Conflict of Interests and the Municipal Employee

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COMMENTS

CONFLICT OF INTERESTS AND THE MUNICIPAL EMPLOYEE

The gravamen of any "Conflict of Interests" charge is that the individual stands accused of having an interest in both sides of a transaction. No assertion is necessarily made that harm has resulted. Rather, since people normally prefer their own interest to that of the public's, the act is considered improper on its face. The critical issue is what behavior or relationship constitutes a conflict of interests. This question has been the subject of analysis by courts, scholars, and governmental administrators.

The state has a right to be concerned with the moral posture of its agents, because it is chiefly through their behavior, character, and personality that its own reputation is derived. If the government earns respect because of its moral posture, its ability to govern effectively will be enhanced. Alternatively, where the appearance of impropriety exists, support, not only for government, but for law in general, will be diminished. To advance governmental self-interest then, steps must be taken to insure that the behavior of municipal officials is above reproach.

The objective of maintaining high ethical standards may be achieved in several ways: Government may adequately compensate its personnel and thus reduce the need to pursue private economic interests. It could attempt to elevate the norms of civic virtue through propaganda. Or, as in New York, it could try to guarantee a desired level of ethical conduct through legislation.

Enacting legislation to regulate ethical conduct does, however, entail certain social and political risks. In the United States, civic participation is largely a matter of choice. The citizen is neither obliged to work for his municipality nor to run for political office. If an individual decides to work as a municipal employee he will generally find the compensation modest. Political posts may also be identified with similar characteristics which tend to discourage entrance into this endeavor. This is undesirable. Even less desirable is legislation which may exacerbate this inherent tendency towards nonparticipation. Government now provides services which are sophisticated and technical, and it is crucial to the success of local government that people with requisite skills are not discouraged from serving their communities. Conflict of interests legislation may create such an effect. If the penalties are harsh and the provisions confusing, citizens may feel intimidated and may shrink from civic participation.

Considering the competing priorities (i.e., the need to maintain governmental integrity and the need for competent personnel), this comment will focus on evaluating the specific balance achieved between these pri-
orities through the provisions of New York's municipal officer and employee conflict of interests statute: Article 18 of the General Municipal Law.¹

I. THE DEVELOPMENT OF COMMON LAW CONFLICT OF INTERESTS DOCTRINE IN NEW YORK

Two theories have been advanced to explain common law conflict of interests in New York. One position is promulgated by Roswell C. Dikeman, former Associate Counsel of the Office of the New York State Comptroller.² Dikeman takes the broad position that "all public officers should be forbidden from having an interest, direct or indirect, in contracts with the municipality. . . ."³ He would not limit the prohibition "to [only] such officers as have some duty or authority in connection with the negotiations for, or the making of contracts on behalf of, the municipality, or who have some function to perform in relation to the performance thereof or the auditing of claims thereunder."⁴ A second theory, advanced by Professors Kaplan and Lillich, takes a more conservative position. It finds a conflict of interests only when the public officer places himself "in a position that might tend in any way to limit his usefulness to the public by bringing his private interests into conflict with his official duties."⁵ If there is no conflict of duties, there is no conflict of interests, and mere employment by the municipality will not automatically make one.

A. Developing Decisional Basis

Smith v. Albany⁶ is the first case specifically developing common law conflict of interest concepts. In 1869, the Albany Common Council adopted a resolution to appropriate $2,500 to defray the expenses of celebrating the Fourth of July. Plaintiff Smith was a member of the Council and voted in favor of the resolution. Under the resolution a committee of the Council was appointed and in turn hired Smith to furnish horses and carriages to be used at the festivities. The employment was held void as against public policy.

The court gave clear expression to a conflict of interests doctrine based on a "conflict of duties" arising out of analogous principles of agency and

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¹ N.Y. GEN. MUNIC. LAW § 800 et seq. (McKinney 1964) [hereinafter referred to as Article 18].
² Dikeman, Interest of Municipal Officers in Public Contracts, 7 OPINIONS OF COMPTROLLER RELATING TO MUNICIPAL Gov'T 15 (1951).
³ Id. at 27 (emphasis added).
⁴ Id. at 27-28.
⁶ 61 N.Y. 444 (1875). Kaplan refers to Roosevelt v. Draper, 23 N.Y. 318 (1861), as an earlier case supporting his position.
trust law. According to the court the contract was void because Smith's tasks as a municipal officer and his private interests were grossly incompatible:

In bargaining for the city he could not be one of a party, acting as an employer, and become himself, by the same bargain, an employee. The rule upon this subject, as well as the reason for it, is so clearly stated by the late Justice Story in his treatise on Agency . . . .

'If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps in many cases too strong for resistance by men of feeble morals . . . would be held out, which would betray them into gross misconduct . . . .' 7

Dikeman cites Smith as authority for the proposition that common law conflict of interests prohibited all municipal employees and officers from contracting with their municipal employer. Reading the above excerpt one indeed wonders how this proposition can be defended. The language of the passage, particularly the quote from Story on Agency, only indicates that an individual responsible for procuring (i.e., negotiating, preparing or performing) a transaction would have an interest appropriate for regulation. The court in Smith does not suggest that all contracts between a municipal employee and his employer should be regulated.

