

**Speaking Frankly**

*By Frank Hannan*

**Attorney Accountability Ordinance: Should it Stay or Should It Go?**

In the next couple of weeks you will see a lot of articles and columns about the West Milford Attorney Accountability Ordinance and whether it should be rescinded. There will be passion on both sides of the issue but I feel that what the public needs are the facts.

Ordinance No. 2003-50 known as "Ordinance Concerning Attorney Accountability" was introduced and passed by the lame duck council in December 2003. It was touted as a one of its kind precedent setting law and that once adopted would spread like wildfire throughout the other 565 municipalities in the state. The only problem was that it was seriously flawed.

The ordinance is a very simple two-page document. It says that "Within seven days after being appointed, reappointed or retained, any attorney within the scope of the ordinance shall execute a 'Disciplinary Authorization and Release' form or other superceding form promulgated by the Supreme Court of New Jersey, Office of Attorney Ethics." The clerk is required to file the results in his or her office and be retained as a public record.

I think the "seven day" rule presents a serious problem. Would you hire a nanny to watch your children and wait seven days after they started to do a background check? What would you think of the town if they decided to hire its policemen or its bus drivers using the seven-day rule? A bus driver is hired and given a contract. Seven days later they conduct a criminal and motor vehicles background check and the report comes back indicating a big problem. Do you think the town should subject itself to this type of exposure?

Well, West Milford already does with the "Ordinance Concerning Attorney Accountability." Here is a fictional but very real scenario. The town hires and gives a contract for labor negotiations to new attorney, John Smith. Seven days after hiring the attorney, he submits his paper work authorizing a background check. One week after that the check is run, copies of the report are given to council members and the mayor in their packets. Since they don't have a meeting for two weeks, they cannot act on the report until four weeks after the hire. A majority of council members don't like what the report says. They vote to rescind the contract because the attorney was not completely honest in the interview. The fired attorney argues that the item on the report is a misunderstanding or a mistake since his name is John Smith and there are 200 John Smiths in the system and besides the infraction is a minor one. He sues the town for breach of contract. Also, the fired attorney argues that the ordinance has no provision or parameters for dismissal for adverse reports. It calls for dismissal only for failing to meet the seven-day requirement of returning the release form. In the end after a long legal battle, the town settles the suit. It costs the town big time money.

Could it happen? Yes, especially in this town, which has a history of settling lawsuits.

The town could be sued over information that any fifth grader could have gotten over the Internet for free. The current ordinance puts a self-imposed burden on the town to generate and maintain information. Due diligence is required not before someone is hired or retained like 99.9 percent of all other hires throughout the United States, but after someone is hired or retained. Failing to properly conduct the due diligence required by the ordinance leads to unnecessary legal exposure and liability for the town.

The solution is to do it administratively. All we need to do is inform all potential lawyers seeking a position with the township that they will be subject to a legal and personal background check. You now have the

information during the interview process and can give a qualified applicant the opportunity to explain or dispute items on the report. The report of the attorney hired could then be kept on file at the clerk's office.

According to an Aug. 29, 2006 Record article, our Attorney Accountability Ordinance has already cost us over \$55,000 in settlement and legal fees. All because of a lawsuit brought by the person who was its activist author.

According to its proponents, the ordinance would spread like locust throughout New Jersey municipalities. Because of the lawsuit brought by the author of the ordinance, the other 565 state municipalities will let the locust lawsuit feeding frenzy end with good old progressive West Milford. They will never adopt the ordinance. They know they don't need it and can't afford it.

The score on the ordinance is now 565 towns to one against it. Let's make it a shutout and rescind this one of a kind activist ordinance. As taxpayers, can we afford to do anything else?

In his February 16<sup>th</sup> article, Frank Hannan levels six inaccurate charges against West Milford's Attorney Accountability Ordinance. As the person who drafted the ordinance, I wish to respond.

**1. According to Mr. Hannan, any fifth-grader can get the same information disclosed by the Attorney Accountability Ordinance for free on the Internet.**

Not so. When an attorney waives confidentiality to his or her disciplinary history, as required by the ordinance, the New Jersey Supreme Court's Office of Attorney Ethics releases confidential information that is not otherwise available anywhere else. Records of pending disciplinary investigations, for instance, are kept strictly confidential unless either the attorney under investigation waives confidentiality or ethics officials bring formal charges.

