

CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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How to Advise Municipal Clients on Ethical Matters Pace Law School, White Plains Nov. 30, 2010

***Article 18 of the New York State General Municipal Law* Mark Davies**

- I. Introduction
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To promote both the reality and the perception of integrity in government by preventing conflicts of interest violations (unethical conduct) from occurring
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- III. Structure of conflicts of interest (ethics) laws – the three pillars
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Visit our home page at <http://nyc.gov/ethics>

NYS GENERAL MUNICIPAL LAW

ARTICLE 18

Summary

By Mark Davies

Section	Content
800-805	Prohibited interests in contracts with the municipality <ul style="list-style-type: none"> • Definitions (800) • Prohibition (801) • Exemptions (802) • Disclosure (803) • Prohibited contracts void (804) • Board members' interest in real property in Nassau County (804-a) • Misdemeanor penalty for violations (805)
805-a, 805-b	Prohibited conduct (restrictions on) <ul style="list-style-type: none"> • Gifts (805-a(1)(a)) • Disclosure/use of confidential information (805-a(1)(b)) • Compensation for services relating to matters before one's agency (805-a(1)(c)) • Contingent compensation for matters before one's municipality (805-a(1)(d)) Exemption for gifts/compensation for solemnizing marriages (805-b)
806-808	Administration <ul style="list-style-type: none"> • Codes of ethics (806) • Posting of Article 18 (807) • Boards of ethics (808)
809	Applicant disclosure in certain land use applications
810-813	Financial disclosure <ul style="list-style-type: none"> • Definitions (810) • Enactment of annual disclosure local laws (811) • Default annual disclosure provisions (812) • Temporary State Commission on Local Governments Ethics (813) <p style="margin-left: 40px;"><i>Note: The powers of the Commission devolved upon the municipalities on Jan. 1, 1993 (1987 N.Y. Laws ch. 813(26)(c))</i></p>

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Article 18 of the New York State General Municipal Law

by
Mark Davies *

[PowerPoint Slide 1]

I have distributed an outline, which I'll follow. It also includes my contact information and our website address, where I will post a copy of these remarks and the slides.

Just a word on my handout. It includes

- General Municipal Law Article 18, which is the state conflicts of interest law for municipal officials (except the financial disclosure provisions),
- The hypos we'll be looking at,
- A little summary of the fundamentals of government ethics laws, and
- A set of articles
 - On Article 18,
 - On relevant non-Article 18 constitutional and statutory provisions regulating ethics at the local level, such as the Hatch Act and compatibility of public offices, and
 - On adopting an effective local ethics law.

More articles may be found on the State Bar Association Municipal Law Section's website and on our agency's website. Our website also reproduces the legislative history of Article 18 and has an article on that.

As you can see from the outline, I will first try to provide some context on ethics issues. I'm going to spend some time on that context because without it, these are all just a bunch of disconnected rules. How does all this ethics stuff fit together, and how do Article 18 and a local ethics law fit in? And by the way, government ethics laws go back millennia; they were old in Moses' time.

Not long ago I read an editorial excoriating the California Fair Political Practices Commission (California's ethics commission) because last year it imposed civil fines in only 17% of the 721 financial disclosure and conflicts of interest cases it closed. Editorials like that

* Executive Director, New York City Conflicts of Interest Board; Co-Chair, Government Ethics and Professional Responsibility Committee, Municipal Law Section, New York State Bar Association. The views expressed in these remarks do not necessarily represent the views of these organizations.

fuel a common misconception about government ethics among the public, public servants, and the media: that ethics laws are all about corruption, are intended to catch crooks, and are inherently punitive. Wrong, on all counts. They are not.

Our agency has visitors from all over the world; and they uniformly tell us, no matter how corrupt their government reportedly is, that the vast majority of their public servants are in fact honest. So what are we doing for that vast majority of honest public servants?

[Slide 2]

Why do we let the tail of corruption wag the ethics dog? Yes, we must fight corruption. Yes, we must have bribery and kickback penal laws and undercover cops and sting operations. But why do we not provide our honest municipal officials with an *effective* conflicts of interest system? Because in New York State we do not. Article 18 is pathetic, but it's what we've got; so we've got to start there.

But first of all, the context.

What do we mean by a “conflict of interest” in the government ethics context?

[Slide 3 - READ]

The purpose of a conflicts of interest (ethics) system therefore is:

[Slide 4 – READ]

Conflicts of interest are inevitable, particularly in smaller and rural communities. The question is therefore how one regulates them, how one prevents violations of the ethics law.

Out of this purpose come certain fundamental principles.

[Slide 5 – READ 1st 4 bullets]

Obviously the authors of that Sacramento editorial I referred to don't understand this. We need to educate them. Because if we expect a conflicts of interest system to do what it is not designed to do – like catch crooks and eliminate bribery and kickbacks - we will be very disappointed.