Furthermore a portion of the opinion has often been misinterpreted, thereby contributing to confusion in this area of the law. As indicated in Smith:

The act of 1843 . . . making it unlawful for a member of any common council of any city in this State to become a contractor under any contract authorized by the common council, and authorizing such contracts to be declared void at the instance of the city, has not wrought a change in the rule referred to; it is, so far as it goes, simply declaratory of the law as it existed previous to its passage. It does not encroach upon the common law, and is not, therefore, to be construed strictly. 8

The above quote has been interpreted to mean that courts have generally regarded the statutes in this area as declaratory of the common law. 9 It is difficult to see that Smith advances this view of the common law. Dike-

7. 61 N.Y. at 445-46.
8. Id. at 447.
9. Dikeman, supra note 2, at 15:
The courts, for the most part, have regarded expressions of the Legislature in this field as merely declaratory of the common law, and thus not to be strictly construed. The courts have concluded that such statutes do not infringe upon the rules of the common law, and that in consequence, such rules remain applicable.
man for instance speaks of the courts and statutes, yet quotes the above portion of *Smith* as authority. The court in *Smith* was referring to only one statute, the act of 1843.\(^\text{10}\) That enactment may be referred to as a "contracting officer" statute.\(^\text{11}\) One might say that a contracting officer statute is explanatory of the common law, but Dikeman's use of the plural "statutes" is careless. Some 19th Century statutes were of the blanket-coverage variety.\(^\text{12}\)

*Beebe v. Board of Supervisors*,\(^\text{13}\) a later conflict case, continues the interpretive argument begun with *Smith*. Anderson, a practicing attorney and town supervisor, was employed by the board of which he was a member to do legal work. After Anderson partially completed his work, he requested to be relieved of his tasks and submitted a bill for his services. Beebe instituted a taxpayer's action to enjoin payment.

The language in *Beebe* is similar to that of *Smith*. Referring to the members of the board the court said, "[t]hey are trustees, and have no right to enter into contracts with each other at the expense of those for whom they are acting, and whose interest they are bound to guard and protect."\(^\text{14}\) The cases cited in support of this statement are agency and trust cases. The narrow construction of the common law rule could not be more lucid. Unfortunately the following portion of the opinion resulted in debate as to the precise holding of the case:

The illegality of such contracts does not depend on statutory enactments, they are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers. And this principle applies with particular force to members of a board like a board of supervisors, which not only makes the contract but subsequently audits the bill.\(^\text{15}\)

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\(^{10}\) N.Y. Sess. Laws [1843] ch. 57 §§ 1, 2:

§ 1. It shall not be lawful for a member of the common council of any city in this state, or of a trustee of any village, or the supervisor of any town, to become a contractor or under any contract authorized by the common council, board of trustees, or board of supervisors of which he is a member, or to be in any manner interested directly or indirectly, either as principal or surety, in such contract.

§ 2. No town, county, city or state officer shall be interested in any contract made by such officer, or be a purchaser or interested in any purchase at any sale made by such officer, or a seller at any purchase made by such officer in the discharge of his official duty.

\(^{11}\) New York has had two types of conflict of interests legislation: "blanket-coverage" statutes and "contracting officer" statutes. Blanket-coverage statutes prohibit all specified municipal employees from making contracts with their municipal employer. Contracting officer statutes cover only those governmental personnel who have some direct duty in the making or approving of a contract. See generally Kaplan.


\(^{13}\) 64 Hun. 377, 19 N.Y.S. 629 (Sup. Ct. 1892), aff'd without opinion, 142 N.Y. 631, 37 N.E. 566 (1894).

\(^{14}\) 64 Hun. at 379, 19 N.Y.S. at 630.

\(^{15}\) Id. (emphasis added).
The disturbing words "officers of any kind" could be ascribed to carelessness or inadvertence, because the preceding portions of the opinion clearly indicate the restricted nature of the holding. However, read in conjunction with the phrase "this principle applies with particular force to members of a board like a board of supervisors," it suggests that the prohibition applies as well to those who have no role in either making or auditing the contract.

Kaplan remarks that while it is understandable for lawyers and administrative officials to read the decision as authority for the broader concept of conflict of interests, a study of the facts calls for a much more conservative holding. Dikeman argues to the contrary: given the facts of the case it is reasonable to read the holding as covering "any kind" of municipal officer. One possible explanation for the court's expansive statement might be that it confused the concept embodied in the blanket-coverage statutes with the common law principle. It is easy to see how this could be done. If one reads the court's remark regarding the statute of 1845 as being explanatory of the common law, and misreads it to mean statutes generally, then considering the blanket-coverage statutes, one could then say that the common law prohibited municipal officers of "any kind" from contracting with their municipality.

