure laws, they are widespread . . . and reflect the not unreasonable judgment of many legislatures that disclosure will help reveal and deter corruption and conflicts of interest."

- Circuit Judge Wilfred Feinberg[60]

State employees designated by their appointing authority as policymakers (currently about 11,650 persons) and state employees receiving annual compensation in excess of the job rate of SG-24, currently $62,346, (about 4,750 additional persons) must file an annual statement of financial disclosure with the Ethics Commission, usually on May 15th of each year.[61] The statute provides the verbatim text of nineteen numbered questions which, with lettered subparts, amount to 27 questions in all.[62] The questions seek information about the employment, profession, income and assets of the filer and the filer's spouse and unemancipated children. In addition to information identifying the filer and the state employment, the questions require disclosure of the following items, among others.

1. Names of any spouse or children.
2. Certain positions, whether compensated or not, held by the filer, spouse or children in organizations, and the name of any state or local agency which regulates the organization, with which it does regular and significant business, or before which it has non-ministerial matters.
3. Employment, business or professional activities of the filer, spouse and children, and the name of any state or local agency which licenses or regulates the activity, with which there is regular and significant business, or before which there are non-ministerial matters.
4. Certain financial interests in government contracts, held by the filer, spouse or children or by partnerships or corporations controlled by any of them.
5. Positions held by the filer as an officer of any political party or political organization, as a member of any political party committee, or as a political party district leader.
6. Description of the filer's practice of law, licensed real estate brokerage or agency, or a profession licensed by the Department of Education.
7. Sources of certain gifts and sources of certain reimbursement for travel-related expenditures and for activities related to the filer's official duties.
8. Interests held by the filer in certain trusts, estates or other beneficial interests, including certain retirement plans and deferred compensation plans.
9. Terms of, and parties to, certain agreements between the filer and another concerning employment of the filer after leaving state employment.
10. Terms of, and parties to, certain agreements for continuation of payments or benefits to the filer from a prior employer.
11. Sources and amounts of income for the filer and spouse during the preceding taxable year and certain sources of deferred income for the filer following the close of the calendar year for which the report is filed.
12. Certain assignments of income.
13. Certain securities, interests in real property, notes or accounts receivable, and other investments held by the filer or spouse.
14. Certain liabilities of the filer or spouse.

Most of the information on statements of financial disclosure is available for public inspection. However, information about values or amounts shall remain confidential. Moreover, certain sensitive information, such as the identity of family members of public safety officials who may be subject to threats, may be deleted from the copies available for public inspection.[63]

State employees who have not been designated as policymakers, but who are otherwise required to file statements of financial disclosure by reason of receipt of compensation earned at a rate in excess of the SG-24 filing rate, may be exempted from such requirement. The Ethics Commission may in its discretion grant the exemption where the public interest does not require disclosure and the applicant's duties do not involve the negotiation, authorization or approval of:

(i) contracts, leases, franchises, revocable consents, concessions, variances, special permits or licenses;

(ii) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor;

(iii) the obtaining of grants of money or loans; or

(iv) the adoption or repeal of any rule or regulation having the force and effect of law.[64]

Conclusion

> *"Conscience is the inner voice that warns us that someone may be looking."*
>
> ***- H. L. Mencken***[65]

The Public Officers Law sets forth minimum standards of ethical conduct for state officers and employees. It does not prohibit higher standards. In fact, other standards in addition to those of the POL may be required, particularly for many licensed professionals, including lawyers. Of course, the Code of Professional Responsibility applies to state government lawyers. Particular government agencies may promulgate standards of conduct

supplementing for their employees the general standards applicable to all. Individual employees may choose to be bound by stricter codes of ethics arising from personal, moral or religious norms of their own. And some may be guided by yet a different rule of thumb: "Even if the ethics laws might permit this, would I do it if an investigative reporter knew about it?"

I hope to write future articles in this journal providing more details about the topics synopsized here and the application of the POL standards to specific examples.

The Ethics Commission cannot answer questions about standards other than those of the Public Officers Law. But it is eager to help the state's employees and former employees to answer questions about that law. Those seeking advice, either formal or informal, are welcome to contact the Commission.

Endnotes

1. See *Webster's Ninth New Collegiate Dictionary*, 426, 427 (Merriam-Webster, Inc., 1988).
2. Moliere, quoted in *Bartlett's Familiar Quotations*, 269:7 (16th ed., Little, Brown and Co. 1992).
3. N.Y. Pub. Off. § 73(1)(i).
4. Matthew, quoted in *Bartlett's*, op. cit., 33:17.
5. N.Y. Pub. Off. Law § 73(2).
6. N.Y. Pub. Off. Law § 73(3).
7. N.Y. Pub. Off. Law § 73(4).
8. N.Y. Pub. Off. Law § 73(5).
9. N.Y. Pub. Off. Law § 73(7).
10. N.Y. Pub. Off. Law § 73(10).
11. N.Y. Pub. Off. Law § 73(12).
12. N.Y. Pub. Off. Law § 74(2).
13. N.Y. Pub. Off. Law § 74(3)(a).
14. N.Y. Pub. Off. Law § 74(3)(b).
15. N.Y. Pub. Off. Law § 74(3)(c).
16. N.Y. Pub. Off. Law § 74(3)(d).
17. N.Y. Pub. Off. Law § 74(3)(e).
18. N.Y. Pub. Off. Law § 74(3)(f).
19. N.Y. Pub. Off. Law § 74(3)(g).
20. N.Y. Pub. Off. Law § 74(3)(h).
21. N.Y. Pub. Off. Law § 74(3)(i).
22. Japanese proverb, quoted by Edward F. Murphy in *The Crown Treasury of Relevant Quotations* 142 (Crown Publishers, 1978).
23. N.Y. Exec. Law § 94(16)(a).
24. 19 N.Y.C.R.R. § 932.2.
25. 19 N.Y.C.R.R. § 932.3(b).
26. 19 N.Y.C.R.R. § 932.3(c).
27. 19 N.Y.C.R.R. § 932.3(d).
28. 19 N.Y.C.R.R. § 932.3(e).
29. 19 N.Y.C.R.R. § 932.5.
30. Taken from "Memorandum issued October 23, 1987 from Donald E. Campbell, Acting Director to Designated Agency Ethics Officials, Inspectors General, General Counsels and Other Interested Persons Regarding Acceptance of Food and Refreshments by Executive Branch Employees" interpreting the federal regulations then in effect, 5 C.F.R. § 735. Those regulations have been updated and now appear at 5 C.F.R. § 2635. Quoted with approval in Advisory Opinion No. 94-16.
31. N.Y. Pub. Off. Law § 73(5).
32. Advisory Opinion No. 94-16.
33. Advisory Opinion No. 94-16.
34. Advisory Opinion No. 94-16.
35. N.Y. Pub. Off. Law § 74; Advisory Opinion No. 94-16.
36. Henry Cardinal Manning, *Pastime Papers*, quoted by Edward F. Murphy in *The Crown Treasury of Relevant Quotations*, 323 (Crown Publishers, 1978).
37. Executive Law § 94(16)(a) and 19 N.Y.C.R.R. pt. 930.
38. 19 N.Y.C.R.R. § 930.2(c)(1).
39. 19 N.Y.C.R.R. § 930.2(c)(2).
40. 19 N.Y.C.R.R. § 930.4.
41. 19 N.Y.C.R.R. § 930.6.
42. 19 N.Y.C.R.R. § 930.3(a)(1) and § 930.6(a)(7).
43. 19 N.Y.C.R.R. § 930.3.
44. 19 N.Y.C.R.R. § 930.6.
45. 19 N.Y.C.R.R. § 930.5 and § 930.6.
46. 19 N.Y.C.R.R. § 930.7.
47. Ira Gershwin lyric, quoted in *Bartlett's*, op. cit., 695:14.
48. N.Y. Pub. Off. Law § 73(8)(a)(i).
49. N.Y. Pub. Off. Law § 73(8)(a)(ii).
50. N.Y. Pub. Off. Law § 73(8)(b).
51. N.Y. Pub. Off. Law § 73(8)(e).
52. N.Y. Pub. Off. Law § 73(8)(f).
53. N.Y. Pub. Off. Law § 73(8)(g).
54. N.Y. Pub. Off. Law § 73(8-a).
55. See, e.g., Advisory Opinions Nos. 91-13, 93-11, 95-1, 95-2, 95-3, 95-20, 95-33, 95-42 and 96-7.
56. See, e.g., Advisory Opinions Nos. 89-7, 91-6, 91-17, 92-22, 94-2, 94-5, 94-6 and 95-28.
57. See, e.g., Advisory Opinion No. 90-18.
58. See, e.g., Advisory Opinions Nos. 90-19, 93-2, 94-9, 94-13, 94-14 and 95-32.
59. See, e.g., Advisory Opinion No. 90-16.
60. *See Slevin v. City of New York*, 712 F.2d 1554, 1560 (2d Cir. 1983).
61. N.Y. Pub. Off. Law § 73-a, 19 N.Y.C.R.R. pt. 936.
62. N.Y. Pub. Off. Law § 73-a(3).
63. N.Y. Exec. Law § 94(17); 19 N.Y.C.R.R. § 937.5.
64. N.Y. Exec. Law § 94(9)(k); 19 N.Y.C.R.R. pt. 935.
65. H. L. Mencken, quoted by Lawrence J. Peter in *Peter's Quotations, Ideas For Our Time* (William Morrow and Co. 1977).

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The Ethics in Government Act: The Early Years

By Joseph M. Bress

The New York State Ethics in Government Act, enacted into law in 1987, is one of the more important legacies of Governor Mario M. Cuomo. It was passed and signed into law after Governor Cuomo had advocated for several years for its passage, a gubernatorial veto because of the weaknesses in the originally passed bill, much media coverage and gubernatorial persistence.[1] The Act provides the citizens with the ability to hold its public officials and employees in the Executive Branch accountable to act with integrity in carrying our their responsibilities without conflicts of interest, real or apparent.[2]

The law was born out of scandals in New York City and in New York State and after the establishment of the "Feerick" Commission to investigate the quality of existing laws covering integrity in government and campaign financing.[3] For the first time in New York, a State Ethics Commission was created to interpret, implement and enforce the ethics law for employees in the Executive Branch of New York as well as in public authorities and the public university systems. The Commission may issue binding opinions on the application of the law, investigate complaints and fine individuals for violations as well as refer matters for criminal violation.[4] And, it also is responsible to collect and audit financial disclosure statements, which are available to the public to review for possible conflicts of public officials and employees between their private investments and earnings and their public responsibilities.

It is important that an ethics law of such scope and impact be implemented in a manner which not only reflects its intention and purpose, but also is sensitive to the effect that enforcement has on the public employee as well as on the public. The State Ethics Commission was vested with the responsibility to do that.[5] As with any new entity created by law, the initial actions will establish the credibility and acceptability of the law and the people who enforce it. The Commission understood this responsibility and set a tone with a balance of educating people to their ethical responsibilities, enforcing the law (with penalties if necessary) and seeking changes where the law may not have recognized the realities of everyday implementation or impact.

The Commission at its creation had to build its infrastructure from scratch—find office space, personnel, and equipment—in addition to its equilibrium. Although the law was enacted in 1987, the Commission and staff were not appointed until mid-1988, several months before the law was to take effect on January 1, 1989. The startup of the Commission involved no less the difficulties and concerns of any new business. While the intricacies of the law immediately had to be addressed, so were the questions of location, furniture, computers and office infrastructure of primary concern. As the Commission built its infrastructure, it also had to address some difficult questions of statutory construction right after its appointment and before the effective date of the law.

The immediate question with which the Commission had to wrestle was whether the public employees and officers who had left state employment before January 1, 1989 were covered by the two-year and lifetime revolving door provisions on and after that date.[6] This question clearly would be a test for the Commission's acceptability.

The new law was much more restrictive than the previous law (and most other laws in the country) and prohibited appearances for two years after termination of any former employees or officers before their former state agency or for a "lifetime" before any agency on a matter in which they were directly concerned and personally participated.[7] Some state employees determined that if they left employment between the enactment of the law in 1987 and the effective date of the law in 1989, the revolving door provisions of the new law would not cover them at all. Other individuals were considering leaving by December 31, 1988 to avoid the application of the law and now were depending on the Commission to affirm that view.[8] Therefore, this question had to be answered as soon as the Commission could.

From the start and for the Commission throughout the period I was associated with it, it looked at each question before it from several points of view: the clear letter of the law, the careful application of the facts to the law, the reasonableness of such an application, and common sense in the result. The Commission knew from the beginning its initial actions would set a tone and balance for its action. Compliance with the law depended on the confidence and trust both the public and covered employees had in the Commission's actions. There was no illusion, however, the first year of implementation would be a judicial test of the law and of the Commission's performance.

"Revolving Door"

In this instance of the application the new "revolving door" provision to individuals who left state agencies before the effective date of the law, the Commission reviewed the language in the bill which was passed and strictly constructed the language in the Ethics in Government Act. In this case, the Act was clear and reasonableness or common sense could not change the result.

The new ethics law "revolving door" provision applied to legislative employees only if they terminated employment with the state on or after January 1, 1989.[9] The law contained no similar provision for state officers and employees. The Commission determined that state officers and employees, therefore, were covered by the two-year and lifetime "revolving door" bar regardless of the date of their termination. The count was simple: if an individual left before January 1, 1989, the two years were counted from the date of such termination and the balance left after January 1 was covered by the two year bar.[10] The "lifetime" bar would apply to all former employees and officers, even though no such prohibition existed before January 1, 1989 and termination of appointment had occurred prior to that.[11] The Commission knew this first opinion with its impact on individuals who left before the effective date of the Act would be controversial and litigated.

Of course, litigation followed. The Commission's opinion was rejected by the New York Supreme Court, which led to headlines saying that "[the ruling] could leave a gaping hole in the state's new ethics law. . . ."[12] This was not an encouraging sign that we could expect immediate acceptability of the law. No ethics law can have a positive impact on its constituency without acceptability, whether based on legal decision or community compliance. The Appellate Division did reverse and the New York Court of Appeals affirmed.[13] The potential gaping hole was closed. The *Forti* decision provided the Commission with the credibility it needed for its actions, controversial as they might be at first blush.[14]

Coverage of Non-Paid or *Per Diem* Board/Council Members

Soon after its first advisory opinion, the Commission was faced with another knotty question as to whether the new § 73 of the Public Officers Law covered non-paid or *per diem* members of state boards or councils. The issue once again required interpretation of statutory language and its application to individuals serving in these positions. The issue presented the Commission with a conflict within the language of the law rather than a clear statute to apply. Section 73 prohibitions (including the "revolving door") would apply to non-paid or *per diem* members of a number of boards, councils and commissions if the Commission resolved the inherent conflict against these individuals.

State officer or employee was defined originally as:

(i) officers and employees of state departments, boards, bureaus, divisions, commissions, councils, or other state agencies;

(ii) members or directors of public authorities . . . public benefit corporations and commissions at least one of whom is appointed by the governor, who receive compensation other than on a *per diem* basis . . .[15]

While members of Commissions who were compensated on a *per diem* basis might not be covered by § 73, Board and Council members even if non-paid or paid on a *per diem* basis were. The Commission could not simply apply the clear letter of the law without an unreasonable result or one that did not appear to meet the common sense test. First, there was a clear conflict as to whether Commission members excluded from § 73 in subdivision (iv) were different than those under subdivision (iii) of § 73(1)(i). And, it was clear that non-paid or *per diem* Board and Council members would be covered by all the provisions of § 73.

The result of covering members of such entities (where in effect no compensation was received) would limit the service of public citizens who were called upon to contribute their knowledge and experience to the government. This could not have been an intended result and the counsel to the governor indicated in a letter to the Commission that there was a lack of clarity in the language of the statute and no desire to "place an undue burden on people volunteering their services."[16] What should the Commission do? Normally one would recommend that the legislature amend the law and fix the anomaly.

This was the second advisory opinion to be considered before the effective date of the new ethics provisions. If the Commission did not reach a decision before January 1, 1989 or it reached an unfavorable decision from these members view, a number of resignations were expected before January 1 from these state agencies.[17] Deferring merely to legislative action would have led to the anticipated resignations and ensuing confusion in the administration of the different boards and councils involved.

The Commission did look at the reasonableness of the law, the inherent conflict internally, the outcome which was both unanticipated by those involved in the law's passage and the unreasonable result of covering some unpaid or *per diem* members of certain entities and not others.[18] It found that it was not a justifiable result to treat the board and council members who were not regularly compensated differently than the directors and board members of public authorities, commissions

and public benefit corporations. The real question was how to resolve the anomaly when the legislature was not in session and would not be expected to act within a short period of time after January 1, 1989 to guarantee that the pending resignations would not occur.

This is when the ethics law had to be implemented with an understanding of its unreasonable impact, need for change and a compromise to assure that the Commission did not make law by its action. The result could be viewed as "splitting the baby" or, as some asserted, outside the authority of the Commission. Here some special wisdom had to be brought to bear to permit the process of government to continue without disruption and without compromise to the promise of integrity of government.

The Commission determined to suspend its enforcement of the law against the members of boards and councils who received *per diem* payments or no compensation until March 1, 1989. The suspension would continue until June 30, 1989 if these boards and councils adopted and filed a code of conduct with the Commission that was not less restrictive than the § 73 in effect before January 1, 1989, contained limitations for "revolving door" post-service appearances and provided a procedure for enforcement. The Commission also recommended that the governor and legislature clarify the law during the suspension and make it retroactive to January 1, 1989.

While the opinion may have raised some issues for the future for the affected boards and councils, no one determined to litigate the question.[19] The Commission took action to suspend its enforcement of the law concerning certain entities. Was the Commission empowered to implement such a suspension? Reason and common sense called for it. And, the ability of enforcement which the Commission could have otherwise done (even though the law was not clear) implies the ability to decide not to enforce in appropriate cases.

This opinion, in my judgment, demonstrated the understanding of the Commission that its responsibility was not simply to enforce the law without consideration of the consequences. That responsibility required judiciousness and intelligence as well—to assure that the ethics law was seen as fair and reasonable rather than strictly applied without thought of the consequences.

