

# Ethical Considerations for the Private and Public Engineer

Henry A. Zomerfeld, Esq.

Air & Waste Management Association

January 25, 2024

Albany | Buffalo | Greensboro | Hackensack | New York City | Palm Beach | Rochester | Saratoga Springs | Toronto  
[www.hodgsonruss.com](http://www.hodgsonruss.com)



# Presentation Overview

1. What are “ethics?”
2. General ethical obligations and considerations for engineers.
  - Professional standards/codes of conduct
  - Disciplinary considerations
  - Licensure considerations
3. Legal obligations for engineers working for/with public entities.
  - New York law & other sources
  - Examples of violations & non-violations
  - Penalties

# So you want to know about ethics?

© Eddy Glasbergen  
www.glasbergen.com



**"I'd like you to do a presentation on business ethics. If you don't have time to prepare something, just steal it off the Internet."**

# What are “ethics?”

- Dictionary definitions:
  - the discipline of dealing with what is good and bad, and with moral duty and obligation
  - a set of moral principles - a theory or system of moral values
  - the principles of conduct governing an individual or a group
  - a guiding philosophy
  - a consciousness of moral importance
  - a set of moral issues or aspects (as rightness)

In other words, your guiding “**ETHOS**”

# What are “ethics”?

- Legal versus ethical – why does the distinction matter?

In short, its all about moral and intrinsic values . . .

- “Spirit” of the law rather than the “letter” of the law avoids problems
- Reputational risk
- Public and stakeholder perception and trust
- Providing appropriate service to your clients and communities
- Contractual obligations and risk management

# Codes of Conduct/Ethics



# Codes of Conduct/Ethics

- If you are associated with a professional organization, you are likely bound by a code of conduct/ethics or bylaws.
  - American Society of Civil Engineers (“ASCE”)
    - Code of Ethics [<http://www.asce.org/code-of-ethics/>] - maintains a Committee on Professional Conduct for enforcement.
  - National Society of Professional Engineers (“NSPE”)
    - Code of Ethics [<https://www.nspe.org/resources/ethics/code-ethics>] – maintains an “Ethics Reference Guide” promulgated by the Board of Ethical Review.
  - New York State Society of Professional Engineers (“NYSSPE”)
    - Professional Compliance Committee
  - American Academy of Environmental Engineers and Scientists (“AAEES”)
    - “Board Certified Environmental Engineer” requirements
  - New York State Office of the Professions
    - Licensed professional engineers must be of “good moral character.”

# Common Ethical Standards

- NSPE Code of Ethics includes six “Fundamental Canons,” guided by the Engineer’s Creed.
  - Hold paramount the safety, health, and welfare of the public.
  - Perform services only in areas of their competence.
  - Issue public statements only in an objective and truthful manner.
  - Act for each employer or client as faithful agents or trustees.
  - Avoid deceptive acts.
  - Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.
- These canons are embodied in the ASCE’s Code of Ethics, and the NYSSPE requires members to uphold these canons.



# Nine-Step Process by NSPE

- A. Steps to ethical engineering decisions
  1. Stop and think
  2. Clarify goals
  3. Determine facts known and unknown
  4. Develop options
  5. Consider foreseeable results of options
  6. Refer to the NSPE ethics resources
  7. Refer to state registration law for guidance
  8. Consult with respect staff or outside professionals
  9. Decide the course of action to take

Each of these has subpoints for further reflection and consideration

<https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/EthicsReferenceGuide.pdf>

## *St. Clair Nation v. City of New York*, 14 N.Y.3d 452 (2010)

- Engineer licensed by the NYS Dept. of Education utilized his seal and attested to accuracy of three projects that were found to be improper.
- New York City (“NYC”) subsequently passed an Administrative Code provision that permitted the Commissioner of the Division of Buildings (“DOB”) to refuse any documents that bear the signature of a person found to have “knowingly or negligently falsified” materials along with a report/submittal.
- Administrative proceeding commenced found in favor of DOB, and recommended that the engineer’s certification privileges be rescinded, which was adopted by the DOB Commissioner.
- Relying on NYC Administrative Code, DOB refused to accept any application or document submitted by the engineer for 2 years, followed by a 3-year probationary period.
- The engineer sued to challenge the Commissioner’s determination.

