

**Adopt Local Law # 3 of the Year 2004
A Local Law Adopting a Defense and
Indemnification and Official Undertaking Law**

WHEREAS, Section 403 of County Law requires various public officers and employees to execute and file an official undertaking to ensure to the County's monies and property, AND

WHEREAS, Section 11 of Public Officer's Law authorizes the County Legislature to procure a blanket undertaking that shall indemnify the County against losses as a result of the failure of the officers, clerks and employees covered thereunder to faithfully perform their duties or to account properly for all monies or properties received by virtue of their positions or employment and/or through fraudulent or dishonest acts committed by the officers, clerks, and employees covered thereunder, AND

WHEREAS, Section 18 of Public Officer's Law requires the County to defend and indemnify of officers and employees of the County in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his or her public employment or duties, AND

WHEREAS, the County Legislature has determined that it is in the best interests of the County of Cortland, its officers and employees and to the general public to insure that its employees are protected against the costs of defense and risks of personal liability arising from or attributable to acts, omissions, or decisions made in the ordinary course of their County employment; and that by affording the fullest possible protection against such risks, the County Legislature finds that it should enhance the willingness and capacity of its agents to effectively and completely perform their assigned duties on behalf of the County and its citizens, AND

WHEREAS, the range of issues for which municipal officers and employees can be named as defendants, and the scope of potential exposure has been expanded, by operation of federal and state statutes and by operation of judicial case law throughout the United States, AND

WHEREAS, the County Legislature of the County of Cortland has determined that it is within its home rule powers to expand the scope of the protections afforded to its officers and employees in a manner similar to that adopted by other jurisdictions in New York State, including the County of Orange (1998), the County of Monroe (1996) and the City of Rochester (1986), NOW, THEREFORE, BE IT

ENACTED, by the County Legislature of the County of Cortland, New York, hereby establishes and adopts this Local Law providing for the Defense and Indemnification of officers and employees of the County of Cortland, to read as follows:

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Section 1.	Definitions
Section 2.	Conferring Benefits
Section 3.	Blanket Undertaking
Section 4.	Defense and Indemnification
Section 5.	Scope of Indemnification & Limitations
Section 6.	Employee Cooperation Required
Section 7.	Preservation of Rights
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Section 1. DEFINITIONS

As used in this local law, unless the context otherwise requires:

(a) The term "County" shall mean the political subdivision of the State of New York comprising the County of Cortland.

(b) The term "employee" shall mean any commissioner, member of a public board or commission, trustee, director, officer, employee, volunteer expressly authorized to participate in a publicly sponsored volunteer program, or any other person holding a position by election, appointment or employment in the service of Cortland County, whether or not compensated, or for a fixed term or not fixed, and including such employees when serving ex officio or as a designated County representative on a non-County board, committee, commission, district, authority or corporation, but shall not include an independent contractor. The term "employee" shall include a former employee, his/her estate or judicially appointed personal representative. For the purposes of this Local Law only, the term "employee" shall include the Sheriff and the Undersheriff of the County of Cortland. The term "employee" for purposes of this Local Law shall not include employees covered by any collective bargaining agreement unless and until the benefits accorded by this section are incorporated through good faith bargaining into such collective bargaining agreement. Until such time, the language contained in any valid collective bargaining agreement shall supercede any inconsistent provisions of this Local Law and shall define the parameters of defense and indemnity available to members of any such bargaining unit.

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(c) The term "governing body" shall mean the Cortland County Legislature.

(d) The term "County Attorney" shall mean the County Attorney and any assistant County Attorney designated to act on his or her behalf in the manner and order prescribed by Section 502 of the County Law.

Section 2. CONFERRING BENEFITS

The Cortland County Legislature, in accordance with its home rule powers under the New York State Constitution and Article 2 of the Municipal Home Rule Law, and other statutory authority does hereby confer the benefits of defense and indemnification described herein, upon its eligible employees and agrees to be held liable for the costs incurred under the provisions of this Local Law. By enactment of this Local Law, the County of Cortland does not intend to establish or enlarge any direct liability of the County or to limit or otherwise abrogate any existing right or responsibility of the County or its officers or employees with regard to legal defense or indemnification. This Local Law shall not in any way impair any powers of the County Attorney granted by the County Law or any other law relative to the commencement, management and disposition of civil actions or proceedings.