This explanation finds support in Clark v. Town of Russia. Clark, a Justice of the Peace and member of the town board, induced the town's Superintendent of Highways to hire him to work on the highway. While Clark was working for the town he was killed. His wife sued for workmen's compensation benefits, and the case reached the Court of Appeals on the issue of the employer-employee relationship. If the contract for services between Clark and the town was prohibited because of a conflict of interests, no employer-employee relationship was established and Mrs. Clark could not recover. The court found a conflict of interests and held the contract void. According to the court, "[u]nder the common law a contract between a municipality and one of its officers is against public policy and illegal." Dikeman is of the opinion that this decision "dispelled some uncertainty" and justifies the blanket-coverage theory. Kaplan describes the phrase as only "a loosely worded statement." The facts of the case indicate that there is a conflict of interests only when there is a violation of a conflict of duties imposing similar obligations to those present in

17. Dikeman, supra note 2, at 18.
18. 283 N.Y. 272, 28 N.E.2d 833 (1940).
19. Id. at 274, 28 N.E.2d at 835.
20. Dikeman, supra note 2, at 15.
the situation of a fiduciary trustee. Nevertheless the language *qua* language gives plausibility to Dikeman's view. This inconsistency may be the result of general judicial confusion about the exact requirements for a common law conflict of interests: if "statutes" are merely explanatory of the common law, and statutes may be of either blanket-coverage or contracting officer, then it is logical, but incorrect, to conclude that the common law concept can be coterminous with the broadest statutory formulation of the conflict of interests doctrine.

In analyzing the preceding cases it appears that: In *Smith* there is neither language nor *ratio decidendi* to support any other common law concept than that of a conflict of duties. In *Beebe* and *Clark*, however, the reasoning and the facts go in one direction, and the language in the other. Nevertheless, despite suggestive language inviting a much lower threshold, the rule which emerges from the cases is that only a municipal official having some duty in relation to the contract is barred from having a personal stake in the transaction.

The courts have not always accepted this limited "direct agency" test. A different standard, the "general prosperity" test, was used in *People ex rel. Schenectady Illuminating Co. v. Board of Supervisors of Schenectady County.* 22 The facts of this case are simple. James O. Carr was a member of the board of supervisors of Schenectady County, and secretary, treasurer and owner of one share of stock in the Schenectady Illuminating Co. The company sold the county $7.44 worth of lamps. The facts reveal that Carr had nothing to do with the sale, and in fact "knew nothing of this particular transaction." 23 Citing *Beebe* and *Smith*, the court held the contract void under common law. Its reasoning differed, however, from those cases. In *Schenectady* the court found the transaction improper, because even though Carr was not directly involved, he nonetheless retained an "interest" derived from his general concern for the company's prosperity. The decision stands for the principle that one could be found an "interested" party merely by reason of employment. This unqualified holding presented a threshold problem. To what classes of employees did this rule apply?

*People ex rel. Crowe v. Peek* 24 offered an answer. The case involved an application for a writ of mandamus to cancel the designation of the Schenectady Gazette as the official newspaper to publish the local laws. One Hill, a county supervisor, was an editor of the Daily Gazette Company, the corporation which published the designated newspaper. Hill had no stock or money interest in the paper, and he was employed at a fixed

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22. 166 App. Div. 758, 151 N.Y.S. 1012 (3d Dep't 1915).
23. *Id.* at 760, 151 N.Y.S. at 1014.
salary. The court holding that Hill was not an interested person, stated that more than the mere fact of employment must be shown. Explaining their position the court enumerated the additional circumstances under which an employee would have an interest:

There may be circumstances under which the employee would have an interest. For example, if he were working on a commission; or, if the success of the business in which he was employed depended upon the contract which he was making; or, if he represented his employer (under the terms of his employment) in making the contract, so that in some degree he would enjoy credit or benefit from the contract; he might be held to have an individual interest.25

B. Judicial Discomfort With the Development

The preceding cases delineate only the preliminary aspects of the conflict of interests problem. Some courts finding the conservative version of the common law doctrine unpalatable refused to find a conflict of interests even when clearly present. People v. Stoll26 provides an example. Stoll, an attorney, was a member of a town board. The board appointed three water commissioners who in turn appointed Stoll’s law firm to serve as bonding counsel to the newly formed water district. The court found that the employment of Stoll’s firm as counsel did not constitute an interest in a “sale, lease, or contract” which defendant, as a member of the town board, was unauthorized to make or take part in within the meaning of section 1868 of the Penal Law.27 The court even failed to find an indirect interest. Defending the transaction, Judge Lehman remarked:

True, if agreement had been made in advance by the persons thereafter appointed as commissioners that they would employ defendant’s firm as counsel, inference might be drawn that the agreement was intended to secure the appointment of these persons as commissioners or to influence the defendant’s official action, but as we have pointed out above, no such charge has been made against this defendant.28