Now here in the U.S., we tend to distinguish between two approaches to conflicts of interest laws: a compliance (rules)-based approach (e.g., POL § 73 for state officials) and a values-based approach (e.g., POL § 74); and these two approaches are often viewed as contradictory.

[Slide 6 – READ]

In fact, both approaches have their strengths and weaknesses. The values-based approach promotes positive values but is insufficiently specific to provide real guidance. The compliance-based approach is specific but negative, focusing on what officials should not do and not on what should do. I would suggest, therefore, that these two approaches fit together as a single whole and should be integrated, much as many professional ethics codes do. So, **[Slides 7-9]**

Article 18 is compliance based. Most local ethics laws are compliance based, but I would suggest for your local ethics law:

[Slide 10 - READ]

The structure of an effective conflicts of interest system rests upon these three pillars, or three legs - :

[Slide 11]

The first pillar, the conflicts of interest or ethics code, forms the heart and soul of a conflicts of interest system. (Like most people I'll use the term "ethics code" instead of "conflicts of interest code.") The code must be clear, comprehensive, straightforward, sensible, and short and must set out an inclusive list of do's and don'ts that will guide and protect public officials. Simple and sensible. Bright line rules help officials the most.

[Slide 12]

[Slide 13]

The second pillar is disclosure. And the third pillar is effective administration.

If you remove any of these pillars,

[Slide 14]

The entire system collapses,

[Slide 15]

which is a major reason that Article 18 is so dysfunctional.

Conflicts of interest rules will vary from place to place, but in almost every place they will address certain basic issues, such as

[Slides 16-17 - READ]

The government may also wish to include in the conflicts of interest system restrictions on private persons and firms causing an official to violate the conflicts of interest code.

These are the core provisions of a comprehensive ethics code. But you'll note that Article 18 completely fails to address most of the major conflicts of issues.

The second pillar of an effective conflicts of interest system is disclosure. Conflicts of interest systems typically include three types of disclosure, which should work together to provide an effective disclosure system:

[Slide 18 – READ]

Sensible annual disclosure helps prevent conflicts of interest violations in several ways:

[Slide 19 – READ]

That dictates certain drafting principles:

[Slide 20 – READ]

The third pillar of a conflicts of interest system is effective administration.

[Slide 21 – READ]

The posted slides contain my views on the indicia of an independent ethics board and on the various duties of the ethics board, including the touchstones of effective enforcement. I won't go over that, but Steve will discuss running a municipal ethics board.

[Skip Slides 22-27]

Article 18. [Slide 28, heading only]

Turning then to our 4th point on the outline – Article 18. Ethics (conflicts of interest) rules for municipal officers and employees are found mainly in two places: Article 18 of the NYS General Municipal Law and your local ethics code, although narrow conflicts of interest provisions are scattered throughout the consolidated laws and even in federal law, such as the Hatch Act, which can apply to municipal agencies receiving federal funds.

Let me make one thing clear from the very beginning: Article 18, in the words of the TSC, is “disgracefully inadequate.” That’s being charitable. Article 18 is a disaster. **[Slide 28, clipart]**

It contains huge gaps; it makes no sense; it provides little guidance to you as municipal officials and municipal attorneys; it imposes a financial disclosure system that is asinine and that treats public servants like crooks; and, in the one area that it does regulate (namely, the prohibition on having an interest in a contract with the municipality), it overregulates to such an extent that it turns honest officials into criminals. For example, that prohibited interest provision required a small town to ship discarded refrigerators, stoves, and the like to another state because

the owner of the only dump in the area was a town board member; and a rural village had to contract for snow removal with a service 40 miles away (at twice the price) because the only local snow-plowing service was owned by a village trustee. And there are no waivers. Plus, there is no enforcement, except disciplinary action and criminal prosecution. Article 18 is a stupid law.

But Article 18 IS the law. Violation of some of its provisions is a crime – a misdemeanor. And there have been criminal prosecutions for violation of this law – and certainly a lot of disciplinary actions. People lose their jobs for violating Article 18. So as awful as this law is, it is still the law and it is important to know it, for yourselves and to counsel your municipal clients.

A couple years ago I gave a talk to the NYSBA on best practices to avoid pitfalls in local government ethics. And I started off by saying that, quite frankly, the only way to avoid pitfalls is for the municipality to adopt its own effective local ethics law. So I would encourage all of you to try to convince your municipal legislative bodies to adopt a local ethics law that is comprehensive and sensible. The materials contain four articles I wrote on adopting a good local ethics law.

So, Article 18.

Prohibited Interests in Contract [Handout, p. 22, #1]. This is the primary prohibition in Article 18: **[Slide 29 - READ]**.

A violation has four elements. **[Slide 30 - READ]**.

