

Westchester County Charter Revision Commission
Ethics Reform in Westchester County
by Mark Davies¹
June 20, 2013
White Plains

Introduction

For the record, my name is Mark Davies. I am the Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York. I should note that the opinions I express here are solely my own and do not necessarily reflect the views of the Board or the City of New York.

I have passed out an outline of my remarks (attached).

I have been asked to give an introduction to municipal ethics laws generally and specifically to comment on Westchester's current ethics law.

I have been in this government ethics business for almost 25 years now, and in that time I have discovered two cardinal principles in government ethics reform. First, one must *never* let the perfect be the enemy of the good. Second, few of the players in ethics reform – not the media, not civic groups, not elected officials, not unions, not public servants, and not the public – really understand the purpose and function of ethics laws.

Let me expand briefly on those two points. First, because one must not let the perfect be the enemy of the good, one should not, for example, refuse to support an ethics law merely because it permits relatively small gifts to officials by those doing business with others in their government agency, even though the better practice would call for an outright prohibition on all such gifts. That said, no ethics reform is better than ethics reform that violates the most fundamental principles of government ethics; bad ethics reform is worse than no ethics reform at all.

Second, one must not underestimate the impact of the lack of understanding of the purpose and function of an effective ethics law. That lack dooms any attempt at an ethics fix because the parties involved erect their reform efforts not upon the foundation of the purpose and principles of an effective government ethics law, but upon the shifting sands of conflicting political arguments and agendas. The debate *should* center upon how and why one proposed

¹ Mark Davies is Executive Director of the New York City Conflicts of Interest Board, the former Executive Director of the Temporary New York State Commission on Local Government Ethics, and deputy counsel to the New York State Commission on Government Integrity. He is Chair of the Municipal Law Section of the New York State Bar Association, where he also co-chairs the Government Ethics Committee, is a member of the Board of Directors of Global Integrity, an Advisor to the American Law Institute's Project on Public Integrity, former Chair of the Municipal Ethics Subcommittee of the New York State Bar Association President's Task Force on Ethics, and an Adjunct Professor of Law at Fordham Law School. He has written and lectured extensively on government ethics, both nationally and internationally. The views expressed in these remarks do not necessarily represent those of any of those entities.

provision promotes that purpose and those principles better than an alternative provision. For example, the debate over the appointment process for ethics board members should focus upon which method best promotes the independence, integrity, and efficiency of the ethics board. But the debate chronically does not. Therefore, one must first understand the purpose, principles, and content of an effective government ethics law before one can even consider any effort at ethics reform.

So, let me, first, lay out those purpose, principles, and content and then, second, briefly measure Westchester's current ethics law against those standards.

Purpose, Principles, and Content of an Effective Government Ethics Law

A. The Purpose and Principles

The purpose of government ethics laws lies in promoting both the reality *and the perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur.

A number of principles undergird this purpose. Specifically, an effective government ethics law:

- Promotes not only the reality but also the *perception* of integrity in government because no matter how honest the government is in fact, it cannot function effectively if citizens believe their officials are self-serving or corrupt;
- Focuses on *prevention*, not punishment;
- Recognizes the inherent *honesty* of public officials;
- Seeks thus to *guide* those honest officials, not imprison dishonest ones;
- Is, therefore, not intended to (and will not) catch crooks, which is the province of penal laws, law enforcement agencies (including inspectors general), and prosecutors; and
- Ensures that the public has a stake in the ethics system.

As a matter of fact, the vast majority of public servants, including, indisputably, the vast majority of elected and appointed officials in Westchester County, are honest and want to do the right thing. They are the ones who require not condemnation but guidance, by a clear and effective ethics law, because bribe takers and kickback receivers will never be deterred by *any* ethics law. Suggesting that ethics laws will prevent criminal or dishonest conduct by elected or appointed officials will only ensure that those ethics laws fail.

Indeed, most so-called government ethics laws are really conflicts of interest laws that regulate not right and wrong or morality and immorality, but rather conflicts of interest, that is, conflicts (usually, though not always, financial conflicts) between an official's public duties and his or her private interests, in short, divided loyalty.

Accordingly, a government "ethics" law may be either values-based or compliance-based. A values-based (ethics) law promotes positive conduct but may lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action). Such a law might

provide, for example, that “public officials shall place the interest of the public before themselves.”

By contrast, a compliance-based (conflicts of interest) law provides bright-line, civilly and criminally enforceable rules but focuses on negative conduct and interests. For example, such a law might provide that “a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official.” Best practice mandates that the government ethics law first set forth ethical precepts (a code of ethics), and then from those precepts draw out compliance-based rules (a conflicts of interest code, what Westchester’s ethics law calls Standards of Conduct).

B. Content: The Three Pillars Upon Which an Effective Government Ethics Law Rests

An effective government ethics law must rest upon three pillars. Failure to establish, or removal of, *any* of these pillars inevitably causes the entire ethics structure to collapse. These three pillars are:

- (1) A simple, comprehensive, and comprehensible *code of ethics* (technically, a conflicts of interest code) and
- (2) Sensible *disclosure*
- (3) Administered by an *independent ethics board* with full authority to interpret and enforce the ethics law for *every* public official who is subject to it.

(1) First Pillar: Code of Ethics

A simple, comprehensive, and comprehensible code of ethics forms the heart and soul of an ethics law. Critical prohibitions include:

- Using one’s government office for private gain, and recusal when any such conflict of interest arises;
- Using government resources for private purposes;
- Soliciting gifts or accepting gifts from persons doing business with the government;
- Seeking or accepting private compensation for doing one’s government job (tips, honoraria, and gratuities);
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one’s government job;
- Disclosing confidential government information or using that information for a private purpose;
- Appearing before government agencies on behalf of private interests or representing private interests in government matters;
- Seeking a job from a private person or firm with which one is dealing in one’s government job;
- After leaving government service, revolving door restrictions, that is,
 - Appearing on behalf of a private employer before one’s former government agency for a specified period, such as one year;
 - Working on a matter on behalf of a private employer on which one worked personally

- and substantially while in government service;
- o Revealing or using confidential government information; and
- Inducing other government officials to violate the conflicts of interest code.

Other common, though less critical, prohibitions may include:

- Having a position or an ownership interest in a firm doing business with the government;
- Purchasing one's government office or position;
- Coercing others (not just subordinates, government contractors, or lobbyists) to make political contributions or engage in political activity;
- Holding certain political party offices (two-hats);
- Engaging in partisan political activity (a little Hatch Act);
- Entering into or maintaining a financial relationship with a superior or subordinate;
- Soliciting subordinates to engage in any non-governmental (not just political) activity or make any non-governmental contributions (e.g., charitable solicitations);
- Engaging in conflicts of interest generally; and
- Engaging in improper conduct generally.

