

# Town of Clifton Park

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ETHICS BOARD



BRIAN GLICK  
Chairman

## ETHICS ADVISORY BOARD MEETING Minutes October 24, 2017

**Present:** Chairman Brian Glick, Ronald Ochrym, Linda Campion and James Mahon

**Absent:** Linda DiCaprio

**Also Present:** Tom McCarthy, Esq., Town Attorney  
Jonathan Schopf, Esq.

Chairman Glick called the meeting to order at 6:30 p.m. and advised that the Annual Ethics Disclosure forms received from Mary Anne Mariotti, Susan Leonard, Terrance Cosgrove, James M. Mahon, Linda DiCaprio and William Tierney, which he had distributed to the board members electronically, had all been reviewed by the Board members present and found to be acceptable.

### OLD BUSINESS

1. **Request for advisory opinion dated May 5, 2017 received from Town Zoning Board Chairman, Michael Dudick.**

Mr. Glick reminded the Board that Michael Dudick, the Town's Zoning Board of Appeals Chairman had requested an opinion relative to his acting as an MC/Moderator for the Stewart's Corp. at a Public Meeting held on 4/27/17 in the City of Troy, for which he was to be paid a fee.

Although an Ethic's Board meeting was held on August 3<sup>rd</sup>, 2017, it did not have a quorum, but the members present at that meeting thought it would be better to have Mr. Dudick recuse himself from any applications involving Stewart's indefinitely. However, a written decision had never been issued. A discussion was had regarding Mr. Dudick's request and it was agreed a written decision would be issued promptly requiring Mr. Dudick to recuse himself from any matters before the Zoning Board of Appeals involving Stewart's.

### NEW BUSINESS

1. **Request for advisory opinion dated October 4, 2017 received from County Supervisor for the Town of Clifton Park, Jonathan G. Schopf.**

Mr. McCarthy provided the Board with some background regarding Jonathan Schopf's request. He explained that there has been a considerable amount of correspondence between Mr. Schopf and the two (2) local Town Justices. He explained that the issue currently before the Board has legal and ethical conflict questions. His advice to the Board is that there is only one Town of Clifton Park Ethics Code and the Town

Board has only delegated this Board with the responsibility to interpret it. He referenced an article distributed earlier this year when new members were appointed from the state Bar's Municipal Law publications on how to run an ethics board, and pointed out that as one recent article states; Town Counsel may think he's in the best position to decipher these things, but the Town Code doesn't say the Town Attorney decides these matters. Further, your going to see correspondence from the Judges offering opinions, but keep in mind that they haven't been appointed to interpret the code either. The Town Code says this Board decides them as an independent advisory body. . He added that both he and Chairman Glick felt it would be best to obtain the backstory first hand from Mr. Schopf who had been invited to attend tonight's meeting, prior to distributing copies of the related correspondence to the Board members for review. He reminded the Board that a decision does not necessarily need to be made this evening and invited Mr. Schopf into the conference room.

Jonathan Schopf entered the meeting at 6:45 p.m. and was welcomed by Chairman Glick. Mr. McCarthy explained to Mr. Schopf that he and Chairman Glick had decided that the best way to review his request would be to first hear from him directly as to what the issues are from his perspective; what his job entails; and what the four (4) categories of representation referenced in his letter entail.

Mr. Schopf advised the Board that:

- He has a private practice in addition to his position as County Supervisor;
- He is in local Courts quite a bit for all different types of reasons;
- Although he is rarely in Clifton Park Town Court an immediate issue has arisen with regard to a pending animal case;
- He is locally known as "the animal attorney"
- He represents most of the local animal shelters and has developed a niche practice representing owners of animals that bite people or other dogs and end up in Town Court;
- In those matters, the tickets are issued by the Town Animal Control Officer; the tickets are served upon the defendant; and the defendant, whom he represents then appears in court;
- In summary, a ticket is issued by town employee, is prosecuted by a town employee (the Town Attorney) and a Town Judge oversees the matter; and
- The only variable here is his position as a County Supervisor.

