



**LEGAL ASPECTS OF BUILDING CODE ENFORCEMENT**

**-January 22, 2018-**

**David J. State**

# Learning Objectives

- Identify ethics laws, rules and regulations.
- Identify agencies who analyze ethics issues and enforce ethics violations.
- Analyze ethics issues such as conflicts of interest, outside activities, prohibition on using public resources for your private benefit, and gifts.
- Understand civil lawsuits against CEOs and defense and indemnification of CEOs.
- Use Lawful Investigative Techniques, understand and comply with Constitutional requirements and write better court cases

## Basic Rule

# AVOID THE APPEARANCE OF IMPROPRIETY

“...knowing the difference between what you have the right to do and what is right to do.”

# Agencies Enforcing Ethics

- Joint Commission on Public Ethics (JCOPE)  
([www.jcope.ny.gov](http://www.jcope.ny.gov))
- NY Office of the Inspector General  
([www.ig.state.ny.us](http://www.ig.state.ny.us))
- NY Office of the State Comptroller  
([www.osc.state.ny.us](http://www.osc.state.ny.us))
- NY Office of the Attorney General ([www.ag.ny.gov](http://www.ag.ny.gov))
- District Attorneys
- Office of the United States Attorneys

# Applicable Ethics Laws and Regulations

- Public Officers Law §74: The Code of Ethics
- Public Officers Law §73: Outside employment and professional activities, restriction on political activities, nepotism, gifts, honorarium, travel, negotiations on future employment, and post employment restrictions.
  - 19 NYCRR Part 932: Outside Activities (revised July 22, 2015)
  - 19 NYCRR Part 933: Gift Regulations
- General Municipal Law Article 18
- Agency Policies/Procedures

# Conflicts of Interest

- YOU SHALL NOT: “have any 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.” NY Public Officers Law §74(2)

# Outside Activities

- Can CEOs also serve as a members of the County's Fire investigation Team?
  - ANSWER: **NO**. Possibility that Fire Investigators would be investigating the origins of a fire that had been previously inspected by them in their capacity as CEOs. If fire inspector, when acting as a CEO, issued a permit/CO there could be a reluctance to make an appropriate finding "...the appearance of impropriety should be avoided in order to maintain confidence in government." (**OAG 98-44 Inf.**)

# Outside Activities

- Can a County building inspector also serve as a Town Judge for a Town within the County?
  - ANSWER: **NO**. Judges personal involvement in the code enforcement action would prevent him from hearing case himself and an appearance of impropriety exists if the town justice, in his capacity as building inspector, is required to appear as a complainant before his fellow justice. (**OAG 88-44 Inf.**)



# Outside Activities

- Can a town building inspector also engage in the business of providing home inspection reports to prospective purchasers of homes within the town?
  - ANSWER: **MAYBE.** “it could be determined that engaging in this private business impairs the building inspector's judgment or discretion in performing his official duties in connection with properties which he has privately inspected, or otherwise conflicts with his official duties. (**OSC 89-60**)

# Outside Activities (Confidential Info.)

- **YOU SHALL NOT** “accept employment or engage in any business or professional activity which will require him to **disclose confidential information** which he has gained by reason of his official position or authority.”  
NY Public Officers Law §73(3)(b).
- **YOU SHALL NOT** “disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.”  
NY Public Officers Law §73(3)(c).

# Gifts

- YOU SHALL NOT: “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 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.” NY Public Officers Law §73(5).