It is not unusual for ethics investigations to take years to complete. For example, Clifton lawyer Vivian M. Hammer was formally charged with "knowing misappropriation" of money on June 23, 2005. But, the investigation of that charge commenced on August 23, 2000—nearly five years earlier.

Suppose Hammer had been appointed as West Milford's attorney in 2004. Without the waiver the Attorney Accountability Ordinance requires her to sign, the Office of Attorney Ethics would not have then disclosed that she was under investigation for knowingly misappropriating money.

**2. Mr. Hannan contends that the fact that a lawyer's normally confidential disciplinary history will not be revealed until after, rather than before, he or she is appointed to office exposes the public to an intolerable level of risk.**

Mr. Hannan correctly notes that the ordinance's "seven-day rule" permits an attorney to be appointed prior to his or her confidential history report being received by the Council and made public. Oddly, he seems to believe that repealing the ordinance will somehow remedy this "problem."

Had Vivian Hammer been appointed as Township Attorney on January 1, 2004, her ethics history report, (assuming that Kevin Byrnes had not elected to unlawfully suppress it, as he did William DeMarco's report) and thus her "knowing misappropriation" investigation would have been revealed to the public in or about the first week of February 2004. Had the Attorney Accountability Ordinance never been passed, the public could not have learned about this charge until the Office of Attorney Ethics filed its formal complaint in June of 2005.

Confidential disciplinary investigations are, of course, known to the attorneys under investigation. The council that enacted the ordinance in 2003 reasoned that any lawyer under investigation, or who had some other secret disciplinary matter to hide, would not apply for a position in West Milford because the Attorney Accountability ordinance would soon publicize his or her secret past. Repealing the ordinance is the equivalent of inviting those questionable lawyers to again seek Township appointments.

**3. Mr. Hannan suggests that attorney background checks should be done during the interview process and attorneys' disciplinary history reports be kept "on file at the Clerk's office."**

I have no quarrel with Mr. Hannan's suggestion that attorneys should waive confidentiality to their disciplinary histories prior to appointment. Indeed, there is nothing in the Attorney Accountability Ordinance that prevents them from so doing. The political party who holds a Council majority after the November 2007 election can, if it wishes, announce that it will not interview any lawyer who does not waive confidentiality to his or her disciplinary record prior to the interview.

I part company with Mr. Hannan, however, if he is suggesting that the confidential history reports be kept in the clerk's office as confidential personnel records instead of being made public. An essential provision of the Attorney Accountability Ordinance is that it not only requires appointed attorneys to disclose their confidential

disciplinary histories, but that it requires the Township to disclose those histories—warts and all—to the *public*. Without publication of these histories, citizens would have no way of knowing if elected officials were appointing lawyers based solely on their political affiliations and without regard to their disciplinary records.

**4. Mr. Hannan speculates that attorneys who are discharged because of something the ethics history report reveals may “sue the town for breach of contract” and thus “cost the town big time money.”**

Mr. Hannan provides an example of the majority of the Council voting to “rescind the contract” of an appointed attorney because it doesn’t “like what the [disciplinary] report says.” Mr. Hannan’s example assumes, however, that the Council discharges the attorney before learning whether or not “the infraction is a minor one” or even if the attorney is the same individual referred to in the ethics history report.

Any lawsuit resulting from the Mr. Hannan’s example would be attributable to the recklessness of the Township Council, not to the Attorney Accountability Ordinance. The ordinance is only a tool designed to give the Council and the public the information they need to make wise decisions. Any negative information provided under the ordinance, or by any other source, obviously needs to be evaluated and verified before action is taken.

**5. Mr. Hannan believes the ordinance should be repealed because it has yet to be adopted by any other municipality.**

I intended to get similar ordinances passed in other towns. Unfortunately, former Township Clerk Kevin Byrnes elected to violate the ordinance and the resulting litigation was not concluded until May 25, 2006.

Any Attorney Accountability ordinances adopted while the litigation was pending would have been voided, or at least seriously compromised, had the Appellate Division found in Byrnes’ favor. Because of the cloud that the lawsuit cast over the ordinance’s viability, I did not pursue its replication in other towns. I fully intend on promoting the ordinance, however, this summer.

Moreover, the decision on whether or not West Milford should repeal or retain its ordinance shouldn’t turn on whether or not other towns have passed similar ordinances. The decision should be based upon whether the ordinance favorably serves the public’s interest.