Some of the most common of the 16 exceptions are:

- (i) having an interest that is prohibited solely because the municipal officer or employee works for a person or firm that has a municipal contract, where the officer or employee is only an officer or employee of the firm, has nothing to do with the contract at the firm, and will not have his or her compensation at the firm affected by the contract;
- (ii) having an interest in a contract between the municipality and a not-for-profit organization;
- (iii) having an interest in an existing contract at the time one joins the municipality (but this exception does not apply to the renewal of the contract);
- (iv) having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls less than 5% of the stock;
- (v) having an interest in municipal contracts where the total amount paid under the contracts is no more than \$750 during the fiscal year.

[Slide 31 - READ]

E.g. You're a town board member. You own 5% of the stock in a Roof It, a family roofing business (just an investor – don't know asphalt shingle from slate one). The town goes out for sealed bids to re-roof town hall. You recuse yourself from the whole process and state on the record that 100% of any profit from this contract (if Roof It wins it) will go to the other shareholders; you won't get a dime. Roof It wins the bid (sealed bids). Any problem? (pack toothbrush – misdemeanor; you're a criminal)

- (a) Contract with town
 - (b) A company you own 5% of the stock in receives a financial benefit as a result of the contract
 - (c) You're member of board that approves the contract
 - (d) None of the 16 exceptions in section 802 applies.
- Sealed bids? Irrelevant. Recusal? Irrelevant. The fact that you personally get no money out of this? Irrelevant.

Dual employment [See handout, pp. 22-23, Dual Employment] – next issue is dual employment, where you have two PUBLIC positions. Article 18 does not address this. But common law restrictions exist on having two government jobs: you can't be your own boss (e.g., you can't be the village code enforcement officer and a village trustee), and the two positions can't be incompatible (e.g., you can't be chair of county planning commission and a town ZBA member). Also we have various statutes that prohibit certain dual office-holding. E.g., can't be on town board and also on town ZBA or planning board; can't be town assessor or work for town assessor and also be on board of assessment review [RPTL § 523(1)(b)]

The materials have a good article by Jim Cole on compatibility of public office; and there's an article on non-Article 18 ethics restrictions, particularly on holding dual municipal positions.

Prohibited conduct provisions [Handout, p. 23, Misc. Ethics Provisions]. As mentioned, Article 18 has no ethics code, just some misc. prohibited conduct provisions in section 805-a. The vast majority of existing local ethics codes in NYS are not much better. Article 18 just has: **[Slide 32 – READ]**

In particular, Article 18 has:

- No prohibition on misusing your office for private gain, the most basic ethics provision – want to hire your husband as your assistant, go right ahead (and we've got comptroller's opinions saying that's ok); or award a contract to your brother, sure why not.
- No revolving door provisions – vote today in favor of a subdivision, resign from the planning board tomorrow to go to work for the developer on that same subdivision and even appear before planning board for the developer tomorrow night – no problem.
- No restrictions on superior-subordinate financial relationships – you supervise your sister (keep it in the family); or ask your secretary if she "wants" to buy a \$50 ticket to your son's high school fundraiser (I'm sure it's a worthy cause).

- There are virtually no restrictions on appearances – you’re town attorney where town has separate ZBA counsel and you appear before your own ZBA on behalf of a private client; be my guest.

AND as pathetic as 805-a is, the only penalty for violating it is disciplinary action. For that reason, and because 805-a is so vague, a municipality can safely replace § 805-a with the municipality’s own local ethics code.

Disclosure. As I mentioned, three kinds of disclosure, and Article 18 actually has all three kinds, though in a very prostituted form.

[Slide 33 – READ]

Transactional disclosure, [Handout, p. 23, 2nd and 3rd bullets]. **[Slide 34 – READ]**

Article 18 has no recusal requirement, but as Les will discuss have it in common law and it has been implied from Article 18.

[Slide 35 – 2nd bullet]

Applicant disclosure. [Handout, pp. 23-24]. Applicants in certain land use matters must disclose certain interests of municipal officials in the applicant or the applicant. Section 809.

[Slide 35 – 3rd bullet]

Annual financial disclosure. Article 18 mandates annual financial disclosure by certain categories of officials in every county, city, town, and village with population of 50,000 or more. The disclosure article in the handout includes information on this. This is a horrible law, but we’re stuck with it for now.

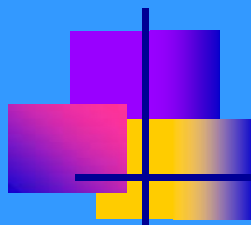
So, in conclusion, before we turn to the hypos, just 3 points:

[Slide 36 – READ]

QUESTIONS?

Hypotheticals – actual cases – ask any questions at any time. **Turn to handout** p. 13 – text of Article 18 starts on p. 3.