Before turning to the second pillar, disclosure, I should add that, because Article 18 of the New York State General Municipal Law contains certain conflicts of interest provisions applicable to every municipality outside the City of New York, I strongly advise that a local ethics law incorporate those provisions in order to avoid officials being tripped up by taking an action that is permissible under the municipal ethics code but is prohibited by state law. Officials should be able to consult one single ethics law.

(2) Second Pillar: Disclosure

Sensible disclosure forms the second pillar upon which an effective government ethics law rests. Such disclosure consists of transactional disclosure, applicant disclosure, and annual (financial) disclosure.

Transactional disclosure, the most critical type of disclosure, occurs when a potential conflict actually arises; transactional disclosure is accompanied by recusal, except perhaps in the case of members of a legislative body. For example, an employee may state that “one of the potential bidders on this contract is a company partially owned by my brother, and therefore I recuse myself from working on this RFP.” Since transactional disclosure acts directly to avoid a conflict of interest violation, it constitutes the most important form of disclosure—and the least controversial. But transactional disclosure can meet that purpose *only* if it is public, to enable other government officials, the public, and the media to ensure that the recusal is adequate and to reassure the citizenry that the conflicted official will in fact have no impact upon the matter.

Applicant disclosure, which in broad-based form is relatively rare in most states, requires private citizens and firms seeking government business or a government license or benefit to disclose in the application the interests of officials in the applicant or the application, to the extent the applicant knows. Applicant disclosure acts as a check on transactional disclosure and thus must also be public. Section 809 of the General Municipal Law mandates applicant

disclosure in certain municipal land use applications. Here, too, I would incorporate the provisions of section 809 into the Westchester ethics code.

Annual (financial) disclosure remains the most controversial form of disclosure—and justifiably so—largely because of its misuse by state elected officials, who often present it to the public as the silver bullet that will cure all ethical ills. It won't. The purpose of annual disclosure, like that of ethics laws generally, lies in preventing conflicts of interest violations (unethical conduct) from occurring in the first place.

Annual disclosure accomplishes that purpose by disclosing to supervisors, co-workers, the public, the media, and the filer himself or herself where the filer's potential conflicts of interest lie—and by doing so helps prevent those potential conflicts from becoming actual conflicts. That's why easy, public availability of financial disclosure statements is so critical. For example, if a high-level official in the Department of Transportation discloses on her annual disclosure statement that her sister holds a senior position with a truck manufacturer, then everyone knows that the official has a potential conflict of interest anytime her agency deals with her sister's company. In addition, annual disclosure should force filers to focus, at least once a year, on the requirements of the applicable ethics code.

But annual disclosure laws, like ethics laws generally, do not catch crooks. No one has yet seen on an annual disclosure statement: "bribes accepted: \$10,000." Criminal financial disclosure cases invariably arise not from what is reported but from what is not reported. Furthermore, while civic groups raise the shibboleth of "the public's right to know," in fact the public has no more right to know financial information about a public official that cannot produce a conflict of interest under the ethics code than to know the names of officials' paramours or the details of officials' medical conditions. In fact, paramours and medical conditions appear far more relevant to an official's ability to perform his or her official duties than financial information divorced from an ethics code; all such information should be off limits to disclosure.

Accordingly, the questions on a financial disclosure form *must* reveal potential conflicts of interest under the ethics code. For example, if the ethics law would permit a public servant to take an official action that might benefit a company in which he or she owns less than \$10,000 in stock, then the financial disclosure form should not require disclosure of stockholdings under \$10,000 because they cannot result in a violation of the ethics law. Unfortunately, many, if not most, annual disclosure laws, including Westchester's (and New York City's), violate this most fundamental principle of annual disclosure.

(3) Third Pillar: Effective Administration

The success of an ethics law rests, first and foremost, upon the quality, integrity, and efficiency of the body that administers it. And that body *must* be independent of all public officials subject to its jurisdiction; or its actions will always be suspect, undermining the very purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in qualified, volunteer ethics board members of high integrity, with fixed terms, removable only for cause, who hold no other government positions,

are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity. Split appointments—that is, appointments to the ethics board by multiple officials—should be avoided because they inevitably produce factions (and not infrequently leaks), as the old New York City Board of Education and the Joint Commission on Public Ethics have so dramatically demonstrated.

In my experience with various ethics bodies, a five-member ethics board appears to be the optimal size, although a seven-member board can work well, too. Smaller endangers quorums; larger encourages leaks and impedes the efficient disposition of business. The best practice provides for appointment of ethics board members by the chief executive with advice and consent of the legislative body, as in Westchester. The ethics board should have an independent budget with a staff accountable solely to the board itself and should be vested with the sole authority to authoritatively interpret the ethics law, subject to court review.

An ethics board performs four primary duties: legal advice, ethics training, administration of disclosure, and enforcement.

First, *legal advice*. To enable officials to determine whether their conduct violates the ethics code, the board must provide timely legal advice on the legality of all future conduct and interests under the code. It must also have the ability to grant waivers of the provisions of that code, after sign-off by the affected agency, where the ethics board determines that the proposed conduct would in fact not conflict with the purposes and interests of the municipality. All requests for advice and all responses to such requests must be confidential; otherwise, public officials will avoid requesting advice out of fear their supervisor or political opponents may retaliate. Waivers, precisely because they permit otherwise prohibited conduct, must be public, to enable interested parties to review the facts upon which the waiver is based. Formal, public advisory opinions, from which identifying information has been scrubbed, provide guidance on the ethics law to all public servants.

Second, *ethics training*. The ethics board must ensure the training of every public servant on the requirements of the ethics law. An unknown law cannot be obeyed.

Third, *disclosure*. The board must also administer the disclosure system - collecting, reviewing, and making public all disclosure statements.

Fourth, *enforcement*. The ethics board *must* have the authority to enforce the ethics law against every official or other person subject to its jurisdiction. An ethics board without enforcement power will remain forever a toothless tiger, raising expectations it cannot meet and thus undermining public confidence in government integrity. Enforcement power requires complete control of investigations and prosecutions, the ability to commence investigations on the ethics board's own initiative, subpoena power, and a broad range of penalties (e.g., civil fines, discipline, censure, damages, disgorgement of ill-gotten gains, and debarment), some imposed by the ethics board, some by the employing agency, and some by the courts; but the ethics board *must* have the power itself to impose civil fines. In addition, to protect officials against unfounded accusations while reassuring the public that the government takes violations of the ethics law seriously, enforcement activity prior to the ethics board's issuance of a formal

complaint should remain confidential while proceedings thereafter should be public.

A few years ago I wrote a series of articles for the *Municipal Lawyer*, the newsletter of the New York State Bar Association's Municipal Law Section, that lays out in greater detail my views on the contents of effective local government ethics law, including model language, and on a proposed process for drafting such a law.² Your counsel has a copy of these articles. In addition, you may wish to review the ethics law enacted by the County of Albany in December 2011 – Local Law No. 8 of 2011.³

C. Westchester's Current Ethics Law

Let me now briefly turn to my assessment of Westchester's current ethics law in light of these standards I have laid out.