Section 3. BLANKET UNDERTAKING

The Cortland County Legislature, in accordance with Section 11 of Public Officers Law, hereby consents and approves the procurement of a blanket undertaking from any authorized surety or insurance company covering officers, clerks, and employees and indemnifying the County against losses incurred through the failure of the officers, clerks and employees cover thereunder to faithfully perform their duties or to account properly for all monies or properties received by virtue of their positions or employment, and/or through the fraudulent or dishonest acts committed by the officers, clerks and employees covered thereunder.

Section 4. DEFENSE AND INDEMNIFICATION

- (a) Civil Cases. The County Attorney shall determine whether the County will defend and/or indemnify an employee. The policy of Cortland County is to afford the broadest civil defense and indemnification protection to its employees consistent with proper exercise of professional judgement and discretion; and the specific reasons for any denial of defense and indemnification shall be stated in writing, as provided in Subsection (f) herein. Upon compliance by the employee with the provisions of Section 5 of this Local Law, and subject to the limitations set forth herein, the County shall provide for the defense of the employee in any civil action or proceeding, state or federal, or before any administrative agency arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or

duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the County employer. When the County Attorney requests defense and indemnification under this Local Law, the determination of eligibility shall be made by the County Administrator.

(b) Criminal Cases. The County shall pay reasonable and necessary attorneys' fees, at rates prevailing in the local legal community, disbursements and litigation expenses incurred by a county employee in his or her defense in a criminal proceeding in a state or federal court arising out of any act or omission that occurred while the employee was exercising or performing his or her powers and duties within the scope of public employment, as determined by the County Attorney. The county employee shall be entitled to private counsel of his or her own choice, except that the County Attorney may require that appropriate groups of county employees be represented by the same private counsel. This duty to pay for a defense in a criminal proceeding shall arise only upon the complete acquittal of a county employee or the dismissal of all criminal charges or termination of all criminal investigations against such employee. Attorneys' fees, disbursements and litigation expenses shall be submitted by the attorney within thirty (30) days after the acquittal or dismissal to the County Attorney; and shall be reviewed by the County Attorney, who shall then make a recommendation regarding payment to the County Auditor. No extraordinary disbursements or fees shall be paid to such private counsel unless prior written consent of the County Attorney was obtained, but such consent will not be unreasonably withheld. Itemized bills providing a description of the work performed, hours worked, person providing service, rate per hour and disbursements shall be submitted to the County Attorney in the manner, time and form required by the County Attorney. The County Legislature shall retain to itself the authority to create a budgetary fund to meet the expenses which accrue under this Section; and to appropriate money to such budgetary fund.

(c) Conflict of Interest. The County Attorney or his or her designee shall have the duty to defend or may employ special counsel to defend the county employee in any civil action, proceeding or administrative hearing unless the County Attorney determines that a conflict of interest exists, in which case the County Attorney shall prepare a list of no fewer than three (3) private attorneys from which the employee may select private counsel of his choice, except that the County Attorney may require that appropriate groups of county employees be represented by the same private counsel. The selections of the County Attorney in preparing such a list in conflict situations shall be made so as to ensure that private counsel has a type and level of experience appropriate to the subject matter of the case; that such counsel has no conflict of interest with the County; that such counsel is prepared to act in the closest cooperation with the County Attorney consistent with standards of professional responsibility and that such counsel has agreed to terms of compensation established by the County, and to other reasonable contract terms including County standards regarding audit and review of financial claims

The County Attorney may, solely as an exercise of discretion, consider and include on the list an attorney requested by the county employee to be defended. If special counsel is employed, due to conflict of interest factors the county shall pay reasonable and necessary attorneys' fees, at rates agreed to by the County Attorney at the time of employment or assembly of the list, as well as disbursements and litigation expenses incurred on behalf of the employee in his or her defense. No extraordinary disbursements or fees shall be paid to such private counsel unless prior written consent of the County Attorney was obtained. Itemized bills providing a description of the work performed, hours worked, person providing service, rate per hour and disbursements shall be submitted to the County Attorney in the manner, time and form required by the County Attorney for review and approval by that official and by the County Auditor in accordance with established County procedures. The County Legislature shall retain to itself the authority to create a budgetary fund to meet the expenses which accrue under this Section; and to appropriate money to such budgetary fund.

