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LITIGATION: A 1999 SURVEY OF ISSUES IN
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MUNICIPAL ETHICS REMAIN A HOT TOPIC IN LITIGATION: A 1999 SURVEY OF ISSUES IN ETHICS FOR MUNICIPAL LAWYERS

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Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers*

Patricia E. Salkin¹

I. INTRODUCTION

Numerous decisions and opinions addressing legal ethics for local government lawyers and non-lawyer municipal personnel were reported in 1999. Cases and opinions addressed issues including: conflicts of interest, dual office holding, the attorney-client relationship, application of state and government ethics laws to the legal profession, and judicial membership on local ethics committees.²

Local government lawyers also continue to grapple with the chilling effects resulting from federal court decisions surrounding the issues of confidentiality, loyalty and the government attorney-client relationship,³ and the recent holding by the Sixth Circuit narrowing the attorney-client privilege in the local government context.⁴ While it may be true that the federal courts have placed a burden on government lawyers, one court has stated clearly that “nothing prevents government officials who seek

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2. This article examines reported cases and opinions in 1999 dealing with all types of municipal ethics issues. For a discussion of unique ethics issues that arise particularly within the context of municipal planning and zoning decision making, see: Patricia E. Salkin, *1998 Survey of Ethics in Land Use Law*, 26 *FORDHAM URB. L.J.* 1393 (1999); and Patricia E. Salkin, *Legal Ethics and Land Use Planning*, 30 *URB. LAW.* 383 (1998).

3. See, e.g., *In re Lindsey*, 148 F.3d 1100, *cert. denied*, 525 U.S. 996 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). For a discussion of the impacts of these cases, see, Paul L. Shechtman & Nathaniel Z. Marmor, *Government Lawyer Confidentiality After Lindsey*, 1 *GOV'T LAW AND POL'Y J.* 30 (Fall 1999); Norman Redlich & David R. Lurie, *Federal Governmental Attorney-Client Privilege Decisions May Prove Significant to All Government Lawyers*, FOOTNOTES, Winter 1998-1999; and Note, *Maintaining the Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 *HARV. L. REV.* 1995 (1999).

4. See *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998). The court held in this case that the attorney-client privilege did not protect communications between a city attorney and the city manager, city fire chief and two city council members because the council members were deemed “third parties” and their presence waived any potential privilege. The court went on to state that even if the attorney-client privilege exists in the municipal setting, the facts in this case did not satisfy the requirements. See also, John Copelan, *The Attorney Client Privilege for Government Attorneys: To Be or Not to Be?* 7 *PUB. LAW.* 1 (A.B.A., Winter 1999).

completely confidential communications with attorneys from consulting personal counsel.”⁵

One New York court summed up the difficulty in defining ethics and ethical conduct at the local government level by stating, “The Constitution does not provide an ethics manual for elected local government officials.”⁶ While it is true that no such manual exists, municipal attorneys must be mindful of the heavy burden and responsibility in counseling municipal clients about appropriate courses of conduct based upon constitutional, statutory, regulatory and local law provisions. Municipal attorneys must also consider the amorphous “community standards” criteria that can change overnight but make the difference between what is and what is not acceptable behavior.

II. CONFLICTS OF INTEREST

A substantial number of municipal ethics issues revolve around conflicts of interest problems. Generally, these cases are born out of a conflict of interest relating to personal financial gain, such as in the case of contracts, employment or special considerations for family members. Other times, the issue may be, for lawyers, one of conflicting duties owed to clients and employers.

A. Contracts

A recent case out of Washington State illustrates the problems inherent with municipal officials who have financial interests in contracts let out by the municipality. The elected Public Works Commissioner for the City of Raymond (Washington State) owns a rock quarry that provides rocks to contractors holding city contracts.⁷ Concerned about a potential conflict of interest, the Commissioner authorized, in writing, the city engineer to approve all future change orders.⁸ In addition, the Commissioner sought the advice of the city attorney, who responded in writing that precautions should be taken against possible conflicts.⁹ Subsequent

5. *Lindsey*, 148 F.3d at 1112.

6. *Masi Management, Inc. v. Town of Ogden*, 691 N.Y.S.2d 706, 722 (N.Y. Sup. Ct. 1999).

7. *See City of Raymond v. Runyon*, 967 P.2d 19 (Wash. Ct. App. 1998), *petition for review denied* 980 P.2d 1283 (1999).

8. *See id.* at 25.

9. *See id.* at 21. Specifically, the City Attorney recommended:

(1) The City should ascertain whether any pre-arrangements existed between contractors and Runyon’s (the Commissioner) business; (2) Runyon should not participate in discussions regarding any such contracts; (3) Runyon should not vote on any contracts or matters in which he operated in a fiduciary capacity; and (4) Runyon should not supervise any contracts in which he might have a pecuniary interest.

