

Public Integrity Criminal Law for the Municipal Attorney

By Julia Davis

You are an attorney with Municipal City's law department and your supervisor calls you with an urgent assignment: Joe Public Servant has been contacted by law enforcement, and you need to advise him and the office how to address the matter. A lawyer who usually defends the municipality in civil cases, but who is now faced with representing a public servant who is being criminally investigated, may be entering a completely new field of law. He or she must know the possible offenses and applicable procedures to represent the client effectively; this article will address these issues.¹



Threshold Issues

The municipal attorney would likely be faced with the issue of representing a public servant in a criminal matter during the investigatory stage of the proceeding: municipal attorneys do not generally represent individual public servants once criminal charges are filed. Before undertaking any substantive action concerning an investigation conducted by law enforcement, however, the municipal attorney must ensure that representation of the individual public servant is proper and appropriate.² Complicating any analysis of whether representation should be afforded the public servant is that the possible outcome of an investigation into "white collar" crimes is rarely known at its initial stages, especially if the investigation is conducted by an entity with both criminal and non-criminal jurisdiction.³ Therefore, the municipal attorney must consider the respective positions of both the municipal agency and individual employees of that agency when confronted with such an investigation. To the extent possible at the commencement of the matter, the municipal attorney must perform due diligence to insure that the interests of the public servant are aligned with those of the municipality.

As in civil matters, so, too, in criminal investigations, the municipal attorney's ultimate client is the municipality itself, and any representation of an individual public servant cannot conflict with that of the municipal client. In civil cases, the municipal attorney may represent an employee of an agency for matters

"arising out of any alleged act or omission which [the municipal attorney] finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred."⁴ However, the duty to provide this representation does "not arise where such civil action or proceeding is brought by or on behalf of the city or state or an agency of either."⁵ Similarly, a municipal attorney could not represent a public servant if the public servant's conduct was beyond the scope of his or her employment, or in conflict with the municipality or any municipal agency. The commencement of an investigation, absent the filing of formal charges, is unlikely to establish that the public servant's conduct was outside the scope of his or her employment or office. The municipal attorney would be well advised, however, to continue to consider this threshold issue as the investigation progresses to insure that the interests of both the public servant and the municipality remain aligned as the facts unfold. Until a decision is made that either there is a conflict between the interests of the public servant and those of the municipality or that the public servant was acting outside the scope of his or her employment or office, having a municipal attorney represent the individual public servant would be advantageous to the municipality and would protect its interests.

Initial Stages

A municipal attorney may first become involved in a criminal matter when the subject public servant has been invited to speak to the law enforcement entity investigating the case. It is imperative to first ask what office has contacted the client and in what context. As with any legal matter, an attorney needs to know whom to contact—for example, to request that the investigators speak to the attorney and not the client and possibly to negotiate the date and time of the client's appearance. In the area of criminal investigations, however, different law enforcement entities are often subject to different governing rules, and the municipal attorney must be aware of the rules, especially procedural ones, which apply to the office that has contacted the public servant.

A prosecutor's office may reach out to schedule an appearance before a grand jury and may issue a subpoena to insure that appearance. In that case, the public servant is likely to be treated as a witness, and not as a subject or target of the grand jury proceeding,

because, absent specific circumstances, a witness in state criminal proceedings is afforded immunity and must waive that immunity if he or she is a target of the grand jury proceeding.⁶ Once that immunity has been waived, the witness is entitled to the presence of an attorney in the grand jury.⁷

The more difficult case arises when a prosecutor calls to request that the public servant appear for an interview. Is the public servant the target or subject of the inquiry? Will there be an agreement as to the parameters of the interview and the use of any information disclosed during the interview? If there is any uncertainty about the public servant's role in or criminal liability for the matter, it might be advisable to meet with the prosecutor with the understanding, reduced to writing, that use of the information disclosed will be limited and not directly used to prosecute the client, commonly referred to as a "proffer" or "queen for a day."⁸ Attorneys and their clients must weigh many issues, however, before determining that a proffer is advantageous for the client: the criminal exposure of the public servant, the use in impeachment of any statements made in a proffer, the chance of a perjury prosecution if false statements are made, and the strength of the prosecutor's case, to name a few examples.