Financial Disclosure

The Commission was given the opportunity many times to set a tone in the application of the ethics law with a balance of enforcement and reasonableness. This time the question was raised as to the application of the financial disclosure requirements of the law to faculty at the State and City Universities of New York. One could say financial disclosure led to a potential clash between academic freedom and governmental exercise of authority.

When the Commission was first created, one of its duties was to collect and review financial disclosure statements required by law. The requirement to file was simple: if you earned more than $30,000, one had to file unless you were specifically exempted under statutory criteria set out in the law.[20] The salary threshold was too low and covered literally tens of thousands of employees. The Commission staff engaged in an intensive effort to review many thousands of requests for exemptions from filing financial disclosure statements.

As mentioned before, initial infrastructure is as important as original implementation of the law. While office space and office materials were still being created, boxes upon boxes of exemption requests were filed, annotated and reviewed as quickly as possible. The first financial disclosure filing deadline was May 15, 1989 and individuals wanted to know whether filing was required—and if it was, they were considering litigation (which followed in some cases).

The staff reviewed these thousands of requested exemptions, acted upon them, developed a specific computer database for all employees (required to file as well as not required to file) and completed its task with little time to spare. Over 22,000 individuals initially had to file financial disclosure statements.[21] The question of a filing waiver for faculty who earned over the threshold became a critical question for the public institutions of higher education in New York.

The argument of the State University and City University as well as the unions representing the faculty centered around the competitive disadvantage which the universities would face in trying to attract talent throughout the country from universities and colleges where no such requirement to file financial disclosure statements existed. The Commission looked at how other universities handled conflicts of interest for its faculty, which was the topic of a number of articles at that time.[22]

Most institutions of higher education did have policies governing faculty conflicts of interest, especially in the public sector. The real question faced by the Commission was the requirement of faculty to file the 12-page, 19-question form required of state employees and policymakers who exercised much different authority and influence.[23]

The Commission again looked at the best way to effectuate the law with a balance of assuring integrity in the business of government with credibility to the people covered by it. The Commission determined that faculty who earned over the threshold had to file some financial information, even though they were a unique category of public employee. The issue of conflict of

interest as to outside earnings and honoraria, particularly in the research and grant areas, was enough to convince the Commission to exercise some responsibility regarding the subject.[24] Much debate had been occurring generally in the academic world at that time about conflicts of interest of faculty, their research, entities paying grants for research and the people they employed to perform that research. The Commission deliberated on this issue while the academic community itself nationwide was asking how to protect against academic conflict of interest.

Again, the power to grant a waiver, from the Commission's perspective, permitted the granting of a partial waiver. And that is what it did. All faculty who earn over the salary threshold must file a simple statement, listing any outside employment and sources of outside lecture fees and honoraria. No amounts or category of amounts were required. For faculty who apply for research grants, additional information must be filed, including listing of directorships, etc., spouse's employment and a list of stocks owned by the faculty member and spouse. No amounts are required here either.[25]

Conclusion

Through its history, and to the present, the Commission accomplishes its task only if the constituencies to which it is responsible give its actions credibility, respect and compliance. To accomplish that the Commission must recognize the realities within which an ethics law operates and attempt to address them without compromising the law. And, if required, it must try to obtain a change in the law.[26]

The examples of its earliest opinions illustrate the balance and practicality the Commission from its inception has brought to the implementation of the new ethics law. The Commission has had before it disparate issues ranging from vaccine technology to mass transit "smart cards" to interests in racehorses to academic freedom. The same law has to accommodate these disparate areas. One can review the many opinions which exist now and see that the Commission has strictly construed the "revolving door" and other provisions where the language gave it no latitude. In other cases, it applied common sense and thoughtfulness to the application of a law which has a wide impact in areas unanticipated when passed. And, the law has been improved based on the Commission's determination to achieve change where change made most sense.

The basic thrust of the Commission has always been education as a first and necessary responsibility. The intent was for people to understand their obligations and be aware of how to incorporate them into their everyday working and private life. Enforcement and punitive measures existed, but they were not considered the primary tool to provide people with an understanding and appreciation of the law.

The purpose of law cannot be forgotten. Governor Cuomo summed this up succinctly:

> Our goal is to build the strongest possible relationship of trust and confidence between the people and government. Because special powers are wielded by those in government, because government should set an example, because government spends other people's money, and because history teaches the potential for abuse and favoritism, the public has a right to hold public officials to an especially high standard of ethical conduct.[27]

The public depends on the Commission to do that for it. I believe the Commission from its beginning has adhered to this goal as it applied a new ethics law with balance and judiciousness. I hope others agree.

Endnotes

1. Chapter 813 of the N.Y. Laws of 1987.
2. The Act provided for separate implementation and enforcement in the Legislative and Judicial branches of government. The author only discusses the Executive Branch implementation of the Act herein.
3. The Commission on Government Integrity was authorized by Executive Order, 88-1. The Commission's original funding was controversial in the legislature and was ultimately authorized as long as the members of the Commission were New York State residents. The Commission members appointed in 1987 included John D. Feerick, Chair, Richard D. Emery, Patricia M. Hynes, Judge Bernard S. Meyer, Bishop Emerson J. Moore, James L. Magavern and Cyrus R. Vance.
4. To this day debate continues as to the legislative mandate that the Commission refer matters to prosecutors before any criminal prosecution could begin rather than allowing prosecutors to act independently. While Governor Cuomo and the State Ethics Commission had supported amending the law to allow independent prosecution of criminal violations under the Ethics Law, the legislature did not then and to this day has not passed legislation to permit that.
5. The original Commission consisted of gubernatorial appointees: Elizabeth D. Moore, Chair, Joseph J. Buderwitz, Jr., Angelo Costanza, Norman Lamm (designated by the Comptroller), and Robert McKay (designated by the Attorney General). The author served as the first Executive Director and succeeded Elizabeth D. Moore as Chair when she was appointed Counsel to the Governor in 1991.
6. N.Y. Public Officers Law § 73(8) (hereinafter "POL").
7. Commonly referred to as the "revolving door" provision.
8. N.Y. Exec. Law § 94(15). The commission was empowered to issue binding opinions, which could be relied upon by the requesting individual and used in any defense in a criminal or civil proceeding.
9. The subdivision stated: ". . . provided, however, that . . . the provision of subdivision eight of section seventy-three ["revolving door"] . . . with respect to *legislative employees* shall apply only to

such employees who terminate their service or employment *after* January first, nineteen hundred eighty-nine . . . (emphasis added)(§ 26 of Chapter 813 of the Laws of 1987).

10. The complete rationale for the opinion in set forth in Advisory Opinion 88-1. Needless to say, the long-time phrase *expressio unius est exclusio alterius* applies here. ". . . (W)here a law expressly describes a particular act, thing or person to which it shall [or shall not] apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded. N.Y. Gen. Const. Law § 240.
11. The ramification of this was to prohibit former employees and public officers who had been legally working on matters in which they had been directly concerned and personally participated before January 1, 1989 from engaging in such work.
12. "*Core of Ethics Law Ruled Unconstitutional Unequal Restrictions Cited*," *Times Union*, February 9, 1989, A1.
13. *Forti v. New York State Ethics Commission*, 75 N.Y.2d 596 (1990).
14. As we at the Commission were told later, we "earned" the award as the agency with the most litigation initiated against it in its first year of operation.
15. POL § 73(1)(i) as it existed on January 1, 1989.
16. Advisory Opinion 88-2, p. 9.
17. Examples of the types of entities involved were: Boards of Trustees of State University of New York and City University of New York, State University College Councils and Boards of Visitors for the Office of Mental Health and Office of Mental Retardation and Developmental Disabilities. The Board of Regents of the University of the State of New York (the head of the Department of Education) were explicitly covered as the head of a state department, even though unpaid. The Board of Regents raised a different problem as indicated *supra*.
18. One of the elements in the Commission's determination included the fact that members or directors of public authorities (such as The Metropolitan Transit Authority, Dormitory Authority, Urban Development Authority and the Municipal Assistance Corporation of New York City) were specifically excluded from § 73 coverage, even though they had, in some cases, even more duties including the ability to borrow and invest money and provide the same if not greater impact on the public policy of the state as members of the affected boards and councils.
19. The law was amended retroactively in 1989 to exempt these board and council members from coverage of the prohibitions of § 73. The boards and councils did file appropriate codes of conduct with the Commission by March 1, 1989. The Commission had also indicated in a footnote that it did not believe that the Board of Regents should be treated differently than the other boards and councils merely because it was the head of a state department. The law was also amended to provide for that change.
20. POL § 73-a. The Commission could exempt employees who would otherwise have to file if they did not negotiate, authorize or approve of contracts, purchase or lease of real property, obtaining of grant money and adoption of a regulation, for example. N.Y. Exec. Law § 94(9)(k).
21. POL § 73-a(1) originally set the threshold at $30,000. In another example of the Commission attempting to make the ethics law more reasonable and applied with common sense, it requested the Legislature to raise that limit and have it float as salaries were increased. As of April 1, 1990, the new threshold became the job rate (or maximum) of SG-24 contained in § 130(1)(a) of the New York Civil Service Law. Presently, it is $62,346.
22. See Advisory Opinion, 90-15.
23. The financial disclosure form requires public revelation of stock holdings, outside income (including that of one's spouse), outside directorships, etc. The amounts of such items are to be indicated by category of amount. The category of amount is not publicly available and reviewable only by the Commission. The form word-for-word is set forth in law and cannot be varied in any way without an amendment of New York Public Officers Law § 73-a(3).
24. The question of conflict of interest existed side-by-side in the academic world with conflict of commitment of a faculty member. To protect the academic freedom of the faculty involved and to lessen the overall administration of the filings, each public university was given the responsibility to review the statement for conflicts, refer questions to the Commission and make them available to the public.
25. See Appendix C of Advisory Opinion, 90-15. These filing requirements are similar to question 13 of the statutory financial disclosure form for all faculty required to file and questions 4, 5 and 16 of that form.
26. The Commission has obtained changes in the law, e.g., the exemption of non-paid or *per diem* board and council members from coverage of the "revolving door," the "floating" salary threshold for those required to file financial disclosure statements, the exemption of certain technical employees from the application of the "revolving door" to perform such duties in a contract with their former agency, the exemption from the "revolving door" for former employees needed as witness by the Attorney General and exemption of laid off employees who are not policymakers from the "revolving door." In the case of some of these changes, special certifications are required. The law has not been amended as requested by the Commission in the area of allowing prosecutors independent authority to commence ethics law violation enforcement without a Commission referral or in the simplification of the financial disclosure form, which is complicated, written in prolix terms and too specific in some regards and not in others.
27. Governor Mario M. Cuomo, *New York's Ethics Reform: Restoring Trust in Government*, 62 Journal of State Government 176-79 (1989), reprinted in Essentials of Government Ethics 377 (Madsen and Shafitz, eds, Meridian, 1992).

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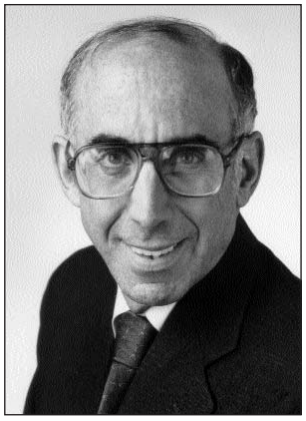
Reflections on Improving the Ethics Law

By Richard Rifkin



In the early 1980s, New York City had a popular mayor, Edward Koch, who, it seemed, could be elected forever. So it came as quite a shock to the populace when Donald Manes, the Borough President of Queens and a political friend and ally of the mayor, was found dead from a self-inflicted act.

The investigation that followed exposed a variety of sordid activities that constituted a major governmental scandal. These activities had been unknown to the City's citizens and were almost certainly unknown to Mayor Koch, an official whose integrity was never open to serious question.

The unfolding details revealed what became known as the "Parking Violations Bureau Scandal." They are far too complex and detailed to be recounted here. What is significant for our purposes was the response. Primarily, there was a loud cry to do something to clean up government. The newspapers were filled with editorials calling for action, including action on the part of the state legislature. A commission headed by Michael Sovern of Columbia Law School was appointed, and it submitted a set of rather comprehensive recommendations. One featured recommendation was a call for enactment by the state legislature of a new ethics law. When the Sovern Commission's recommendations were ignored, a second commission headed by John Freerick of Fordham Law School was appointed.

By 1987, the outcry for ethics legislation was sufficiently vocal that the Legislature could no longer ignore the matter. After passing a modest ethics law in midsession that was vetoed by then Governor Cuomo, the Legislature, shortly before the end of the 1987 session, passed the Ethics in Government Act. It was signed by the governor later that year. Thus, New York followed the experience of the federal government and many other states by enacting an ethics law following the revelation of a major government scandal.

The Ethics in Government Act became effective on January 1, 1989, which makes this year its tenth anniversary. Since anniversaries are a time not only of celebration, but also of reflection, it is appropriate that we look back to see what has been accomplished during the intervening years.

Fundamentally, the Ethics in Government Act provided for three different reforms. First, it created a modern code of conduct that would govern all state officers and employees except those in the judicial branch. The code covered more than 250,000 individuals, as it brought within its ambit all officers and employees in the legislative and executive branches of state government, as well as those who served in many of the state's public authorities and public benefit corporations. The act also established the first annual financial disclosure program for those officers and employees who were either policymakers or in the higher salary ranges. This was truly a new concept in New York. Finally, the act created a body known as the State Ethics Commission to interpret and enforce the new law, and to administer the newly created financial disclosure program.

With ten years of experience, we are now in a position to fairly judge what the legislature accomplished, as well as what it failed to accomplish, when it responded to the ethics outcry in 1987.

When we look at the code of conduct imposed on the state's officers and employees, it is easy to be critical. Many of the provisions are complex and difficult to understand. Some cover situations that hardly present problems, while many potential problems are not addressed. However, the fact that a better code could have been written should not ignore what was accomplished, that is, the writing of a code covering such important subjects a gifts offered to state officers and employees, outside activities in which they may engage and revolving door restrictions, limiting their ability to use to their advantage after they leave state service the knowledge and contacts they gained while serving in government.

That the detailed provisions covering these and other subjects are imperfect is hardly surprising. Ethics laws are difficult to write, and the atmosphere in which the 1987 law was written made the task much more difficult. It should be remembered that the statute was not drafted by ethics experts sitting around a table. Rather, it was written in a highly charged political environment, which does not make for the best draftsmanship. Nevertheless, despite its significant faults, the code of conduct has proved to be of real value. It gives state officers and employees a reference to which they can look to guide their conduct.

The second reform of the Ethics in Government Act was the establishment of a financial disclosure program for high level state officers and employees, as well as for members of the legislature. This provision, although

it was patterned after similar provisions governing high-level officials of the federal government and some other states, was controversial. No one likes to publicly reveal what is often considered private information about his or her life. Initially, there was significant upset on the part of many officials who were required to file. However, after ten years, it has become generally understood that disclosure is the obligation of those who serve in high-level government positions. No one will ever like having to file, but the level of upset has decreased significantly.

There remains an active debate among those who closely follow matters related to ethics as to the value of annual financial disclosure. A common question asked of the Ethics Commission is "how many violations have you caught from a review of the filed statements?" If catching wrongdoing is the purpose of these statements, they have, without question, been a dismal failure.

However, ethics is not a game of how many violations an enforcement body can catch. The Ethics in Government Act should be properly viewed as an effort to allow government employees to avoid ethical violations. Examined from this perspective, financial disclosure statements serve a more valuable purpose. Fundamentally, they serve as a reminder to those who must complete them; that is, they are an annual reminder that the filing employee is subject to the ethics laws. This is important because for all but a few state employees, ethics is not at the forefront of their mission. The disclosure statements may also remind employees of possible conflicts that they may have overlooked, as many individuals forget to connect their personal and professional lives.

In short, these statements serve to avoid inadvertent conflicts. With that limited purpose in mind, they have value.

The final piece of the Ethics on Government Act was the creation of the State Ethics Commission to interpret and enforce the law. I can hardly be objective about the performance of this Commission since I served as its executive director for almost five years. However, I can and will say that Governors Cuomo and Pataki, along with the state's recent Attorneys General and Comptrollers, have appointed truly outstanding commissioners, and their work has been at a level that reflects their considerable abilities. The current commissioners include two former clerks to Chief Justices of the United States Supreme Court, a former Solicitor General of New York State and Corporation Counsel of New York City and a retired Justice of the State Supreme Court who for ten years served on a committee advising judges in New York State on ethics. These commissioners follow others with similar credentials.

The Commission's major function is not, as is often perceived, to find violations, although the Commission does actively investigate complaints and, where violations are found, impose penalties. Its most important function by far, is to help officers and employees avoid violations by advising those who inquire. Advice may be by telephone, informal opinion or formal opinion. Formal opinions serve the additional function of establishing precedent, so that as situations recur, employees can be governed by the advice previously given by the Commission, thereby providing for consistency.

After ten years, the Commission has established a rather impressive body of opinions, and the scope of its precedents is being continuously enlarged. Of course, these opinions interpret the statute as enacted by the legislature, and to the extent that there are weaknesses in the statute, the Commission cannot completely overcome them.

Taking into account all of these considerations, it is fair to ask the question: where are we ten years after the Ethics in Government Act took effect? Unarguably, and most significantly, state officers and employees no longer need to guess when they are faced with an ethical decision. With a statute, a set of opinions and a Commission willing to give advice, there are now real answers to ethical questions. This is not an insignificant achievement although, even today, not every question can be easily resolved. For state officers and employees, this is a real benefit.

Clearly, the ethics laws can and should be improved. Some of the answers to inquiries submitted to the Commission are clear, but they make little sense. With ten years of experience, it is time to examine what seems like some irrational results and find the cause. Maybe it is in the statute or maybe some Commission opinions need rethinking. It would enhance respect for the law if steps were taken to reduce the number of occasions in which the results of its application were not so inconsistent with our notions of fairness. If the governor and the legislature, working with the Commission, were to undertake this task, it would add meaning to this anniversary year.

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Who Is the Client of the Government Lawyer?