Id.

to his election to the position of Commissioner of Public Works, the office was abolished and the Commissioner was elected to the City Council where, again, it was alleged that the potential for conflicts of interest was present.¹⁰ The subject of interests in contracts for municipal officials is covered in a Washington State statute.¹¹ The statute does not provide a strict bar against having any interest in a contract. For example, a municipal officer could have an interest in a contract not exceeding \$200 per month.¹² In the case of a noncharter optional city, as was the case here, a municipal officer may have an interest in city contracts made under the officer's supervision not to exceed \$9,000 per year.¹³ Violation of the statute voids the contract(s) as to the official's interest, subjects the official to a \$300 fine, and requires forfeiture of public office.¹⁴ The Court determined that the Commissioner was in fact the supervisor for all contracts, a power that could not be delegated to someone else, and that contracts entered into after he assumed office violated the plain language of the statute¹⁵ despite the fact that he made well-intentioned attempts to avoid conflicts of interest.¹⁶

In Alabama, the Attorney General opined that a similar state statute¹⁷ prohibits a member of a city utilities board, who happens to be the sole owner of an automobile dealership, from selling cars and trucks purchased by the Board, with or without bids.¹⁸ These types of opinions can be frustrating for local officials, particularly those who serve in a part-

10. *See id.*

11. *See* WASH. REV. CODE § 42.23 (2000).

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

Id. at § 42.23.030.

12. *See id.* at § 42.23.010.

13. *See id.* at § 43.23.030(6). However, the officer is required to disclose the contracts by public list, and where the municipal officer is a supplier or contractor, he or she cannot vote on the city's contract authorization.

14. *See id.* at § 42.23.050.

15. Specifically, contracts that involved the purchase of rocks in amounts that exceeded the \$9,000 statutory limit.

16. *See* City of Raymond v. Runyon, 967 P.2d 19, 21 (Wash. Ct. App. 1998).

17. *See* ALA. CODE § 41-16-60 (1991). This statute provides:

No member or officer of the . . . governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards and other like utility boards and commissions, shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual service, nor shall any person willfully make any purchase or award any contract in violation of the provisions of this article.

Id.

18. *See* 254 Op. Att'y Gen. Ala. 30 (1999).

time or volunteer role. While it may be true that in many cases contracts are awarded after a competitive bidding process, the public perception of an insider advantage would emerge if a local official won the contract. It is this perception, the mere appearance of impropriety, which ethics laws attempt to address.

B. Employment

Lawyers employed by local governments face a complex web of ethical considerations that include not only state and local ethics laws, but also the applicable code or rules of professional conduct. In a New Jersey case, the appellate court faced the issue of whether a defendant's constitutional right to a fair trial was violated when the defense counsel was also employed as a part-time municipal prosecutor in the same county where the trial took place.¹⁹ The defendant, convicted of two counts of sexual assault and two counts of endangering the welfare of a child, alleged that he was "unaware of his attorney's municipal employment during the trial, and that he did not learn of it until long after the completion of his trial and sentence."²⁰ In reversing the convictions and remanding the case for a new trial, the court held that it is impermissible for a part-time municipal prosecutor to represent a criminal defendant in the same county where he is employed.²¹ In reaching this conclusion, the court considered the potential for appearance of impropriety when measured by the frequency of antagonistic relations between a municipal prosecutor and a defense attorney.²² The court went on to admonish that, "[w]hat happened here can 'undermine public confidence in our system of government and in the independence and integrity of the legal profession.'"²³

Another conflict of interest arises when a public employee is also self-employed and offers services that compete with her employer. In a

19. *See* New Jersey v. Clark, 735 A.2d 1 (N.J. Super. Ct. App. Div. 1999), *cert. granted*, 736 A.2d 528 (1999).

20. *Id.* at 4.

21. *See id.* The court noted that it was specifically refusing to follow precedent in *State v. Zold*, 251 A.2d 475 (N.J. Super. Ct. Law Div. 1969), *aff'd*, 264 A.2d 257 (N.J. Super. Ct. App. Div. 1970), *cert. denied*, 270 A.2d 34 (N.J. 1970) because the court states that the "viability of its holding is questionable." *Id.*

22. *See id.* The court cited, among other things, the fact that the part-time municipal prosecutors are supervised by the county prosecutor; that conflicts of interest exist since county prosecutors often downgrade indictable offenses so they can be tried in the municipal courts, and prosecuted by the municipal prosecutor; that municipal prosecutors may conduct probable cause hearings in the absence of a county prosecutor; and municipal prosecutors may represent the State in a motion to suppress evidence.

23. *Id.* at 6 (citing, *In re* Opinion 452 of the Advisory Comm'n On Prof. Ethics, 432 A.2d 829 (N.J. 1981)).