[Training: Pace CLE Nov 2010: Talk]



Pace Law School

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White Plains, Nov. 30, 2010

Article 18 of the New York State General Municipal Law

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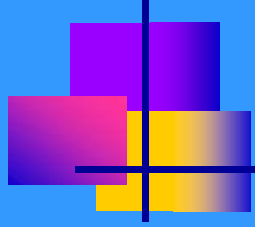
<http://nyc.gov/ethics>

The Tail Wagging the Dog

HONEST
OFFICIALS



Corrupt
Officials



“Conflict of Interest” =

Divided loyalty

A conflict, usually (though not always)
a financial conflict,

between one’s private interests
and public duty

Purpose of a conflicts of interest system



To promote

both the reality *and the perception*
of integrity in government
by *preventing* conflicts of interest violations
before they occur

Fundamental Principles



A conflicts of interest system

- Promotes both the reality and the perception of integrity in government
- Focuses on prevention, not punishment
- Is not intended to catch crooks but instead recognizes the inherent honesty of public officials
- Does not regulate morality (in most cultures)
- Does not focus on efficiency but saves the government money
- Requires that the public have a stake in the system
- Must be tailored to the particular place, society, and culture
- Must undergird the essential values of the nation, state, or locality



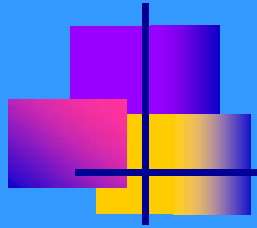
Rules ↔ Values

Rule

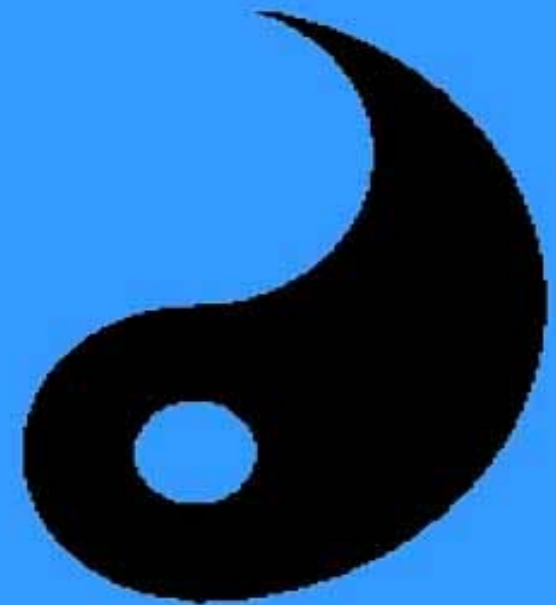
“A public official shall not accept a gift from any person or firm doing business with the government.”

Value

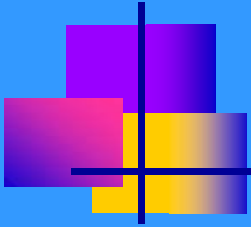
“Public officials shall place the interest of the public before themselves.”