# Definition of a Gift

- Items of more than “nominal value” (so if item is less than nominal value it is not a gift).
- It can come in the form of...money, service, loan, travel, lodging, meals, refreshments, entertainment, forbearance or a promise having a monetary value.
- JCOPE considers “nominal value” to be something that has a fair market value of **\$15 or less.**

# Interested Sources (19 NYCRR Part 933)

Watch out for Gifts from **Interested Sources**:

- Is regulated by or appears before you or your agency
- Has contracts with, or seeks contracts with, you or your agency
- Is a registered lobbyist or client of a lobbyist that lobbies your agency
- Is the spouse or the minor child of a registered lobbyist or client of a lobbyist that lobbies your agency
- Someone who is suing you or your agency
- Has received or applied for funds from your agency during the previous year up to and including the date of the proposed or actual receipt of the gift
- Attempts to influence you or your agency in an official action

# Interested Sources (19 NYCRR Part 933)

If a gift is from an **Interested Source**:

- It is “**presumptively impermissible.**”
- It is only permissible if:
  - It is not reasonable to infer that the Gift was intended to influence the covered person;
  - The Gift could not reasonably be expected to influence the Covered Person in the performance of his or her official duties; and
  - It is not reasonable to infer that the Gift was intended as a reward for any official action on the Covered Person's part.

# Gift Exclusions (19 NYCRR Part 933)

- Food or beverage valued at \$15 or less per event.
- Awards or plaques in recognition of public service.
- Honorary degrees.
- Promotional items with no resale value.
- Discounts available to the general public, or a broad segment thereof, e.g., wireless providers offer discounts to all government employees.
- Gifts from those with whom there is a demonstrated familial or personal relationship.
- Contributions reportable under the Election Law.
- Meals and beverages provided to participants at professional and educational programs.
- Local travel payments for tours related to one's official activity.

# Gift Exclusions (cont'd)

- Travel, food and lodging expenses for speakers at informational events when a governmental entity or in-state accredited institution of higher learning is paying the expenses or reimbursing the speaker, who is a Covered Person.
- Complimentary Attendance, including food and beverage, at a Bona Fide Charitable Event or a Bona Fide Political Event.
- You can accept these items (because they are not considered gifts under the regulations) **as long as the acceptance does not create an actual or apparent conflict of interest or give the impression of improper influence.**



# Other Gift Considerations

- Passing on Gifts to Third Parties is Prohibited
  - You cannot redirect impermissible Gifts to third parties like your spouse or child or a charitable organization and make it ok.
- Multiple Gifts from the Same Source
  - Accepting multiple permissible Gifts from the same source could be a problem if it creates an actual or an apparent conflict of interest or an appearance of improper influence.

# General Municipal Law

- No municipal officer or employee shall: a. directly or indirectly, solicit any gift, or accept or receive any gift **having a value of seventy-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. GML § 805-1(a).

# Agency Policy/Procedures

- The NFTA's, commissioners, officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub agreements

# Gift Summary

- “**nominal value**” (State)
- “**seventy five dollars or more**” (Local)
- Cannot accept “**anything of monetary value**” (Agency)
  
- Always think about the **optics**
- Always think about any appearance that item is be given to **influence** or **reward** you

# No use of Public Resources for Private

- No covered person shall use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes. NY Public Officers Law §73(3)(d)
- **Most common area for violations**

# No use of Public Resources for Private

- Running a private business out of your government office (e.g. yoga class)
- Using government supplies (computer, paper, copier, paperclips for personal/business use)
- Storage of personal equipment in government space (Grand Island – boat storage)
- Hurricane Sandy (tree removal from driveway)

# Other Ethics Issues....

- Financial Disclosure Form -- \$91K or policy maker
- Future employment once you leave government (**2 year bar/lifetime bar**)
- Reverse 2 year bar
- Job offers from entities/individuals that have matters pending before you (30 days)
- Selling goods/services to other State agencies
- Recusal/abstention from acting on matters involving family and friends

# Other Ethics Issues....

- Nepotism
- Reimbursement for travel/lodging expenses from third parties for activities that are related to your official position
- Honorarium
- Restrictions on Political Activities (Civil Service Law § 107)
  - Using State computers for campaigns (emails)
  - Asking about political affiliation as a condition of employment
  - Using State offices to collect political contributions



# Where to go for guidance...

- Agency Ethics Officer and/or Board of Ethics
- Check local ordinances rules, regulations and policies because you may have a rule that is more restrictive (Niagara Frontier Transportation Agency – NFTA)
- Union Contracts/MOAs/CBAs (e.g. outside employment for police officers)
- Joint Commission on Public Ethics (JCOPE)  
([www.jcope.ny.gov](http://www.jcope.ny.gov))