Florida case, a county health department objected to the fact that the plaintiff, an employee of the department, was providing water-sampling services in competition with services provided by the Department's microbiological laboratory.²⁴ The court held that this activity violated a Florida statute dealing with conflicting employment or contractual relationships by creating a continuing or frequently recurring conflict between the employee's private interests and the interests of the health department.²⁵

A Connecticut statute prohibits members of a zoning board or commission from participating in decisions in which the member is directly or indirectly interested in a personal or financial sense.²⁶ The Connecticut Superior Court recently applied the statute in *Blinkoff v. Planning and Zoning Commission*.²⁷ The plaintiff, a sand and gravel company, challenged the Planning and Zoning Commission's decision to allow the applicant, a separate sand and gravel company, to continue quarry operations that had gone on for more than ten years with periodic special exception permit renewals. The Plaintiff alleged that one of the commissioners had a personal and financial interest in the application. The commissioner, an electrical contractor, had worked on several projects with the applicant, including the applicant's office building.²⁸ Holding for the Planning and Zoning Commission, the court found that the plaintiff made a "naked assertion" without knowledge of any facts. In the three situations where the commission member performed electrical work involving the applicant, the commissioner's company won the job by being the low bidder in a competitive bidding process, and that applicant did not give him the job "as a pay off for voting favorably on the application."²⁹

24. *See Velez v. Comm'n on Ethics*, 739 So.2d 686, 687 (Fla. Dist. Ct. App. 1999).

25. *See id.* at 687-88. The Florida statute provides:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, . . . nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

FLA. STAT. § 112.313(7)(a) (West Supp. 1999).

26. *See* CONN. GEN. STAT. § 8-11 (West 1989). This statute provides in part: "No member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense . . ."; *See also id.* at § 8-21 (articulating similar language for members of planning commissions).

27. CV 980078081S, 1999 WL 559585 (Conn. Super. Ct. 1999).

28. *See id.* at *3.

29. *Id.*

In a separate case, the Connecticut Superior Court also considered whether a conversation between the Chairman of the Commission and the applicant resulted in the appearance of impropriety.³⁰ The court noted that, “[l]ocal governments . . . would be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a zoning official.”³¹ This situation demonstrates the need for communication between an applicant and the municipality, yet the management of the communication by local officials in such a way as to not suggest the appearance of impropriety that could undermine public trust and confidence in the integrity of the decision making.

The Alabama Supreme Court recently held that a teacher may not serve on a city board of education.³² Although a plain reading of the applicable Alabama statute suggests such a scenario could occur, the court found that such provisions could be severed from the section specifically denying such action.³³ The court never reached the question of whether such a situation creates a conflict of interest requiring removal under the Alabama Code of Ethics for Public Officials.³⁴ Although this case really centered on the issue of statutory construction, the possibility of a schoolteacher serving on the board of education for the district where he/she is employed does raise some interesting conflicts of interest issues.

In another case based on a procedural error, a North Carolina court declined to consider the petitioners’ argument that their due process rights were violated because a member of the county board of adjustment had been employed by the county planning department and during such employment had been consulted by the petitioners about the possibility of rezoning their property.³⁵ Although the petitioners raised the allega-

30. *Goyette v. Lebanon Planning and Zoning Comm’n*, 112654, 1999 Conn. Super. Lexis 148 (Conn. Super. Ct. 1999).

31. *Id.* at *15.

32. *See Alabama v. Martin*, 735 So. 2d 1156, 1160 (Ala. 1999). Alabama code section 16-11-2(b) provides, in part:

The members of the city board of education, who shall, except as hereinafter provided, serve without compensation, shall be chosen solely because of their character and fitness, but no person shall be appointed or elected to this board pursuant to this section who is subject to the authority of the board. In cities having populations of not less than 50,000 nor more than 60,000 according to the most recent federal decennial census, and the City of Attalla, not more than one classroom teacher employed by the board may serve as a board member and also as a classroom teacher.

ALA. CODE § 16-11-2(b) (Supp. 1999).

33. *See Martin*, 735 So. 2d at 1160.

34. *See id.* It was not necessary to reach the question as the State’s petition for a writ of quo warranto was to be granted.

35. *See JWL Invs., Inc. v Guilford County Bd. of Adjustment*, 515 S.E.2d 715 (N.C. Ct. App.

tion of a conflict of interest on appeal, the court found that their due process rights were not violated because they did not object to the member's presence on the board at the time of the hearing, and they made no showing to the court that they were prejudiced by the member's participation in the case.³⁶