25. Id. at 232, 151 N.Y.S. at 837.
26. 242 N.Y. 453, 152 N.E. 259 (1926). A crucial factor present in Stoll and absent in the preceding cases was that Stoll was faced with the threat of fine and imprisonment. N.Y. Penal Law § 1868 (McKinney 1968).
27. N.Y. Penal Law § 1868 (McKinney 1968):
A public officer or school officer, who is authorized to sell or lease any property, or to make any contract in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, except in cases where such sale, lease or contract, or payment under the same, is subject to audit or approval by the commissioner of education, is guilty of a misdemeanor.
28. 242 N.Y. at 463, 152 N.E. at 262.
Judge Lehman’s argument avoids the issue. If an agreement had been made, then that hypothetical event would have been an entirely different wrong. The fact was that without agreement, the relationship of the parties per se gave rise to an inference of an impropriety. Once raised, an inference based on the facts in Stoll is nearly impossible to defeat by denial. Such situations were intended to be prohibited by conflict of interests legislation. Judge Lehman found no “interest” because he undoubtedly ignored the “straw man” ruse.

Judge Lehman bolstered his position by arguing:

While the defendant or his firm supervised the legal proceedings concerning the award of the bonds . . . , the defendant . . . took no part in any vote concerning the Jericho water district. He was not even present or within the State at the time of the meeting at which the bonds were awarded to the Guaranty Company. He took no part in the official proceedings of the town board in regard to . . . the fixing or auditing of the amount to be paid to the commissioners for their services.29

Similar facts were considered immaterial in Beebe and Schenectady. In Beebe, the court said that Anderson could not put on and take off his official role at will. Anderson also absented himself from the actual auditing. Moreover, in Schenectady, Carr was actually ignorant of the transaction. Applying that reasoning to Stoll, the result in each case, at least in respect to that point, should have been identical. Stoll retained an interest in spite of the fact that he absented himself during the auditing process.

Finally, Judge Lehman introduces another element into the discussion, Stoll’s motive, which is found by the court to be without corrupt characteristics. The thrust of Smith, Beebe, and Schenectady is to the contrary: given the requisite relational elements of the parties, the motive of the participant is immaterial. This is rightly so if the essence of conflict of interests law is to protect the individual by preventing him from committing an act that may in retrospect compromise him. Utilizing “good faith” as an element would shift the effect of the law from prevention of an act to a review of behavior after the act. Judge Lehman’s attempt to add a “good faith” element and to give weight to Stoll’s absence can possibly be construed as either a “bad decision” or as an indication of dissatisfaction with common law conflict of interests doctrine.

A likely reason for this dissatisfaction is the common law rule itself. The rule, drawn from agency and trust principles, could, when serving private needs, be oblivious to any broad political ramifications. The rule once transposed into a principle of municipal law had to operate within a framework rooted in the exigencies of political life. This it was unable

29. Id. at 458, 152 N.E. at 261.
to do satisfactorily. Political policy and administrative convenience had to be taken into account. Thus, though perfectly adequate for the resolution of private law ethical problems, the conflict of interests principle based on any of the private law models could serve only as a starting point for the construction of a public law rule.

By 1955, it was obvious that some courts were willing to take a fresh look at the conflict of interests problem. In *In re Village of Hempstead*, a village property owner opposed an application brought by the Village of Hempstead to ascertain the amount of compensation offered for property to be taken by condemnation. Ownership of more than 40% of the realty was held by a corporation of which the Mayor and one of the Village trustees were stockholders and directors. The court determined that condemnation lacked typical voluntary contractual attributes and such a transaction did not create a conflict situation. Two other points deserve mention: First, since the land in question was owned by a corporation, and was not owned solely by the mayor in a personal capacity, a conflict of interests could not be found. The applicable provision dealing specifically with public improvements required that the land be "owned by him," and the court believed that land held in a corporate capacity did not satisfy the definition of interest within the meaning of the statute. Second, the court offered as a general justification for its position that a more lenient standard could obtain in conflicts questions dealing with condemnation because the threatened improprieties of conflicts situations normally were mitigated, or avoided entirely, through the process of court supervision of the condemnation proceeding.

Nevertheless, this shift in judicial position was not accepted by the Court of Appeals. In *Baker v. Marley*, an action was brought against the mayor of the village of East Hampton to have resolutions adopted by the board of trustees leading to condemnation of various parcels of real property, including one owned by the mayor and such others, declared void. The provisions of section 332 of New York's Village Law provided that a village official shall not act as such in any "matter or proceeding, involving the acquisition of real property then owned by him, for a public improvement." The court held that this provision still applied even
though the mayor did not vote. The court referred to Clark, and cited Beebe, to the effect that "the condemnation must be declared void, even though the vote of the Mayor was not necessary, a majority being sufficient." 35

Justice Van Voorhis dissented, arguing that the purposes of section 332 of the Village Law should not be construed to "prevent the making of what is apparently a desirable public improvement." 36

The salient point of Judge Van Voorhis' dissent was his recognition that Clark, Beebe and the Village Law all failed to reflect a respect for the administrative realities of local government life. 37 Abiding by the majority position meant permanent obstruction in the path of local progress. Public improvements, often urgently needed for the health, safety, and welfare of the community, were to be sidetracked in favor of anticipatory legislation designed to promote high ethical standards and the appearance of governmental dignity. The priorities were out of focus, with the necessary being sacrificed for the imaginary.