Bottom line: although Westchester's ethics law is not horrible, it is not so great either.

Time does not permit a detailed assessment, but here are a few highlights:

- (1) § 883.01 - The preamble should be expanded to include a list of values that lie at the core of public service.
- (2) § 883.11 - The definitions section is too long and too complex. Above all, definitions, which are usually read only by lawyers, should always contract and *never* expand the ethics obligations of public servants set forth in the ethics code.
- (3) § 883.21 – The Standards of Conduct need significant revision, in particular
 - Several provisions provide no guidance at all and at best set traps for public servants, namely
 - The “reasonably be inferred” language in the gifts provision, which should

² Mark Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 21, No. 3, at 4 (Summer 2007), at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/EthMunicipalLawyerSum07.pdf>; Mark Davies, *Enacting a Local Ethics Law – Part II: Disclosure*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 21, No. 4, at 8 (Fall 2007), at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/EthMunicipalLawyerFall07.pdf>; Mark Davies, *Enacting a Local Ethics Law – Part III: Administration*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 1, at 11 (Winter 2008), at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/ethmunicipalwin08.pdf>; Mark Davies, *Local Ethics Laws: Model Administrative Provisions*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 3, at 14 (Summer 2008), at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/EthMunicipalLawyerSum08.pdf>. See also Mark Davies, *The Story of Dharma: The Three-Legged Ethics Dog*, NYSBA MUNICIPAL LAWYER, Vol. 26, No. 3, at 22 (Summer 2012), at http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/26_3_2.pdf; Mark Davies, *New York State Whiffs on Ethics Reform*, 5 ALBANY GOV'T L. REV. 710 (2012), at http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/NYState_Whiffs_on_Ethics_Reform.pdf.

³ Available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/SampleEthicsLaws/AlbanyCountyEnactedLaw.pdf>.

- be replaced with a bright line requirement that also authorizes the ethics board by rule to adopt exceptions (§ 883.21(a));⁴
- The prohibition on investments “in conflict with official duties,” whatever that means (§ 883.21(f));
 - A similar prohibition on private employment or services in conflict with or impairing the discharge of one’s official duties (§ 883.21(g)).
 - “Confidential information” needs defining, and the prohibition needs expanding to prohibit use of the information to further not just one’s own but any associated person’s interests (§ 883.21(b)).
 - The current revolving door provision (§ 883.21(h), (i)(3)) is extremely anemic because it
 - applies only to high level County officials (reporting officers and employees);
 - permits a former County official to work on a matter he or she worked for the County, as long as the official does not appear before the County on the matter;
 - permits a County official to solicit and even accept a job with a firm he or she is dealing with in his or her County job, as long as the firm is not a vendor to the County; and
 - authorizes the County Legislature, rather than the ethics board, to waive certain revolving door restrictions.

Instead, the provision should

- apply to *all* County officers and employees;
- permanently bar them from *working* on *any* non-ministerial matter they personally and substantially worked on for the County;
- bar them for one year from *appearing* before their former County agency on *any* non-ministerial matter;
- prohibit them from *discussing* a possible job with *any* person or firm they are dealing with in their County job; and
- prohibit them from ever disclosing or using confidential County information.
- Several provisions need to be added to the Standards of Conduct:
 - Most critically, a general prohibition on use of one’s County position to benefit oneself, one’s family, one’s private employer or business, or anyone with whom one has a financial relationship – this is the *foundational provision* of any good ethics code;
 - An accompanying recusal requirement to avoid such misuse;
 - A prohibition on use of County time, letterhead, resources, personnel, and supplies for non-County purposes;
 - The General Municipal Law’s prohibition on interests in contracts with the County (Gen. Mun. Law §§ 801-804, 805);

⁴ Although this provision is modeled on Gen. Mun. Law § 805-a(1)(a), the provisions of section 805-a(1) may safely be subsumed in more stringent provisions of the Standards of Conduct because Gen. Mun. Law § 806(1)(a) authorizes a municipality to adopt a code of ethics that is more stringent, but not less stringent, than Article 18 and because no penalty, other than disciplinary action, exists for a violation of section 805-a (*see* Gen. Mun. Law § 805-a(2)).

- A prohibition on acceptance of payment from anyone other than the County for performing one’s County duties (tips);
 - A prohibition on solicitation of subordinates, vendors, or those with whom one deals in one’s County job for political contributions, political activity, or contributions to a not-for-profit organization; and
 - A prohibition on financial relationships between superiors and subordinates.
 - Consideration should be given to *whether* to add certain other provisions to the Standards of Conduct, such as
 - Restrictions on political activities or political positions by high-level appointed County officials;
 - A prohibition on *anyone* inducing a County official to violate the Standards of Conduct; and
 - More restrictive revolving door rules for high-level officials.
- (4) §§ 883.61- 883.101 – As for annual financial disclosure,
- Form A should be amended so that the questions are tied *directly* to the Standards of Conduct because, as I noted, the purpose of this form is to reveal potential conflicts of interest under that ethics code and thus help prevent conflicts of interest *violations* from occurring. For example, the names and positions of immediate family members in County service should be disclosed to ensure that no reporting official supervises a relative. Although such amendments would, overall, probably reduce the form by about one-third, they would make the form much more useful (§ 883.71(1)).
 - The ethics board should also have the power to impose fines for late filing, not just for non-filing, incomplete filing, or misstatements (*cf.* § 883.71(3)).
- (5) § 192.11- No member of the ethics board should otherwise be an officer or employee of the County or an officer or employee of any other municipality subject to the ethics board’s jurisdiction because holding such dual positions severely undercuts the independence of the ethics board, both in reality and perception. The General Municipal Law provision requiring such dual positions may be varied by local law pursuant to the County’s home rule powers.⁵

⁵ The Attorney General has concluded that a local government may enact a local law establishing the composition of a local ethics board that is inconsistent with Gen. Mun. Law § 808(3). 1986 Op. N.Y. Att’y Gen. 100 (Informal Op. No. 86-44), relying upon Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). An earlier Comptroller’s Office opinion to the contrary remains unpersuasive. *See* Op. State Compt. Op. No. 85-48. That opinion relied on section 13 of 1964 N. Y. Laws ch. 946, which chapter enacted Article 18 and which section provided, in relevant part, that “[n]o local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.” *Cf.* Gen. Mun. Law § 806(1)(a) (“Such [local] codes [of ethics] may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited”). The authority to enact a local law not inconsistent with the provisions of the Constitution or with a general law rests not only in state statutory law (namely, Mun. Home Rule Law § 10(1)(i) and (ii)(a)(1)) but also in the Constitution itself (N.Y. Const., Art. IX, § 2(c)). The state legislature, by enactment of Article 18, may not void that Constitutional right of local government. The only issue, therefore, is whether the provisions in Gen. Mun. Law § 808 regulating the composition and establishment of local ethics boards is a general law. In the opinion of the Attorney General, those provisions are clearly not a general law (in contrast to the substantive provisions in sections 801 through 805-a) because they apply only to those municipalities opting into them. Furthermore, one may well argue that the requirements proposed in these remarks