# Outcome

- The Appellate Division, First Department, agreed with the administrative law judge that the engineer negligently certified and submitted a false application for alternations, ***but*** found that the 2 year penalty and 3 year probationary period was improper because the NYC Code was enacted after the events.
- So the activity was improper, but procedurally, the penalty was not appropriate.

# Outcome



# Outcome

- The case went up to the New York State Court of Appeals (“COA”).
- The COA reversed and found that the DOB Commissioner could rely on the NYC code to refuse any documents from the engineer for 2 years, plus the 3 year probationary period, because even though the engineer’s conduct occurred prior to the adoption of the code, the provision was designed to govern future professional eligibility.
- Takeaway:
  - Being conscientious to ethical obligations *matters*. This case was about the scope of the penalty – not the underlying act.

# Licensure

- Appropriately undertaking one's duties is an inherent aspect of professional ethics.
  - Licensure indicates an engineer's ability to competently undertake professional services within a specific jurisdiction.
- In New York, the Dept. of Education has jurisdiction over the licensing of engineers (Section 7208 of the Education Law).
  - There are no specific code of ethics governing conduct. However . . . it does promulgate general requirements associated with unprofessional conduct:
    - New York Education Law § 6509.
    - 8 NYCRR 29.1.
    - 8 NYCRR 29.3.

# Key General Takeaways

- **Non-compliance with licensure requirements**
  - Best case - limitations placed on professional access and abilities.
  - Worst case – jail.
    - Education Law: Class E felony for unauthorized practice or holding oneself out to provide professional services when unlicensed. Penal Law: Class A misdemeanor for official misconduct.
- **Professional affiliations**
  - Loss of affiliation, being reported to jurisdiction-based authorities, and other sanction, depending on the organizational bylaws.
- **Reputation**
  - The effect on your business and colleagues could be extremely detrimental and harmful to long-term trust and business development.
- **Contractual**
  - Risk contractual exposure under various situations, with limited to no recourse.
  - Insurance coverage potentially being disclaimed.

# Legal Sources of Ethics – Public Bodies

- Why Awareness of Municipal Ethics Rules Matters

- **When you're hired by a public entity**

- If you're appointed the Town/Village Engineer, then many of these rules may apply to you
- There are “winning and dining” rules that apply to you
- Engineers, like lawyers, are considered trusted advisors to public bodies
- Understanding and flagging these conflicts provides value to your municipal client

- **When you're hired by a private entity**

- Your clients need approvals, variances, etc. from public bodies
- Do you want those votes compromised by conflicts of interest?
- Understanding and flagging these conflicts provides value to your private client



# Legal Sources of Ethics – Public Bodies

- Local Codes
  - Boards of Ethics establish Codes of Ethics
- State Law
  - Article 18 of the General Municipal Law
  - Public Officers Law § 74 – Code of Ethics for state employees
  - Penal Law § 195 – Official misconduct
- Administrative and Judicial Precedent
  - Common Law/Case Law
  - Opinions of the New York State Attorney General and New York State Comptroller
- Certifying Organizations and Professional Standards

# Local Codes of Ethics

- General Municipal Law § 806 requires that counties, cities, towns, and villages adopt a code of ethics.
- Local codes of ethics set forth standards of conduct for the guidance of a municipality's officers and employees.
- Code of ethics must contain, at a minimum, disclosure requirements for interests in matters before the board; holding of investments in conflict with official duties; private employment in conflict with official duties; and future employment.
- A local code of ethics may regulate or prohibit conduct which is not expressly prohibited by Article 18 of the GML, but it may not authorize conduct that is prohibited by Article 18. Article 18 is a floor, not a ceiling.
- Applicable to municipal engineers and other municipal employees

# State Law – General Municipal Law

- Article 18 of the General Municipal Law:
  - Regulates “conflicts of interest” on the part of municipal officers and employees.
  - Regulates the business dealings of municipal officers with their municipalities.
- What is a conflict of interest?
  - This phrase can apply to a variety of situations in which an individual has divided loyalties, such as when a person has to act on behalf of the public in connection with a matter that affects his/her personal interests.
  - Not all conflicts of interest are prohibited by law.
  - An interest could arise from a matter involving a relative.
  - Interests in contracts with the municipality are prohibited where the municipal employee has an interest in the contract, power over the contract in his/her official capacity, and no exceptions apply.
  - “Contract” is broad; almost any business dealing with a municipality.