# Civil Litigation against CEOs

- Negligent Firefighters or Police Officers?
- Public interest in having officials free to exercise their discretion unhampered by the fear or retaliatory lawsuits (immunity)
- Special relationship requirement:
  - (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. *Cuffy v. New York*, 69 N.Y.2d 255, 260 (1987)

# Civil Litigation against CEOs

- Absent a special relationship creating a municipal duty there is generally no liability:
  - If City has affirmatively certified a building as safe (Certificate of Occupancy) it may be held liable for injuries caused by known, blatant and dangerous conditions
    - *Garrett v. Town of Greece/Holiday Inn*, 58 NY2d 253(1983)  
Allegation that Town issued a false CO and represented property as safe
  - Inspector can also affirmatively certify something as being safe and create liability
    - *Smullen v. New York*, 28 NY2d 66 (1971) Before entering the trench, a city inspector, who was in control of the site and had the power to stop work, assured the worker the trench was “solid” and did not need to be shored

# Civil Litigation against CEOs

- *O'Connor v. City of NY*, 58 NY2d 184 (1983):
  - Conversion of top 2 stories to a Chinese restaurant
  - City inspector visits building nine days before explosion but failed to notice an open ended pipe with no gas shut off valve as required by City regulations
  - Nine days later the owner is observed opening a side walk curb valve outside the building, the gas escapes into the building through the uncapped pipe and the explosion levels a 3 story building in lower Manhattan killing 12 people
  - Court dismisses case in favor of the City and holds “the inspector did not in any sense direct, or even acquiesce, in the restaurant proprietor's unauthorized opening of the sidewalk valve nine days later.”

# Defense and Indemnification

- Must request representation in writing after being served
- Shall provide for the defense of the employee for an act or omission alleged to have occurred while to employee was acting “within the scope of his public employment or duties” (Public Officers Law §17)
- Shall indemnify provided act or omission is “within the scope of his public employment or duties” and injury did not arise from intentional wrongdoing
- You must cooperate in your defense!

# The Constitution applies to CEOs

- Government Official charged with building code enforcement
- Work is important and tangible
- “Exercises sovereign powers of government” Op. Atty. Gen. 95-40 (Inf.)
  - People of the State of New York v. \_\_\_\_\_
- You’re a “Public Officer” within the meaning of the NY Public Officer’s Law
- The Constitution (Federal and State) applies to you!

# The Fourth Amendment

“The right of the people to be **secure in their persons, houses, papers, and effects, against unreasonable searches and seizures**, shall not be violated, and no warrants shall issue, but upon **probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Constitution, Amendment IV.

# The Fourth Amendment

- 4th Amendment prohibits unreasonable searches and seizures without a warrant supported by probable cause
- If **reasonable expectation of privacy** (e.g. home, personal bags) then government official needs to show probable cause and obtain warrant
- If no reasonable expectation of privacy then no warrant required
  - *California v. Greenwood*, 486 US 35 (1988) – no expectation of privacy in opaque garbage bags on street for collection



# The Fourth Amendment

- *Camara v. Municipal Court of San Francisco*, 387 US 523 (1967):
  - The Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence.
- *See v. Seattle*, 387 U.S. 541 (1967):
  - Person may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse.

# The Fourth Amendment

- Recent cases still cite to *Camera* and *See*
- *Aylward v City of Buffalo*, 2015 N.Y. App. Div. LEXIS 1093 (4th Dep't Feb. 6, 2015).
  - Real Property Tax appraisals.
  - Rejecting request for interior inspections for appraisal because City failed to show that their interest in conducting them outweighed Fourth Amendment privacy rights of homeowners.