By Jeffrey Rosenthal

The question for the government lawyer performing routine functions—providing research, litigation support, legislative or regulatory initiatives—is to whom responsibility and allegiance is owed. Unlike the lawyer engaged in private practice, whose client is typically clear, the government lawyer does not *necessarily* represent a single client and, as a result, the client of the government attorney is not so easily identified. Dilemmas concerning who the government lawyer is representing and potential conflicts of interest[1] will arise for the government attorney for which no parallels or comparisons with the private attorney can be drawn.[2] Emphasis is placed on the word "necessarily," since, as this discussion reveals, the government lawyer may arguably owe ethical responsibilities to a number of "clients," in the same or related matters, but the lawyer engaged in private practice generally owes his or her allegiance to a single client in a matter. The purpose of this article is, first, to identify a number of possible clients of the government lawyer and, second, based on ethical considerations applicable to all attorneys and common sense, determine who is the true client and to whom the concomitant responsibilities are owed.[3]

The Government Lawyer

The lawyer employed by a government agency[4] does not undertake his or her work with a specific client's interests in mind in the same sense as the private practitioner does. The government lawyer, generally speaking, is assigned, for example, to draft legislative initiatives, address regulatory issues, or provide litigation support or general legal advice for matters pertinent to the agency. The private attorney is employed by a law firm, which is retained by a client to represent his or her legal interests; the government attorney is employed by the agency, which has as its purpose the implementation of an enabling statute enacted by Congress or a state or local legislature. The government agency must implement the enabling statute in a way that fulfills the policy goals of the executive branch, for example, president, governor, mayor and so on, of which the agency is a part.[5]

An enabling statute such as the New York Environmental Conservation Law provides the general purposes for which the New York Department of Environmental Conservation (DEC) is established and the general policies to be implemented.[6] Generally speaking, the responsibility of the DEC, as set forth in statute enacted by the legislative body, is to promote the public health and welfare by the protection and most efficient and effective use of the state's natural resources. The DEC lawyer, in commencing his or her routine duties, begins to recognize that differing interests can be advocated and goals achieved in fulfilling the legislative mandate, depending upon who is deemed to be the client. Initially, the lawyer must discern what the general requirements in the various statutory provisions are. Specific implementation of those provisions must, however, be accomplished amidst various, often competing, interests. For example, environmental or health advocacy groups, businesses, industries, developers, local governments or municipalities, and neighborhood associations will undoubtedly have different views as to how the overall goals prescribed in statute are to be implemented. Individual legislators or legislative committees will maintain views as to how the statute is to be implemented. The agency head, counsel and staff members may have differing views or interpretations of the statutory mandates and the best means of implementing those requirements, and they may have differing views or interpretations amongst themselves. The chief elected official, the governor, also may have his or her own goals and policy considerations in implementing statutory requirements. Furthermore, judicial opinions may exist that interpret and otherwise give meaning to the statutory mandates. The underlying ethical considerations to preserve, advocate and advance the interests of the "client" remain constant. The specific interpretation given to the enabling statute, as well as the approach, direction and advice of the lawyer will depend on whose interests are to be preserved, advocated and advanced.

Identifying Potential "Clients" Hypothetically

It has been stated that the dilemma in identifying the client of the government lawyer rests in the very dynamics and tension amongst the three branches of government itself and the role that the lawyer plays within such framework.[7] One writer offers a hypothetical wherein the lawyer is assigned to work on a project for which the goal is antithetical to what the lawyer perceives to be in the pubic interest. Additionally, the project may violate a decision of the Supreme Court involving a case that concerned issues similar to those that the lawyer faces in the assignment, or it may not be authorized by the enabling statute enacted by Congress. The author advances two arguments to be made in articulat-

ing the role and responsibility of the government lawyer. First, he recognizes but rejects the argument that a government lawyer, as an advocate of a government agency, has a special responsibility to advance the "public interest." The article points out the impossibility of concluding that the government lawyer represents the public interest as "[i]t is commonplace that there are as many ideas of the "public interest" as there are people who think about the subject."[8] The article continues:

> If attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its own government. More fundamentally, the idea that government attorneys serve some higher purpose fails to place the attorney within a structure of democratic government. Although the public interest as a rarified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systematic empowers lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes."[9]

The public interest in this argument is cast in subjective terms of what the lawyer himself or herself has identified to be in the public interest, not what might be considered to be the public interest as established by one or more of the branches of government.

Addressing this latter notion of the public interest the author raises a second argument that the agency lawyer works for the government as a whole, a notion that "assumes that the public interest is determined through the constitutional processes of government."[10] In the hypothetical the dilemma is that, by undertaking efforts to implement the program, the lawyer may not be fulfilling his or her responsibility to the government as a whole since, to do so, might violate established judicial decisions or exceed statutory authorization. He concludes that the idea that the government lawyer represents the government as a whole "fails to situate the attorney within a system of separation of powers and checks and balances."[11] In making such a conclusion, however, the article does not examine how the processes of government within each of the branches may be viewed as determinative of the public interest.

The Public as the Client

In attempting to identify who is the client, it is helpful to explore some postulates that might be advanced that the public interest is determined by such branches of government, and in exercising professional judgment the lawyer's responsibility is to follow such public interest. An extreme argument might be made that, since the enabling statute has been enacted by the duly elected legislators, the "public interest" is expressed in the statute as the embodiment of universally held beliefs or goals. Therefore, the role of the lawyer is to interpret the statute and provide legal advice that best fulfills the public interest as expressed in such statute. However, such an approach ignores several things. First, an enabling statute does not reflect the views of every citizen, since legislation results not from a universally agreed-upon good or public interest, but from the personal ideals or agendas of the governor and legislators and their constituents, lobbying efforts of different interest groups, negotiation and compromise. Legislation is also driven, in large measure, by budget and political considerations. A legislator may support a proposed piece of legislation, not because he or she necessarily wants to advance the principles enunciated in such legislation, but rather because it serves his or her purpose of having a different, unrelated piece of legislation supported by another legislator. Further, a statute most often establishes only broad policies, not the specific details to implement those policies. While everyone can agree, for example, that having clean water or clean air are in the public interest, specific requirements and methods to achieve these goals may not be so easily agreed upon. The statute authorizes an agency within the executive branch of government to interpret and implement the policies that have been articulated only in general terms. Thus, a more logical interpretation is that the public interest as expressed in a statute, such as the New York Environmental Conservation Law, is the result of the legislative process, not the expression of universally agreed-upon environmental goals or desired outcomes.

Whether the public interest established through legislation is considered to be the embodiment of universal agreement or the result of the legislative process, to conclude that the lawyer is bound to represent such public interest would juxtapose the lawyer between this "public interest" client and the agency heads or supervisors by whom the lawyer was hired and to whom the lawyer is immediately responsible. Their interpretation of the "public interest" may differ from the meaning that the lawyer gives to the statute and, moreover, the views of the agency head, supervisors, or other policy makers of the agency also may conflict with one another. The view that the government lawyer is duty bound to advocate only such interest presupposes that the lawyer possesses the ability to interpret the statute consistently with and on behalf of such public interest on every occasion, and do so for every issue that may arise. This also assumes that the lawyer is ethically bound to advocate for what he or she perceives as the public interest, not only ignor-

ing the wishes or direction of supervisors or other agency superiors who have been appointed to determine policy issues, but also sacrificing the right of the client to be independently represented by agency counsel.[12]

It also might be argued that the lawyer is obliged to follow judicial interpretations and other legal precedent of an enabling statute. If a particular statute is the expression of public interest, then a court decision that interprets the meaning of such statute could be considered a further expression of public interest. Such an approach assumes that the court decision provides additional guidance regarding the meaning of the statute and, thus, additional guidance to the lawyer in advising the agency head or other agency policy makers about the agency's statutory obligation. However, this interpretation of the lawyer's responsibility is too simplistic and assumes, as in the case of determining a statute's meaning, that every lawyer will interpret court precedents the same.

Comparing the agency lawyer's role to that of the private lawyer further demonstrates the weakness of such an argument. Should the private lawyer be guided blindly by court decisions, the interests of the individual client would undoubtedly take a back seat to the "objective" interpretation of the court precedent. It would be unnecessary for the private lawyer to thoroughly scrutinize and distinguish case law from the facts and circumstances underlying his or her client's case. The lawyer's role would necessarily be relegated to reading relevant case law and advising the client what the outcome of his or her case would be. Although the lawyer should bring to bear his or her professional judgment what the probable outcome will be based on judicial precedent, the lawyer, nevertheless, is bound to proceed in accordance with the client's desires.[13] Otherwise, the ethical responsibility to advocate the client's case "zealously within the bounds of the law" would surely be a rather hollow obligation.[14]

Ethical Consideration 7-2 of the Code recognizes that statutes and court decisions are not definitive. "The limits and meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes."[15] Both legislative enactments and judicial opinions are only expressions of an ever-changing public interest. More often, court decisions turn on a particular set of facts, rather than larger fundamental principles. Just as the "public interest" cannot be said to be expressed absolutely in any statute, it cannot be concluded—for purposes of identifying the government lawyer's client—that court decisions provide definitive statements of what constitutes the public interest, never subject to different interpretation or legitimate challenge. The frailty in such an argument is also demonstrated by the fact that legislators often disagree with a court decision and pass or amend statutes to override a judicial decision. Furthermore, Ethical Consideration 7-22 of the Code recognizes that a lawyer has a responsibility to challenge judicial interpretations when appropriate for the proper representation of a client. "Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal."[16] If the government lawyer were to base his or her advice on some subjective sense of the public interest, as somehow expressed by the courts, the ethical obligation to challenge judicial opinions when necessary to advance the client's interests would be undermined.

Bearing in mind that the agency lawyer does not advocate the legislators' interests in formulating laws nor assist the court in deciding the issues surrounding those laws, neither the legislative nor judicial branch of government can be considered the "client" of the government agency lawyer. Therefore, to the extent that the so-called "public interest" has been articulated either by the legislators' enactment of a statute or the court's interpretation of that statute, such "public interest" cannot be said to be the government lawyer's client.

Identifying the client of the government lawyer remains difficult when examined in the context of the executive branch of government. Although there is a paucity of definitive statutory authority or case law that articulates who is the client of the government lawyer,[17] the application of general tenets and ethical considerations of a lawyer's responsibility to his or her client provides guidance about who the client is. It is first helpful to recognize certain facts surrounding the government lawyer's employment, as well as the dynamics in the operations of a government agency itself. Although an agency is part of the executive branch of government, day-to-day operations of the agency are not overseen or controlled by the governor; further, the agency lawyer is rarely hired directly by the chief executive, unless perhaps the lawyer is counsel to the governor.[18] More often, the lawyer is employed by a particular agency, one of many constituting the executive branch, which is charged with the responsibility of fulfilling the mandates of an enabling authorization. The enabling authorization may arise in a statute enacted by the state legislature, or by executive order of the governor. If the authority is provided in statute, the purposes may be set forth in provisions of the statute; if such authority emanates from an executive order, the preamble clauses or paragraphs will identify the purposes and goals for which the agency has been established.[19] The role of the lawyer is to advise agency personnel regarding how to properly implement such enabling authorization.

Even if it is recognized that the client is limited to the executive branch of government, the issue of advis-

ing the client remain complex. The considerations and the advice depend on whether the agency lawyer's client is the governor, that is, the chief officer of the executive branch, an individual or individuals within the agency that employs the lawyer, or the specific agency itself.

Arguably the governor is the ultimate client of the government agency lawyer. He or she, as the chief elected official, speaks for the government on behalf of all citizens and appoints the various heads of the executive branch agencies who, in turn, directly or through designees of the agency, hires the agency lawyer. Thus, all government employees owe their ultimate allegiance to the governor. For the government lawyer this would mean that the governor is the client to whom ethical responsibilities are owed. Such an argument, however, ignores several facts. Most government lawyers are hired by the separate agency head and undertake routine responsibilities relative to the particular agency, not the governor. Agency heads, usually appointed by the governor, are charged with implementing, consistent with the enabling legislation, the policy goals of the governor. In the example of the DEC, the agency undertakes the responsibility of implementing and enforcing the Environmental Conservation Law, mindful of the environmental policies or goals enunciated by the governor. The governor has his or her own legal staff from whom advice is sought. If every government lawyer's client is the chief elected officer there would be no need for each agency to have counsel separate from the governor's staff counsel. Giving advice on the proper implementation of a statute would be a simple task of ascertaining what the governor's desires or interpretation are and proceeding accordingly. This view, as in the previous examples regarding the legislative or judicial branches, would place the government lawyer in a position of having to maintain two loyalties—one to the governor and another to the agency head or other superior in the agency who hired the lawyer. Notwithstanding that the agency heads are usually appointed by the governor and thereby expected to have similar policy goals, there may be situations when the governor and a particular agency head do, in fact, have differing opinions respecting the manner of implementing or enforcing a particular statute. In such a case, if the government agency lawyer bears allegiance to the governor, the interests of the agency head—the lawyer's immediate supervisor—would be sacrificed.[20] Recognizing that a government lawyer does not represent the legislators or the courts, nor the governor, the task of identifying the client of the agency lawyer is narrowed.

However, questions remain as to whether the client is the "agency" as an entity itself or individuals within the agency. The examination must begin by understanding the general operations of a state agency. The overall agency policy goals will be articulated by the agency director, commissioner or similarly titled agency head.[21] A larger agency may have divisions or bureaus within the agency which are charged with the responsibility of implementing specific aspects of an enabling authorization and headed by their own bureau or division chief. Again, in the example of DEC, separate divisions are charged with implementing and enforcing air quality standards, water quality standards and the like. While the division or bureau chiefs may have a role in determining policy for the particular division or bureau, those policies must yield to the goals as determined for such division or bureau by the agency head, since he or she is ultimately responsible for the conduct of the agency. Since division or bureau chiefs are ultimately accountable to the agency head it would be unlikely that they would implement or enforce provisions of an enabling authorization in a manner antithetical to the desires of such agency head. If such a circumstance should arise, the agency lawyer should adhere to the wishes of the agency head, not the separate division or bureau chief.

Federal Ethical Consideration 5-1 of Canon 5 of the American Bar Association Code of Professional Responsibility as adopted by the Federal Bar Association in 1973 provides guidance that the government lawyer represents the agency by whom he or she is employed:

> The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency. He is required to exercise independent professional judgment which transcends his personal interests, giving consideration, however, to the reasoned views of others engaged with him in the conduct of the business of government.

The federal ethical consideration does not make clear whether the language "department or agency" is meant to identify the same governmental organization with different commonly used names or suggests a responsibility of the lawyer to a department—division or bureau—within an agency, when employed within such department. Practically speaking, both "department or agency" should mean the same larger governmental organization, for the reasons outlined above. However, if responsibility to a department within an agency is intended, the ethical consideration fails to address the issue, mentioned above, of the lawyer's obligation when there is a conflict between the department head and the agency head. And if this is the intended interpretation, the lawyer could be forced to advocate interests which would undermine the interests of the agency, as determined by the agency head. It is submitted that, in such a case, the lawyer has an obligation to express to the department chief his or her conclusion that the depart-

ment chief's desires are not consistent with those held by the agency head and discourage the department chief from proceeding in such manner. In the event that the department chief is insistent that the lawyer proceed, he or she must advise that the intended course of action must be disclosed to and discussed with the agency head. While such approach would undoubtedly be difficult or uncomfortable, the lawyer's obligation to the agency, through the agency head, must remain paramount.

Additionally, the federal ethical consideration, although instructive, may be of limited assistance, as it attempts to superimpose an obligation on , in fact the ability, of the government lawyer to exercise independent judgment while being ever keenly aware of the "public interest function" of the agency. To the extent that its guidance is to suggest that, for example, the United States Environmental Protection Agency's (EPA) public interest function is to implement environmental legislation—however it may be interpreted—then it provides direction that the agency lawyer's responsibility is limited to matters concerning the EPA, but not other agencies. If its meaning is to suggest a broader obligation to a universal "public interest" then, as previously discussed, its guidance is less helpful.

The Federal Bar Association has stated that the federal government lawyer's client "is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business."[22] Opinion 73-1 more clearly provides the proper approach for the government agency lawyer. It identifies the agency as the overall client and recognizes the fluidity of individuals who make up an agency and, therefore, the changing interests of the agency as established by such individuals. In recognizing that an agency can only speak through its administrators, that is, those authorized to make policy for the agency, this approach more closely approximates the role of the private lawyer who must advocate the interests of the individual who hires the lawyer to do so. When the private practitioner represents a client there is no infusion of some greater obligation to which the lawyer owes his or her allegiance. Opinion 73-1 does not attempt to impose such a responsibility. Although the federal ethical consideration and Opinion 73-1 are applicable to the federal government lawyer, parallels can be drawn for the government lawyer of a state agency.

At least one state has adopted ethical rules applicable to government lawyers.[23] The comments to the Hawaii Code recognize that the government lawyer faces issues in identifying his or her client, not encountered by the private lawyer: ". . . defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole." However laudable this effort to clarify the ethical obligation owed, the guidance may be of limited utility. First, the comment assumes that it is possible to articulate the interests of the agency entity independently of the individuals who make up the agency. Second, although the comment does remove the notion that the agency lawyer represents a "public interest" superior to any other consideration, it nevertheless clouds the ability to identify the client by casting the ethical responsibility owed in terms of an overall government good, as amorphous a concept as the public interest.[24] If, however, the "government as a whole" can be interpreted to place the lawyer's ethical obligation in the context of the tension between the branches of government, with the recognition that it is through this tension that the democratic process is best served, then the effort to characterize the lawyer's ethical responsibility is of some value.[25] That is, in advocating exclusively on behalf of the agency, with the recognition that the legislature will advocate for its own interests and the court system will independently exercise its role, the fundamental operation of the checks and balances in democratic government will be advanced.[26]

A government agency also has been likened to that of a corporation. Similar to the view that the corporate lawyer represents the corporate entity, but not the officers, directors or shareholders, one court has concluded that the government lawyer represents the agency by which he or she is employed and not the agency head or other employees.[27] The majority of case law concerning the issue of the corporate lawyer's client has generally been addressed to the issue of the attorney-client privilege pertaining to communications between the corporate lawyer and certain individuals within the corporation.[28] And the issue has arisen generally when an individual who has conferred with the corporate lawyer engages in conduct antithetical to the interests of the corporation. The question becomes whether the lawyer is bound to honor the attorney-client privilege of confidentiality of the information received from the client. It has been held that when the individual's conduct is at odds with the lawful corporate interests, the attorney-client relationship does not exist and the lawyer is not bound to maintain confidentiality; in fact, he or she is bound to disclose the information so as to preserve and protect the corporate interests. The conclusions concerning the representation of the corporate entity and not the individuals within the entity parallel the conclusion that the government lawyer represents the agency by whom he or she is employed, but not the individuals within the agency. Citing an opinion of the New York State Bar Association Committee on Professional Ethics, an article by Josephson and Pearce provides support to the conclusion that the agency by whom the government lawyer is employed is owed the ultimate ethical obligation, and not a larger concern such as the "government" or "public interest."[29] Although specifically concerned

with issues regarding governmental lawyer conflicts and questions of dual representation when conflicts arise between the individual clients, the article provides:

> When a governmental body is organized into a number of separate departments or agencies, such department or agency, and not the parent governmental unit, should be treated as the client for purposes of the rule which forbids the concurrent representation of one client against another.