C. Familial Relationships

Municipal decision-makers should also be wary when they are involved in municipal decisions that financially benefit a family member. In a case challenging the granting of a competing developer's subdivision proposal, the plaintiff alleged that his competitor had significant connections with the city council, including the fact that he was represented by the spouse of a town councilwoman.³⁷ The plaintiff emphasized that the councilwoman made the motion to adopt the needed zoning code amendments, although he concedes that she did recuse herself months later when the applicant's project actually came before the council for a vote.³⁸ Basing the plaintiff's arguments on equal protection grounds, the court declined to address the issue, stating that the question of whether the council member labored under a conflict of interest "must be determined under state law in a proceeding appropriate to the purpose (no suggestion one way or another should be inferred here)."³⁹ Thus, a planning board itself is not necessarily infected with an alleged conflict of interest based upon the claim that a competitor applicant was locally favored because the competitor was represented by the spouse of a council member, especially where that council member made the motion to adopt zoning code amendments favorable to the competitor.⁴⁰

A New York appellate court recently decided a zoning case involving familial relationships. In that case, the town board approved Cornell University's rezoning application to implement a new cooling system.⁴¹ Although Cornell employed a town board member and a board member's spouse, the court held that these members did not have a conflict of interest that was prohibited by statute.⁴² Similarly, a third board member

1999).

36. *See id.* at 718.

37. *See Masi Management, Inc. v. Town of Ogden*, 691 N.Y.S.2d 706, 722 (N.Y. Sup. Ct. 1999).

38. *See id.*

39. *Id.*

40. *See id.*

41. *See DePaolo v. Town of Ithaca*, 694 N.Y.S.2d 235, 238 (1999).

42. *See id.* at 240. In relying on Sections 801 and 802 of the N.Y. General Municipal Law, the court found that "neither individual's employment duties involved the preparation, procurement or performance of any part of the [project], nor was their remuneration directly affected by the pro-

who was married to a Cornell retiree did not have a prohibited conflict of interest since the spouse's pension benefits were outside the board's control.⁴³ The court was satisfied that none of the board members had any direct or indirect interest, pecuniary or otherwise, in the application "such that their vote could reasonably be interpreted as potentially benefiting themselves."⁴⁴

Situations such as this are not uncommon, particularly in small cities and towns where there is a major employer. Although the court found no legal basis for a violation of ethics laws in the present case, the New York Legislature, mindful of the appearances of these conflicts, amended the planning and zoning enabling acts in 1998 to address situations where conflicts may be present. The statute now allows for the appointment of alternate members to planning and zoning boards who could be called into service when a conflict of interest prevents a regular board member from serving.⁴⁵

III. WHO IS THE CLIENT OF THE GOVERNMENT LAWYER?

Government lawyers constantly grapple with the issue of who is their client.⁴⁶ For example, is the client of a county attorney the county, the county legislative body, individual county commissioners, department heads, or the taxpayers of the county? A recent Utah case addressed this question when it asked whether the Salt Lake County Attorney had an attorney-client relationship with the County Commission and with each individual commissioner.⁴⁷ Relying on the Utah Rules of Professional Conduct, the court concluded that an elected county attorney has an attorney-client relationship only with the county as an entity.⁴⁸ In consider-

ject." *Id.* at 239.

43. *See id.*

44. *Id.* at 239. Also, a fourth board member was found to not have a prohibited conflict of interest although he was a graduate student at Cornell University whose tuition and stipend were paid for by a foundation unrelated to the Cornell and whose studies did not involve participation with the cooling project at issue.

45. *See* 1998 N.Y. Laws 137 codified at: N.Y. TOWN LAW § 267 (McKinney Supp. 1998); N.Y. GEN. CITY LAW § 27 (McKinney Supp. 1998); N.Y. VILLAGE LAW § 7-712 (McKinney 1996 & Supp. 1998).

46. For a detailed discussion of this issue, see Jeffery Rosenthal, *Who is the Client of the Government Lawyer?*, at 13 in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS AND PUBLIC OFFICIALS*, (Patricia E. Salkin ed., 1999); *see also* Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998).

47. *See* Salt Lake County Comm'n v. Short, 985 P.2d 899, 901 (1999).

48. *See id.* at 902. *See also* UTAH RULES OF PROFESSIONAL CONDUCT, Rule 1.13(f) (2000). This rule provides that any "lawyer elected . . . to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law." *Id.* Rule 1.13(a) states that "[a] lawyer retained or employed by an organization represents the organization through its duly authorized constituents." *Id.*

ing other state laws to determine whether there was any contradictory directives, the court examined the statutory mandates for county attorneys.⁴⁹ The court found nothing explicit in these statutes to suggest that the county attorney has an attorney-client relationship with each individual commissioner or with the commission as a group of individuals.⁵⁰

The court further found that the county attorney has a dual role: 1) to act as an attorney for the county; and 2) to carry out her statutory duties as an elected official. As such, the duties given to the county attorney may create a conflict among the attorney, the commission and the commissioners.⁵¹ In addressing the question of when a county commission may hire outside counsel, the court determined that “the County must be represented by the elected attorney in all matters falling within the scope of the attorney-client relationship unless that person cannot act, either because of a refusal to do so, an incapacity, or a disqualification, as by a conflict of interest.”⁵² Such a determination is fact-intensive, and the court reminded the parties that there are three ways to resolve these issues: 1) the parties may settle the matter among themselves; 2) the parties may appeal to the Attorney General’s office for an opinion; or, 3) as in the case at bar, the parties may resort to the courts by seeking a declaratory judgment.⁵³

