EMPOWERING COUNTY ETHICS BOARDS

By

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By Mark Davies, Esq.

To county attorneys it came as no surprise in 1991 when the Temporary State Commission on Local Government Ethics condemned the state's ethics law for municipal officials as "disgracefully inadequate." That law, set forth in Article 18 of the New York State General Municipal Law, has long been viewed as a cruel joke among municipal lawyers and their clients. Yet despite extensive support throughout the state—from NYSAC, NYCOM, the Association of Towns, local municipal associations, good government groups, individual municipalities and officials, the NYSBA Municipal Law Section, the Retail Council, and over 40 newspaper editorials—the legislature refused to consider the Commission's bill to revamp Article 18. As a result, municipal officials continue to fall prey to this merciless law.[1]

Space does not permit the detailing of Article 18's manifold sins and wickedness. One need only list, as a beginning, its heavy handed prohibited interest provision that often forces rural municipalities either to lose good citizens from municipal government or contract with vendors miles away at inflated prices; a gifts provision that provides so little guidance that one county court struck it down as unconstitutionally vague; a purported code of ethics that contains no prohibition on use of public office for private gain, virtually no restrictions on appearing for pay before county agencies other than one's own agency, no prohibition on putting the bite on subordinates for political contributions or on inducing a colleague to violate the ethics law, no post-employment (revolving door) restrictions, no requirements for disclosure and recusal when a potential conflict arises, no penalties for violating the anemic ethics rules that do exist in Article 18; and a financial disclosure regimen that is so onerous it has driven hundreds of good citizens out of county government.[2]

But it does not have to be that way. Not in your county. Not on your watch.

The solution lies in passing an comprehensive county ethics law, as authorized not only by the state's Municipal Home Rule Law but also specifically by sections 806 and 811 of the General Municipal Law.[3] In drafting an ethics law, four principles must be kept always in mind. First, ethics laws focus on prevention, not punishment. They are written for the honest official, not the dishonest one. Indeed, a good ethics law is the best friend of honest officials because it keeps them out of trouble and protects them against unfounded accusations of unethical conduct and pressure to do something wrong. Second, these laws do not address morality (or even ethics, strictly speaking) but rather conflicts (primarily financial conflicts) between the public official's private interests and public duties. Third, ethics laws must be simple, clear, and sensible. People cannot not obey a law they do not understand and may not obey a law that does not make sense to them. Finally, ethics laws must be tailored to fit the particular county. What is good for Erie may be disastrous for Greene, and vice versa.

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Furthermore, to be effective, an ethics law *must* contain three components: a code of ethics; disclosure (transactional, annual, applicant); and administration (an ethics board with the powers and duties of legal advice, waivers, disclosure, enforcement, and education). Experience has proven time and again that failure to include any of these components will doom the ethics law to failure, raising expectations it cannot meet and thereby increasing, rather than decreasing, public cynicism about the integrity of local government.

Code of Ethics. First, an ethics law must contain a clear and comprehensive code of ethics that is understandable to lay persons without resort to lawyers. Simple, sensible, straightforward, and short, the code should cover all of the basic issues: use of public office for private gain for oneself, family, outside business or employer, or major outside customers or clients; gifts; use or disclosure of confidential information; appearing before any county agency on behalf of private clients or representing them on matters involving the county; inducing other county employees to violate the code of ethics; business and financial relationships between superiors and subordinates; political solicitation of subordinates; "two-hats" (simultaneously holding public and political offices); revolving door (post-county employment); avoiding conflicts of interest; and restrictions on private persons and firms.

Bright line rules should be preferred over vague standards. Definitions should be kept to a minimum, should be set forth in a separate section (and not clutter up the code itself), and should always limit (never expand) the restrictions in the code of ethics. So, too, exclusions should be contained not in the code of ethics but in a separate section. Thus, a county employee who reads and complies only with the ethics code and ignores the definitions and exclusions may refrain from doing a permitted

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act but will never inadvertently commit a violation. A county ethics law should also incorporate the requirements of the General Municipal Law (sections 800 though 805-a and 809), lest a county employee comply with the code of ethics and violate the state law.