# The Fourth Amendment (Exceptions)

- Consent : Use Criminal Procedure Law 710.30 Notice to document this and other key issues (ownership/agency; condition); Notes/emails discoverable.
- Can tenant consent for landlord (3<sup>rd</sup> party consents)?
- *People v. Rosenthal*, 59 Misc.2d 565 (Civ. Ct. 1969)
  - Absentee landlord but tenant consents to inspection and CEO finds deteriorated garage and porches and building unsound (cracked plaster in interior bathroom and in common hallway)
  - Held, tenant cannot give consent and evidence suppressed for interior; garage and porch ok as outside investigations
- Landlord retains right to reenter for management but no right to grant permission to police

# The Fourth Amendment (Exceptions)

- Open fields (wooded areas, open water, vacant lots)
  - An individual may not legitimately demand privacy for activities conducted outdoors in fields, except in the area immediately surrounding the home (curtilage) *Oliver v. United States*, 466 U.S. 170 (1984)

# The Fourth Amendment (Exceptions)

*California v. Ciraolo*, 476 US 207 (1986):

- Police fly over man's home in fixed-wing aircraft at 1000 feet in public airspace and see marijuana being grown in backyard
- Held, no reasonable expectation of privacy even when owner has gone to the extreme of erecting a 6-foot outer and 10-foot inner fence in order to screen the area from ground-level view
- No warrant for "police travelling in the public airways at this altitude..."

# The Fourth Amendment (Exceptions)

- *California v. Ciraolo*, 476 US 207 (1986).
- *Dow Chemical v. US*, 476 US 227 (1986), EPA did not violate the 4<sup>th</sup> Amendment when it took photographs of the Dow Chemical plant from an aircraft at altitudes of 1200, 3000, and 12,000 feet.
- *Florida v. Riley*, 488 US 445 (1989), Upholds warrant applications based on Officer' observations flying in helicopter flying 400 feet over property and observes MJ field.
- Drone Technology and the 4<sup>th</sup> Amendment (51 California Western Law Review – 5/1/15 – Veronica E. McKnight)

# The Fourth Amendment (Exceptions)

- **Observation from Public Place**
  - Inspection from public vantage point or neighboring private property with permission
- **“Licensing programs”** which require inspections prior to operating a business (*See v. Seattle*)
- **Emergency/Exigent Circumstances**
  - Fire or imminent danger of loss of life, limb or property
  
- **Plain view**
- **Pat down searches**

# The Fourth Amendment (Warrant)

- Warrant: Can be issued for observation only (*People v. Katz*, 112 Misc.2d 59 (2nd Dept. 1980))
  - Application by police...“or other public servant acting in the course of his official duties” CPL § 690.05(1)
  - Example, Third Floor Occupancy



# **Massachusetts v. Neilson, 666 NE2d 984 (Mass 1996)**

- **Fitchburg State College**
- **Residence Hall Contract : “residence life staff members will enter student rooms to inspect for hazards to health or personal safety.”**
- **Maintenance worker hears a cat inside a suite with 4 bedrooms**
- **Notices posted on bedroom doors that check would be done at 10:00PM to ensure cat removed**

# Massachusetts v. Neilson, 666 NE2d 984 (Mass 1996)

- **10:00PM search (student not present)**
- **Officials notice light coming from closet and fearing fire hazard they open closet door**
- **Find 2 large marijuana plants, lights, fertilizer and cultivation tools**
- **Campus police called and seize the pot without warrant and prosecute student**

# Massachusetts v. Neilson, 666 NE2d 984 (Mass 1996)

- Student challenges seizure of pot as violating 4<sup>th</sup> Amendment
- Court ok with entry to search for cats (consent)
- Court ok with entry into closet to inspect for fire hazard (health and safety/consent)
- Court not ok with police search and held police should have obtained warrant based on information from officials

# The Fifth Amendment

- “No person shall...be compelled in any criminal case **to be a witness against himself**, nor be deprived of life, liberty, or property, **without due process of law**; nor shall private property be taken for public use, without just compensation.” U.S. Constitution, Amendment V

# The Fifth Amendment

- Before you take away a person's life, liberty or property you must provide them due process by giving them notice and an opportunity to be heard.