While the private lawyer's ultimate ethical responsibility is to safeguard the interests of the corporate entity,[30] the private lawyer also can be representing individuals who comprise the corporation, when and as long as those interests are not in conflict with one another. The ABA Model Rules of Professional Conduct recognize this possible duality of representation.[31] The comment to Rule 1.13 makes its provisions applicable to the government lawyer. Such "duality" of representation is consistent with the discussion herein of the role that the government lawyer fulfills in advocating the interests of the agency, as spoken for through its agency head and other agency policy makers.

The conclusion to be drawn is that the government lawyer is ethically bound to represent the agency by whom he or she is employed, recognizing that the agency speaks through—and its specific interests are formulated by—the individuals within the agency who are authorized to do so.

Particular policies or goals in the implementation of the agency's enabling authority will necessarily be the expression of and articulated by these individuals. As long as the expressions, acts, or desires are not clearly unlawful, the government lawyer has the obligation, both ethically and practically, to advance those interests. Similar to the role of the private lawyer, the government lawyer may not second-guess the feasibility or viability of advancing arguments in support of those interests to the ultimate detriment of arguing in favor of them, nor should the government lawyer substitute his or her personal judgment whether such interest should be advanced.[32] The government lawyer must exercise professional judgement in pointing out the strengths and weaknesses in pursuing the agency head's desired course of action. However, as in the case of the private lawyer, the government lawyer is ethically bound to pursue the course chosen by the agency head. However, the government lawyer must carefully scrutinize the position or argument to be advanced and discern by whom such position or argument is being proffered. The lawyer must not advance a position being articulated by an agency staff member who is not in the role of making policy or setting agency goals, unless it is evident that the position or argument is consistent with and will advance the interests of the agency as articulated by those in the position of making policy or defining agency goals. Further, the government lawyer still must be mindful that he or she, as a public servant, is faced with obligations that the private lawyer is not. The government lawyer carries the obligation to fulfill his or her responsibilities to the agency in a manner which is not clearly inconsistent with lawful requirements. Federal Bar Association Ethics Opinion 73-1 provides:

> [T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest . . . . [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the government organization of which he is a part.[33]

In this context, the responsibility to the public interest is parallel to the ethical responsibility of a public prosecutor, not simply to seek a conviction, but rather to see that justice is served.[34] Similarly, such responsibility mirrors the obligation of all lawyers to strive to maintain the integrity of the legal profession and improve the legal system.[35] Additionally, with the conclusion that the government lawyer represents the agency by which he or she is employed, the arguments that the lawyer is bound to advance the public interest or the government as a whole also can more reasonably be understood. The public interest is that which results from separation of powers amongst the legislature, the courts and the executive branch. The government lawyer promotes the public interest when he or she advocates the agency client's interests; by doing so, the proper functioning of the government as a whole is fulfilled.

Conclusion

In the last analysis, the Code of Professional Responsibility governs the conduct of all lawyers in New York, without distinction concerning the particular field or discipline in which the lawyer practices. The cornerstone of the legal profession is the ethical responsibility owed to clients and the profession itself. The Code prescribes the minimum ethical standards by which all lawyers must abide. While some of the ethical

considerations or disciplinary rules to the canons may not be operational in the government context, this is due to the nature of government lawyer employment, rather than an exception to their facial application. To the extent the lawyer's activities are within the scope of a specific ethical consideration or disciplinary rule, they govern such activities. No single commentary, however, can provide answers to every ethical situation faced by the government lawyer, (or for that matter, any lawyer) and none is intended. Rather, the government lawyer must resolve difficult ethical dilemmas by examining the Code of Professional Responsibility, utilizing professional skills and experience, and applying common sense to the issues presented. The agency lawyer has no independent responsibility to the public interest or the government as a whole. Those interests are served when the lawyer, adhering to ethical requirements, advocates for the agency, just as any other lawyer advocates for his or her client.

Endnotes

1. This chapter discusses issues regarding the identification of the government attorney's client itself and not issues pertaining to conflicts of interest that can arise for government lawyers who may potentially have to advocate conflicting interests of different government clients at the same time. For a discussion of such topic see, for example, William Josephson and Russell Pearce, To *Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 How. L. J. 539 (1986).
2. See, e.g., Catherine J., Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. Cal L. Rev. 951-967 (1991).
3. This article does not address identification of the government lawyer based on issues of confidentiality. That topic is the subject of another article in this issue.
4. The term "agency" will be used throughout to mean any governmental agency, unit, authority, department, bureau, division or other body of the executive branch of the state, federal or local municipal government.
5. This chapter specifically addresses the role of a government attorney employed by an agency within the executive branch of government; parallels to attorneys employed within the judicial or legislative branches of government are indicated where appropriate.
6. N. Y. Envtl. Conserv. Law §§ 1-0101, 3-0101 (McKinney's 1984).
7. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293 (1987).
8. See *id*. at 1294, 1295.
9. *Id*. at 1295.
10. *Id*.
11. *Id*. at 1296.
12. A.B.A. Code of Professional Responsibility, Canon 1, EC 1-1(1969) as adopted by N.Y. State Bar Association, 1/1/1970 (hereinafter referred to as the "Code," "Canon" or "Ethical Consideration," respectively).
13. Code, Canon 7, Ethical Consideration 7-5.
14. Code, Canon 7.
15. Code, Canon 7, Ethical Consideration 7-2.
16. Code, Canon 7, Ethical Consideration 7-22.
17. *See, e.g.*, Hi. Prof. Cond. Rule 1.13 *et. seq.* (1996), (hereinafter referred to as the "Hawaii Code") discussed below, which attempts to identify the government lawyer's client and define the ethical responsibility owed.
18. This discussion assumes that the lawyer is employed by an agency within the executive branch of government, but not the executive chamber itself. However, the conclusions drawn herein are equally applicable to government lawyers employed within the executive chamber, in which case the governor should be considered the "agency head."
19. *See, e.g. supra* note 3; N.Y. Exec. Order No. 20, Governor George E. Pataki, 9 N.Y.C.R.R. § 5.20, November 30, 1995, establishing the Governor's Office of Regulatory Reform which has as its purpose, among other things, the "careful examination [of proposed regulations] to assure that they faithfully execute the laws of the State without unduly burdening the State's economy and imposing needless costs and requirements on the businesses, local governments and citizens of this State."
20. Code, Canon 1, Ethical Consideration 1-1.
21. Hereinafter, for convenience, director, commissioner or other agency head shall be referred to singularly to mean the senior most individual within a state agency.
22. Federal Bar Association Professional Ethics Committee; The Honorable Charles Fahy, Chairman. The Government Client and Confidentiality: Opinion 73-1, 32 F.B.A.J. 71 (1973) (hereinafter referred to as "Opinion 73-1").
23. Hawaii Code. Notes and Comment: Government Agency [7],
24. See Miller, *supra* note 7 at 1296.
25. *See Id.*
26. *Id.*
27. *See, e.g. Dooley v. Boyle*, 140 Misc. 2d 177, 531 N.Y.S.2d 161 (N.Y. Supreme Court, 1988); *Cf. United States v. American Tel. & Tel. Co.* 86 F.R.D. 603 (D.D.C. 1979); Lori A. Barsdate, *Lawyer-Client Privilege for the Government Entity*, 97 Yale L. J. 1725 (1988); *see* Josephson and Pearce, *supra* note 1.
28. *See e.g. Upjohn Co. v. United States*, 449 U.S. 383 (1981).
29. *See* Josephson and Pearce, *supra* note 1 at 121., (*citing* N.Y. State Bar Ass'n. Comm. On Professional Ethics, Op. 501 (1979)); *But see*, Miller, *supra* note 7 at 1298, (to the contrary that the government agency lawyer does owe ethical responsibility to the executive branch as a whole).
30. Code, Canon 5, Ethical Canon 5-18 (1986); *See also* Barsdate, *supra* note 27 at 1731.
31. Model Rules of Professional Conduct, Rule 1.13(a), (e) (1983); *see also, E.F. Hutton v. Brown*, 305 F. Supp. 371, 388 (S.D.Tx. 1969).
32. Code, Canon 5, Ethical Consideration 5-1.
33. Barsdate, *supra* note 27 at 1731, (*citing* Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1).
34. Code, Canon 7, Ethical Consideration 7-13, as adopted by N.Y. State Bar Association, 1/1/1970.
35. Code, Preamble and Preliminary Statement.

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Government Lawyer Confidentiality After *Lindsey*

By Paul L. Shechtman with Nathaniel Z. Marmur

Paul L. Shechtman

In *In re Lindsey*, the United States Court of Appeals for the District of Columbia Circuit held that "[w]hen government-attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury."[1] *Lindsey* focused on the unique role of government counsel, and it raises nettlesome ethical issues. It is therefore an especially appropriate subject for the inaugural issue of this journal.

On January 30, 1998, a grand jury investigating "whether Monica Lewinsky or others suborned perjury, obstructed justice, or otherwise violated federal law" issued a subpoena to Bruce Lindsey, Deputy White House Counsel and Assistant to the President. Lindsey appeared before the grand jury but declined to answer certain questions on grounds of government attorney-client privilege, as well as executive privilege. The Independent Counsel then moved to compel his testimony, and a federal district court granted the motion, rejecting the privilege claims. The Office of the President and the president in his personal capacity appealed the District Court's ruling.[2] In the Court of Appeals, the Office of the President and the President chose not to raise the executive privilege claim and, as a result, the court addressed only the issue of whether Lindsey could invoke an attorney-client privilege to decline to answer the grand jury's questions.

The Court of Appeals majority recognized that a government attorney-client privilege exists, but concluded that the Office of the President was not entitled to assert it in the context of a federal grand jury investigation. It wrote:

> With respect to the investigation of federal criminal offenses . . . government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. . . . Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.

In support of its position, the majority cited 28 U.S.C. § 535(b), which provides that "any information . . . received in a department or agency of the executive branch of the Government relating to violations of [federal law] shall be expeditiously reported to the Attorney General." And it noted that former White House counsel had opined that government lawyers cannot withhold evidence of crimes committed by government officials. For example, in a lecture to the Bar Association of the City of New York, Lloyd Cutler, who served as White House counsel in the Carter and Clinton administrations, emphasized that "[w]hen you hear . . . about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'"[3]

The majority recognized that its decision might chill some communications between government officials and government lawyers, but concluded that government officials "who seek completely confidential communications with attorneys could consult private counsel." It also noted that under *United States v. Nixon*, other senior staff who give the president advice of vital importance to the nation's security do not have an absolute privilege for their communications.[4] The majority suggested that "[o]nly a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy or politics, or why a President's conversation with the most junior lawyer in the White House is deserving of more protection from disclosure in a grand jury investigation than a president's discussions with his Vice President or a cabinet secretary."

Significantly, *Lindsey* imposes a broad "obligation not to withhold relevant information acquired as a government attorney." It is not limited to disclosure of direct evidence of criminal wrongdoing. Nor does it require the prosecutor to make a showing of need for the communication and unavailability from other sources.[5] Since some exploration or fishing is inherent in any grand jury investigation, *Lindsey* seems to call on a government attorney to answer all of a federal grand jury's questions, unless he or she can interpose some other privilege claim (e.g., the qualified executive privilege, which the President abandoned in *Lindsey*).

In his *Lindsey* dissent, Judge Tatel chided the majority for creating a rule that may force future presidents to "shift their trust on all but the most routine legal matters from White House counsel . . . to private counsel." He noted that there was no claim that the president had consulted with White House counsel to further criminal activity, in which event the crime-fraud exception would abrogate the privilege. And he emphasized that to the extent communications between Lindsey and the president involved political and policy discussions, and not legal advice, the privilege would not apply. For Judge Tatel, the majority's approach—that the government attorney-client privilege dissolves in the face of a grand jury subpoena—underestimated the important role of the privilege.

The Office of the President petitioned the Supreme Court to review the Court of Appeals' decision. The Supreme Court denied the writ, however, with Justices Breyer and Ginsburg dissenting. In their brief opinion, they lamented the High Court's unwillingness to "establish controlling legal principle in this dispositive matter of law, of importance to our Nation's governance."[6]

Perhaps the most interesting commentary on *Lindsey* is an article in the Minnesota Law Review by Professor Michael Paulsen.[7] Professor Paulsen asks who "owns" the government attorney-client privilege and finds an answer in the case law regarding the corporate attorney-client privilege. He notes that under federal law, communications by corporate employees concerning matters within the scope of their duties that are made to enable counsel to provide legal advice to the corporation are privileged, but the power to waive the privilege rests with the corporation's current management.[8] Moreover, a well-recognized exception to the corporate attorney-client privilege is the "fiduciary exception" articulated in the Fifth Circuit case of *Garner v. Wolfinbarger*, a shareholders' derivative action.[9] *Garner* holds that corporate management has no absolute privilege to shield confidential communications from shareholders when shareholders have established "good cause" for access to the communications. The doctrine is premised on the principle that "management does not manage for itself, it manages for the shareholders [and] thus it seems anomalous to deny the shareholders access to communications presumptively made on their behalf."[10]

According to Professor Paulsen, *Garner* holds the key to deciding *Lindsey*. He argues (i) that communications from President Clinton, as "CEO of USA, Inc." to legal counsel are covered by the government equivalent of the corporate attorney-client privilege; (ii) that as CEO, President Clinton "owns" the attorney-client privilege, which is absolute where it applies; (iii) that an Independent Counsel investigation (in which the Attorney General has certified to a special judicial tribunal that there are grounds to believe an investigation of high executive branch officials is warranted) is analogous to a derivative suit in which there is good cause to conclude that current management may have violated its fiduciary obligations and (iv) that therefore, as in *Garner*, "current management of the United States" may not assert the government attorney-client privilege against a subpoena issued by an Independent Counsel acting within the scope of his jurisdiction.

The Court of Appeals alluded to the *Garner* doctrine in *Lindsey* but did not press the analogy. Had it done so, its holding would have been far less sweeping. Instead of concluding that a government lawyer may never invoke an attorney-client privilege to withhold information from a federal grand jury, the court would have limited its opinion to federal lawyers and to grand juries impaneled in connection with Independent Counsel investigations. So limited, Lindsey would have been interred this past June when the Independent Counsel statute was not extended.

What makes *Lindsey* so troubling is its willingness to limit the attorney-client privilege depending on the nature of the proceeding. Notably, at virtually the same time that the Court of Appeals was deciding *Lindsey*, the Supreme Court was writing in another Independent Counsel case (involving whether the privilege survives the client's death when the communications are being sought in a criminal investigation) that "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases."[11] As the Supreme Court noted, a client may not know when he discloses information to his attorney whether it will later be relevant to a civil or criminal matter. A criminal/civil distinction therefore introduces substantial uncertainty into the privilege's application, and an uncertain privilege "is little better than no privilege at all."[12]

For a government lawyer, a criminal/civil distinction is especially problematic. The government attorney-client privilege promotes the public interest by encouraging candid client communications, thereby enabling government counsel to ensure that her agency is complying with the law. A doctrine that holds communications privileged in civil suits but not in criminal investigations may well chill agency employees from speaking candidly to counsel.

A hypothetical is instructive. Assume a senior state employee seeks to speak with agency counsel about a recent grant application that he has made on behalf of the agency for federal funds. The employee is concerned that he may have misstated information on the application, albeit unintentionally, and seeks advice on how best to proceed. Under *Lindsey*, the conversation is not privileged if the attorney is subsequently subpoe-

naed to a federal grand jury investigating a potential false statement crime (unless *Lindsey* is limited to communications with federal government counsel). If *Lindsey* applies, counsel may be ethically obligated to advise the employee that their conversation is less protected than the employee might otherwise believe. Good communication and good government may suffer as a result.

In New York, by executive order, all state employees are obligated to "report promptly to the State Inspector General any information concerning corruption, fraud, [or] criminal activity. . . ."[13] That Executive Order is similar in its effect to the disclosure rule embodied in 28 U.S.C. § 535(b), which the court considered in *Lindsey*. But the duty to disclose wrongdoing to the Inspector General (even assuming it applies to government counsel) should not abrogate the government attorney-client privilege if the attorney is subpoenaed to a grand jury as in the hypothetical case. As the hypothetical demonstrates, much that is confided to a government lawyer may be relevant to a future grand jury investigation but is not direct proof of employee wrongdoing.