Disclosure. Disclosure means disclosure to the public. Disclosure limited to an ethics board is largely useless because no ethics board possesses the resources to investigate every disclosure statement but must instead depend upon interested private citizens, whistleblowers, and the media. Failure to disclose must result in stiff civil fines, or no one will disclose at all.

Three basic kinds of disclosure exist. Transactional disclosure, usually accompanied by recusal, occurs when a potential conflict of interest actually arises: "I would like to state for the record that I [a zoning board member] am employed by the applicant for this variance and therefore recuse myself from any involvement in this matter." In applicant disclosure, an applicant or bidder before the county discloses the interest of county employees in the applicant or application, to the extent reasonably known.

Annual disclosure usually consists of a form that certain higher level county employees fill out each year listing certain of their assets and liabilities. Such disclosure is critical to an ethics law because it alerts the public, the media, vendors, the county government, whistleblowers, and the filer himself or herself about potential conflicts of interest and thus helps avoid them – prevention. Annual disclosure also provides a check on transactional disclosure and focuses the attention of the filer at least once each year on the ethics law. But annual disclosure forms should be tailored to the official's position and agency, if possible, and *must* be tied to the code of ethics. Information that cannot reveal a conflict of interest under the ethics code should *not* be asked. For example, if the code of ethics prohibits a county official from acting on a matter that benefits a corporation in which he or she owns more than $10,000 in stock, then the annual disclosure form should not request information on stock holdings of less than $10,000. In general, a question should not be asked unless a clear need exists for the information. The Temporary State Commission purposed a two-page form with three questions. Most counties will wish to add two or three additional questions. Few counties need more than that.

Administration. Experience has demonstrated certain bedrock principles of ethics administration. First, an ethics law must be administered by an independent ethics board, composed of members who hold no political or county office, engage in no political activity, and do not lobby or conduct any private business with the county. Ethics board members should be appointed by the chief executive officer of the county, with the advice and consent of the county legislature or board of supervisors, for fixed, overlapping terms. To the extent that Gen. Mun. Law § 808 provides otherwise, it may be varied under the county's home rule powers.[4]

Second, the ethics board must provide quick oral and written advice to county employees seeking it. Furthermore, requests, deliberations, and advice of the board should be confidential to the greatest extent permitted by law, lest public servants fear to consult the board and thus commit avoidable violations.

Third, to prevent harm to the county or devastating hardship for an official, the ethics board should have the power to waive local government ethics rules (the provisions of Article 18 may not be waived). To protect against abuse, waivers should be granted only pursuant to a strict standard, should require approval of the county employee's agency, and must be public. Fourth, the ethics board should make disclosure statements quickly available (within hours) to the media and the public, upon request, without requiring resort to FOIL.

Fifth is enforcement. An ethics board lacking the authority to investigate complaints, to launch investigations upon its own initiative, to subpoena witnesses, and to impose civil fines is worthless. It will be ignored, berated, and dismissed, as will the elected officials who created it. Better to have no ethics board at all. Again, confidentiality is paramount. Only *after* investigation and commencement of a formal proceeding should an enforcement action become public. But publicity is critical since the primary purpose of enforcement, like ethics laws generally, lies in prevention of future unethical conduct. Thus, all settlements should be public.

Finally, since county employees cannot obey an ethics law they have never heard of, and since the purpose of an ethics law lies in preventing (not punishing) conflicts of interest, ethics training becomes critical. A couple of two-page fliers distributed to new employees and annually to all employees, a poster, and periodic classes should suffice to alert county employees to potential conflicts of interest, which is all one can hope for. Training should be also required of vendors.

The bottom line is this. Do not leave the fate of your county officials in the grimy hands of Article 18. Enact your own ethics law that protects not only the public but

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your public officials as well.

Endnotes

1. See generally Temporary State Commission on Local Government Ethics, *Final Report*, 21 FORDHAM URBAN L.J. 1 (1993).
2. See generally Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALBANY L. REV. 1321 (1996); Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243 (1991).
3. See Op. Atty. Gen. (inf.) 88-2, 91-32, 91-68, 93-14, 97-50. But see Op. Atty. Gen. (inf.) 95-46, 98-3. See generally Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URBAN L.J. 61 (1993).
4. See Op. Atty. Gen. (inf.) 86-44, 91-68, 93-14.

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