**6. Mr. Hannan thinks the litigation costs arising out of my lawsuit justifies the ordinance’s repeal.**

The fact that Kevin Byrnes elected to thumb his nose at the ordinance and expose the town to litigation costs is a red herring. The blame for that should fall upon Mr. Byrnes and the members of the Township Council who sat on their hands while the litigation progressed and both lawyers’ meters ran.

In conclusion, Mayor Weisbecker and the 2003 Council were trailblazers who did right by the Township when they enacted the Attorney Accountability Ordinance. To repeal it now would be a mistake.

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Editor’s Note: At this time, Vivian M. Hammer has only been *charged* with violating the Rules of Professional Conduct. She is contesting the charge and is presumed innocent unless and until the Office of Attorney Ethics bears its burden of proof. Her case is entitled Office of Attorney Ethics v. Vivian M. Hammer, Docket No. XIV-00-257E, and documents filed in the case may be obtained by calling the Office of Attorney Ethics at 609-530-4008.

AIM West Milford, March 23, 2007

(Letters to the Editor should go to Editor Hollis Avakian at [avakian@northjersey.com](mailto:avakian@northjersey.com))

Speaking Frankly,  
a column by Frank Hannan

[Headline] Individual rights vs. the public good is not a zero sum game

My column on the Attorney Accountability Ordinance called, 'Another notch in the gun,' an exposé of the individual and the political party behind the ordinance, resulted in a local Libertarian sending me a courteous note. "It's probably a waste of time for me to write you this note, since you obviously don't think much of Mr. Paff, Libertarians or individual rights." is how it opened up. (Somerset Libertarian John Paff wrote the ordinance and then sued the town over a compliance issue.)

First of all, when I write my columns, I use facts. I have my own opinion about what those facts mean, but as a friend of mine always says, "you have a right to your own opinion but not your own facts."

When I came out against the West Milford Sunshine Act (I call it The West Milford \$un\$shine Tax Act, which was coauthored by Mr. Paff), I encouraged readers to read it and referenced the web sites where it could be found. In "Another notch in the gun," I gave out the Libertarian web site address and encouraged readers to check it out for themselves. I even said that I supported many Libertarian ideas.

I want the people to make their own informed decisions. If they agree with me, fine. If they don't, at least I know they had access to the facts.

As far as not liking Mr. Paff, I never met the man but I have seen his handiwork and don't like what he and others have done and are doing to our town. Let's look at how Mr. Paff got his ordinance.

Since he is an advocate for full public disclosure, why did he have to use deception to get his ordinance passed? Did he appear before the West Milford Council and say something like, "Good evening I am John Paff, the head of the Somerset County Libertarian Party, and I am proposing that you consider passing my Attorney Accountability Ordinance:'

No, he used a local activist who then sold it to the local Democrat party who used it as a campaign issue. His own hometown and others said "no thank you" when he tried to sell it on his own.

In addition, when you go to Mr. Paff's web site ([cjni.org](http://cjni.org)), in a piece called "West Milford moves to repeal its Attorney Accountability Ordinance:' in his discussion of the Appellate Court's decision he leaves out the third and most important part of the court's ruling.

The court decided that the ordinance and others should be reviewed by the state legislature to see if they are laws under OPRA (the 800-pound gorilla I told you they did not want you to know about).

Mr. Disclosure hides the most important part of the ruling on his web site? The part that says hey, we don't know if this information should be released to the public and the main issue I sued about has not been resolved. How convenient is that?

Paff and his fellow Libertarians do not believe in government subsidies. Sounds reasonable until you discover that most of their open records campaigns are funded on the backs of the taxpayers through the government .

Take for example OPRA (Open Public Records Act) requests. According to the law, local towns are not allowed to charge for labor.

The real cost associated with the request is not the copying itself but the labor it costs to procure the document. So it is a subsidy. Why don't Libertarians donate the cost of the labor so they don't get a government subsidy?

When it comes to lawsuits, OPRA says any violations held up in court and the government pays. It was designed so the little guy would not be put at a disadvantage.

It was not designed to allow the same individuals and parties to sue town after town, county after county so they can collect trophies like safari hunters and then take the government subsidy and move on to the next hunt as their lawyer friends get rich.

(Remember the \$394 an hour Paff's lawyer Mr. Gutman thinks he is worth.)