Upon inquiry from Mr. Glick, Mr. Schopf explained that:

- He is the County Supervisor for the Town of Clifton Park, which is an elected position;
- That sometime ago, Saratoga County went to a weighted voting system based upon population and because Clifton Park has such a large population, they get an extra position called County Supervisor;
- Clifton Park has 2 seats on the Saratoga County Board of Supervisors, one is held by himself and the other is held by Phil Barrett;
- He is elected only by the people within the Town of Clifton Park;
- He has zero contact with the Government of Town of Clifton Park other than he represents the interests of the Town at the County level;
- He votes on the County budget, anything to do with grant funding or providing grants to the County, as well as personnel issues;
- He does not vote on the Town Budget, sit on the Town Board and rarely attends Town Board meetings unless he is asked to or unless there's a County issue before the Board;
- He does not have an office at Town Hall;

- His position is different than Phil's because Mr. Barrett runs the Town, sits on the Town Board and also goes up to the County 3 or 4 times a week to sit on the County Board of Supervisors;
- He and Mr. Barrett split their weighted vote for the Town and each get one half of the Town's population to vote at the County level;
- He receives no Town funds;
- At the County level he votes on budgets for public safety, the sheriff's department, Medicaid and Medicare which is paid through the County, highways; and
- That he is paid by the County of Saratoga and not the Town of Clifton Park.

Upon inquiry from Chairman Glick as to the different Court levels, Mr. Schopf explained:

- There are Village Courts and Town Courts which have jurisdiction over town code matters, traffic infractions and crimes committed within the Town, misdemeanor offenses; landlord/tenant matters; and things of that nature;
- County Court consists of Family Court, Criminal Court that handles felony matters and Surrogates Court for wills and probate; and
- Supreme Court.

Chairman Glick inquired whether under his jurisdiction as County Supervisor, funding for any of these Court levels comes out of the County. Mr. Schopf responded that:

- Supreme Court sits at the County and shares space within the same building as the County
- The County does provide offices for the judges and facilities maintenance at the buildings;
- However, the salaries for the Supreme Court Judges, supplies and things of that nature come out of the Office of Court Administration's budget, which the County is not involved in; and
- The Town Judges may be somehow compensated for other things through the Office of Court Administration.

Chairman Glick inquired whether County elections fall under his jurisdiction as County Supervisor and what budgets are passed by the County and Mr. Schopf responded that:

- He has nothing to do with the election of the county clerk, county coroner, county sheriff as they are all elected at the County level;
- Everyone in the County has an opportunity to vote on those positions;
- Budgets for the coroner's office, the county clerk and the sheriff are passed at the County Level; and
- He takes his Oath of Office pursuant to County Law, which is on file in the County Clerk's Office;

Mr. Schopf indicated that the research he has done on this issue has shown that:

- Other than 1 local county local law that was passed in 1968 to correct how the weighted voting was done, the position of County Supervisor doesn't widely exist in New York State;
- It is not included in the definition of Town Officer under NYS Town Law;
- It is not included under the NYS County Law;
- An online search of the Town's Ethics Code does indicate that the Ethics Code applies to a County Supervisor;
- The Town added a special law when he was first appointed 2 years ago to fill a vacancy and he is

now running for full 2-year term;

- In his view, there are 3 branches of government. He represents the people of the Town at the County level and he is trying to represent clients in a judicial setting, which is an entirely separate branch;
- He doesn't believe he is doing anything ethically improper by crossing those 2 branches of government because the judiciary is supposed to be independent of the 2 branches;
- He does not believe he can represent someone on a zoning or planning approval issue before the Planning or Zoning Boards, as that would be an appearance before the executive portion of the government and monies would be changing hands for his representation;
- He believes the Town Ethics Code prohibitions against representing individuals seeking approval from the Town was written to deal with those applications for approval of a permit or a project and those types of things and not to the representation of private clients in court.
- He has attempted to get opinion on this from the both the Attorney General's office and the Comptroller's office, but because it deals with an interpretation of a Town's Ethics Code, no one will provide him with an opinion.
- There is an opinion from 1980 from Comptroller's Office where a County Legislator was asking whether he could appear for clients in Town justice courts or before planning boards and things of that nature for people within his district;
- The Comptroller's opinion at that time was that there is no state law or common law rule that prohibits it and that the County Legislator should seek an opinion from his local ethics board as to any appearance of impropriety under the local codes.;
- The State Bar Association will only issue opinions dealing with their rules of professional conduct but not as to the local ethics code, which is the basis for the current concern put forth by the local judges. He seeks an advisory opinion as to the applicability of the Town's Ethics Code. and
- There is a provision of Town Ethics Code that says a Town Official cannot represent someone against the interest of town.

