

**KEEPING THE FAITH: A MODEL LOCAL ETHICS
LAW—CONTENT AND COMMENTARY**

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KEEPING THE FAITH: A MODEL LOCAL ETHICS LAW—CONTENT AND COMMENTARY

Mark Davies†

I. Introduction

The model local ethics law and accompanying commentary set forth in this Article reflect the work of the New York State Temporary State Commission on Local Government Ethics. From 1990 through 1992, that agency was charged with enforcing the 1987 Ethics in Government Act, with aiding municipalities in addressing their ethics concerns, and with proposing new ethics legislation.¹

Dozens of investigations by the Temporary State Commission, during its three-year life, revealed a broad range of ethical problems in municipalities throughout New York State. With adequate staff and funding, the Commission could have conducted dozens if not hundreds of additional investigations—not because municipal officials often commit unethical acts, but because they are perceived to have committed unethical acts. In the Commission's experience, a great chasm exists between the actual and perceived integrity of local government officials. Virtually none of the actions of officials investigated by the Commission violated current penal or ethics laws. Yet the public, perhaps justifiably, viewed those unregulated actions as improper.

The Commission's determination that corrupt or illegal actions by officials occur with extreme infrequency at the local level is good news. The bad news is this: local government officials lack desperately needed counsel as to what behavior is *ethically* acceptable and what is not.

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1. The 1987 Ethics in Government Act, 1987 N.Y. Laws 813, primarily regulates state officials. The provisions governing the Commission were codified in § 813 of the New York General Municipal Law. N.Y. GEN. MUN. LAW § 813 (McKinney 1986). See generally Temporary State Comm'n on Local Gov't Integrity, *Final Report*, 21 FORDHAM URB. L.J. 1 (1993).

As discussed at length in the Commission's Final Report² and in its report entitled "In Search of a Wise Law: Municipal Ethics Law Reform,"³ current New York State ethical standards for municipal officials are disgracefully inadequate. Most glaringly, they do not even contain a basic code of ethics to guide officials. As a result, neither officials nor citizens know what the rules are; the all-too-common result being that officials often face criticism for engaging in conduct that is permitted under current law. This appalling state of affairs, which exists not only in New York but in many other states as well, must be remedied with all deliberate speed.

The Commission and its Local Government Advisory Board, which was composed of representatives of the New York State Association of Counties, Association of Towns, and Conference of Mayors, proposed a state law to replace the hodgepodge of current ethics laws that govern municipal officials.⁴ That bill was introduced in the New York State legislature in 1991 as Assembly Bill 8637 and Senate Bill 6157. It was not reported out of committee.

II. The Need for Local Ethics Laws

Absent a strong state ethics law for municipal officials, local governments must employ their home rule powers to enact a comprehensive, local ethics law regulating the conduct of their officials. That a crushing need for a such a law exists is demonstrated by the Commission's investigations, which revealed the following instances of questionable activity:⁵

Appearances and representation

A town attorney appeared before the town planning board on behalf of private clients;

A town board member represented developers before the town planning board;

Compatibility of public office

A municipal official held two, allegedly incompatible municipal offices;

2. Temporary State Comm'n on Local Gov't Integrity, *supra* note 1, at 1-62.

3. The report is unpublished and is on file with the *Fordham Urban Law Journal*.

4. The current state ethics law is set forth in article 18 of the New York State General Municipal Law. N.Y. GEN. MUN. LAW §§ 801-813 (McKinney 1986 & Supp. 1993).

5. See Temporary State Comm'n on Local Gov't Ethics, Final Report 4-6 (unpublished sections of the Report, on file with the *Fordham Urban Law Journal*).

Ineffective enforcement

Town officials ignored, with impunity, the opinion of the Attorney General's office that a town planning-board member should refrain from voting on a matter in which he had an interest;

Using public office for private gain

A city housing services commission bought a city official's house at an allegedly inflated price;

Municipal officials used municipal property for private purposes;

Town planning board members engaged in real estate trade in the town;

A town assessor acted as a private realtor and developer in the town;

A village mayor voted to rezone his son-in-law's property to permit a gas station;

A town supervisor voted to award the town insurance contract to his brother-in-law;

A school board trustee voted to raise the salary of his sister, the deputy board clerk;

A town supervisor allegedly contracted with his father's bus company;

A village trustee voted to grant permits to clients of her private consulting business;

Zoning board members voted to grant variances to clients of their private businesses;

A city code-enforcement officer reviewed code compliance of his supervisor's private business;

An industrial development authority (IDA) hired bond counsel who had an interest in an IDA project;

A village board permitted a village golf superintendent to open a private pro shop on the village golf course;

A town code-enforcement officer issued a building permit to himself;

A town supervisor refused to correct a drainage problem until the affected citizen took action that benefitted the supervisor's mother;

Political solicitation

A city mayor solicited campaign contributions from city employees;

A town commissioner of public works solicited campaign contributions from vendors on the town vendor list;

A Democratic city mayor awarded city contracts to campaign contributors;

Republican county officials awarded contracts to contributors of the county Republican committee;

Improper influence of officials by private persons

A private construction firm that needed town permits sought to hire the town supervisor;

Revolving door

A former town assessor appeared before the town's tax-grievance committee on behalf of persons whose property he had assessed;

An IDA chair resigned to become the IDA's outside counsel, earning substantial fees;

Inflexibility of current law

A town board faced the dilemma of either contracting with a board member for recycling services, in violation of Article 18,⁶ or expending far more town money to contract with a vendor in another state;

A village board was prevented from placing a service awards program before the voters because board members who were volunteer firefighters felt constrained to recuse themselves.

Virtually none of the above actions are prohibited by current New York State law. Yet most citizens would regard them as improper. The state legislature having refused to enact a state ethics law for local government, each municipality must adopt its own ethics standards. Based on the bill jointly proposed by the Commission and its Local Government Advisory Board, the model local ethics law set forth below should assist municipalities in meeting that challenge.

III. A Model Local Ethics Law: Content and Commentary

Scope.

The model local law is intended for use in New York State counties, cities, towns, and villages. However, with minimal changes, it

6. N.Y. GEN. MUN. LAW §§ 801-13 (McKinney 1986 & Supp. 1993).

may be used in other municipalities, such as school districts. See, in particular, the Code of Ethics for the Buffalo Board of Education.⁷ With modification to comply with state law requirements, the model law may also be used in municipalities in other states.

Authority to Enact.

Section 806(1)(a) of the New York General Municipal Law requires all counties, cities, towns, villages, and school districts (and permits all other municipalities) to

“adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Such code shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article [18] but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.”⁸

Sections 806(1)(b) and 811 of the General Municipal Law specifically authorize municipalities to adopt a form of annual statement of financial disclosure. Financial disclosure is mandatory in counties, cities, towns, and villages with a population of 50,000 or more.⁹

In light of a recent New York State Court of Appeals decision,¹⁰ municipalities should exercise caution in unilaterally imposing ethics requirements on their unionized employees, as ethics requirements may be found to be mandatory subjects of bargaining and, thus, not necessarily capable of unilateral imposition.

MODEL LOCAL ETHICS LAW

Section 1. Title.

[If desired, assign a title to the local law, e.g.: “This local law shall be known and may be cited as the “Ethics Law of the [County, City, Town, or Village] of ____.”]

7. Unpublished manuscript on file with the *Fordham Urban Law Journal*.

8. N.Y. GEN. MUN. LAW § 806(1)(a) (McKinney 1986).

9. N.Y. GEN. MUN. LAW §§ 810(1), 811(2), 812(1)(a) (McKinney Supp. 1993).

10. *Board of Educ. v. New York State Pub. Employment Relations Bd.*, 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659 (1990).

Section 2. Purpose.

The purposes of this local law are:

- (a) To establish high standards of ethical conduct for officers and employees of the [County, City, Town, or Village];
- (b) To afford officers and employees of the [County, City, Town, or Village] clear guidance on such standards;
- (c) To promote public confidence in the integrity of the governance and administration of the [County, City, Town, or Village] and its agencies and administrative offices;
- (d) By requiring public disclosure of financial interests that may influence or be perceived to influence the actions of [County, City, Town, or Village] officers and employees, to facilitate consideration of potential ethical problems before they arise, minimize unwarranted suspicion, and enhance the accountability of government to the people; and
- (e) To provide for the fair and effective administration of this local law.

This local law is enacted pursuant to section 806 of the General Municipal Law of the State of New York and section 10 of the Municipal Home Rule Law and is not intended to authorize any conduct prohibited by Article 18 of the General Municipal Law. This local law also supplements other provisions of law regulating ethics in local government, such as section 107 of the Civil Service Law of the State of New York.

Section 2. Comment.

While the vast majority of municipal officials are honest and zealous, being honest is not enough. Appearances and public perception play an enormously important role in the effectiveness of officials and in the well-being of their communities.

However, ethics laws are not an academic exercise. Their purpose lies not in filing forms or in prohibiting officials' activity merely for prohibition's sake. To the contrary, proposals for ethics law reform must never be divorced from their impact upon the lives and effectiveness of the officials themselves.

The point of ethics laws for municipal officials is to improve both the perception and the reality of integrity in local government and to encourage, not discourage, citizens from participating in that

government. If an ethics law fails in those goals, it fails in everything. This model local ethics law seeks to fulfill those goals. At the same time, it must comply with, and incorporate, the often confusing requirements of Article 18 of the General Municipal Law.

Apart from Article 18, other New York State statutes, such as Civil Service Law section 107, regulate ethics in local government.¹¹ New York State common law also places certain restrictions on self-dealing by public officials.¹²

This model local ethics law primarily addresses conflicts between the public and private interests of municipal officials, and does not seek to regulate the compatibility of two public offices. The Attorney General, and to a lesser extent the Comptroller's office, have developed an extensive body of opinions on compatibility of public office,¹³ based on various statutory provisions.¹⁴

**Section 3. Supersession of General Municipal Law § 808;
Repeal of Existing [County, City, Town, or
Village] Ethics Laws.**

To the extent this [chapter] is inconsistent with the provisions of section 808 of the General Municipal Law, this [chapter] shall supersede those provisions. [Provide for the repeal of any existing local laws or ordinances governing ethics in the municipality that are rendered obsolete by this local law.]

Section 3. Comment.

As discussed below, both the Attorney General's office and the Commission have taken the position that municipalities' home rule powers permit them, by local law, to vary the provisions of section 808 of the General Municipal Law relating to the establishment

11. N.Y. CIV. SER. LAW § 107 (McKinney Supp. 1993).

12. See, e.g., Clarke v. Town of Russia, 283 N.Y. 272, 28 N.E.2d 833 (1940); Smith v. City of Albany, 61 N.Y. 444 (1875); People *ex rel.* Schenectady Illuminating Co. v. Board of Supervisors, 166 A.D. 758, 151 N.Y.S. 1012 (App. Div. 1915). Cf. N.Y. TOWN LAW § 271(3) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-718(3) (McKinney Supp. 1994).

13. See, e.g., 1943 Op. Att'y Gen. 94; 1946 Op. Att'y Gen. 111; 7 Ops. St. Compt. 15 (1951).

14. See, e.g., N.Y. VILLAGE LAW § 3-300 (McKinney Supp. 1993); N.Y. SECOND CLASS CITIES LAW § 19 (McKinney Supp. 1993); N.Y. TOWN LAW § 20 (McKinney 1990 & Supp. 1993); N.Y. COUNTY LAW § 411 (McKinney 1991); N.Y. GEN. CITY LAW § 3 (McKinney 1989); N.Y. GEN. MUN. LAW §§ 239-b, 243, 553(4), 801, 856(4) (McKinney 1986); see also Strati v. Balancia, N.Y. L.J., May 23, 1991, at 28, col. 2 (Sup. Ct., Westchester Co. 1991) (upholding local law prohibiting town planning board members from running for town supervisor or town board).

and membership of ethics boards. However, when adopting a local law changing or superseding any provision of a state statute or a prior local law or ordinance, the legislative body must specify the chapter or local law or ordinance (and the number and year of enactment, section, subsection, or subdivision) that the legislative body intends to change or supersede, although the failure to do so does not affect the validity of the local law.¹⁵

Section 4. Ethics Law.

The following sections, numbered [100 through 218] are added to the [Unified Code of the County, City, Town, or Village of ____]:

Section 4. Comment.

An ethics law rests upon a triad of provisions: an understandable and comprehensive Code of Ethics, sensible disclosure, and a reasonable enforcement mechanism. Removal of any of those three legs topples the entire ethics structure.

Furthermore, an unintelligible ethics law cannot be obeyed or enforced. This model law, therefore, places heavy emphasis upon easily understandable organization, contents, and word usage, particularly in those provisions that directly affect the activities of officials. An ethics law *must* be user friendly. Otherwise, it fails in its essential purpose of providing guidance to officials and confidence to citizens.

For that reason, this model law is divided into two parts. The first part (sections 100-113) contains the provisions directly concerning the conduct of municipal officials. The second part (sections 201-218) contains the provisions for administering the ethics law. Except for municipal attorneys and ethics board members, officials would not often have occasion to consult the second part; the provisions of concern to officials are therefore grouped into the first fourteen sections of the model law.

15. N.Y. MUN. HOME RULE LAW § 22 (McKinney 1969).

ETHICS LAW
PART A: SUBSTANTIVE PROVISIONS

**§ 100. Code of Ethics for [County, City, Town, or Village]
Officers and Employees.**

1. General prohibition.

A [County, City, Town, or Village] officer or employee shall not use his or her official position or office, or take or fail to take any action, in a manner which he or she knows or has reason to know may result in a personal financial benefit for any of the following persons:

- (a) the [County, City, Town, or Village] officer or employee;
- (b) his or her outside employer or business;
- (c) a member of his or her household;
- (d) a customer or client;
- (e) a relative; or
- (f) a person from whom the officer or employee has received election campaign contributions of more than \$1000 in the aggregate during the past twelve months.