When Mr. Paff is sitting in his office hatching his next stick in the spoke scheme, if there is a fire in one of his rental buildings does he call his private fire brigade? If he doesn't, he is taking a government subsidy.

What about my individual rights as a taxpayer? Should I have to foot the bill for his beliefs?

I believe in individual rights, but there are times when government must look beyond the individual and do things for the public good.

I believe in smaller government so I want those times to be few and far between and I want just compensation. (The lack of money in The Highlands Act is an example. I supported the goal of protecting the state's water supply but opposed the Act based on the fact that it did not "show us the money.")

The individual rights vs. the public good debate is not a zero sum game. Dictators, Communists, Socialists, Royalists, Libertarians and others want you to think it is.

The system we have now is not perfect and sometimes gets out of balance. We need people to help keep the game honest but it was never meant to be an organized profitable bloodsport at taxpayer expense.

I would like to respond to Frank Hannan's March 23, 2007 piece "Individual rights vs. the public good is not a zero sum game."

This piece, like his previous one I responded to ("Attorney Accountability Ordinance: Should it Stay or Should It Go?", February 16, 2007) is replete with factual errors and distortions.

**1. Mr. Hannan accuses me of "deception" because I did not announce the fact that I was a Libertarian Party member when I proposed the Attorney Accountability Ordinance to the Township Council in 2003.**

While I am proud to be a Libertarian and have never made a secret of it, the Libertarian Party had no role in proposing the Attorney Accountability Ordinance. Rather, another organization that I am involved with, New Jersey Citizens for Justice ([www.cjnj.org](http://www.cjnj.org)), which seeks to make New Jersey's attorney disciplinary system more accountable to the public, proposed the ordinance and I presented it to the Council as president of that organization.

**2. Mr. Hannan accuses me of deception for selectively quoting from the Appellate Division's decision that upheld the Accountability Ordinance.**

Readers who take the time to visit the above website will find that it contains a link to the full text of the Appellate Division's decision. And, those who take the time to read the decision will find that the part that Mr. Hannan says is the "most important part of the court's ruling" had no bearing whatsoever on the court's ultimate decision.

**3. Mr. Hannan characterizes my public advocacy work as "sitting in [my] office hatching [my] next stick in the spoke scheme" so that I can "collect trophies like safari hunters" and finance my "open records campaigns . . . on the backs of the taxpayers."**

I find it remarkable that Mr. Hannan, who admits that he has never met me, can draw such colorful conclusions regarding my character and motivations. While I am happy to win public access cases and disappointed when I lose, I have never profited from my advocacy work nor do I take pleasure in knowing that taxpayers are being forced to pay for their government officials' violations of the law.

I have filed suit and lodged administrative complaints against dozens of local government agencies that have violated the Open Public Records Act (OPRA) and the Open Public Meetings Act (OPMA). I do this because, unfortunately a) many town governments don't have much regard for the public's right to know and b) the public prosecutors typically don't enforce these laws thus leaving the job to private citizens. When these "sunshine laws" are ignored, a culture of secrecy develops that allows government corruption to flourish.

When I find a town in violation of these laws, I typically write to the mayor and council and ask that they correct their procedure. If that doesn't get results, or if the violations are egregious, I will sue in court, file an administrative complaint with the Government Records Council or report the violation to the county prosecutor. Any one of these actions—even my letter to the mayor and council—will usually get the municipal attorney involved, and that, unfortunately, costs the taxpayers money.

And there's the rub. When government officials violate the OPRA and OPMA, they are not held personally liable for the costs of those violations. Rather, the cost of my enforcement actions against town officials who illegally suppress public information are borne by the taxpayers who are unfortunate enough to live in that town. If I had my way (and perhaps Mr. Hannan would agree with me on this point), the officials who violate the law should have to personally pay all the legal costs flowing from those violations. But, unfortunately, the way the system *should* work isn't the way it *does* work.

Given these realities, I don't see how the OPMA and OPRA can be enforced, either by private citizens such as myself or by a state or county prosecutor, without costs being imposed upon the taxpayers in the offending towns. All I can suggest to Mr. Hannan and others is a) that they work to convince their elected officials to conduct town business as openly and transparently as possible in order to ward off expensive enforcement actions, and b) that we work together to change the laws so that government officials are required to bear the consequences of their own wrongdoing.