It was not long before Judge Van Voorhis' dissent found support. In Spadanuta v. Village of Rockville Centre, 38 the court held that section 332 of the Village Law prohibited sale by contract, not a taking by condemnation, provided the interested official does not take part in the proceeding to acquire his property. The court declared that "any other rule would stultify the village in carrying on its legitimate functions or permit a taking without compensation, two equally insupportable positions." 39

The court went even further in departing from the traditional treatment of a conflict of interests situation in holding that if there was evidence of "good faith and fair dealing" and the transaction was the result of an innocent mistake, then the parties were to be returned to the status quo. 40

The court in Spadanuta built its opinion on the rationale of J.J. Carroll Inc. v. Waldbaumer. 41 That case arose out of an attempt to enjoin a condemnation proceeding. Defendant, Robinson Roe, a village trustee, received income from a parcel of realty which was the subject of a sale by condemnation. This was alleged to be a conflict of interests in violation of Village Law, section 332. The facts revealed that Roe did not actively

35. 8 N.Y.2d at 367-68, 170 N.E.2d at 901, 195 N.Y.S.2d at 599.
36. Id. (dissenting opinion).
37. Id.
38. 38 Misc. 2d 999, 229 N.Y.S.2d 598 (Sup. Ct. 1963).
39. 38 Misc. 2d at 1001, 229 N.Y.S.2d at 600.
40. Id.
participate in the condemnation of his property. The court distinguished Baker on the ground that Mayor Marley voted on matters concerning the condemnation of his property. In support of this distinction the court interpreted section 332 of the Village Law to mean that there was no conflict of interests until the public officer acted as an owner by participating in matters related to his property. No longer was mere ownership sufficient to create the prohibited "interest." Since it was not established that defendant Roe so participated, the court found no conflict of interests.

After Spadanuta, it was evident that the lower courts had awakened to the fact that the conservative application of the conflict doctrine was inadequate as an instrument of policy, and that the statutes as written and interpreted were gravely in need of reassessment.

II. AN ATTEMPT AT UNIFORMITY: ARTICLE 18

The New York legislative committee studying conflict of interests prior to the enactment of Article 18 noted: "Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible." As Professor Kaplan remarked:

Different groups of public servants are covered to a different extent by each general statute. Each general statute has exceptions differing in scope from the exceptions to other general statutes. Many have strayed far from the common law conception of the prohibition against conflicts of interest. . . . The ramifications of this confusion can best be illustrated by the case of an average citizen considering public service. Depending upon his residence, he may be qualified to enter the service of his village, town, city, county, school district, or fire district. The strength of his moral fiber would undoubtedly remain the same, but because of New York's divergent conflicts of interest statutes and rules the extent of the trust reposed in him by the public would depend on the government he serves and the public position he holds.

Prior to Article 18, therefore, New York civil employees faced a double dilemma: an inadequate common law rule, borrowed from agency and trust law, and congeries of inconsistent statutes. Has Article 18 corrected

42. To date there have been no court cases under Article 18. Consequently the following material is limited to an explication de text, and a speculative analysis of the effect of the statute.


44. Kaplan at 174.

45. In the following discussion of Article 18, §§ 800, 801, 802 and 805-a will be discussed at length. Sections 803, 806 and 809 will be mentioned briefly. Sections 804, 805, 807 and 808, which are largely procedural in nature, will not be discussed herein.
the law's previous unsatisfactory attributes and achieved a useful balance of the competing priorities? 46

Article 18 prohibits a municipal officer or employee from having any interest, direct or indirect, in any contract with his municipal employer. He can neither negotiate, prepare, or authorize a contract with his municipal employer; nor can he appoint anyone to exercise those duties. 47 For the purposes of the act the prohibited interest 48 is any "pecuniary or material benefit" accruing as a result of a contract, 49 which may be read to mean any claim or demand against the municipality. The scope of the act is encompassing. Municipality 50 is defined to include major govern-

46. See text at note 1 supra. See also N.Y. Sess. Laws [1964] ch. 946 § 1: According to the legislative findings the purposes of Article 18 are:
   to protect the public from municipal contracts influenced by avaricious officers,
   to protect innocent public officers from unwarranted assaults on their integrity
   and to encourage each community to adopt an appropriate code of ethics to supplement this chapter.
47. N.Y. GEN. MUNIC. LAW § 801 (McKinney 1968):
   Except as provided in section eight hundred two of this chapter, (1) no municipal officer or employee shall have an interest, direct or indirect, in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder, (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest, direct or indirect, in a bank or trust company designated as a depository, paying agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more public offices or positions of employment, the holding of which is not prohibited by law.
48. Id. § 800:
   "Interest" means a pecuniary or material benefit accruing to a municipal officer or employee as the result of a business or professional transaction with the municipality which such officer or employee serves, . . . [A] municipal officer or employee shall be deemed to have an interest in the affairs of (a) his spouse, minor children and dependents, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.
49. Id.
   "Contract" means any claim, account or demand against or agreement with a municipality, expressed or implied, and shall include the designation of a depository of public funds and the designation of an official newspaper.
50. Id.
   "Municipality" means a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing
mental units, counties and cities, as well as special service units, public library boards, and water districts. The same range of inclusiveness applies to the definition of municipal officer or employee. With minor exceptions almost everyone associated with local government, whether paid or unpaid, elected to a political post, or appointed to a commission, is covered by Article 18.