Moreover, the State Executive Order and 28 U.S.C. § 535(b) mandate intra-executive branch disclosure and not disclosure outside the executive branch. By analogy, a corporation attorney who learns that a corporate officer or employee has violated a duty to the organization or a law that might reasonably be imputed to the organization may "refer . . . the matter to [a] higher authority in the organization" consistent with her own ethical obligations.[14] That rule, however, does not contemplate disclosure outside the organization and, most assuredly, does not mean that the corporate attorney-client privilege gives way in the face of a grand jury subpoena.[15]

Of course, the government attorney-client privilege does not belong to the employee. Here, too, the analogy between a government agency and a corporation is apt: the government attorney-client privilege belongs to the agency (or to the executive branch), and the agency's head (or the governor) may waive it regardless of the employee's desire for confidentiality.[16] As a result, when a government employee is poised to confide information concerning possible criminal wrongdoing to an agency attorney, the attorney has an ethical obligation to inform the employee that the privilege is not his.[17]

What also makes *Lindsey* troubling is its suggestion that the government lawyer represents the public interest and has an "obligation to uphold the public trust" so that her loyalties "cannot and must not lie solely with . . . her agency." As commentators have noted, this conception of the role of the government lawyer is potentially a dangerous one. A Special Committee of the District of Columbia Bar on the ethical responsibilities of government lawyers put the point especially well:

> If the lawyer is to function effectively as counselor and advisor to elected or appointed officials, those officials must not view the lawyer as some independent actor, liable at any time to arrive at some individualistic perception of the public interest and [to] act accordingly. The government client, to be encouraged to use lawyers, must believe that the lawyer will represent the legitimate interests the government client seeks to advance, and not be influenced by some unique and personal vision of the public interests.[18]

A government lawyer who sees his client as the "public" is not a lawyer in whom a government official can repose complete trust.[19]

As a decision of the Court of Appeals for the District of Columbia Circuit, *Lindsey* is not the law of the land. Moreover, the Independent Counsel's willingness to seek to abrogate the government attorney-client privilege is not shared by most prosecutors. Indeed the Department of Justice filed an amicus curiae brief in the Supreme Court arguing that the government attorney-client privilege applies in criminal proceedings—that "where a government attorney-client communication satisfies the ordinary prerequisites of the privilege, the communication is privileged from disclosure to outsiders to the same extent—and for the same reasons—as a corporate attorney-client communication would be."[20] Nor does it appear that state prosecutors in New York have taken the position that the government attorney-client privilege may not be invoked in a criminal investigation.[21] Should they ever do so, one hopes that courts will recognize that *Lindsey* warrants reexamination.

Endnotes

1. *In re Lindsey*, 158 F.3d 1263, 1279 (D.C. Cir) (per curiam), *cert. denied*, 119 S. t. 466 (1998). The government attorney-client privilege was also considered in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.) (rejecting attorney-client privilege claim as to notes taken by the White House attorneys of meetings with Mrs. Clinton concerning disappearance of Rose Law Firm billing records and her actions following Vince Foster's suicide), *cert. denied*, 521 U.S. 1105 (1997).
2. The Independent Counsel asked the Supreme Court to take the extraordinary step of granting certiorari directly from the district court's order. The Supreme Court denied the writ but indicated its expectation that "the Court of Appeals will proceed expeditiously to decide this case." *United States v. Clinton*, 118 S. Ct 2079 (1998).
3. 35 Record of the Ass'n of the Bar of the City of New York No. 8, at 470, 472 (1980).

4. *United States v. Nixon*, 418 U.S. 683 (1974).

5. The district court has required such a showing in its opinion. *In re Grand Jury Proceedings* 5 F. Supp.2d 21 (D.D.C. 1998).

6. *Office of President v. Office of Independent Counsel*, 119 S. Ct. 466 (1998) (Breyer, J., dissenting from denial of certiorari).

7. Paulsen, *Who "Owns" the Government's Attorney Client Privilege?*, 83 Minn. L. Rev. 473 (1998).

8. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985). New York law on the corporate attorney-client privilege appears to track federal law, although the issue of whose communications within the corporate hierarchy fall within the privilege is unresolved. *See* Alexander, Practice Commentary to CPLR § 4503.

9. 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). New York also recognizes a fiduciary exception in shareholder derivative actions. *Beard v. Ames*, 96 A.D.2d 119, 468 N.Y.S.2d 253 (4th Dept. 1983).

10. 2 Saltzberg, Martin & Capra, Federal Rules of Evidence Manual at 724 (7th Ed. 1998).

11. *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2087 (1998).

12. *Upjohn*, 449 U.S. at 393. The problematic nature of a civil/criminal distinction is discussed in Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 Harv. L. Rev. 1995 (1999).

13. Executive Order No. 39, June 17, 1996.

14. Model Rules of Professional Conduct 1.13(b)(3).

15. *See* Gillers, Model Rule 1.13c, *Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 Geo. J. Legal Ethics 269 (argued that in extraordinary circumstances, extra corporate disclosure should be permitted).

16. *See* Restatement (Third) of the Law Governing Lawyers § 124 cmnt. b (Proposed Final Draft No. 1, 1996) (indicating that government attorney-client privilege belongs to the agency); *Department of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (same); D.C. Rules of Professional Conduct (1990) 1.6i "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation or order"). Professor Paulsen has argued that the privilege is held by the executive branch and not the agency. 83 Minn. L. Rev. at n. 44.

17. *See* New York Code of Professional Responsibility DR 5-109: a lawyer employed or retained by an organization must explain to employees that he or she is a lawyer for the organization and not for any of the constituents when "it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing."

18. Report by the District of Columbia Special Bar Committee of Government Lawyers and the Model Rules of Professional Conduct, reprinted in the Washington Lawyer, Sep.-Oct. 1998, at 10.

19. *See generally*, Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal Ethics 291 (1991).

20. Brief *amicus curiae* for the United States. Acting through the Attorney General supporting certiorari. *Office of President v. Office of Independent Counsel*, 119 S. Ct. 466 (1998).

21. Although there are New York cases recognizing the government attorney-client privilege in civil cases, there seems to be no authority in the criminal context.

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A Law Clerk/Author Responds: A Critique of Court Secrecy

By Edward P. Lazarus

When my book *Closed Chambers*[1] was published in the spring of 1997, it was greeted by a firestorm of criticism from former Supreme Court clerks and other Court acolytes who claimed, often without having read the book or considered its mainly public sources, that, as a former clerk to Justice Harry Blackmun, I had breached both formal and informal duties of confidentiality to the Court. These charges are entirely false, but it is not my intention here to debunk the often near-hysterical charges hurled in my direction. Instead, I thought it might be refreshing to consider, albeit briefly and informally, three issues often ignored in the heated debate over my work: first, whether there are good reasons for trying to penetrate the veil of secrecy that the Supreme Court has thrown over its internal decisional processes; second, whether there are compelling justifications for the Court's demand for such secrecy and, third, to what extent, in practice, former law clerks protect the Court's secrets and what light does actual practice shed on issues one and two.

It seems to me almost self-evident, that the idea of opening up, explaining, analyzing and critiquing the internal decisional processes of the Supreme Court, both generally and with respect to specific cases, is supported by a powerful rationale based in the very nature of our republican form of government. We allow nine unelected, life-tenured judges the authority to decide many of our most important legal and social questions because we believe that they engage in a reasoned and deliberative process of decision-making that differs substantially from the tradeoffs of everyday politics in the other branches of government. That is the Court's raison d'etre. It thus seems to me impossible to assess the legitimacy and quality of the Court's functioning without discussing critically the Court's internal decision-making as well as the opinions that the Justices produce.

Speaking in extremes, what if the Justices are flipping coins to decide cases or letting law clerks do all the work, including voting on cases? Should the public know such things and wouldn't such activity call the Court's legitimacy into question? And by the same token, if the Justices are struggling conscientiously with the terribly difficult cases that come before them, shouldn't the public know that as well and wouldn't that knowledge reinforce our confidence in the rule of law? Either way—or wherever in between the truth lies—the case for having a significant degree of openness about the Court's internal deliberations—as those deliberations move from current events into the category of history—is compelling.

Turning to the other side of the ledger, and accepting the undisputed proposition that the Court needs absolute confidentiality in its handling of pending cases, what justifications exist for continuing judicial secrecy and how far, logically and temporally, do they extend? Proponents of long-term or absolute secrecy rest their case on the argument that disclosure of internal deliberations among the Justices will disrupt the Court's collegial nature and chill an unfettered exchange of ideas both among the Justices and between individual Justices and their clerks. Such concerns are far from trivial. Inside the Court, it is certainly important that Justices engage in free-wheeling discussions.

But the "chilling effect" defense of secrecy is less compelling on inspection that might first appear. To begin with, the argument rests on two unexamined and unproven premises: first, that secrecy has in fact nurtured robust deliberations; and, second, that piercing the veil of secrecy would actually discourage the Justices from confiding in each other or their clerks. Empirically, quite the opposite appears to be true. As I sought to document in *Closed Chambers*, an active exchange of ideas among the Justices has hardly been the hallmark of the modern Court. In fact, from the Justices' Conference through the opinion drafting process they have engaged in far too little intellectual exchange. Moreover, although the 1979 publication of *The Brethren*[2] exposed dramatically and at length the personal animosities and infighting that riddled the Burger Court, I have not seen anyone claim plausibly that the book (as opposed to the Justices themselves) caused any lasting damage to the Court's internal decisional culture despite the torrent "leaks" on which it was based.

In any event, the advocates of secrecy must cope with an even more inconvenient fact—that the Court is

by no means unique among our governmental institutions in its need to protect the quality of internal discussion, yet with respect to the other branches we recognize that this concern must be balanced against the need for evaluation and public accountability. Accordingly, with the exception of agencies associated directly with national security, the government does not demand long-term gag orders on its employees. On the contrary, outside the judiciary, we welcome critical assessments by former members of the other branches of government—and consider them essential to understanding and advancing our democracy.

Valuable contributions in the genre of government-service memoir abound, such as Arthur Schlesinger, Jr.'s *Thousand Days*,[3] or recent books by Joseph Califano (about the Carter Administration) and Richard Holbrooke (about his travails in Bosnia). Ironically, in the last year, just as I was being lambasted, George Stephanopoulus has been much lauded for an executive branch memoir more intimate and revealing (and less analytical) than *Closed Chambers*; and Frank Snepp, whose CIA expose was deemed so outrageous that it gave rise to a special legal rule allowing the Agency to garnish his book earnings, has been rehabilitated and is now lauded as a much-maligned whistleblower.

This is not to say that individuals who once held positions of confidence in government should consider themselves free, willy-nilly, to break those confidences as soon as they depart from their jobs. Of course, they should not. A duty of circumspection remains—even as it must be recognized (as it always has been) that the bonds of secrecy diminish over time and must be balanced against the public interest and the call of history. In seeking absolute secrecy for its internal workings, the Court and its self-proclaimed protectors ignore this common-sense balance.

Finally, it must be observed that for all the red-in-the-face talk by former clerks about the sanctity of the Court's deliberations and how I broke the accepted code of silence, the truth of law clerk secrecy differs sharply from the public fulminations of the secrecy proponents. Former law clerks talk. The law professors tell insider clerkship stories to their colleagues and students. The appellate advocates regale their colleagues and use their insider knowledge to advance their clients' interests before the Court—and are paid premiums for this reason. Former clerks of all stripes talk to the press or to authors writing about Court related topics, albeit not for attribution unless they are engaging in flattery. Some 170 former clerks talked to Bob Woodward when he was writing *The Brethren*. Judge Richard Arnold, Chief Judge of the Eighth Circuit, gave the dairy he kept as a clerk to David Garrow for use in his book on reproductive rights. Judge Harvie Wilkinson, III, Chief Judge of the Fourth Circuit, wrote a memoir of his year clerking for Justice Lewis Powell. Several law clerks described the Court's internal deliberations over *Brown v. Board of Education*[4] for Richard Kluger's *Simple Justice*[5] even though Chief Justice Earl Warren was among the strongest advocates for Court secrecy. The list extends for miles.

Of course the fact that many, many clerks have revealed internal information about the Court does not necessarily justify the practice. But the existence of a long tradition of such revelations, and the fact that contributors to the tradition include some of the most luminous and respected names on the roster of former clerks, certainly cast doubt on many claims of the secrecy police (such as the notion that the attorney-client privilege governs Justice-clerk discussions) and suggest that many members of the Court family have recognized the value of public accountability for the institution. Cooler heads among the Justices have done the same.

It is a shame, therefore, that the current Justices do not recognize the importance of this tradition and seem hellbent on clamping down on potential revelations—reportedly, even demanding of current clerks a lifelong omerta. The Justices are the most important legal officers not only in this country, but in the world. Assessing the quality of their work is in our immediate best interest and in the long-term best interest of the institution. That the current Justices apparently feel otherwise reflects an unhealthy and undemocratic defensiveness. As in the other branches of government, the best defense against the criticism of former employees is not to impose unrealistic and unjustified secrecy rules. It is simply for the Justices to do their jobs conscientiously and well.

Endnotes

1. Edward Lazarus, *Closed Chambers* (1999).
2. Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (1979).
3. Arthur Schlesinger, Jr. *Thousand Days: John F. Kennedy in the White House* (1965).
4. 347 U.S. 483 (1954).
5. Richard Kluger, *Simple Justice* (1977).

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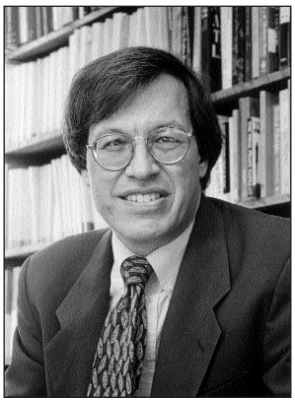
A Law Clerk's Duty of Confidentiality

By Erwin Chemerinsky

The Debate over *Closed Chambers*

The subtitle of Edward Lazarus' book *Closed Chambers*,[1] is "The first eyewitness account of the epic struggles inside the Supreme Court." Underneath Lazarus' name on the cover of the book it says: "Former Supreme Court Clerk."[2] The inside of the book jacket proclaims: "Never before has one of these clerks stepped forward to reveal how the Court really works—and why it often fails the country. In this groundbreaking book, award-winning historian Edward Lazarus, a former clerk to Justice Harry Blackmun, guides the reader through the Court's inner sanctum, explaining as only an eyewitness can the collisions of law, politics and personality as the Justices wrestle with the most fiercely disputed issues of our time."[3]



Not surprisingly, especially in light of this introduction, the book unleased a firestorm of charges that Lazarus had acted unethically, immorally and even illegally. Some, such as Ninth Circuit Court of Appeals Judge Alex Kozinski, in a review in the *Yale Law Journal*,[4] charged that Lazarus breached his ethical duty to the Court by reporting confidential information concerning that term, that he was disloyal in being highly critical of the Court and that he may have acted illegally in relying on documents impermissibly removed from the Court.

In my own review in the *Yale Law Journal*,[5] I disagree with each of Kozinski's charges. I do not believe that Lazarus acted unethically in any way because he reported virtually no confidential information learned during his clerkship. His book relies on material gained from publicly available papers, particularly those of Justice Thurgood Marshall, and on interviews with former clerks. Besides, the Code of Ethics that covered clerks from Lazarus' term cannot be fairly read as extending beyond the clerkship. The Code of Ethics is explicit in its last paragraph that it applies only to current law clerks:

> A person to whom this Code becomes applicable shall comply with it immediately upon commencement of his or her clerkship and throughout his clerkship. Violations of the Code by a law clerk may be disciplined by his or her appointing Justice, including dismissal.[6]

The Code thus could not be clearer: it applies "throughout [the] clerkship." It could have said, but doesn't, that the confidentiality provisions apply forever. The sole enforcement mechanism provided is discipline by the Justice; a possibility that exists only during the clerkship.

Nor do I believe that Lazarus breached any duty of loyalty. Kozinski, and others, imply a duty of former clerks to refrain from "demeaning" or attacking the Court. The basis for this duty is unclear. I know of no job where a condition of employment is that the employee can say only nice things about the former boss or the institution. I would never expect that my former research assistants, who at times handle confidential information, feel obligated to speak only kindly of me or the university that employed them. Kozinski relies on shared experience to support his claimed duty of loyalty, but isn't all of our shared experience that we may describe our bosses and our co-workers in whatever terms we want, including unfavorable ones? I am particularly troubled by a duty of loyalty, such as the one Kozinski asserts, applied to an important public institution such as the Supreme Court.

Finally, the charge that Lazarus might have violated a federal law—initially made by Richard Painter in an essay in the *Wall Street Journal*[7] and then repeated by Kozinski—has no foundation whatsoever. No one has ever offered a shred of evidence that Lazarus, or any one else, illegally removed documents from the Court.

The Underlying Issue

Although I strongly disagree with the attacks on *Closed Chambers*, I think that the debate over the book raises important questions about the proper ethical standards to be applied to law clerks. What is a clerk's duty of confidentiality? The easy answer to the question is positive, not normative: clerks should adhere to whatever promises of confidentiality they made as a condition of their clerkships. If a clerk promises never to reveal any confidential information learned during the clerkship, then the clerk should adhere to this agreement. If a clerk is hired under a code of ethics that

makes confidentiality permanent, the clerk is bound by these rules. The Supreme Court, for example, changed its Code of Ethics for clerks after the publication of *Closed Chambers*.

This approach is simple and compelling. A promise of confidentiality, like all promises, should be taken very seriously. In essence, it is a term of the employment contract and improper disclosures are a breach of that promise.

Yet, this answer to the question—that clerks should abide by their promises of confidentiality—is incomplete. It does not address the underlying normative issue: what *should* be the former clerk's duty of confidentiality? What should be the content of a code of ethics for clerks and former clerks as to issues of confidentiality? Also, are there ever circumstances where a clerk or former clerk is justified in breaching an agreed-upon or imposed duty of confidentiality?

What Should Be the Duty of Confidentiality?

What should any judge demand of his or her clerk in terms of confidentiality? I believe that appropriate scope of the duty of confidentiality can be summarized in four points:

1. While a case is pending before the court, a clerk should be prohibited from publicly disclosing any confidential information learned as part of the clerkship about that case. Obviously, parties and the public should learn about a court's handling of a pending case from the judge, in statements from the bench, orders and opinions. A clerk's disclosures about pending cases could have enormous ramifications. Many decisions affect millions and billions of dollars; advance word about outcomes could have huge consequences. This duty obviously exists during the clerkship and continues so long as the case remains pending before the court.

2. A clerk's conversations with a judge, where there is a reasonable expectation of confidentiality, should be regarded as permanently confidential, unless the judge gives permission for disclosure. Judges should be able to speak with their clerks in confidence. Secrecy of communications encourages judges to express tentative thoughts that they often likely would be unwilling to express if disclosure was likely. An analogy can be drawn to executive privilege, which protects the confidentiality of communications between a president and his or her advisors. The concern is that without confidentiality presidents would be reluctant to ask for and less likely to receive confidential advice. The quality of decisions, over the long term, could suffer.