2. Recusal.

A [County, City, Town, or Village] officer or employee shall promptly recuse himself or herself from acting on a matter before the [County, City, Town, or Village] when acting on the matter, or failing to act on the matter, may financially benefit any of the persons listed in subdivision 1 of this section.

3. Gifts.

A [County, City, Town, or Village] officer or employee shall not solicit anything of value from any person who has received or sought a financial benefit from the [County, City, Town, or Village], nor accept anything of value from any person who the [County, City, Town, or Village] officer or employee knows or has reason to know has received or sought a financial benefit from the [County, City, Town, or Village] within the previous twenty-four months.

4. Representation.

A [County, City, Town, or Village] officer or employee shall not represent any other person in any matter that person has before the [County, City, Town, or Village] nor represent any other per-

son in any matter against the interests of the [County, City, Town, or Village].

5. Appearances.

A [County, City, Town, or Village] officer or employee shall not appear before any agency of the [County, City, Town, or Village], except on his or her own behalf or on behalf of the [County, City, Town, or Village].

6. Confidential information.

[County, City, Town, or Village] officers and employees and former [County, City, Town, or Village] officers and employees shall not disclose any confidential information or use it to further anyone's personal interests.

7. Political solicitation.

A [County, City, Town, or Village] officer or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the officer or employee to participate in an election campaign or contribute to a political committee.

8. Revolving door.

A [County, City, Town, or Village] officer or employee shall not appear or practice before the [County, City, Town, or Village], except on his or her own behalf, or receive compensation for working on any matter before the [County, City, Town, or Village], for a period of one year after the termination of his or her [County, City, Town, or Village] service or employment; however, the bar shall be permanent as to particular matters on which the [County, City, Town, or Village] officer or employee personally worked while in [County, City, Town, or Village] service.

9. Avoidance of conflicts.

[County, City, Town, or Village] officers and employees shall not knowingly acquire, solicit, negotiate for, or accept any interest, employment, or other thing of value which would put them in violation of this Code of Ethics.

10. Inducement of others.

A [County, City, Town, or Village] officer or employee shall not induce or aid another officer or employee of the [County, City,

Town, or Village] to violate any of the provisions of this Code of Ethics.

§ 100.—Comment.

A Code of Ethics is the heart and soul of any ethics law. The Code must be easy for lay persons to understand and apply because, as noted above, its primary purpose is to provide guidance to officials and citizens.

The provisions of the Code of Ethics must be read together with the exclusions in section 102 and the definitions in section 105.

Some municipalities may wish to include in their Code of Ethics certain additional provisions, such as a ban on all, or designated, officials holding offices in a political party or committee (a so-called “two hats” provision). Such a provision might read as follows:

No [County, City, Town, or Village] officer or employee may be a member of a party committee, constituted committee, or duly constituted subcommittee of a county committee.

“Party committee,” “constituted committee,” and “duly constituted subcommittee of a county committee” are defined in section 14-100 of the Election Law and include, for example, state, county, city, town, and village political party committees.¹⁶ Some municipalities may wish to limit the two-hats provision to certain officials (e.g., policymakers) or to exclude certain officials (e.g., elected officials).¹⁷

§ 100(1).

This provision is the centerpiece of the Code of Ethics. It prohibits the official from taking any action that might financially benefit any of the listed persons. Sometimes inaction personally benefits an official or his or her close associates—for example, when a code enforcement officer fails to cite his or her brother for a zoning violation. For that reason, the provision also prohibits the official from refraining from acting. In either case, the official must recuse himself or herself pursuant to section 100(2).

A municipality may wish to add additional categories of associates or relatives to the list, such as brothers-in-law and sisters-in-

16. See N.Y. ELEC. LAW § 14-100 (McKinney Supp. 1993).

17. See, e.g., NEW YORK, N.Y., CHARTER § 2604(b)(15). The New York Court of Appeals upheld § 2604(b)(15) in *Golden v. Clark*, 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990).

law of the official, business associates of the official, employers of designated relatives of the official, partners of the official, creditors of the official, or persons from whom the official has received a substantial gift within the previous twelve months. With respect to the restriction on acting to benefit a campaign contributor (section 100(1)(f)), a municipality may wish to include contributions through a party committee or noncandidate political committee and may wish to expand the twelve month period to an election cycle. The municipality may also wish to adjust the \$1,000 threshold in section 100(1)(f) to an amount appropriate in the particular community.

§ 100(2).

This provision requires that the official entirely refrain from participating in the matter. Mere abstention from voting on the matter is not sufficient. The official may not even discuss the matter with other officials. To emphasize the official's duty to divorce himself or herself *completely* from the matter, some municipalities may wish to add the phrase "formally or informally" between "from" and "acting."

§ 100(3).

General Municipal Law § 805-a(1)(a) provides that:

No municipal officer or employee shall . . . directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, 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 . . .¹⁸

At least one trial court has held that the above provision is unconstitutionally vague.¹⁹

Any conduct prohibited by section 805-a(1)(a) would also be prohibited by the gift provision in the model law, even though section 805-a(1)(a), unlike the model law, contains no exemptions for gifts from parents, spouses, and children.²⁰ Such exemptions are implicit in the "reasonably be inferred" and "reasonably be ex-

18. N.Y. GEN. MUN. LAW § 805-a(1)(a) (McKinney Supp. 1993).

19. *People v. Moore*, 85 Misc. 2d 4, 377 N.Y.S.2d 1005 (Fulton County Ct. 1975).

20. N.Y. GEN. MUN. LAW § 805-a(1)(a) (McKinney Supp. 1993).

pected" language of section 805-a(1)(a). However, currently, no court has addressed this issue.

The gifts provision in the model law prohibits acceptance of gifts only when the official "knows or has reason to know" the giver has received or sought a financial benefit from the municipality. The official is thus protected from inadvertently violating the law by accepting a gift from someone who the official could not have known did business with the municipality. Moreover, section 102 excludes awards from charitable organizations, gifts from parents, spouses, and children, gifts having an aggregate value of seventy-five dollars or less during the year, payments for performing certain wedding ceremonies, and gifts accepted on behalf of the municipality and turned over to the municipality, e.g., the mayor's acceptance of a gift on behalf of his or her city from the mayor of a sister city.

§§ 100(4) & 100(5).

Section 805-a(1)(c) of the General Municipal Law prohibits officials from receiving or agreeing to receive compensation for services to be rendered in relation to any matter before the official's own agency or before an agency over which the official has jurisdiction or to which he or she has the power to appoint someone.²¹ Section 805-a(1)(d) of the General Municipal Law prohibits officials from receiving or agreeing to receive compensation for services to be rendered in relation to any matter before *any* agency of the municipality *if* the compensation is contingent upon any action by the agency with respect to the matter.²² The prohibition on contingent payment, however, does not prohibit the fixing of a non-contingent fee, at any time, based on the reasonable value of the services rendered.

The above provisions fail to address many potential conflicts of interest. For example, although the provisions prohibit a town zoning board member from being paid to appear on behalf of a private client before the town zoning board, they do not prohibit the town attorney from appearing before the zoning board on behalf of a private client, nor would they prohibit the chair of the planning board, or even the code enforcement officer, from appearing before the zoning board for a private client. Sections 100(4) and (5) of the model law address such conflicts and completely incorpo-

21. N.Y. GEN. MUN. LAW § 805-a(1)(c) (McKinney Supp. 1993).

22. *Id.* § 805-a(1)(d).

rate the restrictions contained in sections 805-a(1)(c) and (d) of the General Municipal Law.

With respect to sections 100(4) and 100(5) of the model law, one might argue that any conduct prohibited by subdivision 5 (appearances) is also prohibited by subdivision 4 (representation). However, because the restriction on appearances is probably easier to understand and enforce than the restriction on representation, both provisions should be included in the Code of Ethics.

Some municipalities may find the municipal-wide bar on representations and appearances too broad and may, therefore, wish to restrict the bar to the official's own agency. However, such a narrow bar would, for example, permit the town code-enforcement officer or the town attorney to represent private clients before the town planning board because those officers are not employees of that agency. The broader prohibition or, at the very least, a prohibition that would prevent such abuses is therefore preferable.

In addition, some municipalities may wish to preclude not only representation but also assistance or legal assistance, with an exclusion for representation or assistance in the performance of the officer's or employee's official duties. The model law's exclusion for actions authorized by state or federal law (section 102(1)) would permit an official to represent or assist persons in an official capacity. Sections 102(6) and 102(7) specifically exclude the receipt of municipal services or benefits generally available to residents of the municipality and, in matters of public advocacy, the representation of constituents by elected officials without compensation.

The bar on representation and appearances does not prohibit an official from participating in the fee that his or her business associate receives from such appearances or representation. Furthermore, the only municipal agencies before which the official's business associate may not appear are the official's own agency and agencies over which the official exercises control (section 106).

§ 100(6).

This provision is broader than General Municipal Law section 805-a(1)(b) because it applies to *all* confidential information, however acquired, and prohibits use of confidential information to further *anyone's* personal interests.²³ Confidential information may

23. N.Y. GEN. MUN. LAW § 805-a(1)(b) (McKinney Supp. 1993) ("No municipal officer or employee shall . . . disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.")

be disclosed as permitted by law (section 102(1)), including the state whistleblower law.²⁴

§ 100(7).

Political solicitation of subordinates by an official fosters the appearance, if not the reality, of coercion. The Code of Ethics therefore bars such solicitation, except from political appointees (see definition of "subordinate" in section 105(11)).

Inclusion of the word "knowingly" means that neither an official nor his or her campaign committee need cull the names of municipal officials from voter registration lists. However, a targeted mailing to municipal officials would be prohibited.

Some municipalities may wish to add a bar on soliciting from persons who have sought or received a financial benefit from the municipality within the previous twenty-four months. Municipalities may also wish to consider whether they should extend the bar of section 100(7) to nonincumbent candidates because appointed officials may fear reprisal if they refuse to aid the campaign of a non-incumbent who later wins the election.

Section 100(7) is *not* a little Hatch Act²⁵ and does not restrict voluntary political contributions or political activity by any official.²⁶ The section merely prohibits an official from putting the political bite on a subordinate.²⁷

§ 100(8).

Article 18 of the General Municipal Law contains no restrictions upon the activities of former municipal officials. Thus, a village planning board member may today vote to approve a major development and tomorrow go to work for the developer and even appear before the planning board on that very same project.

The revolving door provision in the model law restricts only the former official; it does not restrict his or her business associates.²⁸ Thus, for example, a former mayor could not work on matters for or before his or her municipality for one year, but all of the mayor's colleagues in his or her new firm could. Section 100(8),

24. N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1993).

25. 5 U.S.C. §§ 1501-1508 (1977 & Supp. 1993).

26. Cf. N.Y. LAB. LAW § 201-d (McKinney Supp. 1994); N.Y. CIV. SERV. LAW § 27 (McKinney 1987).

27. See also N.Y. CIV. SERV. LAW § 107 (McKinney Supp. 1993).

28. See generally *Forti v. New York State Ethics Comm'n*, 554 N.E.2d 876 (N.Y. 1990) (upholding restrictions in section 73 of the Public Officers Law on former state executive branch employees appearing before their former agencies).

however, does prohibit the former official from profiting from his or her associates' business with the municipality.²⁹

Moreover, section 100(8) only restricts appearances by the former official on behalf of customers or clients. The official may appear on his or her own behalf, for example, to seek a zoning variance for his or her own home. In addition, the revolving door provision does not apply to officials who performed only ministerial duties while in municipal service (section 102(8)).

Under section 100(8), a business whose owner and sole employee is a former official would be effectively barred for one year from appearing before the municipality on behalf of customers or clients. However, if that bar creates a particular hardship, the ethics board could grant a waiver under section 211.

The revolving door bar extends for only one year, a period that is sufficiently long for the vast majority of municipalities. Those municipalities that need a longer bar may adopt it, but should bear in mind that the adoption of lengthy bars tends to discourage recruitment of qualified officials. Under the model law a lifetime bar applies to matters on which the former official personally worked while in municipal service. "Personally worked" means the official actually worked on the matter, not that he or she supervised a department that worked on the matter.

This revolving door provision is a municipal-wide bar. Some municipalities may wish to limit the bar to the former official's particular agency. For the reasons set forth in the comments to section 100(4) above, such a narrow bar is not recommended.

Section 100(8) would prohibit the municipality from hiring a former official as an independent contractor. Some municipalities may, therefore, wish to include the phrase "or on behalf of the [County, City, Town, or Village]" after the phrase "except on his or her own behalf." However, such an exemption would permit sweetheart deals between the municipality and a former official, who would normally have the edge in competing with vendors lacking his or her municipal contacts.

29. To that extent, this model local ethics law restricts former officials more than current officials. That apparent anomaly, however, makes sense when one notes that former officials are subject only to the revolving door and confidential information provisions while current officials are subject to the entire panoply of restrictions in the Code of Ethics.

§ 100(9).

One might argue that this provision does not regulate any conduct not otherwise regulated by the other provisions of the Code of Ethics. However, an avoidance of conflicts provision is common to many municipal codes of ethics around the country and provides an additional arrow in the Code of Ethics quiver.

Municipalities finding the phrase "put them in violation" too colloquial could change it to read "result in a violation."

§ 100(10).