Compliance



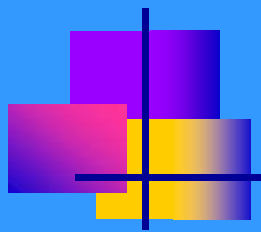
Values



Compliance



Values



Compliance



Values



Ethics → Compliance

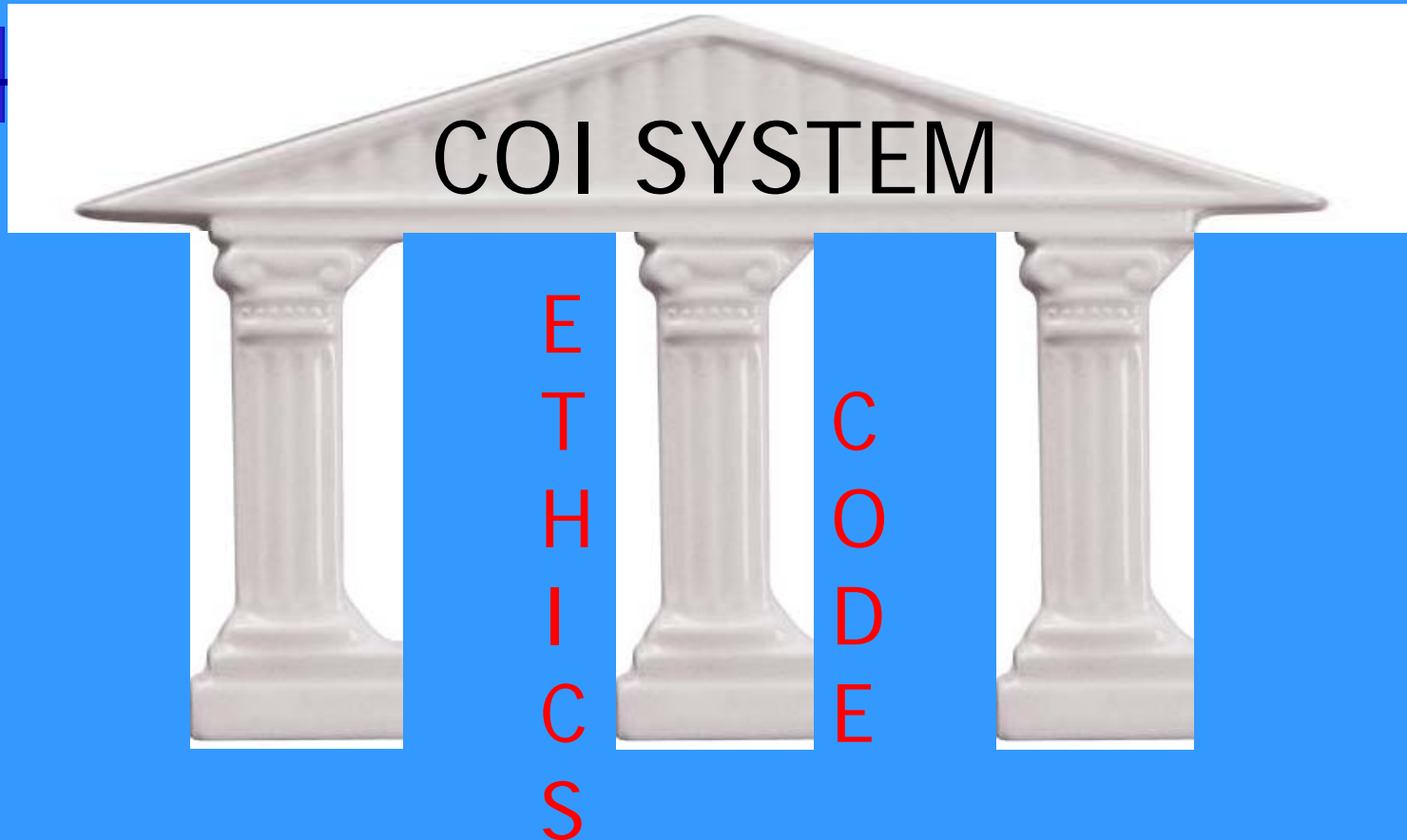
Set forth ethical precepts (code of ethics)

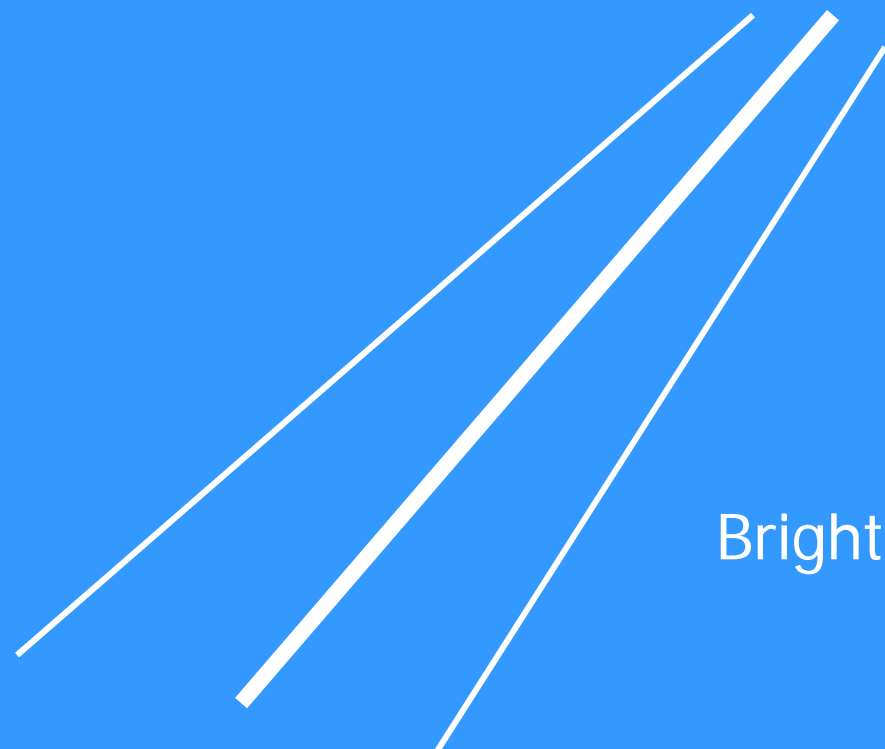
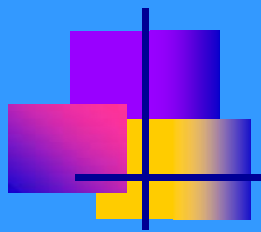
From those draw out compliance-based rules (conflicts of interest code)

Create the conflicts of interest system with

- Clear and comprehensive conflicts of interest code
- Sensible disclosure
- Effective administration by independent ethics body