Mr. McCarthy stated that there is a 1992 ethics opinion from this Board that said other Town Attorneys can't defend these types of cases because the Town Attorney's office presents them or prosecutes them, and the office is a unified office.

Upon inquiry from the Board as to how the issue at hand arose, Mr. Schopf explained that:

- The case where this became an issue was the O'Neal case in which he was retained to represent O'Neal who was accused of having a dog off leash, which is a relatively minor violation that carries a \$25 fine under the Town Code;
- O'Neal strongly felt he wanted to take it to trial and he was retained;
- The matter was assigned to Judge Hughes;
- It was pending for a month or so when he received either a phone call from Chambers or a letter which indicated the Judge wanted to have a court conference with him and the Town Attorney because he was worried about a conflict;
- He met with Judge Hughes who advised he felt uncomfortable with a Town Judge overseeing the case, prosecuted by the Town Attorney and having a County Supervisor appear for the defendant;
- He told Judge Hughes if he was uncomfortable he would have no objection to him recusing himself;
- Judge Hughes responded that he would look into transferring the case to another jurisdiction;
- Other than Judge Hughes indicating his general discomfort, he did not cite any other legal basis or specific code violation for his opinion;
- Judges can recuse themselves for any reason or no reason, and they don't have to disclose their

reasons.

- He ran against Judge Rybak 3 years ago for the position of Town Justice;
- Judge Rybak has never been assigned to any of his cases, which he presumed was because of that relationship;
- If both Judges in Clifton Park were to recuse themselves the matter would get reassigned to another Town Court within the County;
- Apparently Judge Hughes recused himself from the case because a couple months later he received a letter from Judge Rybak indicating he was now assigned to the O'Neal case;
- Judge Rybak also stated in his letter that he felt his representation of Mr. O'Neal was a violation of the Town Ethics Code because he was representing a client against the interests of the Town;
- Mr. Schopf asserted that he was not representing someone against the interests of the Town because the matter was entitled The People of the State of New York v. O'Neal;
- He had offered a description of his job and responsibilities as County Supervisor to show it was not a conflict with the Town directly;
- He received no response back from Judge Rybak;
- Although he did not feel his representation of Mr. O'Neal was improper, he had refunded O'Neal's retainer, obtained another attorney for him and had advised the Court he would seek an opinion from the Town Ethics Board;
- Despite the issue raised by the Judges on the O'Neal case, he continued to represent clients on Vehicle and Traffic Law matters in Town Court to which no objections were received; all of which were handled in the normal fashion with plea bargains;
- Thereafter, he was in the middle of a speeding ticket matter, which was a State Police ticket issued to Paul Sullivan when he received a joint letter signed by both Judge Rybak and Judge Hughes stating he was continuing to violate the Town Ethics Code, which stated they felt fell under the ban on being involved in a Business Dealing with a party and the Town because the judges would need to approve any a plea bargain.

Mr. McCarthy counseled that Board that will have to evaluate whether it's in the town's interest to have its tickets upheld. In other words, whether, when a town security or animal control officer writes a ticket and the Town Attorneys present it, is the Town a party, and is the lawyer defending against that ticket "representing someone against the interests of the Town"

In closing Mr. Schopf stated that:

- The Town Judges can recuse themselves for any reason or no reason;
- In any situation if the Judge feels that there's an issue with their hearing the case they have the duty to recuse themselves;
- He does not believe he has the duty to withdraw his representation;
- His clients have the constitutional right to select an attorney of their choice to represent them in Court and absent a conflict, they have the right to proceed;
- What has upset him the most about this situation is that in the latest correspondence the Judges are effectively removing him from the case based upon their personal interpretation of the Town's Ethics Code without holding a hearing;
- His client does not want another attorney;