- (6) The ethics law should provide the ethics board with a guaranteed budget or at least mandate that the Law Department provide such staff assistance as the ethics board may reasonably require, provided that such counsel may not disclose to anyone outside the ethics board any confidential information.
- (7) To eliminate the appearance of favoritism and of politicization of waivers, the power to grant waivers of the Standards of Conduct must be removed from the Board of Legislators (§ 883.21(h)(2), (i)(3)) and more broadly granted to the ethics board, provided that a waiver may not permit conduct or interests prohibited by state law.
- (8) §§ 883.101, 883.111; Chapter 192 – I leave for last potentially the most serious defect in the County’s ethics law, namely the lack of clarity as to power of the ethics board to investigate and impose fines for violations of the Standards of Conduct, apart from those arising from reviews of financial disclosure statements conducted by the independent consultant. As mandated by state law, the ethics board has been given the power to investigate and impose fines for violations of the financial disclosure requirements. But section 883.101 would appear to limit the ethics board’s power to investigate potential violations of the Standards of Conduct to those referred by the independent consultant, violations that by definition relate only to high level County officials (reporting officers and employees). Although section 192.41(C) empowers the ethics board to “[c]onduct any investigation necessary to carry out the provisions of Chapter 883...and Article 18 of the General Municipal Law” and section 192.31 empowers the ethics board to “impose fines and penalties” as “prescribed by Article 18... and Chapter 883,” neither Article 18 nor Chapter 883 expressly authorizes the Board to enforce the Standards of Conduct, apart from financial disclosure investigations.

If the ethics board in fact lacks the power to impose fines on *any* County officer or employee for *any* violation of the Standards of Conduct, and to initiate investigations of possible violations of those standards on its own volition and to subpoena witnesses in such an investigation, then that is a *fatal flaw* in the County ethics law that must be remedied. In any event, these powers must be expressly spelled out in the law, as, indeed, must the duties and powers in regard to the issuance of advisory opinions and the conduct of ethics training.

Conclusion

In short, Westchester County’s ethics law, while not terrible, needs some serious work to bring it up to the standards of a modern, effective municipal ethics law. All that said, recognizing that we must never let the perfect be the enemy of the good, one may with just a few sentences transform Westchester’s ethics law from a mediocre ethics law into an ethics law that, while not outstanding, is very good. If the Commission wishes, I could provide some draft language.

Thank you. I am happy to answer any questions you may have now or in the future.

[Training: Westchester 2013: Remarks]

for the establishment and composition of a local ethics board are more stringent than the state law since, for example, they provide greater independence for the ethics board and promote, rather than discourage, inquiries and complaints.

Westchester County Charter Revision Commission
Ethics Reform in Westchester County
Mark Davies
June 20, 2013
White Plains

I. Purpose, Principles, and Content of an Effective Government Ethics Law¹

Any attempt to enact or revise a government ethics (conflicts of interest) law is doomed to failure unless one first understands the purpose, principles, and structure underlying such laws.

Purpose of government ethics laws:

To promote both the reality *and the perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur.

Underlying principles: Government ethics laws

- Promote both the reality *and the perception* of integrity in government
- Focus on *prevention*, not punishment
- Recognize the inherent honesty of public officials, whom these laws seek to guide
- Are not intended to (and will not) catch crooks, which is the province of penal laws, law enforcement agencies (including inspectors general), and prosecutors
- Do not regulate morality (most are really conflicts of interest laws not ethics laws)
- Require that the public have a stake in the ethics system.

Values-based v. compliance-based laws

- Values-based (ethics) laws promote positive conduct but lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action)
E.g., “public officials shall place the interest of the public before themselves.”
- Compliance-based (conflicts of interest) laws provide bright-line, civilly and criminally enforceable rules but focus on negative conduct and interests
E.g.: “a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official.”
- Best practice:
 - Set forth ethical precepts (code of ethics)
 - From those, draw out compliance-based rules (conflicts of interest code)

Definition of conflict of interest

“Conflict of Interest” = Divided loyalty

That is, a conflict, usually (though not always) a financial conflict, between one’s private interests and public duty

Three pillars. An effective government ethics law must rest upon three pillars, removal of *any* of which causes the entire structure to collapse:

- (1) A simple, comprehensive, and comprehensible **code of ethics**
Common provisions include:
 - Using one’s government office for private gain – and recusal

- Using government resources for private purposes
- Soliciting gifts or accepting gifts from persons doing business with the government
- Seeking or accepting private compensation for doing one's government job (tips; gratuities)
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job
- Disclosing confidential government information or using that information for a private purpose
- Appearing before government agencies on behalf of private interests or representing private interests in government matters
- Seeking a job from a private person or firm with which one is dealing in one's government job
- After leaving government service,
 - Appearing on behalf of a private employer before one's former government agency for a specified period (e.g., one year)
 - Working on a matter on behalf of a private employer that one worked on personally and substantially while in government service
 - Revealing or using confidential government information
- Inducing other government officials to violate the conflicts of interest code

(2) Sensible **disclosure**

- **Transactional disclosure** and recusal when a potential conflict actually arises ("My brother's company is bidding on this contract, so I recuse myself") – most important type of disclosure
- **Applicant disclosure** by private citizens or firms seeking government business or a government license or benefit, disclosing interests of officials in applicant or application – provides a check on transactional disclosure (*cf.* Gen. Mun. Law § 809)
- **Annual financial disclosure** – check on transactional disclosure; avoids conflicts of interest violations; focuses officials on the ethics code

(3) **Administration** by an independent ethics board

Touchstones of **independence**: qualified, volunteer board members of high integrity, with fixed terms, no other government positions, no government contracts, lobbying, or appearances, appointed by chief executive with advice and consent of legislative body (to avoid factions and leaks), removable only for cause; protected budget; staff accountable solely to board; vested with sole authority to interpret the ethics law (subject to court review)

Four duties of an ethics board:

- Provide timely and confidential advice on the legality of *future* conduct and interests under the ethics code (and perhaps grant waivers of the code)
- Train all officials in the requirements of the ethics code
- Administer the disclosure system (collect, review, make public)
- Enforce the ethics code when violations occur - to educate, deter, and emphasize how seriously the government takes the ethics code

- Absence of enforcement power over all officials subject to code makes the ethics board a toothless tiger
- Enforcement power includes complete control of investigations and prosecution; ability to commence investigations on own; subpoena power; broad range of penalties (civil fines *by the ethics board*, discipline, censure, damages, disgorgement, debarment); confidentiality