It should be emphasized that Lazarus revealed virtually no conversations with Justice Blackmun. Lazarus makes this clear in the introduction to the book. In his author's note, he writes:

> I have been careful to avoid disclosing information I am privy to solely because I was privileged to work for Justice Blackmun. In other words, I have reconstructed what I knew and supplemented that knowledge through primary sources (either publicly available or provided by others) and dozens of interviews conducted over the last five years. Indeed, some of the more controversial revelations in the book, including events that occurred during my clerkship, are things of which I was unaware—or dimly aware—at the time.[8]

The difficult question is whether the conversations between a Justice and a clerk truly must remain forever permanent. Is there a point in time, long after the case is pending and perhaps even after the judge is no longer on the bench, in which disclosure is permissible? I believe that there is, especially for the Supreme Court whose decisions are of such great historical significance, but it is unclear as to how to draw the line and define the time after which disclosure is permissible.

3. A clerk should not be precluded from writing or speaking about cases that were pending at the time of the clerkship, so long as principles 1 and 2, above, are followed. Clerks may criticize the judge or court on which they clerked.

A person who clerks for a court is not forever disqualified from discussing the matters that were before the tribunal during his or her clerkship. A Supreme Court clerk, for example, may teach and write about cases that were pending during the term of the clerkship. The former clerk should not have any less right to discuss the case than anyone else. Certainly, so long as the clerk relies on non-confidential sources of information—such as published opinions, publicly available papers and interviews—there is no breach of confidentiality. Professor David Garrow, in a review of Lazarus' book published in the *Cornell Law Review*,[9] shows that Supreme Court clerks throughout this century have regularly written about matters that were decided during their clerkships.

4. A clerk only should breach principles 1 or 2 under truly compelling circumstances where there is an overriding need for disclosure. Clerks may be disciplined for violations.

It is tempting to argue that the duties of confidentiality are inviolate. Yet, it is hard to conceive of any rule of secrecy that is absolute. The attorney-client privilege has important exceptions, as does executive privilege. It is possible to imagine some circumstances, however unlikely, in which a clerk would be justified in breaching confidentiality. Imagine that a clerk witnesses a judge taking a bribe to decide a case in a particular fashion. Disclosure there would be appropriate and necessary, such as revealing what occurred to law enforcement.

The difficulty, of course, is giving clerks discretion to decide when disclosure serves a compelling need. I see no alternative, though a clerk who violates the confidentiality rules could be subjected to discipline for doing so. The likelihood is that if a clerk used good judgment and the disclosure was necessary, discipline would be unlikely.

These principles do not deal with every imaginable situation. Nor do they deal with hard questions of line drawing, such as deciding the time after which otherwise impermissible disclosures should be allowed or the circumstances in which prohibited revelations serve a compelling purpose. Yet, I think that these four principles provide a framework for defining a clerk's duty of confidentiality.

Conclusion

Edward Lazarus has been much vilified for writing *Closed Chambers*. I've often had the sense that some of his critics never read the book. The vast majority of the work concerns years before and after his clerkship. The book contains a great deal of new information which will be of value to historians and students of the Court. He makes serious charges about the politicization of the Court, about which I largely disagree, but that need to be addressed and seriously considered.

Most of all, Lazarus' book provides an occasion for thinking carefully about the appropriate scope of a clerk's duty of confidentiality. I fear that the knee-jerk reaction will be ethical codes that compel clerks to remain forever silent about anything they learned during their clerkships. This, though, goes too far. The goals of confidentiality can be served by requiring confidentiality so long as a case is pending and for conversations directly with the judge where there is a reasonable expectation of confidentiality. This will adequately protect the integrity of the courts and needed candor in communications between judges and clerks, without unduly silencing an important voice.

Endnotes

1. Edward P. Lazarus, *Closed Chambers* (1998).
2. Lazarus, *supra* note 1, on front cover.
3. Lazarus, *supra* note 1, at book jacket.
4. Alex Kozinski, *Conduct Unbecoming*, 108 Yale L.J. 835 (1999).
5. Erwin Chemerinsky, *Opening Closed Chambers*, 108 Yale L.J. 1087 (1999).
6. Code of Conduct for Law Clerks of the Supreme Court of the United States (1989).
7. Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, Wall Street Journal, April 13, 1998, at A23.
8. Lazarus, *supra* note 1, at xi.
9. David J. Garrow, *The Lowest Form of Animal Life? Supreme Court Clerks and Supreme Court History*, 84 Cornell L. Rev. 855 (1999).

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Pro Bono Programs in State Government

By Sara Osborne

Introduction

In 1995, the American Bar Association passed a resolution encouraging state bar associations to make expansion of pro bono legal services a high priority and to be innovative in their program design and strategies for motivating attorney participation. In response a NYSBA ad hoc working group comprised of government lawyers met to develop a draft proposal that included a proposed executive order enabling government lawyers to definitively participate in pro bono activities if they so desire.[1] Although this proposal was approved in concept by the Bar Association President's Committee on Access to Justice, it was never forwarded to the Governor's Office for formal consideration. This article reviews some of the legislative and policy issues which arise when considering government lawyer involvement in pro bono activities.

Although the practice may appear to be gaining more supporters in other states New York does have some precedent for affording state government attorneys, already traditionally committed to public service, opportunities for direct service to needy citizens.[2] In May of 1997, the Administrative Board of the Courts adopted a resolution, now part of the New York attorney registration statement, urging NY attorneys to provide an annual minimum of 20 hours of pro bono legal services to poor persons and to financially support organizations providing such services. Very recently, a new position filled by of Court of Appeals Chief Judge Judith S. Kaye prioritizes expanded access to the justice system, including increased pro bono participation.[3] There are good reasons to initiate pro bono programs for government attorneys and there are many successful examples from which to draw both inspiration and ideas. In 1988, the Maryland Attorney General instituted one of the first pro bono service programs specifically for government law offices. Attorney General Janet Reno developed a policy for the U.S. Department of Justice in 1996.[4] In 1998, the American Bar Association published *Pro Bono Project Development: A Deskbook for Government and Public Sector Lawyers,* an invaluable resource of collected prior experiences.

However, increased access to legal services is only one of several important factors which would be positively affected by pro bono opportunities in government law offices. Benefits might also include: skills training and professional development, public esteem for the legal profession, attorney job satisfaction and generally a more efficient use of legal resources. To simultaneously maximize these good things, agencies and offices with successfully functioning programs agree that the initial process of drafting, debating and revising a policy statement is critical, but will require an initial commitment of time and leadership.[5] A fruitful policy discussion has the goal of consciously acting on several things at once so that a final policy may accommodate different reasons for acting. Whether a policy discussion is motivated from pure altruism or from the goal of improving practitioner skills or even public relations, the resulting policy can serve all. However, along the way some of the same issues must be addressed regardless of the context in which they arise.

Goal #1: Increased Access to Justice Systems

In 1966 the Federal Office of Legal Services was created to address a chronic need for low cost or free legal services to the nation's indigent. But beginning in the early 1980s and most recently in 1996, financial resources and the scope of permitted activities have been severely restricted.[6] This prompted many states to consider mandatory pro bono service as a readily available resource to close the gap, although Florida became the only state to actually require reporting of pro bono service hours.[7] In response to indications of critical local need, former Chief Judge Sol Wachtler appointed the Committee to Improve the Availability of Legal Services to develop a plan to address access inequities. That committee recommended, among other things, 40 hours annually of mandatory pro bono legal services if New York attorneys did not meet the need voluntarily. Although considered a last resort the scent of mandate in the air prompted considerable debate. The NYSBA approved its own alternative proposal of voluntary aspirational minimum standards. In 1990 Chief Judge Wachtler formed the Pro Bono Review Committee (Marrero Committee) to assess the "amount of and types of pro bono work being done by New York lawyers"[8] and temporarily delayed implementation of a mandatory requirement. During the past decade surveys were conducted by the Marrero Committee, the State Bar and the Unified Court System. Most recently in March of 1999 the UCS released the results of a 1997

survey which will be used to establish a benchmark from which to measure any changes in New York attorneys' pro bono activities.[9] Comparing previously collected data with these most recent findings indicates a negligible variation (consistently hovering around 40-44 hours) in the average number of service hours by slightly less than one half of NY attorneys surveyed.[10] But a 1993 revision of ABA Model Rules of Professional Conduct, Rule 6.1 set an aspirational minimum of 50 pro bono hours per year for *every attorney*.[11]

The Marrero Committee, the Bar Association proposal and the new Model Rules all produced language more explicitly defining pro bono services as those directed at either improving access or raising the standards of the legal profession. Both proposals took cues from Model Rules and Code of Professional Responsibility language citing lawyers' professional obligation to serve the poor.[12] Currently, Rule 6.1 says a "substantial majority" of the 50 hour goal *should* go to meet the legal needs of "persons with limited means" or organizations whose primary purpose is to meet the needs of such persons. But envisioning pro bono opportunities for "all attorneys" immediately raised specific concerns regarding restrictions on outside practice by government attorneys. The Marrero proposal for mandatory pro bono did not exempt government attorneys but preferred finding ways to lighten restrictions and it did not anticipate significant obstacles toward that end.[13] A voluntary approach would also need to work within those particular boundaries established for government legal personnel.

Goal #2: Recognizing the Unique Concerns of Government Law Offices

Comment Five to Model Rule 6.1 acknowledges "Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing services" related to "governmental organizations" and from engaging in the "outside practice of law." Before getting out of port, the government attorney seeking opportunities for pro bono direct service may think the wind will never even reach his/her sails. Nevertheless, the language of 6.1 is intended to "facilitate participation by government attorneys," even where restrictions exist, through its use of broad language describing the range of acceptable pro bono activity. In fact, this can encourage the creation of "boutique" pro bono programs within different government offices; that is, they can be narrowly, or widely, tailored to meet a range of internal and external restrictions. External restrictions may actually provide a convenient pre-existing boundary which make it easier to quickly initiate clearly focused programs.

A common perception among government lawyers is that, as it appears to be defined in rule 6.1, they are already providing pro bono legal services to the public. Indeed, pro bono services can include matters which further the "organizational purposes" of "governmental and educational organizations." Comment Three defines "governmental organizations" to include "sections of governmental or public sector agencies." Therefore, it is not difficult to see how this perception arises. But a threshold question would be: who, as the client, does the government attorney represent? Generally, it is agreed that the client is the agency, not the entire government or the general public.[14] Doing pro bono work for one's own agency employer would be difficult to distinguish from work done in anticipation of income which could not be defined as pro bono.

There are government attorneys who would also prefer a direct service opportunity. But another concern is the "revolving door." This refers to a government attorney "switching sides," or moving back and forth between public and private sector practice.[15] Because of concerns about confidentiality, potential abuse of government information, appearances of—or actual—influence peddling, there are restrictions on where and when a government attorney may practice during and after government service.[16] Therefore, a government attorney engaged in any kind of pro bono work must always be aware that contacts today could present conflicts tomorrow. However, this does not per se exclude pro bono service, but merely limits a particular attorney's options usually to some form of service which is very different from his or her government duties. But this radical change of venue is also precisely what makes direct service pro bono opportunities so attractive for government lawyers.

Although "revolving door" rules protect both attorney and government, they can limit private sector post-employment options. On the other hand, a policy which clearly articulates the boundaries of pro bono options could work with the revolving door to provide a government attorney returning to private practice—either by choice or by political necessity—skills and contacts for employment which might not have otherwise presented themselves. This kind of personal and professional growth through pro bono experience often translates into more job satisfaction, something private firms are discovering as a solution to their chronic problem of high associate turnover rates.[17]

Language in the New York State Constitution which prohibits the use of state monies for "private undertakings,"[18] has also been cited as an obstacle to pro bono service by government attorneys. This arises from the substantial likelihood that a government attorney representing a pro bono client would need to use an office desk, telephone or fax machine, may need to spend time away from the office on court appearances, and perhaps occasionally enlist the clerical skills of office support staff. Separation of public and private

property is a foundation of our society and so these issues are not insignificant. They arise whenever private concerns request the use of government property such as, for example, public school buildings or public parks for a fund-raising event.

Although the NY Court of Appeals has not ruled directly on this issue relating to pro bono services, the history of this language articulated in a 1990 case involving the use of legislative employees for political campaign work indicates that when this language was added it was narrowly directed at preventing fiscally "improvident" legislation and was not aimed at "preventing or punishing larceny."[19] In states where this issue has been addressed directly in connection to pro bono legal services to indigent persons, it has been concluded that even if an individual client might benefit directly from the legal representation such service permits an incidental use of public funds because volunteer attorneys are serving an overall public purpose and meeting a public need. In other words, although public property may not be used to further purely personal objectives, if the primary purpose is a public purpose then some use is permissible.[20]

However, another consideration for New York attorneys making the property use issue more intimidating is the exhortation of DR 9-101 of the NY Code of Professional Responsibility to avoid even the "appearance of impropriety."[21] This encourages caution by pro bono attorneys who must also avoid any appearance that they are acting on behalf of the government, or that government position might influence a case outcome or risk exposing confidential government information. Again, this does not preclude government attorneys' participation in pro bono opportunities but merely helps define the boundaries. For example, a 1993 New York Judicial Ethics Opinion found no objection when a town judge permitted the courthouse to be used by local pro bono attorneys for consultations with unrepresented parties in actions commenced in town court—as long as it was clear that the attorneys were not speaking for the court and that the court facilities were made available solely as a courtesy.[22]

Nevertheless, successful policies *must* address these issues and clearly delineate the extent of *de minimus* property use, as well as the procedures to insure appropriate appearances. This is for the ultimate benefit of client, attorney, and government and can avoid a host of unnecessary embarrassment, inefficiency, or even scandal. Particularly in New York, these guidelines should be publicized to *all* office staff so as to avoid even rumors of misuse of property. This issue can be carried to debilitating extremes, but such instances simply emphasize the need for clarity and common sense, and remind us that the constitutional and statutory goals are meant to deter *abuse* and not necessarily bar any and all *use.*

Goal #3: Legal Skills and Resource Development

Government lawyers considering opportunities for pro bono direct client service often express concerns about the appropriate use of their existing lawyering skills. An attorney whose government work may be limited to reviewing construction contracts might hesitate to participate in a program with a focus on courtroom representation. However, that same attorney may be quite willing to do so with some additional training and the assurance of adequate malpractice insurance coverage. The issue of continuing education and skills development is implicated in pro bono work by government attorneys and solutions can be incorporated into the particular structure and goals of a program. This factor can also be significant when it comes to motivating attorney participation. Programs which look to existing legal services providers for referrals may find those programs very willing to offer training and malpractice insurance because they are able to expand their services to needy clients when the size of their pool of trained attorneys is increased. Such programs include law school and bar association clinics, court based prelitigation mediation, specific types of cases in certain courts (e.g., guardianships, some domestic matters, landlord/tenant disputes, consumer protection, wills, powers of attorney or arbitrations), literacy programs, mentoring for youths and alternative sentencing programs.

Program design can be remarkably diverse and still reap the benefits. An office with a narrow scope such as a county or municipality might need nothing more than a policy simply granting permission to attorneys to participate in pro bono services as long as certain very minimal requirements are met; whereas a statewide, far-ranging office such as the Attorney General's office would require a more centralized program setting out more detail in its policies and procedures. A decentralized program may require attorneys to contribute some out-of-pocket training and insurance expenses. But as was done in Maryland, a nonprofit corporation could be set up to cover these expenses, or they could be provided through state bar association resources.[23]

Some basic guidelines and specific direction in this area is advisable if only to insure the stability of the program. An agency ethics officer or staff attorney could serve as in-house coordinator and liaison to referral organizations and the volunteers. Case pre-screening and training scheduling can be handled between the referral organizations and the internal committee before even contacting a volunteer lawyer. Collection and dissemination of information on programs and available support is essential throughout all stages of establishing a program and may evolve into a source of inspiration and motivation as well as a valuable resource. A source book kept in the Florida Attorney General's Office and

updated annually since 1993 indicates statewide pro bono programs have increased from 47 to 104.[24] This kind of information centrally located in one government agency or with a state bar association is very efficient because it is difficult for a single government office to maintain a pro bono project on its own. However, the NLRB found the medium of in-house electronic bulletin boards convenient and centralized enough for purposes of that agency's program. But for a government attorney who may move from agency to agency, a statewide policy and resource guide for training and support would be most valuable. Carefully thought through but simple procedures can alleviate many attorney concerns about conflicts, insurance, adequate skills, and maintaining standards of professional responsibility.

Finally, a recent development in New York which is changing the landscape of legal practice for both public and private sector attorneys is mandatory CLE, aimed at sustaining high levels of professional knowledge and skill. This is relevant to pro bono services because Model Rule 6.1 cites activities with the goal of "improving the law, the legal system or the legal profession," such as teaching a CLE course, as pro bono service alternatives. Currently, however, pro bono direct service experience is not approved as a source of CLE credits although CLE goals of ethics, skills development and enhancing the quality of the bar for the benefit of the public would certainly be advanced by participation in certain pro bono service opportunities. This pro bono-CLE connection is currently being examined by the NYSBA Pro Bono Office as well as other states.

The First Step: A Good Foundation

Finally, leadership, continuity and attorney motivation are essential for success from initial policy development to implementation and administration. Successful programs all agree that a clear source of leadership was essential for inspiration and perseverance. Experience points to some logical sources: agency heads, ethics officers, bar associations, elected or appointed government officials, law schools and established community service organizations. In 1996, President Clinton issued Executive Order 129888 urging all federal agencies to develop programs facilitating pro bono legal service by government employees. Janet Reno soon initiated a policy for pro bono service within the Department of Justice. As indicated by the experience of the NLRB, other federal government agencies are paving the way as well.

Without strong leadership, government based pro bono programs are particularly susceptible to shifts in political climate, revealing the importance and the fragility of another ingredient necessary for success: continuity and stability. The more visible and consistent the source of leadership the more likely programs are to get off the ground and, once begun, to survive political shifts. Programs also need to foster and sustain relationships with appropriate referral sources who will conversely want to rely on the consistent availability of pro bono services. Continuity is also necessary for meaningful program assessment. The history of Legal Services' reliance on government funds should perhaps send a cautionary message about relying on elected officials as primary sources of leadership. Although continuity can be a political goal it is more likely the offspring of administrative entities and so the leadership of a bar association might be a better guarantee of a program's longevity.

Whether the initial rationale for government pro bono programs is altruism, professional development or public relations the issue of attorney motivation is still critical. Without committed participation the project will fail. Attorney concerns about time commitment, rewards and enforcement should not be dismissed as too self serving, but should be openly addressed in any policy discussion, particularly where continuing legal education now has a pre-existing mandatory claim on New York attorneys' time, money, and administrative resources. Potential motivators such as CLE credit or tax credits for pro bono time are options being discussed across the nation.