IV. JURISDICTION OF ETHICS INVESTIGATIONS WITH RESPECT TO MUNICIPAL LAWYERS

Determination of jurisdiction in ethics investigations can be difficult when the investigated attorney also holds a municipal office. The Pennsylvania Supreme Court held that its exclusive jurisdiction to regulate ethical and professional conduct of attorneys does not prohibit the State Ethics Commission from investigating the city solicitor’s activities.⁵⁴ The

49. Prior to 1993, the Utah Code stated that the “county attorney is the legal adviser of the board of county commissioners.” UTAH CODE ANN. § 17-18-2 (1995). This section was amended to read, “[t]he county attorney is the legal adviser of the county. He must attend meetings of the county legislative body when required, and must oppose all claims and accounts against the county when he deems them unjust or illegal.” *Id.* at § 17-18-2 (1999). The Utah Code also directs the county attorney to “give, when required and without fee, an opinion in writing to county, district, precinct, and prosecution district officers on matters relating to the duties of their respective offices.” *Id.* at § 17-18-1.5(5)(c). Finally, the Utah Code states that the county commission “may control and direct the prosecution and defense of all actions to which the county is a party.” *Id.* at § 17-5-219.

50. *See Short*, 985 P.2d at 905.

51. *See id.*

52. *Id.* at 907.

53. *See id.*

54. *See P.J. S. v. State Ethics Comm’n*, 723 A.2d 174, 178 (Pa. 1999). Specifically at issue was a ethics statute that provided, in part:

(a) No public official or public employee shall engage in conduct that constitutes a conflict of interest.

investigation centered on the lawyer's representation of the city through his private law firm⁵⁵ while simultaneously serving as City Solicitor.⁵⁶ After determining that a solicitor is in fact a public official or public employee for purposes of applicability of the State Ethics Act,⁵⁷ the court reached the constitutional issue of the separation of powers claim between the judiciary and the executive branch. In a strong affirmation of the power of the State Ethics Commission to investigate alleged wrongdoing on the part of municipal attorneys, the court stated, "[a]ppellant attempts to use his status as a member of the Bar of Pennsylvania as a shield protecting him from investigation by the Ethics Commission."⁵⁸ In characterizing the solicitor's argument as "absurd" the court reiterated that while it does have exclusive jurisdiction over the conduct of lawyers as it applies equally to all members of the Bar, this jurisdiction "is not infringed when a regulation aimed at conduct is applied to all persons, and some of those persons happen to be attorneys."⁵⁹

V. DUAL OFFICE HOLDING

The issues surrounding dual office holding regularly arise in small, more rural municipalities where it can be difficult to recruit willing volunteers into public service. It can also arise where one person simultaneously holds two public sector jobs in an effort to earn a full-time salary. In some situations an intentional decision is made to have a local official serve on another official board for the purposes of information exchange

(f) No public official or public employee or his spouse or child or any business in which the person or his spouse or child is associated shall enter into any contract valued at \$500 or more with the governmental body with which the public official or public employee is associated or any subcontract valued at \$500 or more with any person who has been awarded a contract with the governmental body . . .

65 PA. CONS. STAT. § 1103(a),(f) (2000). Although not at issue in the case, findings were made by the State Ethics Commission alleging that the solicitor used city equipment, staff and materials in pursuing his outside legal practice. *P.J.S.*, 723 A.2d at 175 n.3.

55. Although the lawyer was employed full-time by the city, he had an agreement with the mayor that since he could have flexible hours, he may be able to maintain a private law practice as well as fulfilling his city appointment. *See id.* at 175.

56. *See id.*

57. *See id.* The court determined that the solicitor was an employee under Section 1103 of the Ethics Act which defines a public employee as:

Any individual employed by the commonwealth or political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard to: (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimus nature on the interests of any person.

65 PA. CONS. STAT. § 1103 (2000).

58. *P.J.S.*, 723 A.2d at 178.

59. *Id.*

and continuity. Whatever the reasons for dual-office holding, the situation often creates appearance problems for the office holders.