The law enforcement office that has reached out to the public servant may be a local investigatory body, such as an inspector general or department of investigation. These entities often have jurisdiction over public servants that requires them to cooperate with those offices.⁹ Failure to cooperate with these authorities may result in disciplinary proceedings or even loss of the public servant's job.¹⁰ The decision on how to proceed if such an entity has contacted the client may raise the issue of the relationship between the inspector general and the prosecutor. For example, an inspector general cannot confer immunity from criminal prosecution so, if sought, it must be requested of the prosecutor. In addition, there may be an issue of the inspector general sharing information to which he or she has an absolute right with a prosecutor's office that might not have the same authority, or whether there are issues of compulsion with respect to evidence obtained as a result of the investigatory agency's jurisdiction.¹¹

General Criminal Provisions

Once acquainted with the investigating office and the procedures by which it operates, the municipal attorney must research the applicable law to determine what charges may be under investigation.¹² Crimes of a general nature that are applicable to everyone, such as larceny¹³ or forgery¹⁴ or perjury,¹⁵ are likely to be familiar to all attorneys. The municipal attorney would be well advised, however, not to overlook

those categories of crimes; although they are general in nature, they often contain provisions that specifically address public servants. For example, the definition of larceny by extortion contains a specific subdivision addressing public servants. A person obtains property by extortion:

when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will...**use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.** (Emphasis added.)¹⁶

In addition, while the public servant may be charged with the crime of larceny to which any individual is subject, he or she alone may be charged with defrauding the government if there has been an ongoing course of conduct to obtain property from the state or a political subdivision "by false or fraudulent pretenses, representations or promises" and the property obtained is valued in excess of one thousand dollars.¹⁷

While, like larceny, most charges concerning false written statements can be brought against any individual,¹⁸ at least one such offense requires that the person charged be a public servant. The crime of issuing a false certificate can be brought only against a public servant:

A person is guilty of issuing a false certificate when, **being a public servant authorized by law to make or issue official certificates or other official written instruments**, and with intent to defraud, deceive or injure another person, he issues such an instrument, or makes the same with intent that it be issued, knowing that it contains a false statement or false information. (Emphasis added.)¹⁹

Bribery and Related Offenses

When one thinks of public corruption cases, bribery is often the first charge that comes to mind. In New York State, bribery charges separately address the individual offering the bribe and the public servant receiving the bribe.²⁰ However, all bribery charges require proof that the benefit is conferred on the public servant "upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby

be influenced.”²¹ The public servant need not actually perform the act agreed upon; the agreement alone suffices.

Absent evidence of an agreement that the public servant’s discretion was to be influenced, the public servant may still be criminally liable for his or her conduct. The charge of receiving reward for official misconduct in the second degree renders a public servant guilty when he or she “solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant.”²² As with the crime of bribery, here, too, separate charges exist for the individual conferring the reward and the public servant receiving it.²³

The specific facts of a case may increase the degree of the crime of bribery or rewarding official misconduct or receiving reward for official misconduct charged. For example, if the bribe was given or received so that the public servant will be “influenced in the investigation, arrest, detention, prosecution or incarceration of any person for the commission or alleged commission of a class A felony” concerning controlled substances²⁴ or an attempt to commit any such class A felony, the charge is raised to the first degree.²⁵ Similarly, if the reward was given or received “for having violated [the]...duty as a public servant in the investigation, arrest or detention, prosecution or incarceration of any person for the commission or alleged commission of a class A felony” concerning controlled substances or an attempt to commit any such class A felony, the charge is again raised to the first degree.²⁶ There are also specific charges for bribes given and received “upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office.”²⁷

A public servant may argue that, even if he reached an agreement with the person conferring the bribe, reward, or gratuity, he did not have the ability or authority to do what was agreed. However, when charged with bribe receiving, receiving reward for official misconduct, or receiving unlawful gratuities (discussed below), a public servant’s protestation that he did not have the ability to accomplish what he allegedly promised to do will not serve as a defense to the charges.²⁸

Other Penal Law Offenses Specific to Public Servants

In addition to being familiar with those categories of crimes that apply to both public servants and all others, the municipal attorney must also be aware of penal code provisions that apply only to public servants. Perhaps the most common of these provisions, and the one that generally fits any state public

corruption case,²⁹ is the crime of official misconduct.³⁰ This offense encompasses both a public servant’s committing an unauthorized exercise of his or her official duties and refraining from performing a required act of office (or an act inherent in the nature of the office). Therefore, the public servant may be charged either with committing an act or with failing to perform an act if he or she intends “to obtain a benefit or deprive another person of a benefit.”³¹ Accordingly, depending on the facts presented, the public servant’s claim “But I didn’t do anything!” might serve not as a denial of criminality but as an admission of culpability.