II. Revisions of Westchester’s Ethics Law (Chapters 192 and 883)

* = Most Important Revisions

- (1) § 883.01 – Include values in preamble.
- (2) § 883.11 – Limit definitions.
- (3) § 883.21 – Revise Standards of Conduct:
 - * **Replace vague gifts provision with bright line rule (§ 883.21(a))**
 - Replace investments and private employment or services provisions with bright line rules (§§ 883.21(f), (g)).
 - Define “confidential information” and prohibit use of the information to further any associated person’s interest (§ 883.21(b)).
 - * **Amend revolving door provision (§ 883.21(h), (i)(3)) to**
 - **apply to all County officers and employees;**
 - **permanently bar them from working on non-ministerial matters they personally and substantially worked on for the County;**
 - **bar them for one year from appearing before their former County agency on any non-ministerial matter;**
 - **prohibit them from discussing any possible job with any person or firm they are dealing with in their County job; and**
 - **prohibit them from ever disclosing or using confidential County information.**
 - Add provisions on
 - * **Most critically, a general prohibition on use of one’s County position to benefit oneself, family, private employer or business, or those with whom one has a financial relationship;**
 - * **An accompanying recusal requirement to avoid such misuse;**
 - A prohibition on use of County time, letterhead, resources, personnel, and supplies for non-County purposes;
 - The General Municipal Law’s prohibition on interests in contracts with the County (Gen. Mun. Law §§ 801-804, 805);
 - A prohibition on acceptance of payment from anyone other than the County for performing one’s County duties (tips);
 - A prohibition on solicitation of subordinates, vendors, or those with whom one deals in one’s County job for political contributions, political activity, or contributions to a not-for-profit organization; and
 - A prohibition on financial relationships between superiors and subordinates.
 - Consider addition of provisions on
 - Restrictions on political activities or political positions by high-level

- o appointed County officials;
 - o A prohibition on inducing another County official to violate the Standards of Conduct;
 - o More restrictive revolving door rules for high-level officials.
- (4) §§ 883.61- 883.101 – In annual financial disclosure,
- Amend Form A to tie the questions *directly* to the Standards of Conduct (§ 883.71(1)).
 - Empower ethics board to impose fines for late filing (*cf.* § 883.71(3)).
- *(5) § 192.11- Prohibit ethics board members from holding any other County position.²**
- *(6) Provide ethics board with guaranteed budget or mandate Law Department provide staff assistance as ethics board may reasonably require, provided counsel may not disclose to anyone outside ethics board any confidential board information.**
- *(7) Eliminate Board of Legislators’ power to grant waivers of Standards of Conduct (§§ 883.21(h)(2), (i)(3)) and give ethics board broad waiver power, provided waivers may not permit conduct or interests prohibited by state law.**
- *(8) §§ 883.101, 883.111; Chapter 192 – Most important of all, empower ethics board to investigate on its own initiative possible violations of Standards of Conduct by *any* County officer or employee and to impose civil fines for a violation by any County officer or employee.**

¹ See Mark Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 21, No. 3, at 4 (Summer 2007); Mark Davies, *Enacting a Local Ethics Law – Part II: Disclosure*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 21, No. 4, at 8 (Fall 2007); Mark Davies, *Enacting a Local Ethics Law – Part III: Administration*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 1, at 11 (Winter 2008); Mark Davies, *Local Ethics Laws: Model Administrative Provisions*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 3, at 14 (Summer 2008); Mark Davies, *The Story of Dharma: The Three-Legged Ethics Dog*, NYSBA MUNICIPAL LAWYER, Vol. 26, No. 3, at 22 (Summer 2012); Mark Davies, *New York State Whiffs on Ethics Reform*, 5 ALBANY GOV’T L. REV. 710 (2012). See also Albany County Ethics Code, Local Law No. 8 of 2011, available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/SampleEthicsLaws/AlbanyCountyEnactedLaw.pdf>.

² The Attorney General has concluded that a local government may enact a local law establishing the composition of a local ethics board that is inconsistent with Gen. Mun. Law § 808(3). 1986 Op. N.Y. Att’y Gen. 100 (Informal Op. No. 86-44), relying upon Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). An earlier Comptroller’s Office opinion to the contrary remains unpersuasive. See Op. State Compt. Op. No. 85-48. That opinion relied on section 13 of 1964 N. Y. Laws ch. 946, which chapter enacted Article 18 and which section provided, in relevant part, that “[n]o local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.” *Cf.* Gen. Mun. Law § 806(1)(a) (“Such [local] codes [of ethics] may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited”). The authority to enact a local law not inconsistent with the provisions of the Constitution or with a general law rests not only in state statutory law (namely, Mun. Home Rule Law § 10(1)(i) and (ii)(a)(1)) but also in the Constitution itself (N.Y. Const., Art. IX, § 2(c)). The state legislature, by enactment of Article 18, may not void that Constitutional right of local government. The only issue, therefore, is whether the provisions in Gen. Mun. Law § 808 regulating the composition and establishment of local ethics boards is a general law. In the opinion of the Attorney General, those provisions are clearly not a general law (in contrast to the substantive provisions in sections 801 through 805-a) because they apply only to those municipalities opting into them. Furthermore, one may well argue that the requirements proposed in these remarks for the establishment and composition of a local ethics board are more stringent than the state law since, for example, they provide greater independence for the ethics board and promote, rather than discourage, inquiries and complaints.

**Westchester County Charter Revision Commission
Ethics Reform in Westchester County
by Mark Davies**

Proposed Amendments¹

Sec. 883.21. Standards of conduct. [L.L. No. 3-1988, § 1; amended by L.L. No. 3-1989]

The officers or employees of the County of Westchester shall be subject to and abide by the following standards of conduct:

(a) Misuse of office. They shall not use their county position or office, or take or fail to take any action as a county officer or employee, in a manner that they know or should know may result in a personal financial benefit for any of the following:

(1) the county officer or employee;

(2) his or her non-county employer or business;

(3) a person claimed as a dependent on the county officer's or employee's most recent federal income tax return;

(4) a relative;

(5) a person or entity with whom or with which the county officer or employee has a financial relationship of \$1,000 or more;

¹ See generally Mark Davies, *Considering Ethics at the Local Government Level*, in Patricia E. Salkin, ed., *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 145 (ABA 2nd ed. 2008); Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 *FORDHAM URBAN LAW JOURNAL* 61 (1993), available at http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/keep_faith_model_loc_ethics_law.pdf; Mark Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, *NYSBA/MLRC MUNICIPAL LAWYER*, Vol. 21, No. 3, at 4 (Summer 2007), available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/EthMunicipalLawyerSum07.pdf>; Mark Davies, *Enacting a Local Ethics Law – Part II: Disclosure*, *NYSBA/MLRC MUNICIPAL LAWYER*, Vol. 21, No. 4, at 8 (Fall 2007), available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/EthMunicipalLawyerFall07.pdf>; Mark Davies, *Enacting a Local Ethics Law – Part III: Administration*, *NYSBA/MLRC MUNICIPAL LAWYER*, Vol. 22, No. 1, at 11 (Winter 2008), available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/ethmunicipalwin08.pdf>; Mark Davies, *Local Ethics Laws: Model Administrative Provisions*, *NYSBA/MLRC MUNICIPAL LAWYER*, Vol. 22, No. 3, at 14 (Summer 2008), available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/EthMunicipalLawyerSum08.pdf>; Mark Davies, *The Story of Dharma: The Three-Legged Ethics Dog*, *NYSBA MUNICIPAL LAWYER*, Vol. 26, No. 3, at 22 (Summer 2012), available at http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/MunicipalLawyerEthicsColumns/26_3_2.pdf; Mark Davies, *New York State Whiffs on Ethics Reform*, 5 *ALBANY GOV'T L. REV.* 710 (2012), available at http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/NYState_Whiffs_on_Ethics_Reform.pdf. See also Albany County Ethics Code, Local Law No. 8 of 2011, available at <http://www.nysba.org/Content/NavigationMenu18/EthicsforMunicipalLawyers/SampleEthicsLaws/AlbanyCountyEnactedLaw.pdf>.