The model law prohibits a municipal official from inducing or aiding another municipal official to violate the Code of Ethics. For example, if a town board member and a member of the town zoning board jointly own a certain piece of property, the town board member could not ask the zoning board member to vote for a variance for the property.

§ 101. Transactional Disclosure.

1. Whenever a [County, City, Town, or Village] officer or employee is required to recuse himself or herself under the Code of Ethics set forth in section 100 of this [chapter], he or she

- (i) shall immediately refrain from participating further in the matter,
- (ii) shall promptly inform his or her superior, if any, and
- (iii) shall promptly file with the [County, City, Town, or Village] clerk a signed statement disclosing the nature and extent of the prohibited action or, if a member of a board, shall state that information upon the public record of the board.

2. An officer or employee shall not be required to file a disclosure statement pursuant to this section if he or she, with respect to the same matter, has filed with the [governing body of the county, city, town, or village] a disclosure statement complying with requirements of section 104 of this [chapter].

§ 101.—Comment.

Far more important than blunderbuss annual financial disclosure, transactional disclosure provides pinpoint disclosure when a conflict actually arises and should thus constitute the primary focus of disclosure in any ethics scheme.

Some municipalities may wish to replace "nature and extent of the prohibited action" with "reason for recusal," a less precise phrase.

Section 803 of the General Municipal Law, which is incorporated in section 104(2) of the model law, requires disclosure of certain interests in contracts.³⁰ To eliminate an official's need to file separate disclosure statements for the same transaction under both section 104 and section 101, section 101(2) exempts an official from having to file disclosure statements for the same transaction under both section 104 and section 101.

§ 102. Exclusions from the Code of Ethics and from Transactional Disclosure.

The provisions of sections 100 and 101 of this [chapter] shall not prohibit, or require recusal or transactional disclosure as a result of:

1. An action specifically authorized by statute, rule, or regulation of the state of New York or of the United States.
2. A ministerial act.
3. Gifts
 - (a) received by the [County, City, Town, or Village] officer or employee from his or her parent, spouse, or child; or
 - (b) having an aggregate value of \$75 or less during any twelve-month period; or
 - (c) accepted on behalf of the [County, City, Town, or Village] and transferred to the [County, City, Town, or Village].
4. Gifts or benefits having a value of \$50 or less that are received by a [County, City, Town, or Village] officer or employee listed in section 11 of the Domestic Relations Law of the State of New York for the solemnization of a marriage by that officer or employee at a place other than his or her normal public place of business or at a time other than his or her normal hours of business.
5. Awards from charitable organizations.
6. Receipt of [County, City, Town, or Village] services or benefits, or use of [County, City, Town, or Village] facilities, that are generally available on the same terms and conditions to residents or a class of residents in the [County, City, Town, or Village].

30. N.Y. GEN. MUN. LAW § 803 (McKinney 1986).

7. Representation of constituents by elected officials without compensation in matters of public advocacy.

8. [County, City, Town, or Village] officers or employees appearing or practicing before the [County, City, Town, or Village] or receiving compensation for working on a matter before the [County, City, Town, or Village] after termination of their [County, City, Town, or Village] service or employment where they performed only ministerial acts while working for the [County, City, Town, or Village].

§ 102.—Comment.

§ 102(2).

The village clerk may, for example, issue a fishing license to her brother.

§ 102(3).

Some municipalities may also wish to exclude gifts from siblings because the model law would prohibit the sibling of an official from giving the official a wedding gift exceeding seventy-five dollars if the sibling sought or received a financial benefit from the municipality within the previous twenty-four months. However, such a situation would rarely occur. Moreover, where the situation did arise, the sibling could apply for a waiver from the ethics board.

In view of the seventy-five dollar exclusion, little need would seem to exist for excluding attendance at a public social event, or attendance at a private social event (such as a dinner party) arising from normal hospitality with a value not exceeding, for example, \$100. Such exclusions inject unnecessary ambiguity into a provision that requires a bright line rule.

§ 102(4).

This provision tracks the exclusion in General Municipal Law section 805-b, which also defines a town or village judge's "normal hours of business" as "those hours only which are officially scheduled by the court for the performing of the judicial function."³¹

§ 102(5).

Some municipalities may wish to restrict this exclusion somewhat by adding the word "public" before "awards."

31. N.Y. GEN. MUN. LAW § 805-b (McKinney Supp. 1993).

§ 102(6).

As a resident of the municipality, an official should be able to receive from the municipality the same services and benefits as any other resident, provided that the official does not receive any preferential treatment.

§ 102(7).

Elected officials are elected to serve their constituents. Thus, for example, when a resident complains to a town board member that the town highway department blocks the resident's driveway with snow, the board member must be able to pursue that complaint with the proper town authorities.

The phrase "matters of public advocacy" may be replaced by "proper discharge of official duties," a phrase that appears in Public Officers Law section 73(7)(a), which regulates the business activities of state employees.³²

§ 102(8).

The revolving door restrictions (section 100(8)) only apply to officials with some discretionary authority. Employees who perform only ministerial actions are not subject to those restrictions.

§ 103. Inducement of Violations of the Code of Ethics.

No person, whether or not a [County, City, Town, or Village] officer or employee, shall induce or attempt to induce a [County, City, Town, or Village] officer or employee to violate any of the provisions of sections 100 or 101 of this [chapter].

§ 103.—Comment.

Under current state law, absent outright bribery, the occasional dishonest private citizen or company that induces a municipal official to violate ethics laws runs no risk of penalty. For example, hoping to keep a village's business, a bank might give a personal loan to the village treasurer at a below-market interest rate. Quite possibly, the official will lose his or her job as a result, however, absent outright bribery, the bank will lose nothing.

The Commission has repeatedly stressed that private citizens, vendors, developers, and providers must take some responsibility for municipal officials complying with ethics laws. The failure of current Article 18 to penalize private individuals and companies

32. N.Y. PUB. OFF. LAW § 73(7)(a) (McKinney 1988).

who induce a municipal official to violate ethics laws is unacceptable. Three provisions in the bill, and in this model local ethics law, reflect this philosophy: (1) the prohibition against anyone, including a private person, inducing an official to violate the Code of Ethics (section 103); (2) the debarment provision (section 112); and (3) the applicant disclosure provision (section 108). Accordingly, section 103 applies to officials and nonofficials alike.

§ 104. Interests in Contracts with the [County, City, Town, or Village].

1. Prohibited interests.

No [County, City, Town, or Village] officer or employee shall have an interest in a contract with the [County, City, Town, or Village], or an interest in a bank or trust company, that is prohibited by section 801 of the General Municipal Law of the State of New York. Any contract willfully entered into by or with the [County, City, Town, or Village] in which there is an interest prohibited by that section shall be null, void, and wholly unenforceable, to the extent provided by section 804 of that law.

2. Discloseable interests.

Any [County, City, Town, or Village] officer or employee who has, will have, or later acquires an interest in any actual or proposed contract with the [County, City, Town, or Village] shall publicly disclose the nature and extent of that interest in accordance with section 803 of the General Municipal Law. The clerk of the [governing body of the county, city, town, or village] shall cause a copy of that disclosure to be filed promptly with the Ethics Board.

3. Violations.

Any [County, City, Town, or Village] officer or employee who willfully and knowingly violates the provisions of this section shall be guilty of a misdemeanor, to the extent provided by section 805 of the General Municipal Law.

§ 104.—Comment.

The current prohibition against an official having an interest in a contract with the municipality in sections 801 and 802 of the General Municipal Law is overly broad, difficult to enforce, and virtu-

ally unintelligible to a lay person.³³ In many small, rural communities, members of the legislative body, or other elected or appointed officials, may well own the only hardware store, gas station, or snow plowing service in the area. The municipality must then either ignore the prohibition against contracts with municipal officials or obtain the goods and services at a significantly higher price from distant vendors. (Under General Municipal Law Section 800(5), this prohibition applies to *all* municipal officials—whether paid or unpaid).

The General Municipal Law's prohibition against interested contracts in section 801 functions as follows: it prohibits municipal officers and employees from having an "interest" in a "contract" with the municipality if the officer or employee, individually or as a member of a municipal board, has some authority with respect to that contract—namely, the power or duty to negotiate, prepare, authorize, or approve the contract or payment under the contract or the power or duty to audit bills or claims under the contract or the power or duty to appoint someone who has any of those powers or duties.³⁴ (General Municipal Law section 801(2) establishes special requirements for fiscal officers and employees of municipalities).

"Contract" is broadly defined in General Municipal Law section 800(2) to include not only express or implied agreements with the municipality but also claims, accounts, or demands against the municipality.³⁵ Thus, for example, a law suit against the municipality would be considered a "contract."

Under General Municipal Law section 800(3), an official has an "interest" in a contract if he or she receives any "direct or indirect pecuniary or material benefit" as a result of the contract.³⁶ The official, therefore, does not need to be a party to the contract; he or she need only receive a financial benefit because of the contract. In addition, the official is deemed to have an interest in a contract of his or her family or outside business or employment.³⁷ Section 802 then sets forth fifteen exceptions to these rules.

33. See N.Y. GEN. MUN. LAW §§ 801-802 (McKinney 1986).

34. N.Y. GEN. MUN. LAW § 801 (McKinney 1986).

35. N.Y. GEN. MUN. LAW § 800(2) (McKinney Supp. 1993).

36. *Id.* § 800(3).

37. Section 800(3) states:

[A] municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a

If the official has an interest in the contract and has the requisite power or duty with respect to that contract and if no exception applies, then that interest is prohibited. In that event, under section 804 of the General Municipal Law, the contract (if "willfully" entered into) is "null, void and wholly unenforceable"; and, under section 805, the official (if he or she "willfully and knowingly" violated the restriction) is guilty of a misdemeanor. "Wilful" does not require knowledge that the contract violated the law but only knowledge of the facts that resulted in the violation.³⁸ Where a prohibited interest in a contract exists, the official's disclosure of the interest and his or her abstention from participating in the matter is to no avail; the contract is nonetheless void, and the official has committed a crime.

Under section 803 of the General Municipal Law, where the official "has, will have, or later acquires" an interest in an actual or proposed contract with the municipality, he or she must publicly disclose in writing to the governing body of the municipality the nature and extent of that interest as soon as he or she has knowledge of it,³⁹ unless the interest is exempted under section 802(2). Thus, the official must disclose an interest in a contract with his or her municipality even if the official lacks sufficient power or duty over the contract to render the interest prohibited and even if the interest is exempted under section 802(1). "Wilfully and knowingly" failing to disclose an interest in a contract is a misdemeanor under section 805 of the General Municipal Law.

Certain additional prohibited interest provisions apply in Nassau County under General Municipal Law section 804-a.

§ 105. Definitions.

Unless otherwise stated or unless the context otherwise requires, when used in this [chapter]:

1. "Appear" and "appear before" mean communicating in any form, including, without limitation, personally, through another person, by letter, or by telephone.
2. "Customer or client" means (a) any person to whom a [County, City, Town, or Village] officer or employee has supplied

member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.

Id.

38. Op. St. Compt. 85-9; *see also Landau v. Percacciolo*, 66 A.D. 2d 80, 412 N.Y.S.2d 378 (App. Div. 1978).

39. *See N.Y. GEN. MUN. LAW § 803 (McKinney 1986).*

goods or services during the previous twenty-four months having, in the aggregate, a value greater than \$1,000 or (b) any person to whom a [County, City, Town, or Village] officer's or employee's outside employer or business has supplied goods or services during the previous twenty-four months having, in the aggregate, a value greater than \$1,000 but only if the officer or employee knows or has reason to know the outside employer or business supplied the goods or services.

3. "Ethics Board" means the Ethics Board of the [County, City, Town, or Village] of _____ established pursuant to section 203 of this [chapter].

4. "Gift" and "financial benefit" shall include any money, service, license, permit, contract, authorization, loan, travel, entertainment, hospitality, or any promise thereof, or any other gratuity or promise thereof or anything of value. A financial transaction may be a financial benefit but shall not be a gift unless it is on terms not available to the general public. "Gift" and "financial benefit" do not include campaign contributions authorized by law.

5. "Ministerial act" means an action performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the act.

6. "[County, City, Town, or Village]" means the [County, City, Town, or Village] of _____ but shall not include the [County, City, Town, or Village court].

7. "[County, City, Town, or Village] officer or employee" means any officer or employee of the [County, City, Town, or Village], whether paid or unpaid, and includes, without limitation, all members of any office, board, body, advisory board, council, commission, agency, department, district, administration, division, bureau, or committee of the [County, City, Town, or Village]. "[County, City, Town, or Village] officer or employee" shall not include:

- (a) A judge, justice, officer, or employee of the unified court system;
- (b) A volunteer fire fighter or civil defense volunteer, except a fire chief or assistant fire chief; or
- (c) A member of an advisory board of the [County, City, Town, or Village] if, but only if, the advisory board has no authority to implement its recommendations or to act on behalf of the [County, City, Town, or Village] or to restrict the authority of the [County, City, Town, or Village] to act. No entity established pursuant to the Gen-

eral Municipal Law of the State of New York shall be deemed an advisory board for purposes of this paragraph.

8. "Outside employer or business" means:

- (a) any activity, other than service to the [County, City, Town, or Village], from which the [County, City, Town, or Village] officer or employee receives compensation for services rendered or goods sold or produced;
- (b) any entity, other than the [County, City, Town, or Village], of which the [County, City, Town, or Village] officer or employee is a member, officer, director, or employee and from which he or she receives compensation for services rendered or goods sold or produced; or
- (c) any entity in which the [County, City, Town, or Village] officer or employee has an ownership interest, except a corporation of which the [County, City, Town, or Village] officer or employee owns less than five percent of the outstanding stock.