Regardless of whether the public servant has or has not committed an unauthorized act, he or she may not accept any unauthorized payment for his or her public service. Any “tip” to a public servant is illegal: “a public servant is guilty of receiving unlawful gratuities when he solicits, accepts or agrees to accept any benefit for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.”³²

Non-penal Code Provisions

Research into possible charges should not be limited to the Penal Law; the municipality’s local laws may contain provisions that create criminal liability, for both general conduct and specific acts. For example, the New York City Charter provides that:

any council member or other officer or employee of the city who shall willfully violate or evade any provision of law relating to such officer’s office or employment, or commit any fraud upon the city, or convert any of the public property to such officer’s own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit such office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.³³

The Charter further provides that “[any] officer or employee of the city or of any city agency who shall knowingly make a false or deceptive report or statement in the course of duty shall be guilty of a misdemeanor and, upon conviction, forfeit such office or employment.”³⁴ Violations of the conflicts of interest law, Chapter 68 of the Charter, shall also render a person guilty of a misdemeanor and, upon conviction, require forfeiture of the public office or employment.³⁵

New York City's financial disclosure law subjects a public servant to a misdemeanor conviction for "any intentional and willful disclosure of confidential information that is contained in a report filed in accordance with this section, by a city officer or employee or by any other person who has obtained access to such a report or confidential information contained therein."³⁶ It also subjects a public servant to a misdemeanor conviction for any intentional violation of the law, "including but not limited to failure to file, failure to include assets or liabilities, and misstatement of assets or liabilities."³⁷ For example, former New York City Police Commissioner Bernard Kerik was convicted in a prosecution brought by the Bronx District Attorney's Office for violating the City's conflicts of interest and financial disclosure laws when he accepted, and failed to report on his financial disclosure report, gifts from persons seeking City business.³⁸ Laws addressing the jurisdiction of individual municipal agencies may also contain provisions that render certain conduct an unclassified misdemeanor, and they should be researched before any substantive meeting with a law enforcement official is held or any action in defense of the client is taken.

Procedural Issues

In addition to researching the applicable law, the municipal attorney must also research whether there are specific procedural rules that apply to the public servant client or that might affect the public servant's case. For example, in New York State, there is an extended statute of limitations for criminal prosecution of public servants. The statute of limitations in criminal cases is generally five years for felonies, two years for misdemeanors, and one year for petty offenses.³⁹ However, those periods are extended by five years in the case of misconduct by a public servant: a prosecution may be brought "any time during the defendant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable...."⁴⁰ The municipal attorney should be mindful of this extension.

Conclusion

A municipal attorney representing a public servant in a law enforcement investigation should be aware that the public servant may be subject to different laws, both substantive and procedural, than the general public. Understanding these laws and the jurisdiction of the entity conducting the investigation will assist the municipal attorney in representing the client effectively.

Endnotes

1. This article serves as an introduction to the topic discussed and does not purport to be exhaustive concerning all the issues that might arise for the situation addressed.
2. This article assumes that the subject matter of the investigation relates to the public servant's employment or office; the municipal attorney would not be involved in any investigation into the public servant's personal actions or conduct.
3. For example, municipal investigators, such as inspectors general, often have jurisdiction to investigate not only potential crimes but also fraud, mismanagement, or conflicts of interest; the latter investigations may result in civil proceedings and penalties or public reports. *See, e.g.*, New York City ("NYC") Charter § 803.
4. *See, e.g.*, General Municipal Law ("Gen. Mun. Law") § 50-k (2) (discussing New York City and its corporation counsel).
5. Gen. Mun. Law § 50-k (2).
6. Criminal Procedure Law ("CPL") § 190.40(2) (a witness giving evidence in a grand jury proceeding receives immunity unless it is waived, the evidence provided is "not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive," or it consists of records produced pursuant to a subpoena duces tecum and the witness "does not possess a privilege against self-incrimination with respect to the production of such evidence").
7. CPL § 190.52 (1). The attorney "may advise the witness, but may not otherwise take part in the proceeding." CPL § 190.52 (2).
8. *See, generally*, Wisenberg, Solomon, Queen For A Day: The Dangerous Game of Proffers, Proffer Agreements and Proffer Letters, <http://library.findlaw.com/2005/Feb/21/138691.html> (retrieved January 31, 2011) (although this article discusses proffers in the context of federal prosecutions, the general concepts apply to state proceedings). Attorneys generally outline in hypothetical form what the subject will say before a proffer is scheduled.
9. *See, e.g.*, New York City Charter § 1128 (full cooperation with the commissioner of investigation is required, and interference with an investigation may result in sanction of suspension or removal from office); section 4 (c) of New York City Mayoral Executive Order No. 16 (1978) ("NYC Exec. Order No. 16") ("Every office or employee of the City shall cooperate fully with the Commissioner [of the Department of Investigation] and the Inspectors General. Interference with or obstruction of an investigation conducted by the Commissioner or an Inspector General shall constitute cause for removal from office or employment or other appropriate penalty.").
10. *See, e.g.*, NYC Charter § 1128 (a).
11. *See, e.g.*, Section 4 (b) of NYC Exec. Order No. 16. *See also Kastigar v. United States*, 406 U.S. 441 (1972).
12. The assumption is that there has been a preliminary conversation during which the municipal attorney has learned, at the least, both a general idea of the subject matter of the investigation and the relevant facts.
13. Penal Law ("P.L.") § 155.00 et seq.
14. P.L. § 170 et seq.
15. P.L. § 210 et seq.
16. P.L. § 155.05 (2)(e)(viii).
17. P.L. § 195.20 (defrauding the government).
18. Penal law provisions addressing falsifying business records, tampering with public records, and offering a false instrument for filing all commence with "a person is guilty of ..." and do not contain any restrictions as to the class of persons who may