The Superintendent of the Recreation Services Division of the City of Stamford (Connecticut) directed an employee not to accept additional part-time employment as a referee or umpire for various local athletic events sponsored by the city.⁶⁰ Although the employee did not directly assign officials to the various games, two employees supervised by him were responsible for the assignments.⁶¹ The Superior Court upheld the superintendent's directive, which further stated that the employee's actions represented "a practice that does not present the proper image that I want the Department to have."⁶² The employee had a letter from the local board of ethics opining that his refereeing of city-sponsored games did not constitute either a real or apparent conflict of interest.⁶³ However, the court felt that the issue was not whether the employee was accused of unethical conduct, but "whether the city is justified in prohibiting him from conduct that the plaintiff's supervisor believes gives her division an undesirable image in the community."⁶⁴

A similar decision by the Michigan Court of Appeals held that a township trustee could not also be the county delinquent personal property tax coordinator because the offices were incompatible under the Incompatible Offices Act.⁶⁵ The trustee had discussed and voted on whether the township should contract with the county for the county to provide collection services for delinquent personal property taxes.⁶⁶ The court ordered the official to resign from one of her offices stating, "[a]bstaining from any official action in an attempt to avoid the incompatibility does not remedy a breach of duty; vacating one of the offices is the only solution to the problem."⁶⁷

The official also claimed that the county prosecutor had acted in direct conflict with his statutory duty to give advice and counsel to the

60. See *Troy v. City of Stamford*, CV 990169739, 1999 Conn. Super. Lexis 1456 (Conn. Super. Ct. 1999).

61. See *id.* at *1-2.

62. *Id.* at *2-3.

63. See *id.* at *2. Actually, even though the teams paid the referees and not the city, there had been allegations that the employee was getting choice assignments based upon his city employment status.

64. *Id.* at *6.

65. See MICH. COMP. LAWS ANN. § 15.182 (West 1994) (providing that, "a public officer or public employee shall not hold 2 or more incompatible offices at the same time."); *Id.* at § 15.181(b) (defining incompatible offices as, "public offices held by a public officials which, when the official is performing the duties of any of the public offices held by the officials, results in any of the following with respect to the offices held: (i) The subordination of 1 public office to another. (ii) The supervision of 1 public office by another. (iii) A breach of duty of public office.").

66. See *Macomb County Prosecutor v. Murphy*, 592 N.W.2d 745 (Mich. Ct. App. 1999).

67. *Id.* at 748.

county treasurer when he filed the discretionary action seeking her removal. The official also brought allegations that such action on the part of the county prosecutor violated the Michigan Rules of Professional Conduct.⁶⁸ The court dismissed these arguments stating, “indeed, if we accept defendant’s argument, it is questionable whether the prosecutor could prosecute an employee of the treasurer’s office for embezzlement, should the situation present itself.”⁶⁹

The Kentucky Court of Appeals examined whether the same person could serve on both the local legislative body and on the county planning commission.⁷⁰ After reviewing compatibility provisions in the State Constitution⁷¹ and statute,⁷² and considered the common-law of incompatibility of dual office-holding, the court held that the two positions present an inherent conflict of interest with respect to zoning matters.⁷³ In concluding that the two offices were “functionally incompatible,” the court found that both due process and public policy prohibit the simultaneous service.⁷⁴ The court also rejected the notion that abstention from the vote at the planning commission level would remedy the conflict between the two positions.⁷⁵

68. Although rule 1.7 of the Michigan Rules of Professional Conduct prohibits a lawyer from representing one client if the representation will be directly adverse to another client, or if the representation may be materially limited by the lawyer’s responsibilities to another client or third person, or by the lawyer’s own interest, Rule 1.13 states that when a lawyer represents an organization, the lawyer represents the organization “as distinct from its directors, officers, employees, members, shareholders, or other constituents.” MICHIGAN RULES OF PROFESSIONAL CONDUCT, Rule 1.13(a) (1999).

69. *Macomb County Prosecutor*, 592 N.W.2d. at 751.

70. *See Lagrange City Council v. Hall Bros. Co, Inc.*, 3 S.W.3rd 765 (Ky. Ct. App. 1999).

71. Section 165 of the Kentucky Constitution provides:

No person shall, at the same time, be a State officer or a deputy officer or member of the General Assembly, and an officer of any county, city, town or other municipality, or an employee thereof; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities, except as may be otherwise provided in this Constitution.

KY CONST. § 165.

72. *See* KY. REV. STAT. ANN. § 61.080 (Michie 1998) (enumerating twelve offices it deems incompatible).

73. *See Lagrange*, 3 S.W.3rd at 770.

74. *Id.*

75. *See id.* at 771. Furthermore, even though the council member abstained from the vote below, he did take part in the discussions at the meetings of both bodies and he voted on the matter when it was before the second body for consideration. Interestingly, the court then went on to absolve the council member from any personal unethical conduct by stating:

There is absolutely no evidence in the record to indicate that Hoffman has any personal or financial interest in the outcome of the vote of the proposed zoning map amendment. Furthermore, Hoffman’s decision to abstain from the vote before the Planning Commission demonstrates a desire to avoid any appearance of impropriety. We merely hold that public policy mandates that Hoffman cannot simultaneously hold positions as a member of the City Council and of the Planning Commission.

Id.