(6) a person from whom the county officer or employee has received election campaign contributions of more than one thousand dollars in the aggregate during the previous twenty-four months; or

(7) a not-for-profit organization of which the county officer or employee is a director, officer, or employee.

*Commentary: A prohibition on misuse of office is the most basic, and most important, provision of an ethics code. An official should never be permitted to use his or her office for private gain – for himself or herself, his or her family or private business or employer, or anyone with whom the official has a business or financial relationship. See, e.g., N.Y.C. Charter §§ 2601(5) and 2604(b)(3), available at http://www.nyc.gov/html/conflicts/downloads/pdf2/books/blu_bk.pdf. Such a benefit may result not only from taking an action but also from failing to take an action, such as failing to cite one's brother for a zoning violation. See Mark Davies, *Considering Ethics at the Local Government Level*, in Patricia E. Salkin, ed., *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 145, 152-153 (ABA 2nd ed. 2008); Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 *FORDHAM URBAN LAW JOURNAL* 61, 71-72 (1993). The accompanying disclosure and recusal provision is set forth in a proposed § 883.21(k).*

(b) Gifts. They shall not, directly or indirectly, solicit any gifts, **regardless of value,** or accept or receive any gift having a value of ~~\$75.00~~**\$25.00** or more, whether in the form of money, services, loan, travel, entertainment, hospitality, thing or promise, or any other form, ~~under circumstances in which it could reasonably be inferred that the gift was intended to influence them, or could reasonably be expected to influence them, in the performance of their official duties or was intended as a reward for any official action on their part from any person or firm the officer or employee knows or should know has sought or received a financial benefit from the county during the previous twelve months or who or which is seeking such a benefit, subject to such exceptions as the County Board of Ethics shall establish by rule.~~ A donation to a person seeking public or party office or to a committee supporting the efforts of such person shall not be considered a gift hereunder.

Commentary: The “reasonably be inferred” language, copied from Gen. Mun. Law § 805-a(1)(a), provides no guidance to public officials but instead creates only a trap. A bright-line rule is therefore preferable, subject to such exceptions as the ethics board may specify. See Jessica Alaimo, “Committee approves ethics bill,” Rochester Democrat & Chronicle, June 24, 2013 (reporting on Monroe County’s replacement of “reasonably inferred” language, which the legislative sponsor called a big loophole), at <http://www.democratandchronicle.com/article/20130624/NEWS01/306240057/monroe-county-legislature-ethics-ldc>. The exceptions should not be set forth in the Standards of Conduct because of their length and because the formulation of such exceptions lends itself better to administrative than legislative action. In addition, casting exceptions in the concrete of legislation prevents relatively easy modification when an exception proves less than satisfactory in practice. Gifts that may be accepted should be de minimis, certainly no more than \$25. Officials should never solicit gifts, regardless of

their value. Not all gifts are prohibited but only gifts from those persons who have recently sought or are seeking something from the County. See Mark Davies, Considering Ethics at the Local Government Level, in Patricia E. Salkin, ed., ETHICAL STANDARDS IN THE PUBLIC SECTOR 145, 155 (ABA 2nd ed. 2008); Mark Davies, Keeping the Faith: A Model Local Ethics Law – Content and Commentary, 21 FORDHAM URBAN LAW JOURNAL 61, 72-73 (1993).

(c) Confidential information. They shall not disclose confidential information acquired by them in the course of their official duties or use such information to further their personal interests or the interests of any of the persons or entities set forth in subsection (a) of this section.

Commentary: Confidential County information is often properly used to further personal interests – the granting of every permit and the awarding of every contract in fact furthers personal interests, and some of those permits and contracts may properly involve the use of confidential information. But confidential County information must not be used to further the personal interests of anyone with whom the County officer or employee is associated, including family members and business associates. See Mark Davies, Considering Ethics at the Local Government Level, in Patricia E. Salkin, ed., ETHICAL STANDARDS IN THE PUBLIC SECTOR 145, 156 (ABA 2nd ed. 2008); Mark Davies, Keeping the Faith: A Model Local Ethics Law – Content and Commentary, 21 FORDHAM URBAN LAW JOURNAL 61, 74-75 (1993).

Reletter existing subsections (c) through (g) as (d) through (h).

(h) (i) Future employment.

~~1. After the termination of service or employment with the county, no former reporting officer or employee, on his or her own behalf or as an employee, agent or representative of another, may appear before any agency in relation to any contract, case, proceeding or application in connection with which he or she personally rendered substantial services during the period of his or her service to or employment by such agency; nor shall any such former reporting officer or employee appear before any such agency in connection with any other matter for a period of one year following such termination.~~

~~2. No paid reporting officer or employee shall accept present or future employment, within one year following termination of county service, with any person, firm or corporation which furnished goods or services to the county during such person's service to the county unless such potential employment is disclosed to the Board of Legislators before being accepted by the officer or employee and is approved prospectively by such board.~~

1. They shall not seek or obtain any non-county employment with any person or entity they are dealing with in their county job.
2. For one year after leaving county service, they shall not communicate for compensation with their former county agency on any non-ministerial matter

and shall never accept anything of value to work on any particular, non-ministerial matter that they personally and substantially worked on while in county service.

3. **After leaving county service, they shall not disclose confidential information acquired by them in the course of their official duties or use such information to further their personal interests or the interests of any of the persons or entities set forth in subsection (a) of this section.**
4. ~~A reporting officer or employee~~ **They** shall disclose in writing to an immediate supervisor any offer of employment received by such person from any person, firm or corporation which, to the knowledge of such officer or employee, is furnishing or seeking to furnish goods or services to the county, whether or not such offer is verbal or written and whether or not it is accepted.