For purposes of this definition, "compensation" shall not include reimbursement for necessary expenses, including travel expenses.

9. "Person" shall include both individuals and entities.

10. "Relative" means a spouse, child, step-child, brother, sister, or parent of the [County, City, Town, or Village] officer or employee, or a person claimed as a dependent on the [County, City, Town, or Village] officer's or employee's latest individual state income tax return.

11. "Subordinate" of a [County, City, Town, or Village] officer or employee shall mean another [County, City, Town, or Village] officer or employee over whose activities he or she has direction, supervision, or control, except those who serve in positions that are in the exempt classification under section 41 of the Civil Service Law of the State of New York or in the unclassified service under subdivisions (a) through (f) of section 35 of that law.

§ 105.—Comment.

Although many ethics laws lead off with a section containing numerous and lengthy definitions, the Commission believed that the first section of an ethics law should be a code of ethics. Furthermore, substantive provisions should not be buried in intricately drafted definitions. In particular, words in the code of ethics must not be so defined that they trap an unsuspecting official.

The definitions in this model local law are kept to a minimum and do not add to the official's duties imposed by the plain meaning of the Code of Ethics. Rather, if anything, the definitions cut back on the official's duties as he or she would understand them to be upon reading the Code of Ethics. For example, the definition of "relative" only includes the immediate family, not cousins, uncles, or aunts. Thus, the official who reads the Code of Ethics, without consulting the definitions or exclusions, will in all likelihood view the Code of Ethics as more restrictive than it really is. This approach protects the official from inadvertently violating the Code of Ethics.

Some municipalities may wish to include additional definitions—for example, of "member of household" (section 100(1)(c)) or "political committee" (section 100(7)).⁴⁰

§ 105(2).

An employee of a large corporation may not know many of the customers or clients of his or her employer and should not be penalized for that understandable ignorance. For that reason, the "knows or has reason to know" language is included in the definition.

§ 105(4).

"A financial transaction . . . on terms not available to the general public" would include, for example, a reduced-interest loan to a municipal official. The reduction in interest would constitute a gift.

§ 105(6).

As discussed under section 105(7) below, the model law excludes court officers and employees from its coverage. The definition of the municipality (county, city, town, or village) enacting the local ethics law expressly excludes the municipal court, thereby clarifying that the local ethics law does not apply to the local court. Thus, to the extent permitted by state regulations governing attorneys, a lawyer who is a town zoning board member could appear in the town justice court on behalf of a private client. So, too, the revolv-

40. "Member of household" might be defined as follows: "'Member of household shall mean any person with whom an officer or employee of the [County, City, Town, or Village] lives as a single household unit.' Cf. *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (N.Y. 1985). "Political committee" might be defined as follows: "'Political committee' shall have the meaning ascribed to that term in section 14-100 of the Election Law."

ing door provision would not restrict former municipal officials (e.g., assistant district attorneys or assistant county attorneys) from appearing before the local court after leaving municipal service.

§ 105(7).

Like Article 18, the model law includes unpaid as well as paid officials. Indeed, at the municipal level it is the unpaid officials, such as zoning and planning board members, who often wield the greatest power.

Except in the area of financial disclosure, Article 18 regulates not only executive and legislative officers and employees but also judicial officers and employees.⁴¹ The model law, however, excludes judges and nonjudicial employees of the Unified Court System. Accordingly, for example, the revolving door bar would not preclude a former court clerk from appearing before the municipality's zoning board immediately upon leaving municipal service. If the municipality feels that further clarification is needed in that regard, the following exclusion could be added to section 102: "Appearances by a former [County, City, Town, or Village] officer or employee in a court of the [County, City, Town, or Village]."

Members of purely advisory boards are excluded from coverage by the Code of Ethics because those members are not "officers or employees" of the municipality.⁴²

§ 105(8).

Some municipalities may wish to lower the five percent threshold for publicly traded stock. Other municipalities may wish to require disclosure of an official's interest in a corporation that exceeds a specific value, such as \$25,000, even if the official owns less than five percent of the stock in that corporation. Some mu-

41. N.Y. GEN. MUN. LAW §§ 800(5), 810(2), 810(3) (McKinney Supp. 1993).

42. Cf. ASPCA v. Board of Trustees of State Univ. of N.Y., 184 A.D.2d 508, 584 N.Y.S.2d 198 (App. Div. 1992) (holding that SUNY Laboratory Animal Users' Committee was not "performing a governmental or proprietary function for the state" within the meaning of the Freedom of Information Law, N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1993)); ASPCA v. Board of Trustees of State Univ. of N.Y., 165 A.D. 561, 568 N.Y.S.2d 631 (App. Div. 1991), *aff'd on other grounds*, 79 N.Y.2d 927, 591 N.E.2d 1169, 582 N.Y.S.2d 983 (1992); Poughkeepsie Newspaper Div. of Gannet Satellite Info. Network v. Mayor's Intergov'tal Task Force on N.Y.C. Water Supply Needs, 145 A.D.2d 65, 537 N.Y.S.2d 582 (App. Div. 1989); Goodson Todman Enter., Ltd. v. Town Bd. of Milan, 151 A.D.2d 642, 542 N.Y.S.2d 373 (App. Div.), *appeal denied*, 547 N.E.2d 103 (1989) (all three cases holding that an advisory board meeting certain conditions is not a "public body" for purposes of the New York State Open Meetings Law, Public Officers Law §§ 100-111).

nicipalities may wish to include debt as well as equity within the definition of "outside employer or business." Other municipalities may wish to extend the definition to noncompensated positions, such as the director of a nonprofit organization; however, municipalities should exercise caution in that regard, lest the definition capture every religious, fraternal, and social affiliation of an official.

§ 105(10).

"Relative" appears both in the general prohibition of the Code of Ethics (section 100(1)(e)) and in the annual disclosure requirement (section 107(4)(a)). The definition is limited to the immediate family. Some municipalities may wish to expand or contract that definition.

§ 105(11).

The smooth functioning of government often requires, at least in large municipalities, ideological and political compatibility between elected officials and their senior staff. To prohibit officials from soliciting from such subordinates, who are inherently part of the political process, is simply unrealistic. Thus, the model law excludes exempt employees and certain unclassified employees from the definition of subordinate.

§ 106. Appearances by Outside Employers and Businesses of [County, City, Town, or Village] Officers and Employees.

1. Except as provided in subdivision 3 of this section, the outside employer or business of a [County, City, Town, or Village] officer or employee shall not appear before the particular agency in which the [County, City, Town, or Village] officer or employee serves or by which he or she is employed.

2. Except as provided in subdivision 3 of this section, the outside employer or business of a [County, City, Town, or Village] officer or employee shall not appear before any other [County, City, Town, or Village] agency if the [County, City, Town, or Village] officer or employee has the authority to appoint any officer, employee, or member of the agency or to review, approve, audit, or authorize any budget, bill, payment, or claim of the agency.

3. Nothing in this section shall be construed to prohibit the outside employer or business of a [County, City, Town, or Village] officer or employee from

- (a) Appear on its own behalf, or on behalf of the [County, City, Town, or Village], before a [County, City, Town, or Village] agency;
- (b) Seeking or obtaining a ministerial act; or
- (c) Receiving a [County, City, Town, or Village] service or benefit, or using a [County, City, Town, or Village] facility, which is generally available to the public.

§ 106. — Comment.

Article 18 contains no general prohibition on the employer or business of a municipal official appearing before the official's board or agency or before other agencies of the municipality over which the official has control. Thus, for example, a mayor's law firm could appear on behalf of a private client before the city council, so long as the mayor receives no compensation for that representation.⁴³

Section 106 of the model law would restrict such appearances. However, one must emphasize that under section 106 an official's private employer or business is only prohibited from appearing on behalf of a customer or client before the official's particular agency or before an agency over which the official exercises some control. The firm may appear before any other agency of the municipality. The firm may also appear before the official's own agency on behalf of the firm itself, for example, to obtain a zoning variance to expand its own office; however, in that event the official would still be required to recuse himself or herself under section 100(2). "Particular" is included before "agency" to clarify that "agency" includes only that unit within which the official has control. In addition, the firm may appear before the official's agency on behalf of the municipality or to seek a ministerial action or to receive the same benefits available to anyone else in the community (section 106(3)).

Some municipalities may wish to extend the ban on appearances by officials' firms to agencies with which the official is not associated. However, prohibiting an official's outside firm or business from appearing before any agency of the municipality would effectively bar many professionals from serving on municipal boards. Furthermore, citizens' concerns over appearances by officials' firms before the municipality are met by a prohibition of such ap-

43. N.Y. GEN. MUN. LAW § 805-a(1)(c) (McKinney Supp. 1993).

pearances before those agencies of the municipality over which the official has some control.

§ 107. Annual Disclosure.

1. Officers and employees required to file.

Officers and employees holding the following job titles or positions shall be required to file a signed annual disclosure statement:

[Set forth the job titles or positions of all officers and employees required to file annual disclosure statements.]

2. Time and place for filing.

Annual disclosure statements shall be filed with the Ethics Board:

- (a) Within 120 days after the effective date of this section;
- (b) Within 30 days after becoming subject to the requirements of subdivision 1 of this section; and
- (c) No later than May 15 of each year thereafter.

3. Changes in disclosed information.

Within 30 days after a change in the information contained in his or her most recently filed annual disclosure statement, an officer or employee shall file a signed amendment to the statement indicating the change.

4. Contents of annual disclosure statement.

The annual disclosure statement shall disclose:

- (a) The location of any real property within the [County, City, Town, or Village], or within one mile of the boundary of the [County, City, Town, or Village], in which the officer or employee, or his or her relative, has a financial interest.
- (b) With respect to each outside employer or business of the [County, City, Town, or Village] officer or employee:
 - (i) Its name (if any);
 - (ii) The nature of its business;
 - (iii) Whether it is self employment, a sole proprietorship, or an entity and, if an entity, what type of entity;
 - (iv) The [County, City, Town, or Village] officer's or employee's relationship to it, such as owner, part-

- ner, officer, director, member, employee, or shareholder.
- (c) With respect to each outside employer or business of the [County, City, Town, or Village] officer's or employee's spouse, the information required by paragraph (b) of this subdivision.

5. Good faith efforts.

Failure to disclose the information required by subdivision 4 of this section with respect to a [County, City, Town, or Village] officer's or employee's spouse or other relative shall not constitute a violation of that subdivision if the officer or employee has made a good faith effort to obtain the information and if he or she also sets forth those efforts in his or her disclosure statement.

§ 107.—Comment.

NOTE: COUNTIES, CITIES, TOWNS, AND VILLAGES WITH POPULATIONS OF 50,000 OR MORE MUST COMPLY WITH THE FINANCIAL DISCLOSURE REQUIREMENTS SET FORTH IN SECTIONS 810-813 OF THE GENERAL MUNICIPAL LAW.

However appropriate lengthy annual financial disclosure statements may be for state employees, who are full time and relatively well paid, the imposition of such statements by state mandate upon local government officials is wholly inappropriate. Unlike state government, local government at the highest levels is essentially a volunteer government. Legislative bodies, zoning boards of appeal, planning boards, architectural review boards, community college boards, and the like, are composed entirely of unpaid or minimally paid members.

The grossly intrusive financial disclosure requirements in Article 18 have given annual disclosure a bad reputation. However, while far less significant than transactional disclosure, reasonable annual disclosure does fill an important, though limited, role in an ethics law. In particular, annual disclosure reveals potential conflicts of interest before they arise and thus alerts the official—and the citizenry—to those potential conflicts. Annual disclosure thereby provides a check on transactional disclosure and protects officials by

identifying potential ethical pitfalls, which the official can then take steps to avoid.⁴⁴

§ 107(1).

The local government ethics bill proposed by the Commission⁴⁵ would require disclosure by the following classes of officers and employees:

- (a) Elected officials;
- (b) Department heads and those authorized to act on their behalf (e.g., first deputies);
- (c) Officers and employees who hold policymaking positions, including members of municipal boards, such as the planning and zoning boards;
- (d) Officials whose job descriptions or whose actual duties 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, personal property, or services, or a contract therefor;
 - (iii) The obtaining of grants of money or loans; or

44. See generally *Bertoldi v. Wachtler*, 952 F.2d 656 (2d Cir. 1991) (per curiam) (upholding, against federal and state constitutional challenges, financial disclosure requirements of New York's Ethics in Government Act as applied to court clerks); *Igneri v. Moore*, 898 F.2d 870 (2d Cir. 1990) (holding that financial disclosure provisions of Public Officers Law § 73-a, as applied to political party chairs, do not violate constitutional right to privacy); *Levison v. County of Orange*, 186 A.D.2d 257, 588 N.Y.S.2d 330 (App. Div. 1992) (upholding county ethics board's refusal to grant employee waiver of disclosure requirement); *Watkins v. New York State Ethics Comm'n*, 554 N.Y.S.2d 955 (Sup. Ct. 1990) (holding that financial disclosure provisions of Public Officers Law § 73-a, including requirements for financial disclosure by spouses, do not violate federal or state constitutional rights to privacy, free speech and free association, fourth amendment protection, equal protection, or the privilege against self-incrimination); *Grygas v. New York State Ethics Comm'n*, 554 N.Y.S.2d 779 (Sup. Ct. 1990) (rejecting claim that New York State Legislature, in violation of separation of powers provision of article III, section 1, of New York State Constitution, delegated to state agencies, and to State Ethics Commission, authority to determine which state employees are "policy makers" for purpose of financial disclosure, without meaningful standards and guidelines); *Twelve Assistant Dist. Attorneys v. Nassau County Bd. of Ethics*, N.Y. L.J., Nov. 12, 1991, at 35 (upholding local board of ethics' denial of assistant district attorneys' request for exemptions from filing financial disclosure statements, even though filers were not policymakers).