Where a deliberate violation of Article 18 occurs, the contract in question is a nullity; and the municipal officer involved may be found guilty of a misdemeanor.

Certain changes from common law and earlier statutes are immediately evident. By broadly defining municipality, a step was taken in the direction of uniform legislation. Also, the ghost of the blanket-coverage statutes was laid to rest, since the provisions apply only to those officers or employees whose powers or duties invest them with some specific responsibility in the making of a contract. In that respect the statute may be characterized as a "contracting officer" statute.

Article 18 appears to have a harsh effect on public spirited citizens when section 801 is read by itself. However, when section 801 is read in conjunction with section 802 (exceptions) the character of the act

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one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.

51. Id.

'Municipal officer or employee' means an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a chief engineer or assistant chief engineer.

52. Id. § 804.

53. Id. § 805.

54. Id. § 801.

55. Id. § 802:

The provisions of section eight hundred one of this chapter shall not apply to:

1.a. The designation of a bank or trust company as a depository, paying agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated;

b. A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will
changes. Section 802(1)(b) may be the most important exception. It provides that section 801 will not apply to a contract in which a public officer has an "interest" merely by reason of employment. The employee can be an active agent in the making of the contract, so long as his remuneration is unaffected. Thus a sales representative receiving commissions could not avail himself of section 802(1)(b) because his active agency in selling the product could be tied directly to gain from the contract itself. Nor would the exception permit an individual to receive a raise in salary or bonus which could be related to his efforts in connection with a contract with the municipality. Preventing such conduct though, may be difficult. In some cases there will be evidence clearly linking the making of the contract with an increase in remuneration. Nevertheless there are situations where the tracing of benefits may be difficult to prove. Executives whose duties involve some phase of contract work will deal with many transactions of an almost identical sort throughout the year. All that may distinguish one transaction from the next is the name of the purchaser. As an example, assume that among the many successful transactions con-
cluded by a company employee, one is with his municipal employer. At year's end the employee is given a bonus which prompts an investigation to determine whether Article 18 has been violated. The allegation is that the additional remuneration is a reward for the one contract with the municipality. The defense is that the bonus is either a result of the success of all the other transactions, or one particular one, but certainly not the one with the municipality. Since it is difficult to trace benefits, it is likely that few prosecutions will be brought for a violation of this section. Once this weakness is recognized it may well be exploited. Consequently, the public may be deprived of the express protection of the act, and may ultimately be forced to vent its frustration by regressing to attacks on public officials. Some attacks may be warranted; others may not.  

Implicit in section 802(I)(b) is the demise of the “general prosperity” theory of Schenectady. In Schenectady, Carr was found to have an “interest” because “[a]lthough he knew nothing of this particular transaction, it was one of the details which was the result of his supervision and management.” 57 Under Article 18 a situation as innocuous as that presented in Schenectady would not create a conflict of interests. This exception then makes a contribution towards a reasonable adjustment of the competing priorities: securing qualified personnel, while insuring the probity of contractual transactions. Corporate employees and others in the exempted category will be less likely to be inhibited from entering public service as a result of the provision. In addition, the act does prevent transactions where contract and remuneration are unmistakably integrated.

Another important exception of section 802 pertains to stockholders. 58 A contract is permitted with a corporation in which a municipal officer has an interest if ownership is less than five percent of the corporation's stock. Though this is an improvement over a rule which prohibited ownership of even a single share of stock, 59 it remains to be seen whether the five percent figure is reasonable. A single percent of a large company representing millions of dollars would be exempt from regulation; while five percent of a local corporation would be sufficient to subject a muni-

56. N.Y. Sess. Law [1964] ch. 946 § 1:
The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter.


58. N.Y. GEN. MUNIC. LAW § 802(2)(a) (McKinney 1968).

principal employee's interest to regulation. Nevertheless, the five percent figure is an important change because many employees own but small amounts of stock in their corporate employer.

The weakness of this provision is that it may easily be misconstrued by the public. Though it is true that even one percent of a major corporation represents a large capital sum, and often a correspondingly significant income, it is equally true that the effect and accretion of income resulting from any one contract with a municipal employer is both remote and minimal. However, the average individual is not going to trace out the actual benefits accruing to the stockholder. Thus he will not realize how insignificant the stockholder's "interest" is in a given transaction. He will only keep in mind that Article 18 permits a man owning millions of dollars of stock to be involved with a contract with the municipality, while prohibiting similar transactions by owners of larger percentages but much smaller stock investments. Inevitably this will foster an appearance of impropriety.