*Commentary: The current revolving door provision has numerous defects. It applies only to high level County officials (reporting officers and employees); permits a former County official to work on a matter on which he or she worked for the County, as long as the official does not appear before the County on the matter; permits a County official to solicit and even accept a job with a firm he or she is dealing with in his or her County job, as long as the firm is not a vendor to the County; and authorizes the County Legislature, rather than the ethics board, to waive certain revolving door restrictions. Instead, the provision should apply to all County officers and employees; permanently bar them from working on any non-ministerial matter they personally and substantially worked on for the County; bar them for one year from communicating on behalf of their new employer or business with their former County agency on any non-ministerial matter (they could thus, for example, contest an assessment on their home since such a communication would be uncompensated); prohibit them from discussing a possible job with any person or firm they are dealing with in their County job; and prohibit them from ever disclosing or using confidential County information. Any waivers would be granted by the ethics board, not the Board of Legislators, pursuant to proposed section 192.41(G). See Mark Davies, *Considering Ethics at the Local Government Level*, in Patricia E. Salkin, ed., *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 145, 158-159 (ABA 2nd ed. 2008); Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 *FORDHAM URBAN LAW JOURNAL* 61, 75-76 (1993).*

(i) Consulting services.

...

3. No reporting officer or employee shall, upon termination of employment with the county, become employed by or accept a position of paid consultant to the county or any agency thereof within a period of one year following such termination unless such consultation be first approved by the Board of ~~Legislators~~ **Ethics pursuant to section 192.41(G) of the Laws of Westchester County.**

Commentary: Vesting in a legislative body the power to waive a provision of the ethics code inevitably politicizes such waivers. Such power should be vested only in the ethics

board. See discussion of waivers in the commentary to proposed section 192.41(G) below.

(k) Transactional disclosure and recusal.

1. **They shall promptly recuse themselves from acting on a matter before the county when acting on the matter, or failing to act on the matter, may financially benefit any of the persons or entities set forth in subsection (a) of this section.**
2. **Whenever they are required to recuse themselves pursuant to paragraph 1 of this subsection, they shall by writing promptly inform their immediate supervisor, if any, with a copy to the County Board of Ethics, of the recusal and the reason for it, provided, however, that if they are a member of a body they shall instead state the recusal and its ground upon the public record of the body.**
3. **A member of the Board of Legislators required to recuse on a matter pursuant to this chapter may vote on the matter, with the required disclosure, but may not otherwise participate in the matter.**

*Commentary: When presented with a conflict of interest under subsection (a) of this section, a County officer or employee must recuse himself or herself in order to avoid misusing his or her County office or position for private gain. But the public must be apprised of the reasons for the recusal in order to ensure that it is sufficient and to reassure the public that officials are serving the public and not themselves. Thus, such disclosures must be publicly available, as set forth in the proposed revision to section 192.51. A simple email to a supervisor, cc to the ethics board, will suffice. A County board member need only state the recusal and its ground on the public record of the board. In the unusual case where disclosure would reveal confidential information, such as the name of an oncologist-legislator's patient, the ethics board can provide guidance. Legislators should not be required to recuse themselves from voting because doing so disenfranchises their constituents, but they should not be permitted to otherwise act on the matter, such as sponsoring legislation or lobbying for its passage. See Mark Davies, *Considering Ethics at the Local Government Level*, in Patricia E. Salkin, ed., *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 145, 153, 162-163 (ABA 2nd ed. 2008); Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 *FORDHAM URBAN LAW JOURNAL* 61, 77-78 (1993); N.Y.C. Conflicts of Interest Board Advisory Op. No. 2009-2 (discussing N.Y.C. Council members voting on, but not sponsoring, discretionary funds for a not-for-profit organization with which they are associated), available at [http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library](http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/city_admin_library).*

Sec. 883.101. Investigations and Formal Complaint Process. [Added by L.L. No. 10-2011]

1. Upon receipt of the confidential report by the Independent Consultant, **or upon receipt of any complaint or upon its own initiative**, the County Board of Ethics shall review the report **or complaint** and shall **in any event** determine whether subsequent action by the County Board of Ethics is warranted. To assist in this determination, the County

Board of Ethics shall send a letter to the individual(s) noting the issue that was brought to its attention and provide an opportunity to the individual to respond.

...

4. Individuals who are the subject of an investigation shall be provided with notice, and an opportunity to be heard, and any other due process requirements as required by the County Board of Ethics. Thereafter, the County Board of Ethics shall render a final determination regarding any potential issue raised by the Independent Consultant in a report and/or considered by the County Board of Ethics. If the County Board of Ethics finds that:

a. there is a violation of the Code of Ethics, the County Board of Ethics shall issue a civil penalty as provided for in **sections 883.71 and 883. 111 of this chapter**;

*Commentary: As currently drafted, Chapters 192 and 883 do not make clear that the ethics board has the power to impose civil fines up to \$10,000 for any violation of the Standards of Conduct, not just for one arising as a result of a review of financial disclosure statements conducted by an independent consultant pursuant to section 883.91. That power must be expressly set forth in the law. The above additions would do so. One must emphasize that an ethics board that lacks the power to impose fines for violation of the ethics law remains a toothless tiger that only raises expectations that it cannot meet and that thus undermines, rather than promotes, public confidence in the integrity of County government. Enforcement power requires complete control of investigations and prosecutions, the ability to commence investigations on the ethics board's own initiative, subpoena power, and a broad range of penalties (e.g., civil fines, discipline, censure, damages, disgorgement of ill-gotten gains, and debarment), some imposed by the ethics board, some by the employing agency, and some by the courts; but the ethics board itself must have the power to impose civil fines. See Mark Davies, *Enacting a Local Ethics Law – Part III: Administration*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 1, at 11, 14-16 (Winter 2008); Mark Davies, *Considering Ethics at the Local Government Level*, in Patricia E. Salkin, ed., *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 145, 166-169 (ABA 2nd ed. 2008); Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 *FORDHAM URBAN LAW JOURNAL* 61, 98-103, 112-116 (1993).*

Sec. 192.11. Membership. [Added by L.L. No. 15-1993]

There shall be a County Board of Ethics consisting of seven members, to be appointed by the County Executive subject to the confirmation of the County Board, **a majority none** of whom shall **not** be **an** officers or employees of the county or municipalities wholly or partially located in the county ~~and at least one of whom shall be an elected or appointed officer or employee of the county or a municipality located within the county~~. No more than four members of such board shall be of the same political registration.