be charged. *See, e.g.*, P.L. §§ 175.05 (falsifying business records in the second degree); 175.10 (falsifying business records in the first degree); 175.20 (tampering with public records in the second degree); 175.25 (tampering with public records in the first degree); 175.30 (offering a false instrument for filing in the second degree); and 175.35 (offering a false instrument for filing in the first degree).

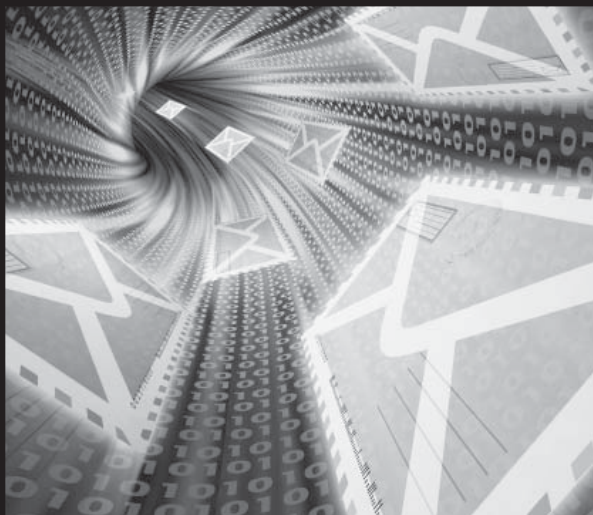
19. P. L. § 175.40.
20. Compare P.L. § 200.00 (bribery in the third degree) with P.L. § 200.10 (bribe receiving in the third degree).
21. *See, e.g.*, P.L. §§ 200.00 (bribery in the third degree), 200.03 (bribery in the second degree), 200.04 (bribery in the first degree), 200.10 (bribe receiving in the third degree), 200.11 (bribe receiving in the second degree), and 200.12 (bribe receiving in the first degree).
22. P.L. § 200.25.
23. Compare P.L. § 200.20 (rewarding official misconduct in the second degree) with P. L. § 200.25 (receiving reward for official misconduct in the second degree).
24. *See* P.L. §§ 220.21 (criminal possession of a controlled substance in the first degree), 220.18 (criminal possession of a controlled substance in the second degree), 220.43 (criminal sale of a controlled substance in the first degree), and 220.41 (criminal sale of a controlled substance in the second degree).
25. P.L. §§ 200.12 (bribe receiving in the first degree), 200.04 (bribery in the first degree).
26. P.L. §§ 200.27 (receiving reward for official misconduct in the first degree), 200.22 (rewarding official misconduct in the first degree).
27. P.L. §§ 200.45 (bribe giving for public office), 200.50 (bribe receiving for public office).
28. P.L. § 200.15 (2) ("It is no defense to a prosecution pursuant to the provisions of this article that the public servant did not have the power or authority to perform the act or omission for which the alleged bribe, gratuity or reward was given").
29. Although bribery may be the crime that first comes to mind when one thinks of a public corruption case, the crime of

official misconduct, in the author's opinion, applies in more cases.

30. P.L. § 195.00.
31. P.L. § 195.00. Note that, unlike other crimes that concern officials, this charge does not require the involvement of any other individual.
32. P.L. § 200.35 (receiving unlawful gratuities). As with the other charges discussed above, there are separate charges for giving and receiving unlawful gratuities. Compare P.L. § 200.30 (giving unlawful gratuities) with P. L. § 200.35 (receiving unlawful gratuities).
33. NYC Charter § 1116 (a).
34. NYC Charter § 1116 (b).
35. NYC Charter § 2606 (e).
36. New York City Administrative Code ("Ad. Code") § 12-110 (g) (3). The penalty also includes grounds for discipline, including removal from office.
37. NYC Ad. Code § 12-110 (g)(2).
38. *See* <http://bronxda.nyc.gov/information/2006/case47.htm> (retrieved January 31, 2011).
39. CPL § 30.10 (2).
40. CPL § 30.10 (3)(b).

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