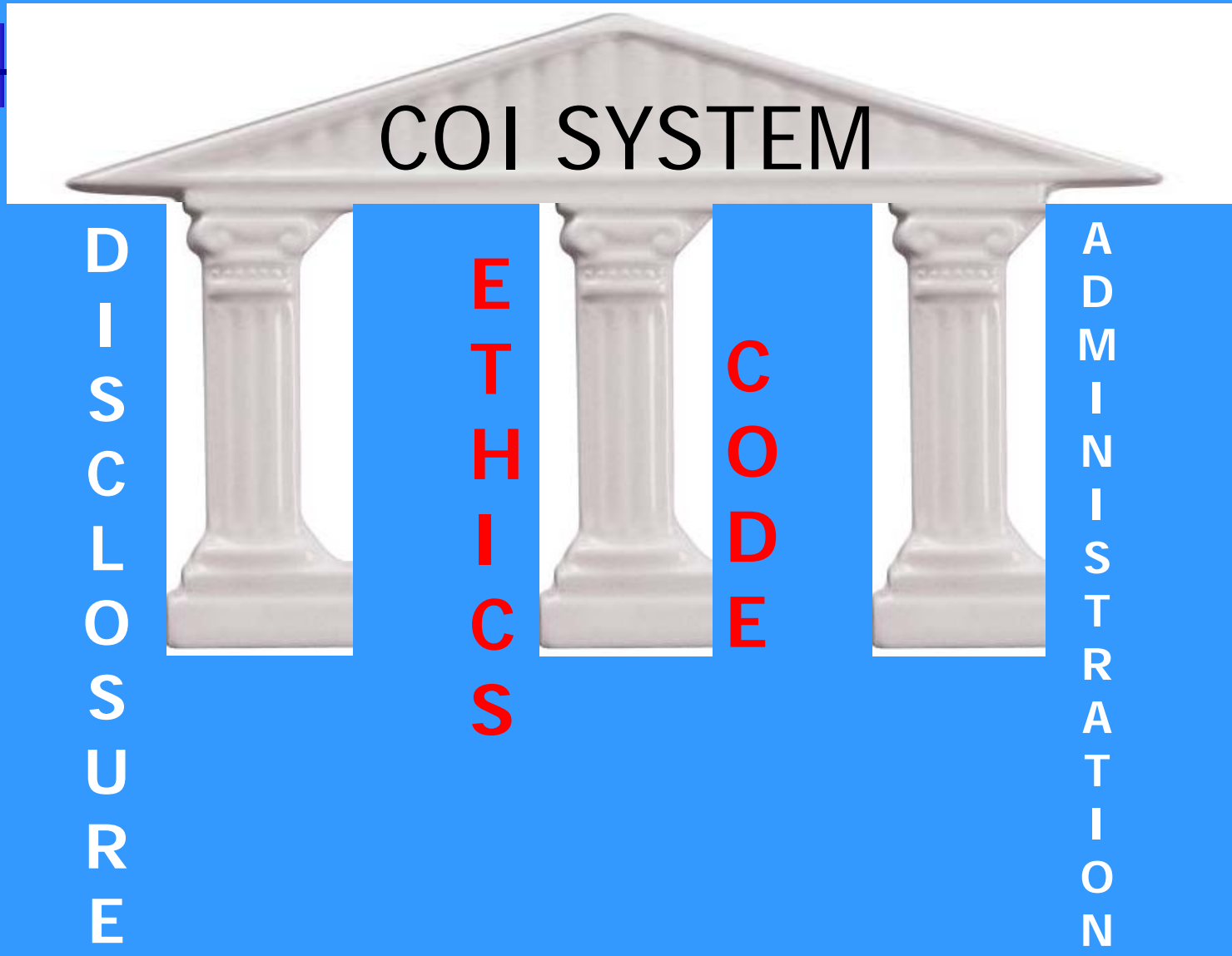
Conflicts of Interest System: The Three Pillars