In Michigan, a state statute specifically allows for one member of a township planning commission to simultaneously serve on the township's zoning commission.⁷⁶ The Michigan Attorney General, however, opined that it is a violation of the Incompatible Public Offices Act⁷⁷ for more than one member of a township planning commission to simultaneously serve as a member of the township's zoning board of appeals. The zoning board of appeals reviews decisions of the planning commission, and the planning commission could influence the actions of a member of the zoning commission, thereby creating the possibility of a breach of public duty.⁷⁸ Based upon the analysis in the most recent opinion, it remains peculiar that the legislature continues to authorize dual membership for one member of the planning commission/zoning board of appeals.

Modifying a previous opinion,⁷⁹ the Ohio Attorney General opined that since Ohio law permits zoning commissions to organize in such way as to have its members also serve as secretary of the commission on a rotating basis, it is within the discretion of the board of township trustees to determine whether and what amount of additional compensation may be paid to the member serving as secretary at each meeting.⁸⁰ While the dual office holding question has long been settled as not a violation of an ethical standard, the question of additional compensation to board members for performing the additional record-keeping tasks was a new matter. Since it was not the zoning commission that set the compensation, it was discretionary with another body, and because the zoning commission members rotated the responsibility, the Attorney General found no impropriety.⁸¹

76. See MICH. COMP. LAWS ANN. §§ 125.331, 125.288(1) (West 1997). This dual office holding has been upheld by the Michigan Attorney General in previous opinions where the Attorney General stated, among other things, "[t]he Legislature may, of course, expressly authorize the simultaneous holding of two public offices that would otherwise be incompatible." 1995-1996 Mich. Op. Att'y Gen. No. 6837 (1995). See also, 1985-1986 Mich. Op. Att'y Gen. No. 6268 (1985).

77. The Act defines "incompatible office" as:

Incompatible office" means public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:

- (i) The subordination of 1 public office to another.
- (ii) The supervision of 1 public office by another.
- (iii) A breach of duty of public office.

MICH. COMP. LAWS ANN. §15.181(b) (West 1994).

78. See 1999 Mich. Op. Att'y Gen. No. 7012.

79. See 1957 Ohio Op. Atty. Gen. No. 1052 which, relied on an earlier version of the state statutes (R.C. 519.05) opined that "public policy prohibits a commission member from being paid to perform the duties of commission secretary if the latter position is a salaried position under the authority of the commission on which the member serves." *Id.*

80. See 1999 Ohio Op. Atty. Gen. 99-035 (1999).

81. See *id.*

The New Jersey Supreme Court has granted review to consider whether an attorney may simultaneously serve as a municipal attorney and borough clerk/administrator for the same municipality,⁸² and whether a municipal planning board attorney may also serve as a public defender in the same municipality.⁸³

VI. MEMBERSHIP ON LOCAL ETHICS COMMITTEES

The Judicial Ethics Advisory Committee for the State of Delaware advised a superior court judge that he must decline an invitation to serve as chair (as well as declining membership) of a school district's ethics review committee.⁸⁴ After considering relevant Canons of the Delaware Judges' Code of Judicial Conduct,⁸⁵ the Committee indicated concern that the work of the ethics review committee could become controversial and might ultimately result in litigation in the superior court.⁸⁶ The Committee opined that although in such circumstances, the judge could recuse himself from any such cases, the potential option of future judicial recusal did not justify service on the local ethics review commission.⁸⁷

VII. ELECTIONS

An attorney who is "of counsel" to the law firm of the attorney representing an unsuccessful candidate for the office of mayor is not eligible to make the required certification of a practicing attorney that an independent assessment of the claim has been made.⁸⁸ Certification is required in Mississippi by two practicing attorneys that each has, "fully made an independent investigation into the matters of fact and law upon which the protest and petition are based and that after such investigation they verily believe that the said protest and petition should be sustained

82. See *In the Matter of the Advisory Committee on Professional Ethics*, 736 A.2d 522 (1999).

83. See *In re: Advisory Committee on Professional Ethics*, ACPE Docket No. 1-99, 1999 N.J. LEXIS 1182 (N.J. 1999).

84. See *In re Your April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory Committee*, JEAC 1999-1, 1999 WL 743525 (Del. Super. Ct. 1999).

85. Including: Canon 2, "A judge should avoid impropriety and the appearance of impropriety in all activities"; Canon 4, "A judge may engage in activities to improve the law, the legal system, and the administration of justice"; and Canon 5, "A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties."

86. See *In re Your April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory Committee*, JEAC 1999-1, 1999 WL 743525 (Del. Super. Ct. 1999).