# The Fifth Amendment (Notice)

- Your giving them notice by using NOV's, Court Filings (Information), Appearance Tickets etc.
- Important to be clear, consistent, specific and accurate in this documents

# The Fifth Amendment (Notice)

In Informations:

- Cite Law
  - Home owner should be able to go look up the law
- Cite facts
  - Non-hearsay allegations
- Specific facts not conclusions (Not in compliance with the Code is a NO-GO)
- If mistake is made, don't worry, NO DOUBLE JEOPARDY!!!

# The Fifth Amendment (Notice)

- THE ROOF IS DETERIORATED (**NO!!!**)
- THE ROOF HAS 3 HOLES IN IT ON THE LOWER FRONT AREA OF THE HOME (**YES**)
- THE PROPERTY HAS HIGH GRASS (**NO!!!**)
- THE FRONT YARD HAS GRASS IN EXCESS OF 12 INCHES IN HEIGHT AT THE AREA ADJACENT TO THE CITY SIDEWALK(**YES**)
- STRIVE TO PROVIDE DETAILED FACTUAL ASSERTIONS
- ATTACH AND USE PHOTOGRAPHS



# INFORMATION DOCUMENT (Form and Content; CPL §100.15)

CT 317 - REV. JULY 1985

THE CITY COURT OF BUFFALO, NEW YORK

COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK  
Plaintiffs

vs.

Tom Smith  
123 Main Street  
Buffalo, New York 14209

Defendant(s)

INFORMATION  
-- Page One --

RE: 123 Main St.

# STORIES  
# DWELLING UNITS  
 VACANT  OCCUPIED

I, **GEORGE W. BUSH**, the Complainant herein, am a **BUILDING INSPECTOR** for the City of Buffalo and I maintain offices in Room 301, City Hall, Buffalo, New York.

The defendant named above in this action, did own the property listed above, in the City of Buffalo, and did there violate the Ordinances of the City of Buffalo on or about the 18<sup>th</sup> day of DECEMBER 2008, to wit:

Count	Chapter	Section	Description Of Offense
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WHEREFORE, I request that this Court issue a Summons requiring the Defendant(s) to appear before this Court.

I HAVE READ THIS INFORMATION WITH THE UNDERSTANDING THAT FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

\_\_\_\_\_  
COMPLAINANT

CT 317 - REV. JULY 1985

THE CITY COURT OF BUFFALO, NEW YORK

COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK  
Plaintiffs

vs.

Tim Smith  
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Defendant(s)

INFORMATION  
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RE: 123 Main Street

# STORIES

# DWELLING UNITS

VACANT  OCCUPIED

THE FACTS ON WHICH THIS ACCUSATION IS MADE ARE OF MY OWN KNOWLEDGE. AND ACCORDING TO CITY OF BUFFALO RECORDS.

- 1) INSERT FACTS  
INSERT FACTS  
INSERT FACTS

Based on City of Buffalo Department of Assessment records which were consulted on (date) 12/17/2008 found the above-named defendant did OWN the property listed above on the above same date.

WHEREFORE, I request that this Court issue a Summons requiring the Defendant(s) to appear before this Court.

I HAVE READ THIS INFORMATION WITH THE UNDERSTANDING THAT FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS "A" MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

\_\_\_\_\_  
COMPLAINANT

Verified this \_\_\_<sup>th</sup> day  
of DECEMBER, 2008

- Name of Court with which it is filed
- Title of action (People of the State of NY versus...)
- Accusatory part (designate the offense charged) Watch out for over charging
- Factual part (alleging facts of an evidentiary character supporting or tending to support the charges)
  - Tip: Review law and compare to facts
  - Tip: Avoid conclusions like “deteriorated” or “does not comply with the code”
- Subscribed and verified by complainant (i.e. sworn to under penalty of perjury)

# Criminal v. Civil Court

- Consider Civil Court
- Different burden of proof
- Public nuisance declaration

# Enforce the Code and Win!!

- Train
- Assemble your team
- Plan the work/work the Plan
- Do dry runs
- Conduct an After Action Review
- Learn from your mistakes and improve

QUESTIONS?

DAVID J. STATE

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