- (d) Disputes. Any dispute with respect to representation of multiple employees by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding.
- (e) Preservation of Right to Appear. Where the employee timely delivers process and a written request for a defense to the county under Section 5 of this local law, the county shall take the necessary steps on behalf of the employee to avoid entry of a default judgment pending resolution of the question pertaining to the obligation to provide for a defense.
- (f) Determination of Eligibility and Revocation. In making the determinations of eligibility for defense or for indemnity under this Local Law, the County Attorney may utilize the cumulative information available to him or her at the time of making the determination, including but not limited to any allegations, any type of records or any examinations or investigations by whomever conducted. With respect to subsection (a) of this section, the County Attorney shall make a determination of eligibility at or before the time to serve or file an answer in a civil action or proceeding. A determination favorable to the county employee may thereafter be revoked by the County Attorney no later than the start of trial for good cause; or, if the county employee, with respect to any material and relevant acts or omissions, lied in any investigation of the underlying incident upon which the County Attorney relied in making the original determination and the truth causes the County Attorney to revise the original determination. The County Attorney's determination, original or revised, shall be in writing and promptly provided to the county employee; and if a determination is adverse to the county employee, it shall state the facts and reasons therefor. The County Attorney shall consult with the County Administrator [or, with the Chairman of the County Legislature, when it is the County Administrator who requests defense

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and indemnification] prior to issuing an adverse determination. A special proceeding brought in New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules shall be the exclusive method by which a county employee aggrieved by a determination of the County Attorney may seek judicial review of that determination. If, as a result of such review, the county employee obtains a reversal of the County Attorney's determination, the County shall reimburse the employee for attorneys fees and filing fees incurred in obtaining the reversal providing that such fees are reasonable and necessary according to prevailing practices and standards in the legal community of Cortland County, as determined by the County Attorney, subject to judicial review.

Section 5. SCOPE OF INDEMNIFICATION & LIMITATIONS

- (a) Civil Case Indemnification. The County shall indemnify and save harmless its employees in the amount of any civil judgment obtained against such employees in a state or federal court or administrative agency, or in the amount of any settlement of a claim, in the nature of compensatory, special, punitive or other damages, including sanctions, fines, costs and attorneys fees, provided that the act(s) or omission(s) from which such judgment or claim arose occurred while the employee was acting within the scope of his public employment or duties and as to punitive damages was properly discharging his or her powers and duties within the scope of the public employment as determined by the County Attorney; which determination, and any revision thereof, shall be made prior to trial, and in the time and manner specified by Section 3(f) of this Local Law; and provided further that in the case of a settlement, the duty to indemnify and save harmless shall be conditioned upon the approval of the amount of settlement in the manner established by the County Legislature for resolution of claims. Judgments shall be paid in the time and manner established by the County. The duty to indemnify shall not arise where a judgment is obtained or a claim settled as a result of an action or proceeding brought by or at the behest of the County itself.
- (b) Exclusion. Except as otherwise provided by law, the duty to indemnify and save harmless proscribed by this section shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.
- (c) Prior Orders. Nothing in this section shall authorize the County to indemnify or save harmless an employee with respect to money recovered from an employee pursuant to Section 51 of the General Municipal Law; provided, however, that the County shall indemnify and save harmless its employees' in the amount of any costs, attorneys' fees, damages, fines or penalties which may be imposed by reason of an adjudication that an employee, acting within the scope of his public employment or duties, has, without willfulness or intent on his part, violated a prior order, judgment, consent decree or stipulation of settlement entered in any court of this state or of the United States.

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- (d) Tender of Judgment to County. Upon entry of a final judgment against the employee, or upon the settlement of the claim, the employee shall serve a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the Chairman of the County Legislature or the County Attorney; and if not inconsistent with the provisions of this section, the amount of such judgment or settlement shall be paid by the County.

Section 6. EMPLOYEE COOPERATION REQUIRED

The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon: (i) delivery by the employee to the County Attorney or to the Chairman of the County Legislature of a written request to provide for his defense together with the original or a copy of any summons, complaint, process, notice, demand or pleading within three (3) business days after he is served with such document; (ii) the full and truthful response by the employee in any and all County investigations into the incident(s) and transaction(s) upon which the action or proceeding is predicated and the full and continuing cooperation of the employee in the defense of any action or proceeding against him or her, or against the County of Cortland based upon the employees alleged acts or omissions and in the taking of any appeals; and (iii) the full cooperation of the employee in the defense of such action or proceeding and in the defense of any action or proceeding against the County based upon the same act or omission, and in the prosecution of any appeal.