Finally, on a more philosophic note related to legal education, when people refer to an attorney's inherent obligation to service they are talking about something that is hard to teach because it is more than just a matter of skills acquisition. The title "Esquire" means servant, but always a servant with a privileged status. Both duty and privilege—which attach as well to the other historically traditional professions of medicine and clergy—come from a presumed moral authority. Perhaps the sense that there is a need for classroom instruction in professional ethics "will have arisen from a failure to teach the point of the profession itself." This sense that the practice of law is not just about doing certain things, but being a certain kind of person, can only be imparted through a process of imprinting-by-example onto each successive generation.[25] If lawyers today chafe at the increase in codes and rules defining ethical conduct, then perhaps the only alternative to more of the same will be to pay more attention to learning by example. If so, then it makes sense to find ways to develop more attorney-servants as a "yeast" for future law practice. The best professional development and the best service will be gained by doing, showing and mentoring and well-designed pro bono opportunities for government attorneys is a good place to start.

Endnotes

1. NYSBA, Department of Pro Bono Affairs, Director Anthony Cassino, One Elk Street, Albany, NY 12207.
2. N.Y. Attorneys General Robert Abrams and Dennis Vacco both had an in-house policy; U.S. Attorney offices in N.Y. follow federal pro bono policies issued by Janet Reno.
3. Press release, New York State Unified Court System, June 29, 1999, regarding the appointment of Judge Juanita Bing Newton as Deputy Chief Administrative Judge for Justice Initiatives.
4. *See* John J. Capowski, *Jumping the Hurdles: Establishing Pro Bono Programs in Government Law Offices*, 9 PBI Exchange 2 (1991) (the history of the Maryland program); Kathleen Waits, *Pro Bono and the Government Lawyer*, Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials 84 (Patricia Salkin, ed. 1999) (a comparison of the U.S. Attorney and the Maryland policies.
5. *See* Daniel F. Collopy, *Setting Up and Running a Pro Bono Program in a Government Office: The NLRB's Experience*, 7 Pub. Law. 14 (1999); Anne-Marie Thompson, *Pennsylvania's Attorney General's Office Spearheads Pro Bono by Government Lawyers, Pennsylvania Lawyer,* May/June 1996 (The office spent three years developing a comprehensive policy).
6. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No.104-134, § 504, 110 Stat. 1321. *See also*, David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor,* 25 Fordham Urb. L.J. 895 (1998).
7. Patricia R. Gleason, *Government Lawyers Making a Difference: Pro Bono and Public Service*, Florida Bar Journal, April, 1999; Cynthia Rapp, *Volunteer Legal Services and Government and Public Sector Attorneys*, in Florida Bar Journal**,** Feb. 1996 (The Florida Supreme Court, requires all lawyers to complete a reporting form as part of their annual fees statement. Florida calls for an annual minimum of 20 hours of pro bono work which must be directly related to the legal needs of the poor).
8. *Final Report of the Pro Bono Review Committee* 1 April 18, 1994, Victor Marrero, Co-chair, Justin L. Vigdor, Co-chair.
9. See report online at http://www.courts.state.ny.us/probono/pbrpt.htm. Another survey is planned for 2000.
10. Press Release, New York State Unified Court System, March 4, 1999 (Since 1990 and 1992, ". . . the percentage of pro bono participation has remained unchanged" and the "average number of service hours rendered has declined from 43.5 to 41.9 hours").
11. ABA Model Rule 6.1, *1998 Selected Standards on Professional Responsibility* 87-88 (Foundation Press).
12. Legal needs may also be met by restored funding for Legal Services, instruction for *pro se* litigants, increased statutory compensation for appointed lawyers, as well as expanded pro bono opportunities. *See*, *Amended Rule 6.1: Another Move towards Mandatory Pro Bono? Is That What We Want?* 7 Geo. J. Legal Ethics 1139 (1994)**.** All options should be considered.
13. Waits, *supra* note 4, 98 (*citing* Marrero Committee: ". . . the particular concerns expressed by government lawyers (seeking exemption) are not difficult to overcome".
14. Jeffrey Rosenthal, *Who Is the Client of the government Lawyer?*, Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials 84 (Patricia Salkin, ed. 1999).
15. *See* Grant Dawson, *Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment*, 11 Georgetown Journal of Legal Ethics 329 (1998) A very thorough review of revolving door issues, policy, legislation with proposed guidelines for actual practice.
16. For example, *see* Office of the N.Y. Att'y Gen. 92-F7 199 WL 479132 (N.Y.A.G.) ("Attorneys who volunteer to serve as bar mediators and *pro bono* special counsels on behalf of the Supreme Court, Appellate Division, First Department, in the administration of the Department's disciplinary system, are covered by Section 17 of the Public Officers Law").
17. R. Bruce McLean, *Associate Retention Program: An Innovative Approach*, 11 Law Firm Partnership & Ben. Rep. 1 (1998).
18. N.Y. Const. art. VII, § 8.
19. *In re Manfred Ohrenstein. v. Robert M. Morgenthau*, 77 N.Y.2d 38 (1990).
20. Rapp, *supra* note 7, Texas Attorney General's Office and Broward County Commissioners.
21. New York Code of Professional Responsibility, *1998 Selected Standards on Professional Responsibility* 374-375 ; *see also* Canon 9 ABA Model Code of Professional Responsibility; *but see*, Comment 5, Model Rules 1.9 (limited usefulness of term "impropriety" when determining grounds for disqualification).
22. New York Advisory Committee on Judicial Ethics Opinion 93-51, April 29, 1993.
23. Waits, *supra* note 4 at 94.
24. Patricia R. Gleason, *Government Lawyers Making a Difference: Pro Bono and Public Service,* Florida Bar Journal, April 1999.
25. Thomas F. Green, *Voices: The Educational Formation of Conscience,* 1999 Univ. of Notre Dame Press 79-80 (Dr. Green, Emeritus Professor of Philosophy of Education, Syracuse Univ., explores the development of conscience as an exercise in "governance").

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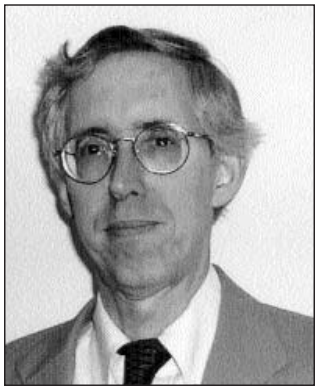
Ethics Laws for Municipal Officials Outside New York City

By Mark Davies



Nothing can get a municipal attorney into hot water quicker than failing to counsel a municipal client how to avoid accusations of unethical conduct. Unfortunately, the law in that regard offers at best a model of murkiness, and self-help is about the only help available. This article will attempt to set out some guideposts for municipal lawyers seeking to traverse New York State's ethics morass.[1] Discussed below are five topics: (1) The sources of ethics regulations in New York State; (2) prohibited interests under the state ethics law for municipal officials; (3) prohibited conduct under that law; (4) incompatibility of public offices; and (5) disclosure and recusal.

Threading the Ethics Needle: Sources of Ethics Regulations

Sadly for our public officials, no single clear and comprehensive, uniform ethics law exists in New York State for officers and employees of local government. Instead, one must consult the following:

- Article 18 of the New York State General Municipal Law, the primary state ethics law for municipal officials and the main topic addressed in this piece;
- The municipality's own ethics provisions (every county, city, town, village and school district in the state must adopt a so-called "code of ethics,"[2] and almost all have done so, although few of these codes even approach a real code of ethics);
- The state constitutional restriction on giving or loaning money or property to or in aid of any private person or undertaking;[3]
- Miscellaneous conflicts of interest provisions scattered throughout the consolidated laws, such as a prohibition on the simultaneous holding of elective and appointive village offices;[4]
- Case law restrictions on conflicts of interest, either as a matter of pure common law, such as the prohibition on a municipal official having a contract with his or her own municipality, or by extension of Article 18, such as a prohibition on municipal officials acting on matters in which they have a financial interest;[5]
- Official misconduct provisions in articles 195 and 200 of the Penal Law; and
- Conflicts of interest restrictions contained in the rules, regulations, guidelines, policies and procedures of individual municipal agencies, such as police department prohibitions on accepting gifts of any kind or size.

Municipal attorneys should familiarize themselves with these various provisions. The rest of this article, however, focuses on Article 18, which applies to virtually every officer and employee of every municipality in the state, whether paid or unpaid, except New York City.[6]

Dipping One's Hand into the Municipal Well: Prohibited Interests

In an enormously complicated—and for small, rural municipalities, enormously burdensome—provision, Article 18 of the General Municipal Law prohibits municipal officers and employees from having an interest in any contract with the municipality if the municipal officer or employee has some control over that contract for the municipality.[7] Although often an exercise in futility, analysis of this prohibition requires answering four questions:

- Is there a *contract* with the municipality?
- If so, does the municipal official have an *interest* in that contract?
- If so, does the municipal official have any *control* over that contract on behalf of the municipality?
- If so, do any of the various *exceptions* to the prohibition apply?

Although space does not permit an extended discussion of these questions, the following should prove helpful.[8]

Contracts with the municipality. Article 18 expansively defines "contract" to include not only express or implied agreements with the municipality but also "any claim, account or demand against" the municipality.[9] Thus, a lawsuit against the municipality is a contract with the municipality. The state Comptroller's Office has opined that neither an application for a zoning change nor the granting of that application is a "contract" under Article 18, although one court has held that an application for a building permit, and the issuance

of the permit, is a contract.[10] It would seem that an application for a zoning variance, which like a zoning change requires the exercise of discretion, is not a contract; but no reported decisions exist on the issue.

Interests in contracts. A municipal officer or employee has an "interest" in a contract if "a direct or indirect pecuniary or material benefit" will accrue to the official as a result of the contract. Note that the official does not have to be a party to the contract.[11] For example, if a village hires a firm to refurbish village hall, and the firm subcontracts the plumbing work to a part-time deputy village clerk, that clerk has an interest in the contractor's contract with the village. In addition, a municipal officer or employee is deemed to have an interest in:

- Any contract of his or her spouse, minor children or dependents;
- Any contract of his or her outside employer or business;
- Any contract of a corporation any stock of which he or she directly or indirectly owns or controls.

Note that in these instances the municipal officer or employee is deemed to have an interest in the contract even though he or she does not receive any pecuniary or material benefit as a result of the contract. An exception: a municipal official does not have an interest in a contract of employment between the municipality and his or her spouse, minor child or dependent. In other words, nepotism is allowed. A town board member could vote to hire her husband as the town code enforcement officer.

Control over the contract. A municipal official's interest in a contract with the municipality is prohibited only if the official has the power or duty to exercise some authority with respect to that contract, by negotiating, preparing, authorizing or approving the contract, by authorizing or approving payment under the contract, by auditing bills or claims under the contract or by appointing anyone who has any of those powers or duties.[12] Note that the official does not have to act on the matter; he or she need only have the power or duty to act—either individually or as a member of a board. For that reason, neither recusal nor competitive bidding will avoid a violation of the prohibited interest provision. For example, a town board member whose private company wins a competitively bid contract with the town to remove dirt to a landfill violates § 801 even if he recuses himself from voting on the contract and also allows his partner to keep all of the company's profit from the contract.

Exceptions. Worse than the hearsay rule, the prohibited interest provision of Article 18 contains 16 exceptions, set forth in § 802. While some of these exceptions appear rather arcane, some provide significant relief from § 801. The more common ones address certain outside employment with a company having a contract with the official's municipality, contracts with not-for-profit organizations, grandfathered interests in contracts, certain small purchases by rural municipalities, stock holdings amounting to less than 5% of the corporation having a contract with the municipality and certain small contracts.

Penalties. Any municipal officer or employee who "willfully and knowingly" violates section 801 commits a misdemeanor.[13] One must emphasize, however, that a violation is willful if the official knows the facts that make the interest a prohibited one; the official need not know that his or her conduct violates the law. Furthermore, any contract "willfully entered into by or with a municipality" in violation of § 801 "shall be null, void and wholly unenforceable;" it may not be ratified by the municipality.[14]

Walking Both Sides of the Municipal Street: Prohibited Conduct

Article 18 contains no code of ethics as such but only four extremely limited conflicts of interest restrictions on municipal officials' conduct:[15]

- A prohibition on soliciting *gifts*, or accepting gifts worth $75 or more, "under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part"—a provision so vague that one county court struck it down as unconstitutional;[16]
- A prohibition on disclosure or use of *confidential information* acquired in the course of official duties;
- A prohibition on receiving *compensation*, or expressly or impliedly agreeing to receive compensation, for services to be rendered in relation to any matter before the officials' *own municipal agency* or before any agency over which the official has jurisdiction or to which he or she has the power to appoint anyone;
- A prohibition on receiving *compensation*, or expressly or impliedly agreeing to receive compensation, for services to be rendered in relation to any matter before *any agency* of the municipality where the compensation is contingent upon any action by the agency—but note that payment may be fixed at any time for the reasonable value of services actually rendered.

The only penalty for violating any of these provisions, however, is disciplinary action.[17]

Serving Two Municipal Masters: Incompatibility of Public Offices

Ordinarily, governmental ethics rules regulate conflicts between public duties and private interests. Nonetheless, § 801 of Article 18 has been interpreted as prohibiting incompatible public offices, whether in the same or different municipalities.[18] So, too, a number of state statutes prohibit the simultaneous holding of two public positions. For example, a member of a town zoning board of appeals may not serve on the town board.[19] The common law likewise prohibits as incompatible the simultaneous holding of certain offices. "Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second."[20] The New York State Attorney General's Office has issued numerous opinions on compatibility of public offices and should be consulted on any such question.

Spilling One's Guts: Disclosure and Recusal

Article 18 contains extensive financial disclosure requirements, applicable in all counties, cities, towns, and villages with a population of 50,000 or more. A discussion of those poorly drafted and impossibly onerous requirements lies beyond the scope of this introductory article.[21]

Article 18 further requires that applications, petitions, and requests in certain zoning and planning matters disclose the interest of state and municipal officials in the applicant, but only to the extent the applicant knows of such an interest. As with § 801, "interest" is broadly defined. Anyone who "knowingly and intentionally" violates the requirement in this section commits a misdemeanor.[22]

Finally, Article 18 requires written disclosure by any municipal officer or employee of the nature and extent of his or her interest in any actual or proposed contract with his or her municipality "as soon as he has knowledge of such actual or prospective interest." The disclosure must be made to the municipality's governing body and becomes part of its official records. This disclosure requirement applies even where the interest is not prohibited because the official lacks the requisite authority over the contract or because one of the exemptions in § 802 applies. Two exceptions to this disclosure requirement exist. First, once disclosure has been made, any interest in subsequent contracts with the same party during the same fiscal year need not be made. Second, disclosure is not required where the interest falls within subdivision (2) of § 802.[23] "Willfully and knowingly" failing to disclose is a misdemeanor;[24] failure to disclose may also render the contract void, or at least voidable by the municipality.[25]

On its face, Article 18 does not require recusal. Some courts, however, either by extension of the disclosure provisions of Article 18 or as a matter of common law, have mandated recusal where action by a municipal official would result in a pecuniary benefit to the official.[26] In any event, attorneys are well advised to counsel their municipal clients to recuse themselves whenever acting on a matter would result in a pecuniary benefit to themselves, their family or their outside business or employer. Indeed, some local ethics laws require recusal whenever an action by the official would benefit anyone with whom the official has a business or financial relationship.[27]

Following the Yellow Brick Road: A Municipal Ethics Law

If the foregoing appears confusing, it is. New York State has long foundered in the backwater of ethics reform, and the state legislature appears disinclined to change that. Consequently, municipalities wishing a path through this ethics thicket must create their own by enacting a clear and comprehensive local ethics law.[28] Only then will municipal officials have the guidance they need, and the public the reassurance they demand, to ensure that the public's business is conducted in the public's interest.

Endnotes

1. For a detailed review of New York State's ethics law for municipal officials, see Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 Albany Law Review 1321-1351 (1996) (hereafter "*Davies*"). That law review article remains current except for (a) the addition of a handful of cases, none of which changes the law; (b) an amendment to General Municipal Law § 802(2)(e) (raising from $100 to $750 the small contracts exemption from the prohibition of § 801); and (c) the addition of General Municipal Law § 802(1)(j) (exempting certain small purchases by rural municipalities from the prohibition of § 801).
2. N.Y. Gen. Mun. Law § 806 (1)(a).
3. N.Y. Const. art. VIII, § 1. See also N.Y. Gen. Mun. Law § 51.
4. N.Y. Village Law § 300(3). *See generally Davies supra* note 1 at n. 176.
5. *See Davies, supra* note 1 at 1345-1347.
6. "Municipality" is broadly defined to include not only political subdivisions (counties, cities, towns, and villages) but school districts, public libraries, urban renewal agencies, and just about every other municipal entity one can think of. N.Y. Gen. Mun. Law § 800(4). Excluded from the definition of "municipal officer or employee" are volunteer fire fighters (except fire chiefs and assistant fire chiefs, who are included) and civil defense volunteers.
7. N.Y. Gen. Mun. Law § 800(5).N.Y. Gen. Mun. Law § 801.
8. For a detailed analysis of the prohibited interest prohibition, with a discussion of the relevant case law, see *Davies supra* note 1 at 1322-1335.
9. N.Y. Gen. Mun. Law § 800(2).
10. *See* 1983 Op. N.Y. Comp. 114; *People v. Pinto*, 88 Misc. 2d 303, 387 N.Y.S.2d 385, 388 (Mt. Vernon City Ct. 1976).

