

Running a Local Municipal Ethics Board: *Tips For Drafting Advisory Opinions*

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In many local municipalities, ethics boards are authorized to issue advisory opinions. These opinions help government officials to maintain high standards of conduct, protect them from unwarranted criticism, and help to foster public confidence in government. This article is offered as advice to the advisors, to assist local boards in the important task of drafting advisory opinions.

1. **Prepare and Distribute a Plain Language Guide to Government Ethics.** Most members of the municipal work force are not lawyers; many are not college or high school graduates. Ethics regulations are useless unless they are understood. Every municipal officer and employee should receive a copy of the Plain Language Guide.

2. **Beware of Casual Inquiries to Individual Board Members.** The board is a deliberative body; only a quorum can act. You probably won't have all the facts you need to answer the question when asked; you don't want to be cited as having approved a code violation.

3. **Get the Request in Writing.** You want to have a record of the question that was posed to you, and the information that your opinion was based on.

4. **Give Advice to Proper Parties Only.** Local ethics boards are typically authorized to give ethics advice only to municipal officers and employees, or to members of the public inquiring about themselves.

5. **Gather the Relevant Information.** What is the official's civil service job description? Is the official working out of title? Does the official influence policy? How does a particular agency interact with another? etc.

6. **Only Decide Actual "Cases and Controversies".** The particular facts of an actual case will often determine the outcome of an ethics inquiry. Answer general inquiries by providing a copy of the Plain Language Guide.

7. **Avoid Interference With Criminal Investigations.** Refer suspected criminal misconduct to the District Attorney. Refrain from acting while a criminal investigation is pending.

8. **Always Consult Your Local Ethics Code.** In giving ethics advice, apply the ethics code to the facts presented. Many inquiries are more complicated than they appear. The relevant code provisions should be re-read for each inquiry. Also, remember that the standards of conduct set forth in Article 18 of the NY General Municipal Law may apply, even if they are not incorporated in your local ethics code.

9. **Consider Published Opinions of the NYS Attorney General and Comptroller.** These informal opinions are non-binding, but persuasive authority. They are available on-line.

10. **Develop a Template for Opinions.** Frame the issue presented; set forth the governing authority; discuss how the law applies to the facts; state the Board's conclusion. Opinions should be signed by the chair.

11. **Distinguish Between Government Ethics and Legal Ethics.** Only give advice on government ethics. Officials seeking advice on the ethics of the legal profession should be referred to the ethics committee of the local bar association.

12. **Distinguish Between Ethics Issues and Other Legal Issues.** The Board is authorized to interpret ethics regulations. Other legal questions should be referred to the municipal attorney.

13. **Narrowly Frame the Issue.** Limit the application of the NY Freedom of Information Law and the NY Open Meetings Law by framing the issue narrowly, and by avoiding broad policy declarations.¹ Confidentiality encourages officials to seek ethics advice.

14. **Limit the Opinion to the Facts Presented.** You may not know the whole story, and you don't want to set a bad precedent.

15. **Omit Name and, Where Possible, Other Facts that Identify Inquiring Official.** Confidentiality encourages officials to seek ethics advice.

16. **Respect Your Own Precedents, But Take a Fresh Look Where Warranted.** Inconsistent rulings encourage skepticism. But don't ignore the lessons of experience.

17. **Be Restrained in Finding an "Appearance of Impropriety".** Ethics regulations are not only designed to promote high standards of official conduct. They are also designed to foster public confidence in government. An appearance of impropriety

undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated.² But fairness requires that public officials have clear advance knowledge of what conduct is prohibited, and what conduct is not. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended conflicts of interest and unwarranted suspicion. When a prohibited appearance of impropriety is found, the finding should have a rational basis, and the board's reasoning should be clear and convincing. Such a finding should be reserved for the rare cases involving conduct that is contrary to public policy, and that raises the specter of self-interest or partiality. It should not be found in cases where the improper appearances are speculative or trivial. Where a contemplated action by an official might create an appearance of impropriety, the board should recommend that the official refrain from acting. But ethics boards should be restrained in finding, after the fact, that an official's conduct violated the implied duty to avoid appearances of impropriety. In particular, boards should be restrained in finding that a legislator was required to abstain from participating in a legislative matter because the recusal of a legislator disenfranchises voters, and because an abstention will normally be counted as a "nay" vote.³

18. **Be Reasonable and Practical; Remember Your Goals.** The goals of ethics regulations are to encourage high standards of conduct among government officials, foster public confidence in government, and protect honest officials from unwarranted criticism.

19. **Respond in Time.** Many inquiries are time sensitive. For example, an outside job opportunity may be lost while an official waits for the ethics board to determine whether the secondary employment would be compatible with the official's government duties.⁴ To be useful, ethics advice must be timely.

20. **Avoid Partisanship.** A board that is perceived as "political" will have no credibility.

21. **Allow Dissenting Opinions.** Some ethics opinions will be based on subjective judgments; reasonable minds may differ. The public will have greater confidence in a Board that does not suppress dissent.

22. **Avoid Public Statements.** Most ethics inquiries escape public notice. But some draw intense public attention. Public statements by board members may send mixed messages, and may undermine the force and credibility of advisory opinions. Let your opinions speak for themselves.

Endnotes

¹ See, N.Y. Comm. on Open Gov't. FOIL Adv. Op. 8922 (1995); OML Adv. Ops. 2269 (1993), 2805 (1997).

² See, Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo, 69 A.D. 2d 320 (2d Dept., 1979).

³ See, NY General Construction Law §41.

⁴ In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible. See, People ex rel. Ryan v. Green, 58 NY 295 (1874).

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