Commentary: Including County officials on the ethics board is a singularly bad idea because it significantly undercuts the independence of the board, both in reality and in

*perception. Indeed, County officers and employees may hesitate to seek advice or file complaints if they believe that a “mole” serves on the ethics board who might disclose the complaint to the requester’s or complainant’s supervisor. So, too, an ethics board action favorable to a County officer or employee may well appear suspect to the public and to County public servants if a County official serves on the board. Although Gen. Mun. Law § 808 requires that a County official serve on the ethics board, the Attorney General has concluded that a local government may enact a local law establishing the composition of a local ethics board that is inconsistent with Gen. Mun. Law § 808. 1986 Op. N.Y. Att’y Gen. 100 (Informal Op. No. 86-44), relying upon Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). An earlier Comptroller’s Office opinion to the contrary remains unpersuasive. See Op. State Compt. Op. No. 85-48. That opinion relied on section 13 of 1964 N. Y. Laws ch. 946, which chapter enacted Article 18 and which section provided, in relevant part, that “[n]o local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.” Cf. Gen. Mun. Law § 806(1)(a) (“Such [local] codes [of ethics] may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited”). The authority to enact a local law not inconsistent with the provisions of the Constitution or with a general law rests not only in state statutory law (namely, Mun. Home Rule Law § 10(1)(i) and (ii)(a)(1)) but also in the Constitution itself (N.Y. Const., Art. IX, § 2(c)). The state legislature, by enactment of Article 18, may not void that Constitutional right of local government. The only issue, therefore, is whether the provisions in Gen. Mun. Law § 808 regulating the composition and establishment of local ethics boards is a general law. In the opinion of the Attorney General, those provisions are clearly not a general law (in contrast to the substantive provisions in sections 801 through 805-a) because they apply only to those municipalities opting into them. See Mark Davies, *Enacting a Local Ethics Law – Part III: Administration*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 1, at 11-12 (Winter 2008); Mark Davies, *Considering Ethics at the Local Government Level*, in Patricia E. Salkin, ed., *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 145, 165-166 (ABA 2nd ed. 2008).*

Sec. 192.41. Additional powers and duties. [Added by L.L. No. 15-1993; amended by L.L. No. 10-2011]

In addition to any other powers and duties specified by this law, the Board of Ethics shall have the power and duty to:

- A. Act as a repository for completed ~~financial~~-disclosure forms filed pursuant to Chapter 883 of the Laws of Westchester County and Article 18 of the General Municipal Law;

Commentary: All disclosure forms filed pursuant to Chapter 883 and Article 18 should be maintained by the ethics board, including transactional disclosure forms filed pursuant to proposed section 883.21(k) and disclosure forms, if any, filed pursuant to Gen. Mun. Law §§ 803 and 809.

...

E. Verify and ensure that all individuals required to file financial disclosure forms pursuant to Chapter 883 of the Laws of Westchester County and Article 18 of the General Municipal Law file such financial disclosure forms, and that said forms are fully completed. This duty shall be discharged by an Independent Consultant and the County Board of Ethics in accordance with the procedure set forth in Sections 883.91 and 883.101 of the Laws of Westchester County; **and**

...

G. Upon written application by a county officer or employee and written approval by his or her agency head, grant the applicant a waiver of any of the provisions of section 883.21 of the Laws of Westchester County, where the County Board of Ethics finds that waiving such provision would not be in conflict with the purposes and interest of the county, provided, however, that no such waiver shall permit any conduct or interest otherwise prohibited by Article 18 of the General Municipal Law or waive the provisions of subsections (c), (f), or (k) of such section and further provided that waivers shall be in writing, shall state the grounds upon which they are granted, and shall be available for public inspection and copying; and

Commentary: Waivers protect the County against an application of the Standards of Conduct that harms the County, for example, by preventing it from placing a trusted employee in a critical but troubled social services agency, in violation of the revolving door restrictions. Waivers also act as a safety valve where application of the Standards of Conduct is unfair or unjust or just does not make sense in the particular situation. Waivers may be conditioned, most often on some form of recusal. The requirement for agency head approval acts as a check on the validity of the facts represented by the applicant and helps ensure that a waiver would not harm the County. The proposed standard for granting a waiver – “would not be in conflict with the purposes and interests of the County” – has worked well in New York City over the past 20 years. See N.Y. C. Charter § 2604(e), available at http://www.nyc.gov/html/conflicts/downloads/pdf2/books/blu_bk.pdf, discussed in N.Y.C. Conflicts of Interest Board, CONFLICTS OF INTEREST UNDER THE NEW YORK CITY CHARTER, at 105-106, 151-153 (2013), available at http://www.nyc.gov/html/conflicts/downloads/pdf2/mono/mono_outside_acts.pdf (pages 13-14) and http://www.nyc.gov/html/conflicts/downloads/pdf2/mono/mono_postemployment.pdf (pages 12-14). Finally, since waivers permit a violation of law, they must always be public, to enable the public to determine the validity of the facts underlying them and to protect against the ethics board giving away the store. See Mark Davies, Enacting a Local Ethics Law – Part III: Administration, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 1, at 11, 13 (Winter 2008); Mark Davies, Considering Ethics at the Local Government Level, in Patricia E. Salkin, ed., ETHICAL STANDARDS IN THE PUBLIC SECTOR 145, 151 (ABA 2nd ed. 2008); Mark Davies, Keeping the Faith: A Model Local Ethics Law – Content and Commentary, 21 FORDHAM URBAN LAW JOURNAL 61, 116-117 (1993).

H. To appoint hearing officers and such other persons as are necessary to carry out its duties under this chapter and Chapter 883 of the Laws of Westchester County and to require the reasonable assistance of the Department of Law in the performance of the County Board of Ethics' duties, provided, however, that any confidential communications between the Board of Ethics and any such persons shall not be disclosed to anyone other than the Board of Ethics or its designees, except as otherwise required by state or federal law or by this chapter or Chapter 883.

*Commentary: Volunteer ethics board members cannot by themselves carry out the work of the board. At the same time, the board probably lacks the steady volume of work necessary to justify the hiring of ethics board staff. Thus, the ethics board must rely upon other County staff to draft advice letters, supervise and/or conduct investigations and prosecutions, train county officers and employees in the ethics law, manage the disclosure system (beyond the work conducted by the independent consultant under section 883.91), and otherwise advise and assist the ethics board members in meeting their statutory duties. The ethics law must therefore mandate that another County agency assist the ethics board. Since much of the ethics board's work is legal and since the Law Department is relatively insulated from the political winds, that agency may be best suited to provide such support. However, to preserve the integrity and independence of the ethics board, all confidential communications between the ethics board members and such assigned Law Department staff must be confidential from everyone other than the ethics board itself, upon penalty of prosecution for violation of proposed section 883.21(c) (confidential information). See Mark Davies, *Enacting a Local Ethics Law – Part III: Administration*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 22, No. 1, at 11, 12 (Winter 2008).*

Sec. 192.51. Public information. [Added by L.L. No. 15-1993]

Notwithstanding the provision of Article 6 of the Public Officers Law to the contrary, the only records of the Board of Ethics which shall be available for public inspection are:

- (i) The information set forth in an annual statement of financial disclosure **or other disclosure statement** filed pursuant to Chapter 883 of the Laws of Westchester County, except the categories of value or amount which remain confidential and any other item of information deleted pursuant to law;
- (ii) Notice of delinquency sent pursuant to law; and
- (iii) Notice of reasonable cause sent pursuant to law; **and**
- (iv) Notices of civil assessments imposed pursuant to law; **and**
- (v) Waivers issued pursuant to Chapter 883 of the Laws of Westchester County.**

Commentary: As noted above, all disclosure statements filed with the ethics board, including the transactional disclosure statements filed pursuant to proposed section 883.21(k), must be public, as must waivers granted by the ethics board pursuant to proposed section 192.41(G).

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