45. See Temporary State Comm'n on Local Gov't Integrity, *supra* note 1 at 26 (Appendix L).

- (iv) The adoption or repeal of any rule or regulation having the force and effect of law.

The above categories are taken from sections 810(2), 810(3), 812(1), and 813(9)(k) of the General Municipal Law. Municipalities subject to mandatory financial disclosure under section 811 of that law must require, at a minimum, annual disclosure by those types of officials, although such municipalities may, if they desire, require disclosure by additional types of officials. Municipalities not subject to mandatory annual financial disclosure under current Article 18 may wish to expand or contract the above list. For example, some municipalities might wish to add candidates for local elected office or local political party leaders.⁴⁶

For clarity, a municipality's local ethics law should set forth the job titles or positions of the officials required to file annual disclosure statements.

§ 107(2).

Municipalities may wish to include different deadlines. The specified date of May 15 occurs a month after most officials' income tax returns are due and should provide adequate time for an official to file.

§ 107(3).

Some persons fear that this requirement may trap officials who simply forget to file an amendment when, for example, they sell real property they own. On the other hand, absent such a requirement, a disclosure statement may rapidly become outdated.

§ 107(4).

WARNING: THESE DISCLOSURE REQUIREMENTS DO NOT COMPLY WITH CURRENT STATE LAW FOR COUNTIES, CITIES, TOWNS, AND VILLAGES WITH A POPULATION OF 50,000 OR MORE. A DISCLOSURE FORM COMPLYING WITH THOSE REQUIREMENTS IS SET FORTH IN APPENDIX A

Annual disclosure requirements differ widely throughout the country. The requirements set forth in the model law will suffice in all but the largest municipalities in the state because the vast majority of conflicts of interest arise either with respect to the offi-

46. See N.Y. GEN. MUN. LAW § 812(1)(a) (McKinney Supp. 1993).

cial's real property ("May I vote to make the land adjoining my brother's home a park?") or with respect to the official's nonmunicipal business or employment.⁴⁷

Numerous discussions and public hearings during the Commission's tenure revealed virtually no opposition to disclosure of the information required by section 107(4), precisely because that information is relevant to the duties of the officials. Furthermore, all of the information requested by section 107(4) is a matter of public knowledge, although it is not otherwise collected in one place. Ethics boards have the authority to subpoena additional information from the official if necessary (section 209(1)). They also have the power under section 211 to grant waivers from filing or from disclosing certain information on the annual disclosure statement in the rare instances in which such filing or disclosure proves intrusive or dangerous (e.g., the home address of certain law enforcement officials in a large city).

Section 107(4)(a) requires disclosure of the location of the real property of the official and of his or her spouse, brothers, sisters, parents, children, and dependents. Those relatives are included because of the significant appearance of impropriety that results when actions of an official benefit his or her relative's real property. However, officials need not disclose the nonmunicipal business or employment of their parents, children, or siblings (section 107(4)(b)-(c)). Real property "within one mile of the boundary of the [municipality]" should be disclosed because an official's actions not infrequently affect property in the neighboring community. In the event an official, after a good faith effort, is unable to obtain the required information from an estranged spouse or other relative, the official need only set forth those efforts in the disclosure statement; he or she need not review land records (section 107(5)). (Some municipalities may wish to replace the good faith effort provision with a requirement that an official who lacks the requested information about his relative need only so state under oath or by affirmation subject to the penalties of perjury.)

The model law does *not* require disclosure of any financial data, such as the amount of income an official receives from nonmunicipal business or employment. As the Commission often remarked, disclosure of financial data serves little purpose because a conflict

47. A sample disclosure form complying with the requirements of section 107(4) is set forth in Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 269-272 (1990) (Appendix B: Annual Statement of Financial Disclosure).

is a conflict, whether it involves \$500 or \$5,000. Furthermore, officials strenuously object to disclosing their finances; the financial disclosure requirements of Article 18, mandatory for the municipalities with populations of 50,000 or more, have already caused the resignation of over 200 officials around the state.⁴⁸ Finally, under Article 18, financial data must be redacted before the disclosure statement can be shown to the public;⁴⁹ redaction substantially increases the administrative burden and expense of administering an ethics law.

Some municipalities may feel the need to require disclosure of additional information, such as creditors or debtors of the official, and such as persons from whom the official has received a gift in excess of a specified amount during the year covered by the filing. Some municipalities may wish to vary the type and amount of disclosure according to the nature of the official's duties or according to whether the official is paid or unpaid. However, many volunteer board members, such as members of planning and zoning appeal boards, have extensive authority at the local level and should, therefore, be required to file some form of annual disclosure statement.

The text of the disclosure form should not be included in the local law, lest every minor clarification in the form require a new local law.

§ 108. Applicant Disclosure: Generally.

1. Where a person requests the [County, City, Town, or Village] or a [County, City, Town, or Village] officer or employee to take or refrain from taking any action (other than a ministerial act) that may result in a financial benefit both to the requestor and to either any officer or employee of the [County, City, Town, or Village] or one of the other persons listed in subdivision 1 of section 100 of this [chapter], the requestor shall disclose the names of any such persons, to the extent known to the requestor at the time of the request.

2. If the request is made in writing, the disclosure shall accompany the request. If the request is oral and made at a meeting of a public body, the disclosure shall be set forth in the public record of the body. If the request is oral and not made at a meeting of a

48. See Temporary State Comm'n on Local Gov't Ethics, Final Report 9 (unpublished section of the Report, on file with the *Fordham Urban Law Journal*).

49. See N.Y. GEN. MUN. LAW § 813(18)(a)(1) (McKinney 1988 & Supp. 1993); N.Y. PUB. OFF. LAW § 89(2)(a) (McKinney 1988).

public body, the disclosure shall be set forth in a writing filed with the [County, City, Town, or Village] clerk.

3. A person shall not be required to file a disclosure statement pursuant to this section if he or she, with respect to the same matter, has filed a disclosure statement complying with requirements of section 109 of this [chapter].

§ 108.—Comment.

This section is the second of three provisions in this model local ethics law, reflecting the view that private citizens and companies must share responsibility for officials complying with ethics laws.

Article 18 requires applicant disclosure only in connection with land use applications; that requirement is reflected in section 109 of this model law. Section 108 broadens applicant disclosure to all instances in which the applicant is requesting the municipality to act (or refrain from acting) on a matter in which any official of the municipality, or his or her family, business, customers, or clients, may have a financial interest. For example, an applicant for a zoning variance would be required to list the names of any officer or employee of the municipality who might financially benefit from the granting of the application.

Applicant disclosure provides a check on transactional and annual disclosure; together, these three types of disclosure form the disclosure triad in this model law. Section 108 does not require the applicant to research which officials, if any, have an interest in the matter, but only requires the applicant to disclose the names of interested officials to the extent the applicant knows them. Also, the section imposes no burden on the applicant to update the disclosure if the applicant later learns that certain officials have an interest in the application.

To avoid imposing too great a burden on applicants, section 108 only requires applicant disclosure when the application financially benefits the applicant, for example, a zoning variance for the applicant's home. Thus, for example, no applicant disclosure would be required by a developer who offers to donate as parkland a lot immediately across the street from the building inspector's home. Some municipalities may, therefore, wish to delete the requirement in section 108 that the requested action result in a financial benefit to the requester.

To obviate the necessity of an applicant having to file one disclosure statement under section 108 and another one under section 109 for the same application, section 108(3) exempts an official

who files a statement under section 109 from filing one under section 108.

§ 109. Applicant Disclosure: Land Use Applications.

1. Disclosure.

Every application, petition, or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license, or permit, pursuant to the provisions of any ordinance, local law, rule, or regulation constituting the zoning and planning regulations of the [County, City, Town, or Village] shall state the information required, to the extent required, by section 809 of the General Municipal Law of the State of New York.

2. Violations.

Any person who willfully and knowingly violates the provisions of this section shall be guilty of a misdemeanor, to the extent provided by section 809 of the General Municipal Law.

§ 109.—Comment.

As noted above, this section reflects the requirements of section 809 of the General Municipal Law. It is not contained in the bill proposed by the Commission and Advisory Board because its provisions are sufficiently covered by section 108 of the bill.

§ 110. Void Contracts.

Any contract or agreement entered into by or with the [County, City, Town, or Village] which results in or from a violation of any provision of sections 100, 101, or 106 of this [chapter] shall be void unless ratified by the [governing body of the county, city, town, or village]. Such ratification shall not affect the imposition of any criminal or civil penalties pursuant to this [chapter] or any other provision of law.

§ 110.—Comment.

Some municipalities have opted for a provision making a tainted contract voidable by the municipality's ethics board. Such an approach rewards inaction. Therefore, this model law makes a contract entered into in violation of the ethics law void unless ratified by the municipality's governing body. Under the Open Meetings

Law, such ratification would have to be done in a public meeting after public notice.⁵⁰

The model local ethics law gives the governing body of the municipality, rather than the ethics board, the authority to ratify the contract, because the governing body is better able to evaluate whether the contract is in the best interests of the municipality. Ratification of the contract does not prevent the imposition of penalties upon any person whose ethical improprieties caused the contract to be tainted. Moreover, section 110 does not apply to contracts prohibited by section 801 of the General Municipal Law (incorporated into section 104 of this model local law); such contracts may not be ratified.

§ 111. Penalties.

1. Disciplinary action.

Any [County, City, Town, or Village] officer or employee who engages in any action that violates any provision of this [chapter] may be warned or reprimanded or suspended or removed from office or employment, or be subject to any other sanction authorized by law or collective bargaining agreement, by the appointing authority or person or body authorized by law to impose such sanctions. A warning, reprimand, suspension, removal, or other authorized sanction may be imposed in addition to any other penalty contained in this [chapter] or in any other provision of law.

2. Civil fine.

Any [County, City, Town, or Village] officer or employee who violates any provision of this [chapter] may be subject to a civil fine of up to \$1,500 for each violation. A civil fine may be imposed in addition to any other penalty contained in any other provision of law or in this [chapter], other than a civil forfeiture pursuant to subdivision 4 of this section. A civil fine may not be imposed for a violation of section 104 of this [chapter].

3. Damages.

Any person, whether or not a [County, City, Town, or Village] officer or employee, who violates any provision of this [chapter] shall be liable in damages to the [County, City, Town, or Village] for any losses or increased costs incurred by the [County, City,

50. N.Y. PUB. OFF. LAW §§ 103(a), 104 (McKinney 1988).

Town, or Village] as a result of the violation. Such damages may be imposed in addition to any other penalty contained in any other provision of law or in this [chapter], other than a civil forfeiture pursuant to subdivision 4 of this section.

4. Civil forfeiture.

Any person, whether or not a [County, City, Town, or Village] officer or employee, who intentionally or knowingly violates any provision of this [chapter] may be subject to a civil forfeiture to the [County, City, Town, or Village] of a sum equal to three times the value of any financial benefit he or she received as a result of the conduct that constituted the violation. A civil forfeiture may be imposed in addition to any other penalty contained in any other provision of law or in this [chapter], other than a civil fine pursuant to subdivision 2 or damages pursuant to subdivision 3 of this section. Civil forfeiture shall not be available for a violation of section 104 of this [chapter].

5. Misdemeanor.

Any person, whether or not a [County, City, Town, or Village] officer or employee, who intentionally or knowingly violates any provision of this [chapter] shall be guilty of a class A misdemeanor and, upon conviction thereof, if a [County, City, Town, or Village] officer or employee, shall forfeit his or her [County, City, Town, or Village] office or employment. This subdivision shall not apply to a violation of section 104 of this [chapter].

§ 111.—Comment.

Aside from criminal penalties—and seldom should an ethics violation be classified as criminal—few penalties exist for violation of Article 18. Indeed, except in the financial disclosure context, a violation of Article 18 is either a misdemeanor or is punishable only by disciplinary action. By contrast, the model law provides an appropriate range of penalties for ethical improprieties.

The authority for the adoption of these penalties rests upon the Municipal Home Rule Law, which empowers municipalities

[t]o provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punish-

ment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments⁵¹

§ 111(1).

The appointing authority, which, as a general rule, has the power to remove appointed officials, must be given the power to impose disciplinary action. The ethics board only recommends such action.

§ 111(2).

Under sections 811(1)(c) and 813(13) of the General Municipal Law, a municipality may prescribe civil fines of up to \$10,000 for knowingly and wilfully failing to file an annual statement of financial disclosure or for knowingly and wilfully making a false statement with intent to deceive or giving information on a financial disclosure statement that the reporting official knows to be false.⁵² The model law provides for a maximum fine of \$1,500, which will normally be sufficient. However, a provision for a \$10,000 fine is required in those municipalities subject to mandatory financial disclosure under section 811(2) of the General Municipal Law.⁵³

The model law exempts violations of section 104 (prohibited interests in contracts) from the civil fine provision because such activity constitutes a misdemeanor under section 805 of the General Municipal Law and because such activity should not be prohibited but should merely require disclosure and recusal. (Such violations are not exempted from subdivision 1 (disciplinary action) because any official who commits a crime should be subject to disciplinary action.)

Finally, to avoid unfairness and possible claims of confiscation, the model law precludes imposition of both a civil fine and a civil forfeiture.

§ 111(3).