- Although he has appeared before virtually all of the Judges of Saratoga County at one point or another, this is the only time this issue has been raised;
- He doesn't see this as a conflict;
- He routinely recuses himself at the County on certain matters because his wife is a highly placed attorney at the Department of Environmental Conservation and there are matters at the county that he just can't vote on or participate in;
- Because of the separation of powers, he could not appear in front of the County Planning Board on behalf of a client because of his position as County Supervisor;
- He used to represent quite a few towns in Saratoga County, including Clifton Park, on tax certiorari matters, and even there, where he because he would be seeking to uphold the tax base, he doesn't get involved in those cases anymore because of his position;
- This is a unique issue because he has a niche practice as the animal attorney; and
- The reason the dog bite cases are so contentious at the Town Court level is because a lot of what happens in that determination is going to impact that person civilly.

Mr. Mahon pointed out that the Town Law says that this Board are the only people designated to make that call.

Chairman Glick thanked Mr. Schopf for coming in and predicted the Board would have a decision within the next 4-6 weeks, if not sooner.

Mr. Mahon inquired whether Mr. Schopf had anything pending which would require a ruling sooner.

Mr. Schopf replied that in the last correspondence on the Sullivan Vehicle and Traffic matter, he had asked the 2 Judges to recuse themselves or in the alternative, to give him 60 days to obtain an opinion from the Town Ethic's Board and that although they had declined to recuse themselves, they did give him 60 days from October 12, 2017. He would therefore, need an opinion roughly by December 12, 2017.

Mr. McCarthy inquired as to whether or not Mr. Schopf feels that the issues relate to the fact that he ran a contested election against one of the Judges involved.

Mr. Schopf replied that based upon hearsay information he's received in conversations with other people, he believes it is absolutely a personal attack by Judge Rybak against him.

Mr. McCarthy asked him for the basis for that statement.

Mr. Schopf replied that he honestly doesn't know why there is the attitude from Judge Rybak towards him. He explained that as a matter of judicial ethics candidates are not allowed to say bad things about each other or talk about anything other than how you would run a courtroom and conduct yourself in public. You cannot give opinions on how you would decide on a particular legal issue and that he believes he ran a neutral election. He added that He had heard a lot of back and forth from friends and associates concerning the aftermath of the election, coming from Judge Ryback. From other discussions he has had as from the latest letter received from both Judges, in his opinion, he feels Judge Rybak is not going to stop at this level and is going to attempt to seek to preclude him from representing clients in all courts in Saratoga County. He doesn't see the basis for this under the Town's Ethics code, which is the law being cited.

Mr. Ochrym inquired as to why Judge Hughes signed the letter.

Mr. Schopf replied that Judge Hughes had told him he felt that he had to go with Bob (Rybak) on this because of the ethics issue. He again stated that in his opinion if that is an issue, then they should be recusing themselves. He added that if he was in their position; had won the election and Judge Rybak had appeared in front of him, he would have recused himself just because of having run against him and for no other reason. He advised that he found it ironic because he never appeared in front of Judge Rybak prior to the election and never even spoke to him except for a few times during the election.

Mr. Mahon asked whether the Judges know that it is this committee's job to determine the ethics of this and wondered why they had not brought the issue to the Board, because it seems to him that if this is not a personal issue, the legal procedure would be for the Judges to present the issue to the Board for an advisory opinion versus unilaterally determining the situation.

Mr. Schopf replied that there is certainly a procedure for bringing an ethics complaint and that he has requested an opinion from the Board himself to clarify the issue. He thanked the Board for their time and advised that if there are any further questions or documents needed to feel free to reach out to him, although he had provided Mr. McCarthy with everything that wasn't attorney-client privileged correspondence. Mr. Schopf left the meeting at 7:31 p.m.