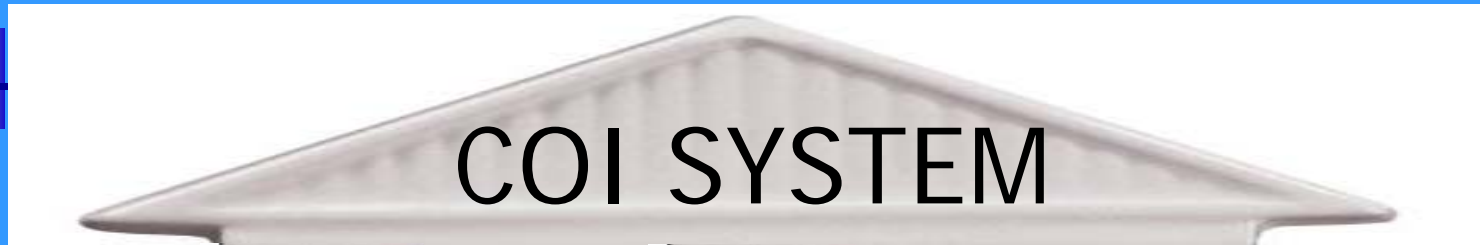


Bright line rules

Conflicts of Interest System: The Three Pillars



Conflicts of Interest System: The Three Pillars



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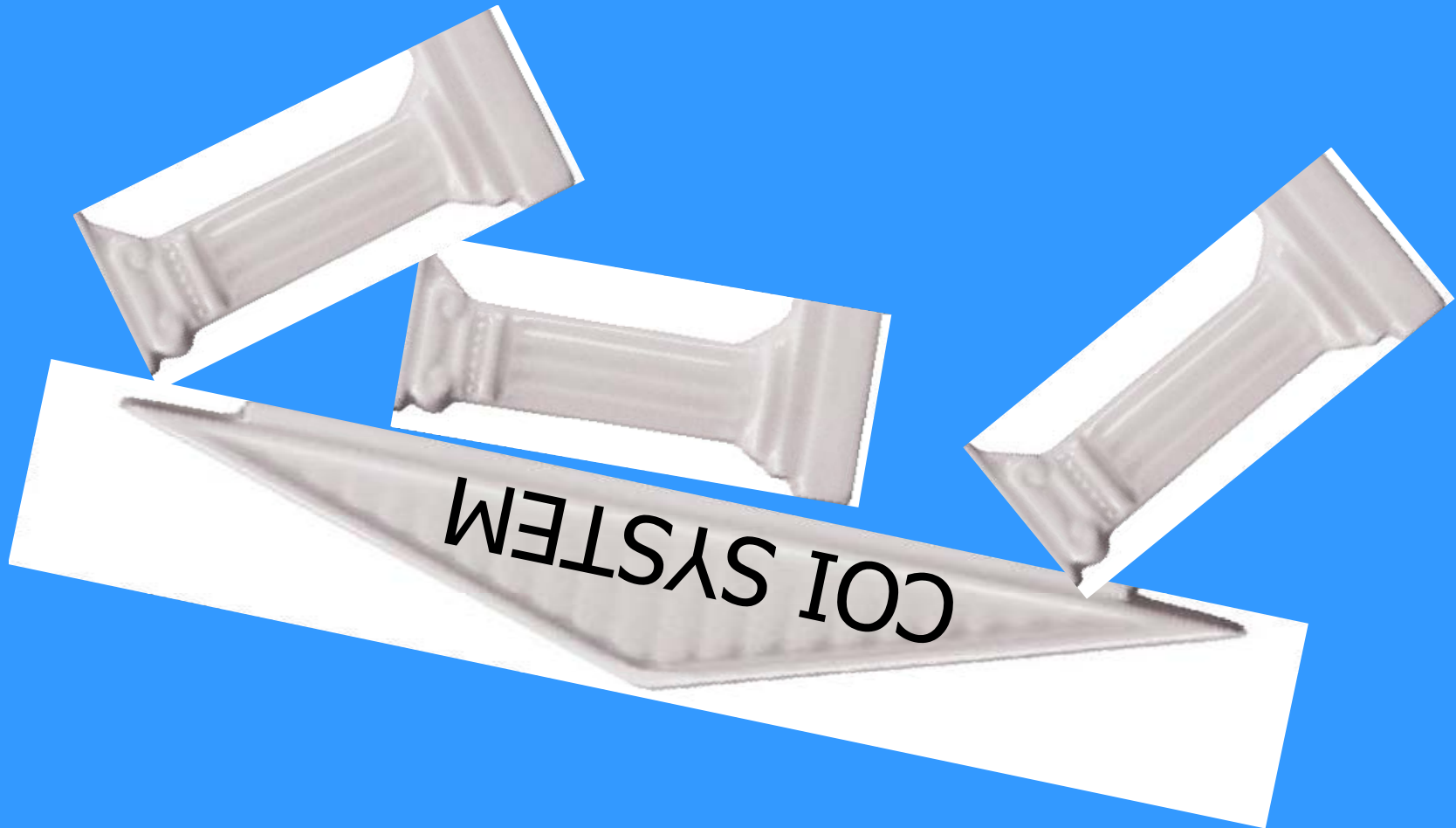
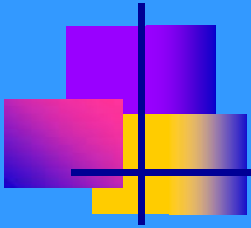


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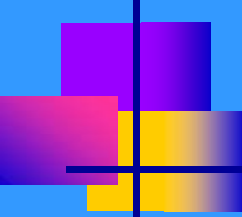
Conflicts of Interest System: The Three Pillars



First Pillar: Conflicts of Interest Code

Possible Provisions

- * = Article 18 addresses (Gen. Mun. Law § 805-a)
- Using one's government office for private gain
- Using government resources for private purposes
- * Soliciting gifts or accepting gifts from persons doing business with the government
- Seeking or accepting private compensation for doing one's government job (tips; gratuities)
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job (except as expressly permitted by law)
- * Disclosing confidential government information or using that information for a private purpose