A municipality may not by local law create a new cause of action. This provision merely recognizes the municipality's right to obtain damages from an official whose unlawful acts have resulted in loss to the municipality. For that same reason, this provision does not exempt a violation of section 104.

51. N.Y. MUN. HOME RULE LAW § 10(4)(b) (McKinney 1969).

52. See N.Y. GEN. MUN. LAW §§ 811(1)(c), 813(13) (McKinney Supp. 1993).

53. See *id.* § 811(2).

§ 111(4).

For the reasons set forth under subdivision (2) above, violations of section 104 are excluded from this provision as well.

§ 111(5).

Since a violation of section 104 is subject to the separate misdemeanor provision of section 805 of the General Municipal Law, as incorporated in section 104 of this model law, such violations are excluded from this provision.

§ 112. Debarment.

1. Any person, whether or not a [County, City, Town, or Village] officer or employee, who intentionally or knowingly violates any provision of this [chapter] shall be prohibited from entering into any contract with the [County, City, Town, or Village] for a period not to exceed three years, as provided in subdivision 5 of section 210 of this [chapter]. Debarment may not be imposed for a violation of section 104 of this [chapter].

2. No person, whether or not a [County, City, Town, or Village] officer or employee, shall enter into a contract in violation of a bar imposed pursuant to subdivision 1 of this section.

3. Nothing in this section shall be construed to prohibit any person from receiving a service or benefit, or from using a facility, which is generally available to the public.

4. Under this section, a corporation, partnership, or other entity shall not be held vicariously liable for the actions of an employee. A corporation, partnership, or other entity shall not be debarred because of the actions of an employee unless the employee acted in the execution of company policy or custom. A store, region, division, or other unit of an entity shall not be debarred because of the actions of an employee of that unit unless the employee acted at the direction, or with the actual knowledge or approval, of the manager of the unit.

§ 112.—Comment.

This section is the third of three provisions in the bill, and in this model local ethics law, reflecting the view that private citizens and companies must share responsibility for officials complying with ethics laws. Simply stated, debarment means that anyone who intentionally or knowingly violates a provision of the model law, including a private business that induces a municipal official to

violate the Code of Ethics, may be prohibited from doing business with the municipality for a period not to exceed three years. That penalty would be imposed by the court in a proceeding initiated by the governing body of the municipality or its ethics board (section 210(5)).

Although no court has ruled on the issue, a municipality may enact this provision under the municipality's home rule powers, provided that the provision limits the debarment to doing business with the particular municipality.

Section 112 excludes from debarment violations of section 104 (prohibited interests in contracts) for the reasons set forth in the discussion of section 111 above.

Section 112(4) has been added to address a concern of the business community that debarment might be imposed against an entire corporation for the illicit and unauthorized acts of an individual employee in one division or corporate subsidiary. Under this provision, a store or division of a corporation could be debarred if the manager of that store or division directed or actually knew or approved of the ethics violation; however, the corporation itself could not be debarred unless the employee's actions reflected corporate (not store or divisional) policy or custom.⁵⁴

§ 113. Injunctive Relief.

1. Any resident, officer, or employee of the [County, City, Town, or Village] may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin an officer or employee of the [County, City, Town, or Village] from violating this [chapter] or to compel an officer or employee of the [County, City, Town, or Village] to comply with the provisions of this [chapter]. In lieu of, or in addition to, injunctive relief, the action or special proceeding, as appropriate, may seek a declaratory judgment.

2. No action or special proceeding shall be prosecuted or maintained pursuant to subdivision 1 of this section, unless (a) the plaintiff or petitioner shall have filed with the Ethics Board a sworn complaint alleging the violation by the officer or employee, (b) it shall appear by and as an allegation in the complaint or petition filed with the court that at least six months have elapsed since the

54. The phrase "policy or custom" is taken from *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691-92 (1978) (holding that a municipality can be found liable under 42 U.S.C. § 1983 only when execution of a government policy or custom inflicts the injury and that vicarious liability does not apply under § 1983).

filing of the complaint with the Ethics Board and that the Ethics Board has failed to file a determination in the matter, and (c) the action or special proceeding shall be commenced within ten months after the alleged violation occurred.

§ 113.—Comment.

Allegations of unethical conduct raise sensitive questions that cannot be left unresolved. This section addresses the failure of an ethics board to act on a matter before it. If, however, an ethics board does act within the period prescribed by subdivision 2, the remedy of the aggrieved party (the official or the complainant) lies not in section 113 but in a proceeding under Article 78 of the New York State Civil Practice Law and Rules⁵⁵ to review the board's determination (see section 213). (Where the ethics board files a determination in the matter after the section 113 suit has been commenced, the matter should proceed as an Article 78 proceeding to review that determination, provided that the petitioner is aggrieved by it.)

Section 113 expressly acknowledges the right of a citizen or official to seek the aid of the court in compelling an official to comply with ethics laws or in determining what obligations those laws impose where the ethics board has failed to act on a complaint within six months.⁵⁶ Absent that six-month cap, the matter might be left unresolved for a year or more. This provision does not relieve the plaintiff or petitioner of the usual requirements that he or she have standing to sue in the particular instance and that, in an action for declaratory judgment, an actual controversy exist between the parties. Furthermore, before bringing the lawsuit, the plaintiff or petitioner must exhaust the administrative remedies set forth in subdivision two, a requirement necessitated by the excessive cost the municipality might otherwise incur as a result of repeated lawsuits.

Section 113 only applies where the *plaintiff or petitioner* has filed a sworn complaint with the ethics board. The section does not address the concern of an official against whom the complaint has been made or of whom an ethics board, on its own initiative, has undertaken an investigation. (But see discussion of section 212 below.)

Some municipalities may wish to replace "file" with "issue."

55. N.Y. CIV. PRAC. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1993).

56. Cf. N.Y. GEN. MUN. LAW § 51 (McKinney 1989).

PART B: ADMINISTRATIVE PROVISIONS*Comment.*

As noted above, this, the second part of the model law, contains the provisions for administering the law (sections 201-218). Generally, only the municipal attorney and the members of the ethics board will need to consult this part.

Duties of Municipal Clerk.

Prior to January 1, 1991, section 806(3) of the General Municipal Law required the municipal clerk to file certain documents with the state Comptroller.⁵⁷ Beginning January 1, 1991, the clerk was to file those documents with the Commission. With the termination of the Commission on December 31, 1992, the clerk must file only one of those documents with the state. However, the clerk must maintain a copy of the other documents on file for public inspection. These various documents are:

- (1) A copy of the municipality's code of ethics and amendments thereto (under section 806, codes of ethics are mandatory for counties, cities, towns, villages, and school districts);
- (2) A statement that the municipality has established an ethics board and the composition of the board (under section 808, an ethics board is optional);
- (3) A copy of the form of annual statement of financial disclosure, if any, adopted by the municipality pursuant to General Municipal Law section 811;
- (4) A copy of either:
 - (i) a statement that the municipality is not subject to mandatory annual financial disclosure under Article 18 because it is not a county, city, town, or village having a population of 50,000 or more; or
 - (ii) a statement that the municipality, though subject to annual financial disclosure, has failed to adopt an annual financial disclosure statement or to resolve to continue an existing statement and is thus subject to section 812; or
 - (iii) a statement of the date on which the governing body of the municipality either adopted a form for an annual disclosure statement or resolved to continue

57. See *id.* § 806(3) (McKinney Supp. 1993).

an existing form for an annual disclosure statement; and

- (5) A copy of the municipal clerk's annual report to the legislature stating whether the municipality has a code of ethics in effect as of the date the report is filed.

Of those five documents, the clerk need only file item (5)—the annual report—with the state. The filing deadline is February 15. A one-sentence letter will suffice (“As of the date set forth above, the [County, City, Town, or Village] of _____ has [or does not have] in effect a code of ethics within the meaning of section 806 of the General Municipal Law”).

Designation of Officers and Employees Required to File Annual Disclosure Statements.

Within 90 days after the effective date of this local law, and during the month of March each year thereafter, the [chief executive officer or, if none, the chair of the governing body] of the [County, City, Town, or Village] shall:

- (a) Cause to be filed with the Ethics Board a list of the names and offices or positions of all [County, City, Town, or Village] officers and employees required to file annual disclosure statements pursuant to section 107 of this [chapter]; and
- (b) Notify all such officers and employees of their obligation to file an annual disclosure statement.

§ 201.—Comment.

If the municipality does not have a chief executive officer, then the chair of the municipality's governing body should ensure that the list is compiled and the filers notified.

Maintenance of Disclosure Statements.

1. The [County, City, Town, or Village] clerk shall transmit promptly to the Ethics Board each transactional and applicant disclosure statement filed pursuant to sections 101, 104, 108, and 109 of this [chapter].
2. The Ethics Board shall index and maintain on file for at least seven years all disclosure statements filed with the Board pursuant to sections 101, 104, 107, 108, and 109.

§ 203. Ethics Board: Establishment; Qualifications of Members; Appointment of Members; Term of Office.

1. There is hereby established an Ethics Board consisting of five members.
2. No more than one member of the Ethics Board may be an appointed officer or employee of the [County, City, Town, or Village]. Of the total membership of the Board, no more than two shall be registered in the same political party.
3. No Ethics Board member shall hold office in a political party or be employed or act as a lobbyist or hold elective office in the [County, City, Town, or Village]. An Ethics Board member may make campaign contributions but may not participate in any election campaign.
4. Within 60 days after the effective date of this local law, and no later than December 31 each year thereafter, the [elective chief executive officer, with the advice and consent of the governing body of the county, city, town, or village, or, if there is no elective chief executive officer, the chair of the governing body of the county, city, town, or village] shall appoint the members of the Ethics Board.
5. The term of office of Ethics Board members shall be three years and shall run from January 1 through December 31, except that of the members first appointed one member shall serve until December 31 of the year in which the Board is established, two shall serve until the second December 31, and two shall serve until the third December 31.
6. An Ethics Board member shall serve until his or her successor has been appointed. Consecutive service on the Ethics Board shall not exceed two full terms.
7. The members of the Ethics Board shall not receive compensation but shall be reimbursed for reasonable expenses incurred in the performance of their official duties.

§ 203.—Comment.

Section 808 of the General Municipal Law contains provisions for the establishment and membership of ethics boards.⁵⁸ However, the Attorney General's office and the Commission have taken the position that municipalities' home rule powers permit them to vary those provisions by local law.⁵⁹ Thus, for example,

58. See N.Y. GEN. MUN. LAW § 808 (McKinney 1986 & Supp. 1993).

59. See Op. Att'y Gen. 86-44; Op. Att'y Gen. 91-68.

the municipality may establish an ethics board with no members who are officers or employees of the municipality.

The local government ethics bill proposed by the Commission and its Advisory Board expressly recognized the right of municipalities to form joint or regional ethics boards or to contract out their ethics board to another municipality pursuant to Article 5-G of the General Municipal Law.⁶⁰ Municipalities lacking the resources to establish an individual ethics board may wish to consider this option, to the extent permitted by current law. Indeed, section 808(2) of the General Municipal Law authorizes county ethics boards to render advisory opinions to officers and employees of municipalities wholly or partly within the county with respect to Article 18 or local ethics laws.⁶¹ Section 808(4) authorizes local ethics boards to refer matters to the county ethics board.⁶²

Thus, some cities, towns, and villages lacking their own ethics board may either have the county ethics board act as the ethics board for the city, town, or village, or have the county ethics board take referrals from the local ethics board. For example, a provision might read: "The Ethics Board, or the [governing body of the City, Town, or Village], may request the ethics board of the County of _____ to investigate, hear, and determine a matter arising under this [chapter]."

Section 203 of the model law provides for a five-member ethics board. Some municipalities may wish to establish a three, seven, or nine-member board instead. An even number of board members is inadvisable because of the increased risk of tie votes. In addition, because a municipal board may only act by the majority vote of its total authorized membership,⁶³ municipalities should not make an ethics board so large that frequent vacancies or frequent absences will occur.

The terms of office of members should be staggered, to provide continuity in the work and philosophy of the board. Municipalities may wish to increase or decrease the length of the term of office or establish a different year of service than the calendar year. However, terms of office should be sufficiently long to ensure the members acquire expertise but not so long as to discourage persons from serving on the board. In addition, ethics board members

60. N.Y. GEN. MUN. LAW §§ 119-m to 119-o (McKinney 1986 & Supp. 1993).

61. See N.Y. GEN. MUN. LAW § 808(2) (McKinney 1986).

62. See *id.* § 808(4).

63. N.Y. GEN. CONSTR. LAW § 41 (McKinney 1951).

should not be allowed to become entrenched on the board; the model law therefore contains a term limitation.

A possible alternative provision on terms of office would be the following:

The members of the Ethics Board shall be appointed for staggered terms of five years, commencing on July 1 and expiring on June 30, provided, however, that the first Ethics Board appointed under this provision shall consist of five members appointed for terms expiring respectively on June 30 of the first, second, third, fourth, and fifth calendar years following the calendar year of appointment. Upon expiration of each term, an appointment shall be made for the following five-year term.

The restriction on municipal officials serving on the ethics board seeks to ensure that the board is as free as possible from pressure from other officials—co-workers and superiors alike. The restriction on the political make-up of the board aims to strengthen both the perception and the reality of a board that is nonpartisan. (Subdivision 2 of section 203 requires at least one member of the board to be registered in a third party or as an independent. Moreover, the restriction must be upon party registration not upon some vague criteria such as “political opinion on state and national issues.”⁶⁴) Ethics boards must not become political footballs. For that same reason, the model law restricts the political activities of ethics board members; such restrictions are quite common around the country.

§ 204. Ethics Boards: Vacancies.

