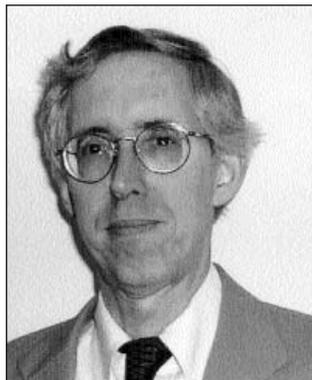


# Ethics Laws for Municipal Officials Outside New York City

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.<sup>1</sup> 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,"<sup>2</sup> 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;<sup>3</sup>
- Miscellaneous conflicts of interest provisions scattered throughout the consolidated laws, such as a prohibition on the simultaneous holding of elective and appointive village offices;<sup>4</sup>
- 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;<sup>5</sup>

- 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.<sup>6</sup>

## 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.<sup>7</sup> 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.<sup>8</sup>

*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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

## 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:<sup>15</sup>

- 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;<sup>16</sup>
- 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.<sup>17</sup>

## 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.<sup>18</sup> 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.<sup>19</sup> 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."<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup> "Willfully and knowingly" failing to disclose is a misdemeanor;<sup>24</sup> failure to disclose may also render the contract void, or at least voidable by the municipality.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup>

## 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.<sup>28</sup> 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).

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