There is also an exception in Article 18 based on a concern for the economic health of the local community. The statute permits the designation of a bank as a depository for public funds despite a conflict of interests resulting from the involvement of a bank officer in the activities of a municipality, if, to avoid such a conflict, the municipality would be forced to designate a bank outside its geographical boundaries. However, if there is another qualified banking institution within the municipality whose services may be utilized then the exception is not applicable. The value of this exception to "one-bank" towns and villages is apparent. If a small community were forced to deposit funds elsewhere economic progress would be diminished and lending power curtailed.

Several of the other excepting provisions echo the judicial sentiments of *In re Parking Place, Carroll* and *Spadanuta*, by permitting a sale of property by condemnation despite a conflict of interests. Judicial rationale favored permitting exemption of sale by condemnation because the court's supervisory function would adequately protect the public interest. Accepting the court's reasoning, the legislature went one step further by providing for "[t]he purchase by a municipality of real property or an interest therein, [if] the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board." The exception serves as an example of the best form of conflict of interest regulation because it permits the transaction and guarantees propriety through court supervision.

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60. N.Y. GEN. MUNIC. LAW § 802(1)(a) (McKinney 1968).
61. Id. § 802(1)(e).
62. Id. § 802(1)(d).
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The statute also permits a public officer or employee to let a contract for the "reasonable rental of a room or rooms owned or leased by an officer or employee when . . . used in the performance of his official duties and . . . designated as an office or chamber." 63 It is unfortunate that the only supervisory safeguard is that the rental price must be "reasonable." At the outset this suggests that bargaining in any real sense will be absent from the transaction, because the price need not represent the lowest fair price. The requirement speaks only of reasonableness, therefore, it is permissible to charge a price which reaches the outer edge of credibility.

Several purposes of Article 18 are frustrated by this exception. The act is supposed to prevent unwarranted attacks on municipal officials; yet under this exception a truly reasonable price can be criticized by comparing it with a lower price that might be presented as more reasonable than the price obtained.64 Further, a truly unreasonable but not quite outrageous price might induce public disapproval but, due to the subjectiveness of "reasonable," the transaction might be immune to successful prosecution. This situation can be rectified either by administrative opinion or judicial construction equating "reasonable" with fair market value. Article 18 includes certain disclosure provisions. It requires disclosure when a city officer or employee has an interest in a contract with the municipality. The nature and extent of the interest must be reported in writing to the governing body and is to be "set forth in the official record . . . of such body." 65 Disclosure need only be made once during the fiscal year. If there are additional contracts with the same party, no further disclosures need to be made during the year. The provision applies to actual or proposed contracts, and the disclosure of such interest is required when the officer has knowledge of an actual or prospective interest.

Section 809 is also a disclosure provision.66 This section requires disclosure on "[e]very application, petition or request submitted for a vari-

63. Id. § 802(2)(d).

1. Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any state officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the applicant) to the extent known to such applicant.

2. For the purpose of this section an officer or employee shall be deemed
The definition of "interest" is stricter in section 809 than in section 800. Under section 800 a municipal officer is deemed to have an "interest" only if his spouse, minor children, or dependents are involved in the contract. In section 809 an individual is deemed to have an interest when

... his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them ... is the applicant or

... an officer, director, partner or employee of the applicant, or

... legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant, or ...

... is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

Fortunately, section 809(4) mitigates to some extent the impact of the disclosure requirement by providing for a misdemeanor charge only if the section is violated "knowingly and intentionally." Nevertheless, where there has been a failure to disclose pursuant to subsection (1), the lack of knowledge and intent will not prevent denial of the application.

The emphasis of section 809 is on disclosure, not prohibition, which no doubt justifies to some extent its ensnaring quality. However, since the coverage of section 809 is so extensive and does not follow the easily understandable limits of "interest" described in section 800 (i.e., spouse, minor children, dependents), inadvertently people will violate the requirement. This situation is disappointing. Theoretically a disclosure provision should independently serve as a substitute for prohibitions instead of merely being an additional restrictive requirement.

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67. Id. § 809(1).
68. Id. § 809(2) (emphasis added).
69. Id. § 809(4).
70. Id. § 809.
The next provision to be discussed is section 805-a, which prohibits a municipal officer or employee from accepting or receiving any gift worth twenty-five dollars or more in the form of money, service or hospitality under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.\(^7\)

The provision may represent a danger to municipal employees. The language portrays the situation solely from the donor's perspective; and the definition of gift is overly broad. A naïve municipal officer could easily be trapped. To protect himself the prudent official would refuse gifts as a matter of course. No economic loss would result, while positively, the officer's reputation would secure protection against unwarranted attack.

There is a further provision in section 805 prohibiting the disclosure of "confidential" information acquired by a municipal agent "in the course of his official duties."\(^7\) Discretion in the conduct of public affairs is essential, therefore it is reasonable that there be some provision of this general nature in Article 18. As written though, the provision has a serious defect. The term confidential is vague. What is confidential is commonly a matter of debate, particularly when there are no guidelines. Much information may be, \textit{ex cathedra}, pronounced confidential, to prevent political opponents from exposing administrative bungling. For that reason the provision may have pernicious consequences.