When a vacancy occurs in the membership of the Ethics Board, the vacancy shall, within 60 days, be filled for the unexpired portion of the term in the same manner as the original appointment. Any person appointed to fill a vacancy on the Ethics Board shall meet the qualifications set forth in section 203 of this [chapter].

§ 205. Ethics Board: Removal of Members.

An Ethics Board member may be removed from office in the same manner in which he or she was appointed, after written notice and opportunity for reply. Grounds for removal shall be failure to meet the qualifications set forth in section 203 of this [chapter], substantial neglect of duty, gross misconduct in office,

64. Carpinelli v. City of Kingston, 175 A.D.2d 509, 510, 572 N.Y.S.2d 777, 779 (App. Div. 1991).

inability to discharge the powers or duties of office, or violation of this [chapter].

§ 206. Ethics Board: Meetings.

At its first meeting each year, the Ethics Board shall elect a chair from among its members. A majority of the Board shall be required for the Board to take any action. The chair or a majority of the Board may call a meeting of the Board.

§ 207. Ethics Boards: Jurisdiction, Powers, and Duties.

1. The Ethics Board may only act with respect to officers and employees of the [County, City, Town, or Village].
2. The termination of a municipal officer's or employee's term of office or employment with the [County, City, Town, or Village] shall not affect the jurisdiction of the Ethics Board with respect to the requirements imposed on him or her by this [chapter].
3. The Ethics Board shall have the following powers and duties:
 - (a) To prescribe and promulgate rules and regulations governing its own internal organization and procedures in a manner consistent with this [chapter];
 - (b) To appoint hearing officers, an executive director, if necessary, and such other staff as are necessary to carry out its duties under this [chapter], and to delegate authority to the executive director, if any, to act in the name of the Board between meetings of the Board, provided that the delegation is in writing and the specific powers to be delegated are enumerated and further provided that the Board shall not delegate the power to determine violations, recommend disciplinary action, impose any civil fine, refer any matter to a prosecutor, or render any advisory opinion. An executive director shall meet the qualifications of an ethics board member as specified in section 203 of this [chapter];
 - (c) To review, index, and maintain on file lists of officers and employees, and disclosure statements filed with the Board, pursuant to sections 101, 104, 107, 108, 109, 201, 202, and 208 of this [chapter];
 - (d) To review, index, maintain on file, and dispose of sworn complaints and to make notifications and conduct investigations pursuant to sections 208 and 209;

- (e) To conduct hearings, recommend disciplinary action, assess penalties, make referrals, and initiate appropriate actions and proceedings pursuant to section 210;
- (f) To grant waivers pursuant to section 211;
- (g) To render, index, and maintain on file advisory opinions pursuant to section 212;
- (h) To provide training and education to [County, City, Town, or Village] officers and employees pursuant to section 214;
- (i) To prepare an annual report and recommend changes to this local law pursuant to section 215;
- (j) To provide for public inspection of certain records pursuant to section 216; and
- (k) To select provisions of this [chapter] for reproduction and distribution pursuant to section 218.

§ 207.—Comment.

This model law has been drafted so as to minimize the administrative burden the law would impose on municipalities. For that reason, probably only the three or four largest municipalities in the state would find it necessary under this model law to hire staff for their ethics boards. All other municipalities could rely upon other municipal staff members for the occasional secretarial services or legal advice the enforcement of the law will require.

However, care must be taken that any municipal staff used by the ethics board maintain the confidentiality of board actions and remain free from conflicts of interest and political and other pressures from superiors and peers. In particular, where the municipal attorney is a political appointee or is otherwise beholden to the chief elective officer or a majority of the governing body, the ethics board must have the authority, when necessary, to obtain separate counsel. For that reason, some municipalities may wish to require, in their ethics law, funding for such counsel, perhaps with the proviso that the ethics board, if feasible, shall request outside counsel to serve without compensation and in the public interest (see Buffalo Board of Education Code of Ethics⁶⁵).

With respect to the authority of a municipality to authorize its ethics board to conduct investigations and subpoena documents and witnesses, see the comments to section 209 below.

65. Unpublished manuscript on file with the *Fordham Urban Law Journal*.

The Commission concluded that counties, cities, towns, and villages subject to the mandatory annual financial disclosure requirements of Article 18 of the General Municipal Law must give to their ethics boards the same powers and duties enjoyed by the Commission under General Municipal Law section 813 with respect to the enforcement of those requirements.⁶⁶ Specifically, such municipalities must provide for inspection and review of annual financial disclosure statements, receipt of complaints alleging ethics law violations, issuance of advisory opinions, extensions of time to file financial disclosure statements, deletion of information from copies of disclosure statements made available for public inspection, exemptions from filing disclosure statements or from requirements to report items of information, notifications that a filer has failed to file or has filed a deficient statement, a fifteen-day period in which to cure such deficiencies, notices of delinquency, notices of possible ethics law violations and a fifteen-day response time, investigatory authority (including subpoena power), adjudicatory proceedings, notices of no violation and notices of reasonable cause to believe a violation has occurred, the imposition of civil penalties up to \$10,000 (or, in lieu thereof, referral to the prosecutor as a misdemeanor) for knowingly and wilfully failing to file an annual financial disclosure statement or knowingly and wilfully filing a false statement with intent to deceive, and restrictions on disclosure of ethics board documents.⁶⁷

§ 208. Review of Lists and Disclosure Statements.

1 The Ethics Board shall review:

- (a) The lists of officers and employees, prepared pursuant to section 201 of this [chapter], to determine whether the lists are complete and accurate. The Board shall add the name of any other officer or employee who the Board determines should appear on the list pursuant to section 107.
- (b) All annual disclosure statements to determine whether any person required to file such a statement has failed to file it, has filed a deficient statement, or has filed a statement that reveals a possible or potential violation of this [chapter].
- (c) All transactional disclosure statements.

66. See N.Y. GEN. MUN. LAW § 811(1)(d) (McKinney 1989)

67. See *id.* §§ 813(9)-(16), (18), 811(1)(c)-(d), 812(6).

2. If the Board determines that an annual disclosure statement or a transactional disclosure statement is deficient or reveals a possible or potential violation of this [chapter], the Board shall notify the person in writing of the deficiency or possible or potential violation and of the penalties for failure to comply with this [chapter].

§ 208.—Comment.

The only persons whom the ethics board may add to the list of filers are those persons whom the ethics law itself requires to file. Some municipalities may wish to include a requirement that the ethics board consult with the municipality's chief executive before adding a name to the list and perhaps a requirement that the chief executive notify the official that he or she is now required to file. Some municipalities may also wish to require the ethics board to provide forms for annual and transactional disclosure statements.

It is not uncommon for an ethics law to set a deadline for the ethics board to review the list of filers and the annual disclosure statements themselves. However, the imposition of such deadlines on a volunteer board should be approached with caution.

With respect to municipalities subject to mandatory annual financial disclosure, see comments to section 207.

§ 209. Investigations.

1. Upon receipt of a sworn complaint by any person alleging a violation of this [chapter], or upon determining on its own initiative that a violation of this [chapter] may exist, the Ethics Board shall have the power and duty to conduct any investigation necessary to carry out the provisions of this [chapter]. In conducting any such investigation, the Ethics Board may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records which it may deem relevant and material.

2. The Ethics Board shall state in writing the disposition of every sworn complaint it receives and of every investigation it conducts and shall set forth the reasons for the disposition. All such statements and all sworn complaints shall be indexed and maintained on file by the Board.

3. Any person filing a sworn complaint with the Ethics Board shall be notified in writing of the disposition of the complaint.

4. Nothing in this section shall be construed to permit the Ethics Board to conduct an investigation of itself or of any of its members or staff. If the Ethics Board receives a complaint alleging that

the Board or any of its members or staff has violated any provision of this [chapter], or any other law, the Board shall promptly transmit to the [governing body of the county, city, town, or village] a copy of the complaint.

§ 209.—Comment.

General Municipal Law section 808 contemplates that ethics boards will be purely advisory bodies with no investigatory or enforcement power. However, as noted above, the Attorney General's office and the Commission have taken the position that municipalities' home rule powers permit them, by local law, to vary the provisions of section 808.⁶⁸ In particular, in the opinion of the Attorney General's office, "a local government, through enactment of a local law, may grant to its board of ethics the authority to receive complaints alleging violations of ethics regulations, to investigate those complaints, and to conduct investigations on its own initiative as to whether violations of ethics standards have occurred. Further, [the Attorney General's office] believe[s] the board may be given enforcement authority and the local law may provide for the administering of penalties."⁶⁹ In short, "a city, or any other local government, by local law may grant to its board of ethics the authority to conduct investigations, subpoena power and enforcement power."⁷⁰

The ethics board need not receive a sworn complaint before initiating an investigation. Some municipalities may wish to change "sworn complaint" to "written complaint." Some may wish to require that the official under investigation be notified of the outcome of the investigation.

Some municipalities may wish to establish a procedure for a preliminary review of written complaints and to set a deadline for that review, thereby forcing the ethics board to weed out quickly any complaints that are clearly unjustified (see Buffalo Board of Education Code of Ethics⁷¹). Although protection of the interests of the official under investigation are important, the setting of any requirements that impose undue burdens on the volunteer ethics board must be approached with caution.

With respect to municipalities subject to mandatory annual financial disclosure, see the comments to section 207.

68. See Op. Att'y Gen. 86-44.

69. Op. Att'y Gen. 91-68.

70. *Id.*

71. Unpublished manuscript on file with the *Fordham Urban Law Journal*.

§ 210. Hearings; Assessment of Penalties; Injunctive Relief.**1. Disciplinary action.**

In its discretion, after a hearing providing for due process procedural mechanisms and subject to any applicable provisions of law and collective bargaining agreements, the Ethics Board may recommend appropriate disciplinary action pursuant to subdivision 1 of section 111 of this [chapter]. The recommendation of the Ethics Board shall be made to the appointing authority or person or body authorized by law to impose such sanctions. The Board shall conduct and complete the hearing with reasonable promptness, unless in its discretion the Board refers the matter to the authority or person or body authorized by law to impose disciplinary action or unless the Board refers the matter to the appropriate prosecutor. If such a referral is made, the Board may adjourn the matter pending determination by the authority, person, body, or prosecutor.

2. Civil fine.

In its discretion and after a hearing providing for due process procedural mechanisms, the Ethics Board, pursuant to subdivision 2 of section 111 of this [chapter], may assess a civil fine, not to exceed \$1,500 for each violation, upon any municipal officer or employee found by the Board to have violated this [chapter]. The Board shall conduct and complete the hearing with reasonable promptness. The civil fine shall be payable to the [County, City, Town, or Village].

3. Damages.

The [governing body of the county, city, town, or body] may initiate an action in the court of appropriate jurisdiction to obtain damages, as provided in subdivision 3 of section 111 of this [chapter].

4. Civil forfeiture.

The [governing body of the county, city, town, or village], or the Ethics Board on behalf of the [County, City, Town, or Village], may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction to obtain civil forfeiture, as provided in subdivision 4 of section 111 of this [chapter].

5. Debarment.

The [governing body of the county, city, town, or village], or the Ethics Board on behalf of the [County, City, Town, or Village], may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for an order of debarment, as provided in section 112 of this [chapter].

6. Injunctive relief.

The [governing body of the county, city, town, or village], or the Ethics Board on behalf of the [County, City, Town, or Village], may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin a violation of this [chapter] or to compel compliance with this [chapter], as provided in section 113 of this [chapter].

7. Prosecutions.

The Ethics Board may refer to the appropriate prosecutor possible criminal violations of this [chapter]. Nothing contained in this [chapter] shall be construed to restrict the authority of any prosecutor to prosecute any violation of this [chapter] or of any other law.

8. Limit on Board.

Nothing in this section shall be construed to permit the Ethics Board to take any action with respect to any alleged violation of this [chapter], or of any other law, by the Board or by any member or staff member thereof.

§ 210.—Comment.

See discussion of penalties in the comments to section 111 above.

Some municipalities may wish to grant a cure period (e.g., fifteen days) to any official who has failed to file an annual disclosure statement or who has filed a deficient statement. However, such cure periods, while they provide some protection for officials who inadvertently fail to file or disclose, undermine the effectiveness of annual disclosure requirements and impose unnecessary administrative burdens on the ethics boards.

School districts that adopt an ethics code based upon this model law should set forth procedures coordinating hearings under this

section with disciplinary hearings under sections 3020 and 3020-A of the Education Law.⁷²

If a municipality desires, it may make explicit that any hearings and recommendations for disciplinary action are subject to section 75 of the New York State Civil Service Law.⁷³

With respect to municipalities subject to mandatory annual financial disclosure, see the comments to section 207.

§ 211. Waivers.

1. Upon written application and upon a showing of compelling need by the applicant, the Ethics Board may in exceptional circumstances grant the applicant a waiver of any of the provisions of subdivisions 1 through 9 of section 100, paragraph (i) of subdivision 1 of section 101, section 106, section 107, or section 108 of this [chapter], provided, however, that no such waiver shall permit conduct otherwise prohibited by Article 18 of the General Municipal Law of the State of New York.

2. Waivers shall be in writing and shall state the grounds upon which they are granted. Within 10 days after granting a waiver, the Ethics Board shall publish a notice setting forth the name of the person requesting the waiver and a general description of the nature of the waiver in the official newspaper designated by the [County, City, Town, or Village] for the publication of local laws, notices, and other matters required by law to be published. All applications, decisions, and other records and proceedings relating to waivers shall be indexed and maintained on file by the Ethics Board.

§ 211.—Comment.