# State Law – General Municipal Law

- Article 18 of the General Municipal Law:
  - “Contract” is broad; almost any business dealing with a municipality.
    - "Contract" means any claim, account or demand against or agreement with a municipality, express or implied. . . .
  - “Interest” is broad, too.
    - Interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of:
      - (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves,
      - (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.

# GML § 803 - Disclosure

- Disclosure of Interest Required
- Any municipal officer or employee (or spouse) who has, will have, or later acquires an interest in an actual *or proposed* contract, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.

# GML § 805-a

- Gifts
  - No municipal officer shall: “directly or indirectly, solicit any gift, or accept or receive any gift having a value of [\$75] 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.”
  - Check your local code of ethics.
  - Those working with municipalities must be mindful of this.

# State Law - Public Officers Law § 74

- Applies to engineers employed by state agencies. Private engineers working with state agencies should be mindful of the obligations of state employees.
- Prohibits conflicts of interest and sets forth standards of conduct.
  - No “interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her duties in the public interest.”
  - Standards prohibit the appearance of a conflict, even if no actual conflict.
- Confidentiality obligations (*e.g.*, critical infrastructure).
  - May not engage in business that will require disclosure of confidential information gained by reason of an official position.

# POL § 74(4)

- Penalty for violating knowing and intentional violations of standards of conduct:

“In addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate any of the provisions of this section may be *fined, suspended or removed from office or employment* in the manner provided by law. Any such individual who knowingly and intentionally violates [certain] provisions . . . of this section shall be subject to a *civil penalty in an amount not to exceed ten thousand dollars* and the value of any gift, compensation or benefit received as a result of such violation. Any such individual who knowingly and intentionally violates [certain] provisions . . . of this section shall be subject to a civil penalty in an amount not to exceed the value of any gift, compensation or benefit received as a result of such violation.”



# POL § 73(5)

## ▪ Gifts

- No state employee may “solicit, accept or receive any gift having more than a nominal value, whether in the form of money, service, loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance 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 her, or could reasonably be expected to influence him or her, in the performance of his or her official duties or was intended as a reward for any official action on his or her part. No person shall, directly or indirectly, offer or make any such gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances.”
- Even if you are not influenced by the gift, could create an appearance of a conflict.
- Cumulative or repeated permissive gifts could become impermissible gifts.

# Penal Law § 195

- A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit: (1) He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or (2) He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.
- Official misconduct is a class A misdemeanor.

# Examples - Advisory Opinions

- A licensed engineer retained by a Town to act as an engineering consultant could represent private clients before the town boards and perform other engineering services involving property within the town because the nature of the engineer's relationship to the Town was that of an independent contractor, not an employee. (NY Op. Attorney General No. 76-232).
- A former engineer of the DOT could not accept a position as an engineer with a consulting engineering firm because the position at the consulting firm would require the former engineer to report directly to a DOT employee and would have substantial contact with DOT employees. This would amount to an impermissible appearance in violation of the Public Officers Law 2-year bar. (NY Op. Attorney General No. 04-07).
- An engineer employed by the DEC (Engineer A) could submit an application, in his name, for his family to obtain a permit to build a dam, where another DEC engineer (Engineer B) would assist the family in obtaining the permit. This would not violate POL § 74 so long as Engineer A recuses himself from any consideration of the application in his capacity as a DEC employee. (NY Op. Attorney General No. 95-43).
- A private engineer was prohibited under the POL 2-year bar from working on projects funded by her prior state agency employer for 2 years after her termination from employment. (NY Op. Attorney General No. 90-7).

# Questions?



# Thank you!

**Henry A. Zomerfeld, Esq.**

Hodgson Russ LLP

The Guaranty Building

140 Pearl Street

Buffalo, New York 14202

(716) 848-1370

*hzomerfe@hodgsonruss.com*