Mr. McCarthy advised the Board that his advice would be to:

- Decide what part of the Town's Ethics Code would be violated if Mr. Schopf were to appear in Town court if any;
- Decide if there is a basis for finding prohibitions under the code and if so, then to parse out the 4 different kinds of cases that Mr. Schopf has identified in his request, and apply the code to each of the four scenarios.
- Decide in each case whether Mr. Schopf is or would be representing someone "against the Town's interests";
- That would include Deciding whether the Town has an interest in upholding it's the tickets written by Town Enforcement on the one hand, the Sheriffs and State Police on the other as it relates to VTL tickets;
- That it may be a very close call on whether Mr. Schopf's representation on animal issues is against the interests of the Town and if so, whether that is outweighed by the clients right to an attorney of his or her choice;
- Decide whether the sections of the Code dealing with business dealings or in seeking approvals from the Town Code are intended to apply to this situation or if it is intended to apply more directly when it's a case where somebody is battling the Town Board or the Zoning Board in land use or permit type situations or otherwise where the Town is more directly involved such as a contract matter or Real Estate transaction.
- Pay attention to the progression of the correspondence and ask yourself why, what is the basis there;
- Decide whether this or that scenario would violate any section of the code of ethics and if it does, what section and if it doesn't, then why not; and
- Consider whether there might be another forum available to the Judges, such as the Office of Court Administration that could render an opinion on this and if they haven' been asked to review it, consider why.

Chairman Glick commented that one of the things that brought it home for him was when a decision goes against the dog owner and they put the dog down, then civilly there's a liability and responsibility on the owner's party for the bills that are incurred, which he now understands. In addition, Mr. Schopf had discussed those types of charges having certain implications which could be upwards of millions of dollars. He added that upon his initial read of things, he doesn't see a violation.

Mr. Mahon agreed and stated that he believes the Judges should have brought this to the Ethics Board themselves as versus the actions they took. Mr. Ochrym stated that he disagrees completely; that its separation of powers; and that Judges are going to see it the way they believe it is. Further, although both Judges are honorable guys, the Board can issue an advisory opinion, but the Judges may not even follow the advisory opinion. He cautioned against getting down into the weeds on what the Town can do versus what the judges can do, and that they have their own Code of Ethics

Mr. McCarthy agreed, but pointed out that the Judges hadn't cited anything other than sections of the Town Ethics code that you are charged with interpreting when asked.

Mr. Ochrym agreed and suggested that the Board could ask them that question.

Mr. McCarthy passed out a folder containing copies of correspondence Mr. Schopf had provided to each of the Board members, stating that he and Mr. Glick both thought it would be easier to first hear the issues and then review the correspondence rather than vice versa.

Mr. Ochrym inquired as to how the Board can get the Judges to accept this Board's advisory opinion.

Mr. McCarthy offered suggestions about how the Board could address the way the Judges went about this, or could cite the authority in code this Board has and welcome them to refer any future questions directly to the Board's attention.

Mr. Mahon stated that he is struggling with several issues involving the interplay of the Judges role with the duty of an attorney to represent his client to the best of his ability and if the Judge is abiding by his code, he should be presiding over a fair trial. Therefore, he is trying to grasp the fact that if those 2 things are consistent, how is this an issue an issue at all.

Mr. McCarthy suggested that if it is a town ticket, a Clifton Park Town Attorney would be prosecuting that ticket and perhaps the Board may need to ask themselves, would that Town Attorney be more willing to take a less effective plea bargain in the case because Jon Schopf, who happens to represent the Town as a County Supervisor, is the defense attorney.

Mr. Mahon wondered how they could judge that, considering each attorney's professional codes that cover each party's roles interplays with that concern. Don't the Town Attorneys need to represent their clients to the best of their ability too?

Mr. Ochrym made a motion to table the issue to allow the Board to conduct further research and review the related correspondence. Mr. Mahon seconded and the issue was tabled.

Chairman Glick stated that a special meeting will be held on November 14, 2017 and adjourned the meeting at 8:04 p.m.

Respectfully submitted,

M. Kathleen Smith  
Acting Secretary

Cc: Town Clerk  
Ethics Committee Members  
Tom McCarthy, Esq.