- 
-
- * Appearing before government agencies on behalf of private interests or representing private interests in government matters
 - Seeking a job from a private person or firm with which one is dealing in one's government job
 - After leaving government service,
 - Appearing on behalf of a private employer before one's former government agency or
 - Working on a matter on behalf of a private employer that one worked on while in government service or
 - Revealing or using confidential government information
 - Inducing other government officials to violate the conflicts of interest code



Second Pillar: Disclosure

Types of Disclosure

- Transactional disclosure and recusal when a potential conflict actually arises (“My brother’s company is bidding on this contract, so I recuse”) – most important type of disclosure
- Applicant disclosure by private citizens or firms seeking government business or a government license or benefit, disclosing interests of officials in applicant or application – check on transactional disclosure
- Annual financial disclosure (asset declaration)



Annual Disclosure (Asset Declaration) Prevents Conflicts of Interest Violations By

- Focusing the attention of officials at least once each year on where their potential conflicts of interest lie
- Letting everyone know the nature of those private interests of the official that might conflict with the official's duties
- Providing a "check" on transactional disclosure by revealing if the filer is making required transactional disclosures and recusals

Financial Disclosure Drafting Principles



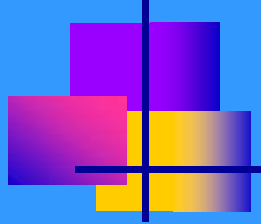
- Tie disclosure form directly to code of ethics – ask only questions that may reveal a potential violation
- Start with a blank sheet of paper and ask only such questions (zero-based drafting)
- Never let the perfect be the enemy of the good – a short form that reveals 95% of potential conflicts is better than a long form that reveals 98%



Third Pillar: Administration

Effective administration by independent ethics board:

- Provide advice on legality of future conduct and interests under conflicts of interest code
- Train all officials in requirements of code
- Administer disclosure system
- Enforce code when violations occur



Article 18 of the GML





Article 18, §§ 800-805

Prohibited Interests in Contracts

A municipal officer or employee may not have an interest in a contract with the municipality if he or she has any control over the contract, unless an exception applies. (§ 801)

Article 18, §§ 800-805

Prohibited Interests in Contracts

- Does the matter involve a **contract** with the municipality? (A claim is also a “contract”.)
- Will you **receive a financial benefit** as a result of that contract, or will your spouse or minor children or dependents or outside business or employer or a corporation in which you own stock receive such a benefit?
- Do you have any **control** as an official over the contract or appoint anyone who does?
- Do any of the **exceptions** in Gen. Mun. Law § 802 apply or is the contract an employment contract between the municipality and your spouse, minor child, or dependent?



Article 18, §§ 800-805

Prohibited Interests in Contracts

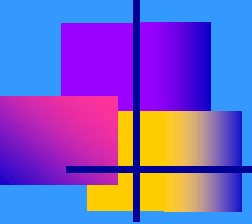
Note:

- The official does not have to be a party to the contract
- Control over the contract includes the power or duty to negotiate, prepare, authorize, or approve the contract or payments under it or audit it or appoint anyone who does
- Recusal and sealed bids are irrelevant
- Penalty: misdemeanor; contract is absolutely void



Article 18, § 805-a Prohibited Conduct

- Vague restrictions on soliciting and accepting gifts
- Prohibition on disclosing or using confidential information
- Limited restriction on being paid by a private party to work on a matter that's before your own agency
- Limited restriction on getting a contingent fee from a private party for working on a matter before your municipality



Article 18, §§ 803, 809, 810-813 Disclosure

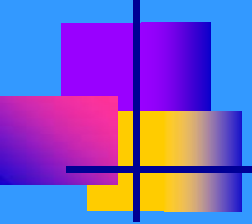
- Transactional disclosure (§ 803)



Article 18, § 803

Disclosure of Interests in Contract

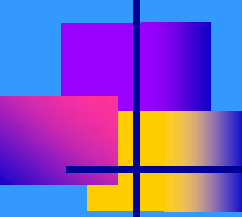
- Official has interest in municipal contract but no control over contract
- Official has control but exception in § 802(1) applies



Article 18, §§ 803, 809, 810-813 Disclosure

- Transactional disclosure (§ 803)
- Applicant disclosure (§ 809)
- Annual financial disclosure (§§ 810-813)

Conclusion

- 
-
- (1) Neither you nor your spouse nor any company you or your spouse work for or own any part of may get a financial benefit from any contract with or claim against your municipality if you, as an official, have any control over the contract.
 - (2) Find out what your local ethics code requires and obey it.
 - (3) Push to get your municipal legislature to adopt a good local ethics law that gives you real guidance as to what you can and can't do and that sets up an effective ethics board.