A provision for waivers of ethics provisions is dangerous because it opens the door to the wholesale gutting of local ethics laws, encourages political pressure on the ethics board by various individuals and groups within the community, and leads to charges of partiality, all of which undercuts the perception of the ethics board as an impartial, nonpartisan body of high integrity. For those reasons, many municipalities may wish to forego a provision for waivers. Other municipalities, concerned over the need to remedy unnecessary hardship that some of the ethics provisions may im-

72. N.Y. EDUC. LAW §§ 3020, 3020-A (McKinney 1981).

73. N.Y. CIV. SERV. LAW § 75 (McKinney 1983 & Supp. 1993).

pose upon an individual official in a particular instance, will wish to run those risks.

To minimize the risks, section 211 sets a high standard for granting a waiver ("compelling need" and "exceptional circumstances"), restricts waivers to certain specified ethics provisions, and requires that the waiver be published in the municipality's official newspaper. Moreover, the state's Open Meetings Law may require that the meeting of the ethics board at which the waiver is considered be held in open session after public notice.⁷⁴ Some municipalities may in fact wish to specify in their ethics law that waivers may only be granted at an open session after public notice or even that they may only be granted after a public hearing.

An ethics board may not grant waivers from the requirements of Article 18 of the General Municipal Law.

§ 212. Advisory Opinions.

1. Upon the written request of any [County, City, Town, or Village] officer or employee, the Ethics Board may render a written advisory opinion with respect to the interpretation or application of this [chapter] or of Article 18 of the General Municipal Law of the State of New York. Any other person may similarly request an advisory opinion but only with respect to whether his or her own action might violate a provision of this [chapter] or Article 18.

2. Advisory opinions and requests for advisory opinions shall be indexed and maintained on file by the Ethics Board.

3. Any person aggrieved by an advisory opinion of the Ethics Board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York.

4. Any person who has submitted to the Ethics Board a written request for an advisory opinion may bring a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules for an order compelling the Ethics Board to issue the advisory opinion. In addition to, or in lieu of, such injunctive relief, the person may seek a judgment in accordance with section 3001 of the Civil Practice Law and Rules determining the question posed in the request for the advisory opinion. No action or special proceeding shall be prosecuted or maintained pursuant to this subdivision unless (a) it shall appear by and as an allegation in the petition or complaint that at least six months have elapsed since the filing of the request and that the Ethics Board has failed to file any determination in

74. See N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 1988).

the matter and (b) the action or special proceeding shall be commenced within ten months after the submission of the request for the advisory opinion.

§ 212.—Comment.

To avoid burdening the ethics board with requests for advisory opinions, the model law permits a private citizen to request an advisory opinion only as to the permissibility of his or her own conduct. Any official, on the other hand, may request an advisory opinion with respect to his own, a subordinate's, a superior's, or even a colleague's conduct.

This section addresses formal advisory opinions. An ethic board remains free at any time to answer questions of anyone with respect to the model law or Article 18.

Recognizing that persons requesting advisory opinions need quick answers to their ethics questions, section 212 acknowledges the right of a person to seek judicial assistance in compelling the ethics board to respond to a request for an advisory opinion or in answering the question posed, once six months have elapsed since submission of the request to the board. This provision obviates, to some extent, the limitation of section 113 injunctive relief to persons who have filed a sworn complaint. An official against whom a complaint has been made, or who is otherwise under investigation by the ethics board, may immediately request an advisory opinion as to the propriety of his or her conduct and, if that opinion is not forthcoming within six months, may proceed under section 212.

Some municipalities may wish to make advisory opinions binding upon the ethics board. For example, the municipality could include the following in its ethics code:

An advisory opinion rendered by the Ethics Board, until and unless amended or revoked, shall be binding upon the Ethics Board in any subsequent proceeding concerning the person who requested the opinion and who acted in good faith, unless he or she omitted or misstated a material fact. The opinion may also be relied upon by the person, and may be introduced and used as a defense, in any civil action brought by the Ethics Board or the [County, City, Town, or Village].

The second sentence would result in the ethics board's opinion binding not only the ethics board but also the municipality itself, for example in a disciplinary proceeding or in an action for damages, civil forfeiture, debarment, or injunctive relief. Many municipi-

palities may not wish to give that extensive authority to the ethics board.

Judicial Review.

Any person aggrieved by a decision of the Ethics Board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York.

Training and Education.**The Ethics Board:**

- (a) shall make information concerning this [chapter] and Article 18 of the General Municipal Law available to the officers and employees of the [County, City, Town, or Village], to the public, and to persons interested in doing business with the [County, City, Town, or Village], and
- (b) shall develop educational materials and an educational program for the officers and employees of the [County, City, Town, or Village] on the provisions of this [chapter] and on Article 18 of the General Municipal Law.

§ 214. —Comment.

Educating officials and the public on Article 18 and the local ethics laws are among the most important functions of an ethics board.

Annual Reports; Review of Ethics Laws.

1. The Ethics Board shall prepare and submit an annual report to the [chief executive officer and governing body of the county, city, town, or village], summarizing the activities of the Board. The report may also recommend changes to the text or administration of this [chapter].

2. The Ethics Board shall periodically review this [chapter] and the Board's rules, regulations, and administrative procedures to determine whether they promote integrity, public confidence, and participation in [County, City, Town, or Village] government and whether they set forth clear and enforceable, common sense standards of conduct.

§ 216. Public Inspection of Records; Public Access to Meetings.

1. The only records of the Ethics Board which shall be available for public inspection are those whose disclosure is required by Article 6 of the Public Officers Law of the State of New York or by some other State or Federal law or regulation.

2. No meeting or proceeding of the Ethics Board concerning misconduct, non-feasance, or neglect in office by a [County, City, Town, or Village] officer or employee shall be open to the public, except upon the request of the officer or employee or as required by the provisions of Article 7 of the Public Officers Law or by some other State or Federal law or regulation.

§ 216.—Comment.

Any ethics board inquiry, including inquiries into complaints that later prove meritless, may compromise an official's career. For that reason, the model law permits an ethics board to disclose only those records for which disclosure is mandated by the state Freedom of Information Law.⁷⁵ That law provides that an agency "may deny access" to certain records.⁷⁶ The model law makes that denial mandatory.

Similarly, the model law does not allow an ethics board to open its meetings to the public, except as required by the state Open Meetings Law or if requested by the target of the investigation, consistent with that law.⁷⁷ The Open Meetings Law provides that a public body "may conduct" an executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."⁷⁸ The model law makes such executive sessions mandatory, except on request of the official under investigation.

However, in the Commission's opinion, in counties, cities, towns, and villages subject to the mandatory financial disclosure requirements of sections 810-813 of the General Municipal Law, the only records an ethics board may open to the public *with respect to such disclosure* are those records identified in section 813(18)(a) of that law. The Commission took the position that under section

75. N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 1988 & Supp. 1993).

76. *Id.* § 87(2).

77. See *id.* § 105 (McKinney 1988). Cf. CRIM. PROC. LAW § 190.85 (McKinney 1993).

78. N.Y. PUB. OFF. LAW § 105(1)(f) (McKinney 1988).

813(18)(b), ethics boards in those communities, *with respect to such annual disclosure*, are exempt from the Open Meetings Law. The Commission concluded that section 813(18) applies to those counties, cities, towns, and villages, because of the language of section 811(1)(c) and (d). The Committee on Open Government disagreed with these conclusions and believed that the Open Meetings Law and the Freedom of Information Law govern local ethics boards in all instances.

The model law intends that disclosure statements be made available immediately upon the request of any person. Because the statements do not contain confidential information, it is unnecessary to redact any information from them before disclosing them to the public. Some municipalities may in fact wish to require that disclosure statements, whenever practicable, be made available immediately upon request.

To prevent the circulation of an officials' disclosure statements (particularly in an altered form), the Commission adopted a regulation prohibiting the photocopying of statements on file with the Commission.⁷⁹ However, the Freedom of Information Law, which expressly provides for copying as well as for public inspection, may preclude a municipality from adopting such a regulation in a local ethics law.⁸⁰

§ 217. Miscellaneous provisions.

1. No existing right or remedy shall be lost, impaired, or affected by reason of this [chapter].
2. Nothing in this [chapter] shall be deemed to bar or prevent a present or former [County, City, Town, or Village] officer or employee from timely filing any claim, account, demand, or suit against the [County, City, Town, or Village] on behalf of himself or herself or any member of his or her family arising out of personal injury or property damage or any lawful benefit authorized or permitted by law.
3. If any provision of this [chapter] is held by a court of competent jurisdiction to be invalid, that decision shall not affect the validity and effectiveness of the remaining provisions of this [chapter].

79. N.Y. COMP. CODES R. & REGS. tit. 9, § 9978.6(c) (1991); see also John v. New York State Ethics Comm'n, 581 N.Y.S.2d 882 (App. Div. 1992) (upholding similar regulation of State Ethics Commission).

80. See N.Y. PUB. OFF. LAW § 87(2) (McKinney 1988 & Supp. 1993).

§ 218. Distribution and posting.

1. Within 90 days after the effective date of this section, and thereafter as appropriate, the Ethics Board shall transmit to the [chief executive officer or, if none, the chair of the governing body] of the [County, City, Town, or Village], in a form suitable for posting, copies of those provisions of this [chapter] which the ethics board deems necessary for posting in the [County, City, Town, or Village]. Within ten days after receipt of those copies, the [chief executive officer or, if none, the chair of the governing body] shall cause the copies to be posted conspicuously in every public building under the jurisdiction of the [County, City, Town, or Village].

2. Within 90 days after the effective date of this section, and thereafter as appropriate, the Ethics Board shall transmit to the [chief executive officer or, if none, the chair of the governing body] of the [County, City, Town, or Village], in a form suitable for distribution, copies of those provisions of this [chapter] which the ethics board deems necessary for distribution to the officers and employees of the [County, City, Town, or Village]. Within ten days after receipt of those copies, the [chief executive officer or, if none, the chair of the governing body] shall cause the copies to be distributed to every officer and employee of the [County, City, Town, or Village], and made readily available to the public. Every [County, City, Town, or Village] officer or employee elected or appointed thereafter shall be furnished a copy of those provisions within ten days after entering upon the duties of his or her position.

3. Failure of the [County, City, Town, or Village] to comply with the provisions of this section or failure of any [County, City, Town, or Village] officer or employee to receive a copy of the provisions of this [chapter] shall have no effect on the duty of compliance with this [chapter] or on the enforcement of its provisions.

§ 218.—Comment.

Section 807 of the General Municipal Law requires that Article 18 be posted in its entirety. Section 806(2) requires that any ethics law adopted by a municipality be distributed to every officer and employee of the municipality. However, failure to post or distribute does not affect the enforcement of those laws or the duty of officials to comply with them.

The model law permits the ethics board to select provisions of the local law for distribution and posting. For example, the board of ethics may decide that only the Code of Ethics itself (section

100) should be posted but that sections 100 to 113 should be distributed to the municipality's officers and employees.

Section 5. Effective Date.

This local law shall take effect immediately upon filing in the office of the Secretary of State and in compliance with all applicable provisions of law.

APPENDIX A

**SAMPLE ANNUAL DISCLOSURE STATEMENT
UNDER THE LOCAL GOVERNMENT ETHICS
BILL
(S.6157/A.8637)**

**ANNUAL DISCLOSURE STATEMENT
[MUNICIPALITY] OF _____
FOR 199_____**

| Last Name | First Name | Initial |
|--------------|----------------------|---------|
| | | |
| Title | Department or Agency | |
| | | |
| Work Address | Phone No. | |
| | | |

If the answer to any of the following questions is "none," please so indicate.

1. **REAL ESTATE.** List the address of each piece of property that you, your spouse, or other relative own or have a financial interest in. List only real estate that is in the [municipality] of _____ or within one mile of the boundary of the [municipality] of _____. "Relative" means your spouse, child, step-child, brother, sister, parent, or a person you claimed as a dependent on your latest state income tax return.

| Name of Family Member | Relationship to You | Address of Real Estate | Type of Investment |
|-----------------------------|------------------------|--------------------------------|-----------------------|
| <i>John Jones</i> | <i>Father</i> | <i>1 Main St., Teatown</i> | <i>Owns</i> |
| | | | |
| | | | |
| | | | |
| | | | |

2. YOUR OUTSIDE EMPLOYER OR BUSINESS. List the name of any outside employer or business from which you receive compensation for services rendered or goods sold or produced or of which you are a member, officer, or employee. Also include any entity in which you have an ownership interest, except a corporation of which you own less than five percent of the outstanding stock. Identify the type of business, such as a partnership, corporation, self employment, or a sole proprietorship and list your relationship to the employer or business (i.e., owner, partner, officer, director, member, employee, or shareholder).

| Name of Employer or Business | Nature of Business | Type of Business | Your Relationship |
|------------------------------------|-------------------------------|---------------------|----------------------|
| <i>Monument Realty</i> | <i>Real Estate Agency</i> | <i>Partnership</i> | <i>Employee</i> |
| | | | |
| | | | |
| | | | |

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3. YOUR SPOUSE'S EMPLOYER OR BUSINESS. List the information in question 2. for your spouse.

| Name of Employer or Business | Nature of Business | Type of Business | Spouse's Relationship |
|------------------------------------|-----------------------|---------------------|--------------------------|
| [E.g.: <i>Pottery Ltd.</i>] | <i>Pottery</i> | <i>Manufacturer</i> | <i>Corporation</i> |
| | _____ | _____ | _____ |
| | _____ | _____ | _____ |
| | _____ | _____ | _____ |

Date:

Signed: _____