Finally, it should be noted that before being amended in 1970, section 806 provided for, but did not mandate, the creation of municipal codes of ethics to supplement the provisions of Article 18.\(^7\) As amended the act

\footnotesize{\begin{itemize}
\item[71.] N.Y. Sess. Laws [1970] ch. 1019 § 805-a:
1. No municipal officer or employee shall: a. directly or indirectly, solicit any gift, or accept or receive any gift having a value of twenty-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part; \ldots
\item[72.] N.Y. Sess. Laws [1970] ch. 1019 § 805-a (1) (b):
\begin{itemize}
\item b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.
\end{itemize}
\item[73.] N.Y. GEN. MUNIC. LAW § 806 (McKinney 1968).}

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requires certain governmental units to adopt local codes of ethics.\textsuperscript{74} As amended, section 806 could benefit from reconsideration by the legislature. The need for such codes has never been proven. The effectiveness of such codes is indeed doubtful. Moreover, the quality of the codes may well be uneven, depending on the quality of available legal talent. Alternatively, if the municipalities adopt some \textit{standardized} code, then the purported advantage of local regulation in response to local conditions will be lost. In either case, the institution of local codes may provide a tool for purposes of political harassment. Thus the public may be exposed to numerous overlapping, inconsistent, and possibly contradictory regulations. This may defeat what Article 18 sought to remedy.\textsuperscript{75} A return therefore of section 806 to its original form, permitting, rather than requiring, municipal codes of ethics, would improve the statute.

\textbf{CONCLUSION}

Has Article 18 adjusted the policy considerations of promoting standards of trustworthiness, while not discouraging the participation of prospective public servants? Some progress has been made toward achieving a better balance of priorities. Compared with the scope of the doctrine under the common law and predecessor statutes, Article 18 has narrowed the proscribed types of conflicts of interests. This can be maintained despite the backsliding tendency of sections 805-a and 806. Indeed, the legislature appears willing to permit conflicts when assurance is available that some form of supervision can be substituted for prohibition of the activity. This is as it should be. There is no need to forbid good faith business dealings if by some control the desired level of conduct can be achieved. To this end more extensive reliance should be placed on sealed bids, fiscal and audit controls, divestment provisions, and court and administrative supervision. The scope of activities subject to Article 18 regulation would

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\item \textsuperscript{74} N.Y. Sess. Laws \textsuperscript{[1970]} ch. 1019 § 806:
\begin{enumerate}
\item The governing body of each county, city, town, village and school district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Such code shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.
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\item \textsuperscript{75} N.Y. Sess. Laws \textsuperscript{[1964]} ch. 946 § 1.
\end{itemize}
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thereby be decreased. Moreover, since the legislative roots of Article 18 lie deep in private agency and trust law, it would be in keeping with that tradition for the legislature to declare contracts affected by conflicts of interest to be voidable rather than void. Notwithstanding the foregoing remarks, Article 18 appears to be a significant attempt to achieve uniform regulation of conflict of interests.

Finally, it should be noted that the ultimate problem in this area is that of trust, and it is difficult to disagree with the thoughts expressed by Dean Manning: "The best way to make a man trustworthy is to trust him. And the best way to attract men of dignity to public office is to treat them as men of dignity." 76

BERNARD M. BRODSKY

GROUP LEGAL SERVICES AND THE NEW CODE OF PROFESSIONAL RESPONSIBILITY

The unique monopoly granted the legal profession to render legal services imposes a duty on the profession to ensure that every person who is in need of such services has ready access to them at an affordable cost.1 While the profession has accepted the burden in regard to the indigent,2 it has become increasingly apparent that a large proportion of our population, somewhere between the poles of poverty and affluence, has been unable to obtain these needed services.3 This gap is attributable, at least in part, to the potential recipients' lack of awareness of legal services; more specifically, to the ignorance of the public as to the need and value of such services, the lack of knowledge as to where to find a lawyer and of any particular attorney's qualifications, and finally, fear of the law itself, especially its processes and delays.4 From the standpoint of the profession,


1. "The maxim 'privilege brings responsibility' can be expanded to read, 'exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it.'" Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar, 12 U.C.L.A.L. Rev. 438, 443 (1965).

2. This comment will be restricted to a discussion of the legal problems of the non-indigent, as to treat the problems of the poor would necessitate a detailed examination of current facilities designed to supply their needs. In addition, the problems of the indigent vary significantly from those of the non-indigent.

3. "The need for some device for making lawyers' services more readily available to the public is apparent from the fact that large numbers of persons of moderate means do not now obtain needed legal services—at least not from lawyers." Christensen, Lawyer Referral Services: An Alternative to Lay Group Legal Services?, 12 U.C.L.A.L. Rev. 341, 342 (1965).

4. Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 Colum. L. Rev. 973, 975 (1963).