11. N.Y. Gen. Mun. Law § 800(3).
12. N.Y. Gen. Mun. Law § 801. An analogous provision exists for the interests of certain fiscal officers in banks with which the municipality does business. *Id.*
13. N.Y. Gen. Mun. Law § 805.
14. N.Y. Gen. Mun. Law § 804. *See also Landau v. Percacciolo*, 50 N.Y.2d 430, 434, 429 N.Y.S.2d 566, 568, 407 N.E.2d 412, 415 (1980).
15. N.Y. Gen. Mun. Law § 805-a(1).
16. *See People v. Moore*, 85 Misc. 2d 4, 377 N.Y.S.2d 1005 (Fulton County Ct. 1975).
17. N.Y. Gen. Mun. Law § 805-a(2). *See also* N.Y. Pub. Off. Law §§ 33, 36, discussed in *Davies supra* note 1 at 1349 (removal of certain public officers by governor or supreme court).
18. N.Y. Gen. Mun. Law § 801, annotations 261-320.
19. N.Y. Town Law § 267(3).
20. *O'Malley v. Macejka*, 44 N.Y.2d 530, 535, 406 N.Y.S.2d 725, 727, 378 N.E.2d 88 (1978).
21. For a detailed review of those requirements, see Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 Pace L. Rev. 243 (1991).
22. N.Y. Gen. Mun. Law § 809.
23. N.Y. Gen. Mun. Law § 803.
24. N.Y. Gen. Mun. Law § 805.
25. *See Landau v. Percacciolo*, 50 N.Y.2d 430, 429 N.Y.S.2d 566, 407 N.E.2d 412 (1980) (upholding the rescission of a sale for failure to disclose). *Cf.* N.Y. Gen. Mun. Law § 804.
26. *See, e.g., Tuxedo Conservation & Taxpayers Ass'n v. Town Board of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979); *Conrad v. Hinman*, 122 Misc. 2d 521, 471 N.Y.S.2d 521 (Sup. Ct., Onondaga County, 1984).
27. *See, e.g.,* N.Y.C. Charter §§ 2601(5), 2604(b)(3).
28. For a model local ethics law, based on the work of the Temporary State Commission on Local Government Ethics, see Mark Davies, *Keeping the Faith: A Model Local Ethics Law B Content and Commentary*, 21 Fordham Urb. L.J. 61-126 (1993). *See also* Mark Davies, *Considering Ethics at the Local Government Level*, in Ethical Standards in the Public Sector 127-155 (ABA 1999).

Mark Davies is the Executive Director of the New York City Conflicts of Interest Board. He formerly served as Executive Director of the New York State Temporary State Commission on Local Government Ethics. The views expressed in this article do not necessarily reflect those of the Conflicts of Interest Board.

Ethics Laws for Municipal Officials Within New York City

By Jennifer K. Siegel

New York City's ethics law is contained in chapter 68 of the New York City Charter and is enforced by the New York City Conflicts of Interest Board (the "Board"), successor to the New York City Board of Ethics, established in 1959. The Board is one of the oldest, if not the oldest, ethics boards in the country.

Chapter 68 contains virtually all of the provisions necessary for a good ethics law. This article will review the most significant of those, including: (1) Moonlighting, (2) Ownership Interests, (3) Political Activities, (4) Gifts, (5) Post-Employment, (6) Volunteer Activities, (7) Financial Disclosure and (8) Enforcement.

Keep in Mind: Some Charter Sections Always Apply

Some Charter sections always apply to a public servant's conduct, whether the specific issue is moonlighting, volunteer positions, political activities, or any other topic. These universal prohibitions, which the Board calls the "(b)(2), (b)(3), and (b)(4) warnings," will be referred to throughout this article. Charter §§ 2604(b)(2), (b)(3), and (b)(4) provide that any non-city activity performed by a pubic servant must be performed on the public servant's own time, without the use of city resources, including personnel and letterhead (unless otherwise authorized), and must be performed without divulging confidential city information. The Charter's waiver provision, discussed in detail below, does not apply to (b)(2), (b)(3), or (b)(4).

Making Ends Meet: Moonlighting

A full-time foster care worker at the Administration for Children's Services (AACS) wants to work part-time for a foster care agency with contracts with ACS. Is this allowed? Opportunities for part-time work by New York City public servants abound, and who doesn't need extra money from time to time? Although moonlighting by New York City public servants is generally permitted, there are a few restrictions.

Full-time and part-time public servants may moonlight part-time with a person or firm which has *no* business dealings with the city,[1] provided that they comply with (b)(2), (b)(3), and (b)(4). *Full-time* public servants are prohibited from moonlighting for a firm which the public servant knows is engaged in business dealings with the city.[2] The rule for *part-time* public servants is less restrictive, prohibiting moonlighting only when the firm is engaged in business dealings with the public servant's own agency.[3] Since many firms in New York City are engaged in business with the city, without a waiver provision, many public servants might be prohibited from moonlighting at all.

Waivers. Waivers allow public servants to hold an otherwise prohibited position if written approval is granted by the public servant's agency head *and* the Board determines that the position would not conflict with the purposes and interests of the city. To determine whether to grant a waiver, the Board considers the hours of the part-time work and whether there is any relationship between the public servant's city and non-city jobs.

In the above example, the ACS employee would require a waiver to work part-time for the foster care agency. If the ACS Commissioner gives his approval, and if the ACS employee has nothing to do with the contract agency in his or her city job and nothing to do with ACS in his or her work for the contract agency, the Board would probably grant the waiver.

Common Requests and Special Rules. The most common waiver requests come from public servants who want to teach at local universities and colleges, almost all of which engage in business dealings with the city. Such waivers are generally granted, provided that the public servant does not teach his or her job or the confidential inner workings of the city. Special rules exist for public servants who work through a temporary agency,[4] for public servants who have a private law practice,[5] for those who seek to give compensated expert testimony[6] and for those who seek to work part-time for another city agency.[7]

Having Your Own Business: Ownership Interests

Public servants are a diverse group of people with many different interests. Many public servants have their own businesses or have an interest in a family

business. Chapter 68 refers to ownership in a business as an "ownership interest." Public servants are prohibited from having ownership interests in firms that do business with the city.[8] Also, ownership interests are imputed to a public servant if they are held by the public servant's spouse, domestic partner or unemancipated child. There are, of course, some exceptions to this prohibition. Excluded from the rule are firms whose shares are publicly traded and any interests held in a pension plan, deferred compensation plan, or mutual fund, if those investments are not controlled by the public servants. Moreover, in certain circumstances, the Board may grant an order under Charter §§ 2604(a)(3) and (a)(4), which allows a public servant to retain an otherwise prohibited ownership interest.

Determinations. In determining whether to grant an order, the Board considers the nature of the public servant's official duties, the manner in which the interest may be affected by any action of the city, and the appearance of conflict to the public, as well as the financial burden on the public servant which would be caused by the Board's decision. Generally, when issuing an order, the Board requires the public servant to recuse himself or herself from acting on matters involving the private firm's business dealings with the city. Public servants are generally allowed to retain their ownership interests in and sit on the board of directors of cooperative or condominium apartments where they reside.[9]

To Run or Not to Run: Political Activities

Chapter 68 does not for the most part prohibit voluntary political involvement by public servants, provided that the general provisions of (b)(2), (b)(3), and (b)(4) are adhered to.

Political Fundraising. Public servants are prohibited from coercing other public servants to engage in political activities, from requesting any subordinate public servant to participate in any political campaign and from compelling or requesting any person to make political contributions under threat of prejudice or promise of advantage.[10] High-level public servants and those with "substantial policy discretion," other than elected officials, are prohibited from requesting any person to make a political contribution for any candidate for an elected office of the city or for an elected official of the city who is a candidate for another elective office.

Special Rules. Elected officials, high-level public servants and public servants with substantial policy discretion may not be members of national or state committees of political parties, may not serve as an assembly district leader of a political party or as chair or officer of a county committee or the county executive committee of a political party. Certain exceptions exist for City Council members. Chapter 68 does not prohibit public servants from seeking elective office.

The Golden Goose: Gifts

From time to time public servants get offered items of value from persons or businesses engaged in business dealings with the city. In some cases, gifts may be accepted; in most, however, acceptance of a gift is a conflict of interest. The general prohibitions of (b)(2) and (b)(3), which state that public servants may not use their official positions for personal financial gain and may not engage in activities which are in conflict with the proper discharge of their official duties, are particularly pertinent when discussing gifts.

The General Rule. The Board's Gift Rule allows acceptance of gifts if they are valued at less than $50.[11] The $50 value is calculated as either one gift or a number of gifts from the same source or related sources within any 12-month period. Any gift over $50 must be returned, or if that is impracticable must be reported to the agency's inspector general who shall determine the disposition of the gift. A gift is not only cash, but may also be lunch or dinner, entertainment, travel or anything else of value. Even small gifts, however, may have the appearance of a conflict and thus should not be accepted. Indeed, even a $5 gift might in some circumstances violate the general prohibitions in (b)(2) and (b)(3).

Gifts that May Be Accepted. Gifts given on family or social occasions may be accepted so long as the real reason for the gift is a social relationship and there is no appearance of a conflict.[12] Awards and plaques in recognition of public service may be accepted, provided that their value is less than $150.[13] In some cases, meals, refreshments or travel-related expenses may be accepted as well. Certain gifts may be accepted by agencies (as opposed to individuals) as a gift to the city from private entities which are engaged in business dealings with the city.

The Party's Over: Post-Employment Restrictions

Negotiating. Public servants may not negotiate for a position with a private firm with which they are currently dealing in their city job.[14] For example, Linda is a contract manager for a city agency and is currently working with ABC Corp. as part of her city job. ABC Corp. enjoys working with Linda and asks her for a resume. Can Linda give ABC her resume? Linda cannot give ABC her resume until she has finished the project she is working on with them. She may, however, ask her supervisor to remove her from the project and then submit her resume.

The One-Year Ban. Public servants who leave city service may not appear before their former city agencies for one year from the date of their separation from the city.[15] An appearance is a "communication for compen-

sation" and includes making phone calls, attending meetings, writing letters and signing documents. [16]

Exceptions to the Ban. One exception to the one-year ban is for an appearance that is ministerial in nature.[17] For example, a former public servant may drop off papers to his or her former agency, but may not have a discussion about what is contained in those papers. In addition, a former public servant may communicate with his or her former agency when that communication is incidental to an otherwise permitted appearance before another agency or body. This exception does not apply, however, if that proceeding was pending in the agency while the former public servant was employed there.[18]

Particular Matter. The lifetime bar is a permanent prohibition and covers any matter on which the public servant worked personally and substantially while in city service. Personally and substantially, which is construed very narrowly, means that the public servant had responsibility over the matter through decision, approval, recommendation, investigation, or other similar activities. This ban applies to both paid and unpaid appearances.

Confidential Information. A former public servant may never divulge confidential information they may have learned as a result of their city employment.

Exceptions. The post-employment prohibitions do not apply to those public servants who leave the city to work for another government agency. This is referred to as the "government-to-government" exception. Another exception applies to those public servants who seek to contract with their former agencies to perform identified tasks. Such "consulting back" allows a former public servant to appear before their former agency prior to the expiration of the one-year appearance ban and to work on particular matters.[19]

Waivers. Waivers of the post-employment provisions are available, but are granted by the Board very sparingly. Factors used by the Board in determining whether to grant a waiver include: the relationship of the city to the public servant's prospective employer; the benefits of the waiver to the city (as opposed to the public servant); and the likelihood of harm to other organizations or companies in competition with the public servant's prospective employer if the waiver is granted.

For the Greater Good: Volunteer Activities

Public servants become involved in a myriad of volunteer activities for charitable organizations. Generally, volunteer work is ok, but there are a few restrictions. Volunteer work done for not-for-profit organizations that have *no* business with the city is permissible, provided that the restrictions contained in (b)(2), (b)(3) and (b)(4) are adhered to.

Business Dealings with the City. If the not-for-profit has business with the city or receives funding from the city, a public servant may still volunteer for the organization, but there are four conditions that must be met. First, the public servant may not take part, directly or indirectly, in the organization's business dealings with the city. Second, the organization may not have business dealings with the public servant's own agency, except where it is determined by the public servant's agency head that the volunteer activity is in furtherance of the purposes and interests of the city. Third, the public servant must perform work for the organization on his or her own time; and fourth, the public servant may not receive any compensation for the work. If the public servant wants to be involved in the business dealings with the city, a waiver may be possible.

Fundraising. Fundraising for a not-for-profit is generally allowed, but there are restrictions for some elected officials and high-level appointed public servants.[20] Elected officials may not take an "active role" in fundraising on behalf of charitable organizations. "Active" means making telephone calls, signing letters or otherwise directly soliciting for a charitable group. They may, however, serve as the chair or a member of an honorary committee for a fundraising event or be honored at a fundraising event. This is referred to as "passive" fundraising.

The New (b)(2) Rule. This rule allows public servants to perform certain volunteer work on city time, using city resources, and city personnel but not city letterhead. Such activities must be pre-approved by the public servant's agency head and by the Board.

Let it All Hang Out: Financial Disclosure

Approximately 12,000 city employees file financial disclosure reports with the Board each year. The Board retains the reports, which are available for public viewing, for six years. City employees may submit a request to the Board to have some or all of their financial disclosure reports withheld from public inspection. Failure to file a timely report may lead to monetary fines of up to $10,000.

Who Files. City employees who are agency heads, deputy agency heads, assistant agency heads, paid members of a board or commission, and each city employee who is a member of the management pay plan or whose salary exceeds $68,100 must file a financial disclosure report with the Board. In addition, any employee whose duties involve contracts, even if they are not one of the above types of employees, must file with the Board.

Required Information. The financial disclosure form requires a myriad of information. Those filing must include, for example, any non-city positions held, even if they are honorary and uncompensated; any earned and unearned income in excess of $1,000 from any non-city source; any reimbursements for travel-related expenses; any gifts over $1,000; and securities, real estate and business investments over $1,000. Also to be disclosed is certain information about the public servant's spouse and unemancipated children.

The Power of the Badge: Enforcement

A public servant or former public servant who violates any of the prohibitions discussed above is subject to an enforcement action by the Board.

Procedure. Ordinarily, an enforcement action begins with the receipt of a complaint. The Board may (1) dismiss the complaint if it fails to state allegations of a charter violation; (2) refer it to the Department of Investigation (DOI) for investigation if the complaint states a possible charter violation; (3) issue an "initial determination of probable cause," or, in the case of a minor violation or if related disciplinary charges are pending, refer the alleged violation to the head of the agency employing the public servant accused of a charter violation; or (4) issue a private warning letter. If the complaint has been referred to DOI, DOI makes a formal, confidential report to the Board. The Board then determines whether to proceed with a probable cause notice or to dismiss. If the Board decides to proceed with an action, the target of the investigation is afforded full due process. If the matter is not resolved at this stage, the Board may decide to go forward with a hearing. Most hearings are conducted at the Office of Administrative Trials and Hearings (OATH). After a hearing, OATH issues a non-binding, written report and recommendation, at which time both parties may submit comments to the Board. The Board considers OATH's recommendation and all the evidence as well as any comments submitted by the parties in making its own final findings of fact, conclusions of law and order. The Board's findings, conclusions, and order are made public only if a violation is found to have occurred. Once there is a final Board action, an appeal may be made to state court.

Penalties. Penalties include civil monetary fines of up to $10,000 per violation, recommendation of suspension or removal from office, or voiding of a contract. A District Attorney may separately prosecute a Chapter 68 violation as a misdemeanor in a criminal case.

Most public servants want to do the right thing. A comprehensive ethics law such as Chapter 68 provides a roadmap to guide them down the right path.

Endnotes

1. "Business dealings with the City means any transaction involving the sale, purchase, rental, or disposition of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but does not include a transaction involving a public servant's residence or a ministerial matter." Charter § 2601(8).
2. Charter § 2601(12).
3. *See* Charter § 2604(a)(1)(a).
4. Any pubic servant who works during any 12-month period for more than 30 days for any individual firm which is a client of a temporary agency, whether consecutive or in seriatim, is deemed to have a position with the firm and therefore must obtain a waiver if the firm engages in business dealings with the city. Advisory Opinion No. 98-5.
5. *See* Advisory Opinion No. 91-7 and Charter §§ 2604(b)(6) and (b)(7).
6. *See* Charter §§ 2604(b)(6) and (b)(8).
7. *See* Advisory Opinion No. 95-26.
8. *See* Charter § 2601(16), as amended by Board Rules § 1-11 (definition of ownership interest).
9. *See* Advisory Opinion No. 92-7. *See also* Advisory Opinions Nos. 94-27, 95-11, and 95-25.
10. *See* Charter §§ 2604(b)(9), (b)(11), (b)(12).
11. *See* Charter § 2602(b)(5) and Board Rules § 1-01.
12. *See* Board Rules § 1-01(c).
13. *See* Board Rules § 1-01(d).
14. *See* Charter § 2604(d)(1).
15. *See* Charter §§ 2604(d)(2), (d)(3).
16. *See* Charter § 2601(4).
17. *See* Charter § 2601(15). *See also* Charter § 2604(d)(7).
18. *See* Charter § 2604(d)(2) and Advisory Opinion No. 96-6.
19. *See* Advisory Opinion Nos. 93-12, 95-1.
20. *See* Advisory Opinion No. 91-10. *See also* Advisory Opinion Nos. 93-15, 93-26, 95-2, 95-7, 98-14.

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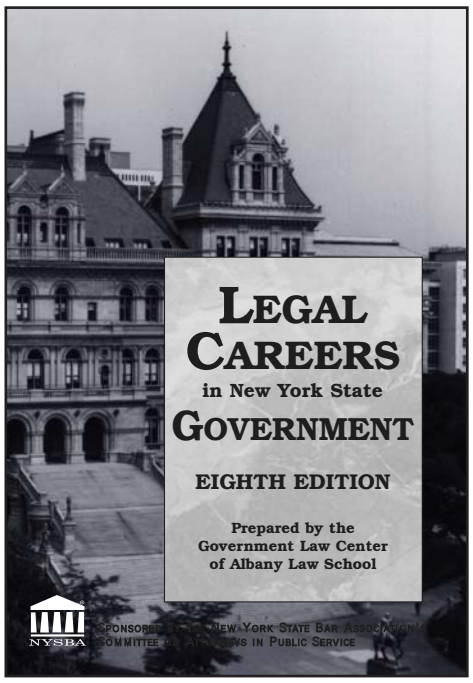

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Class based on first year of admission to bar of any state.

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☐ Attorneys admitted 1992 and prior	$ 235.
☐ Attorneys admitted 1993-1994	155.
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☐ Attorneys admitted 1997-1999	70.
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Out of state attorneys who do not work in New York

☐ Attorneys admitted 1995 and prior	95.
☐ Attorneys admitted 1996-1999	70.

☐ **Send Information on the Dues Waiver Program**

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