Section 7. PRESERVATION OF RIGHTS

The benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the Workers' Compensation Law.

Section 8. NOTICES REQUIRED/ EFFECT ON OTHER LAWS

This section shall not in any way affect the obligation of any claimant to give notice to the County under Section Ten of the Court of Claims Act, Section 50-e of the General Municipal Law, or any other provision of law; nor shall it operate to waive, extend or modify the limitation upon actions provided under Section 50-i of the General Municipal Law.

Section 9. INSURANCE OR PARALLEL COVERAGE

- (a) The County, upon direction by the County Legislature, is hereby authorized and empowered to purchase insurance from any insurance company created by or under the laws of this state, or authorized by law to transact business in this state,

against any liability imposed by the provisions of this section, or to act as a self-insurer with respect hereto.

- (b) The duties to pay for or to provide a defense to and to indemnify and save harmless a compensated county employee serving ex officio or as a designated County representative on a non-County board, committee, commission, district, authority or corporation shall be secondary and supplemental to any obligation to defend and indemnify and any liability insurance provided by the non-County entity on which the county employee serves.

Section 10. PUBLIC PURPOSE

All payment made under the terms of this section, whether for insurance or otherwise, shall be deemed to be for a public purpose and shall be audited and paid in the same manner as other public charges.

Section 11. NON-LIMITATION OF RIGHTS/OBLIGATIONS

The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

Section 12. IMMUNITY

- (a) Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity to liability available to or conferred upon any unit, entity, officer or employee of the County by, in accordance with or by reason of, any other provision of state or federal statutory or common law.
- (b) The duty to indemnify and save harmless a volunteer shall be secondary to the immunity provisions of the federal Volunteer Protection Act of 1997, 42 USC Section 14501 ff.; and to any other federal, state or local statutory provisions limiting the liability of volunteers, or establishing complete or limited immunity from liability.

Section 13. SOLE BENEFITS

Except as otherwise provided in this law, benefits accorded to employees under this section shall be in lieu of and take the place of defense or indemnification protections accorded the same employees by another enactment.

Section 14. CONSTRUING PROVISIONS

- (a) Except as otherwise specifically provided by this Local Law, the provisions of this Local Law shall not be construed in any way to impair, alter, limit, modify,

abrogate or restrict any immunity available to or conferred upon any unit, entity, officer or employee of the County of Cortland, or any other level of government, or any right to defense and/or indemnity provided for any governmental officer or employee by, in accordance with, or by reason of, any other provisions of county, state or federal statutory or common law.

- (b) The Sheriff of the County of Cortland, the Undersheriff of the County of Cortland and any person appointed by the Sheriff of the County of Cortland including but not limited to Sheriff's deputies are included under the term "employee" for convenience of reference within this Local Law only. The provisions of this chapter shall not be construed as establishing an employment or *respondent superior* relationship between the County of Cortland, the Sheriff of the County of Cortland, the Undersheriff of the County of Cortland, or any person appointed by the Sheriff of the County of Cortland, including but not limited to Sheriff's deputies. The provisions of this Local Law shall not be construed as an assumption by the County of Cortland, of responsibility or liability for the negligence or tortuous conduct of the Sheriff or Undersheriff of the County of Cortland, or for any person appointed by the Sheriff of the County of Cortland, including but not limited to the Sheriff's deputies.
- (c) This Local Law shall not include employees covered by any collective bargaining agreement unless and until the benefits accorded by this section are incorporated through good faith bargaining into such collective bargaining agreement. Until such time, the language contained in any valid collective bargaining agreement shall supercede any inconsistent provisions of this Local Law and shall define the parameters of defense and indemnity available to members of any such bargaining unit.

Section 15. APPLICABILITY

The provisions of this Local Law shall apply to all actions and proceedings pending upon the effective date thereof, or thereafter instituted.

Section 16. CONFLICTS IN LOCAL LAW OR RESOLUTION

The provisions of this Local Law shall govern. All previous Local Laws or Resolutions duly adopted by the County Board of Supervisors or County Legislature in conflict herewith are hereby rescinded.

Section 17. SEVERANCE

If any provision of this section or the application thereof to any person or circumstances by held unconstitutional or invalid in whole or in part by any court, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