87. See *id.*

88. *Esco v. Scott*, 735 So.2d 1002 (Miss. 1999).

and that the relief prayed therein should be granted.”⁸⁹ After discussing the definitions and roles of attorneys who have “of counsel” relationships with law firms, the court concluded, “[g]iven the close, regular, personal relationship between attorney and law firm contemplated by the ABA where the ‘of counsel’ designation is employed . . . an attorney listed as being ‘of counsel’ on the letterhead of the firm representing the contestant . . . is not eligible to make the certification required by the Election Code.”⁹⁰

VIII. BAD FAITH

The issue of ill-conceived motivations or bad-faith on the part of local officials may properly be viewed as a question of ethics or ethical conduct by those vested with the public trust. The cases where these allegations, correctly or incorrectly, are being made appear to be growing at an alarming rate and should signal both a warning and a cause for concern to local officials. For example, in a Wisconsin case, petitioners claimed that they were denied a fair and impartial hearing when, after a 4-1 vote to approve the petition for a reclassification by the county planning and survey committee, the Chair of the Committee erroneously represented to the county board of supervisors that the vote had been 3-2, that she voted against it (she did not).⁹¹ Furthermore, prior to the vote by the board of supervisors, the Chair of the Town Board was alleged to have made the following misrepresentations: that the petitioners were real estate developers who had ulterior motives; that the town residents were anti-development; and that she failed to correctly state the reasons in the petition for their request.⁹² Although the claim was dismissed on procedural grounds,⁹³ the allegation of bias and the resulting public perception of the conduct of local officials in these situations goes a long way to erode the public trust.

In another case, an alleged equal protection violation by an applicant that a competing developer was locally favored and that the other applicant was represented by the spouse of a town council member did not contain sufficient evidence to prove that, “selective treatment was based on impermissible or discriminatory animus against a cognizable group or class of individuals, or that plaintiff was maliciously singled out for disparate treatment because of the exercise of constitutional rights, or bad

89. *Id.* (citing 7 ANN. MISS. CODE § 23-15-927 (West 1999)).

90. *Id.* at 1005.

91. *See Thorp v. Town of Lebanon*, 593 N.W.2d 878 (Wis. 1999).

92. *See id.* at 882.

93. The petitioners filed a federal claim alleging a deprivation of due process, but they failed to assert their state claim remedy which rested with a certiorari review.

faith intent to injure plaintiff.”⁹⁴ As the court correctly points out, the federal circuit courts are not in agreement on the issue of whether evidence of malicious or bad faith intent to injure will support an equal protection claim.⁹⁵ The United States Supreme Court has an opportunity, however, to provide further guidance with the granting of certiorari in 1999 of the *Olech* case arising out of the 7th circuit.⁹⁶

A claim based upon prejudice and bias as a reason for failing to exhaust administrative remedies was not supported where the crux of the allegation was that a hearing now by the people appointed to fill vacancies on the Board of Adjustment after the filing of the litigation would be futile since, “any Board formed would be comprised of individuals who were prejudiced and biased against the Petitioner and therefore would be predisposed to rule against him.”⁹⁷ In fact, the record revealed that the three individuals appointed to fill vacancies were not part of any opposition to the application, nor did they participate in the matter in any other forum, leaving nothing to suggest that they would act other than impartially.⁹⁸

IX. CONCLUSION

With more than two dozen reported cases and opinions in 1999 where the central issue was ethical conduct of a local government official, government lawyers need to continue to meet the challenge of keeping current on trends on the field of government ethics. There is no treatise on government ethics, no national newsletter devoted exclusively to the field, nor a web site where these types of cases and opinions are typically summarized and searchable. Thus, government lawyers must be creative in their research path and mindful of jurisdictional differences in the law and in community values and standards that have so much to do with determining whether the conduct complained of is in fact unethical. Government lawyers need to be proactive and play a leadership role in the training of municipal officials about the wide array of potential ethics

94. *Masi Management, Inc. v. Town of Ogden*, 691 N.Y.S.2d 706, 722 (N.Y. Sup. Ct. 1999).

95. *See id.* at 902, reciting a string of conflicting circuit court cases.

96. *See Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998), *cert. granted*, ___ U.S. ___, 120 S. Ct. 10 (1999).

97. *Cheswold Aggregates v. Town of Cheswold*, No. 99M-02-0009HDR, 1999 WL 743339 (Del. Super. Ct. 1999).

98. *See id.* at *2 (quoting *Phillips v. Board of Educ. of Smyra Sch. Dist.*, 330 A.2d 151, 154 (Del. Super. Ct. 1974)). “There is a presumption that public officials discharge their duties and perform the acts required of them by law in accordance with the law and the authority conferred upon them and that they act fairly, impartially and in good faith.” *Id.*

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allegations,⁹⁹ demonstrated through the microcosm of a look at the types of cases and matters arising in 1999 and reported in this article.

99. For a discussion of easy strategies for lawyers that are designed to educate local officials on ethics issues see, Patricia E. Salkin, *Ten Effective Strategies for Counseling Municipal Clients on Ethics Issues*, 22 STATE & LOCAL LAW NEWS 1 (Fall 1998).