

CONCURRENT SESSION

Land Use Ethics: Current Issues

11:20 a.m.—12:30 p.m.
Friday, April 22, 2005
Sturm College of Law

Moderator: J. Bart Johnson, Esq.
Shareholder/Director
Otten, Johnson, Robinson, Neff & Ragonetti, P.C.
Aspen, Colorado

Panelists: Lora Lucero, Esq., AICP
Staff
APA Amicus Committee
Albuquerque, New Mexico

John E. Hayes, Esq.
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Denver, Colorado

Ethics & Land Use Planning

Lora A. Lucero, AICP
Albuquerque, N.M.

The Three R's

- Revisions
- Resources
- Recommendations

Why a Code of Ethics?

- American Institute of Architects
- National Society of Professional Engineers
- American Bar Association
- American Medical Association
- American Planning Association

AICP Code of Ethics and Professional Conduct

- Members of the American Institute of Certified Planners
- Aspirational Principles
- Rules of Conduct
- Procedural Provisions of the Code
- Effective June 2005

Principles to Which We Aspire

- Our Overall Responsibility to the Public
- Our Responsibility to Our Clients and Employers
- Our Responsibility to Our Profession and Colleagues

Our Rules of Conduct

- 25 rules
- Sanctions possible for violation
- www.planning.org
- Rule #1 - *"We shall not deliberately or with reckless indifference fail to provide adequate, timely, clear and accurate information on planning issues."*

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- Rule #4 – *"We shall not, as salaried employees, undertake other employment in planning or a related profession, whether or not for pay, without having made full written disclosure to the employer who furnishes our salary ..."*

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- Rule #5 – *"We shall not, as public officials or employees, accept from anyone other than our public employer any compensation, commission, rebate, or other advantage that may be perceived as related to our public office or employment."*

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- Rule #8 – *"We shall not, as public officials or employees, engage in private communications with planning process participants if the discussions relate to a matter over which we have authority to make a binding, final determination if such private communications are prohibited by law or by agency rules, procedures, or custom."*

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- Rule #9 – *"We shall not engage in private discussions with decision-makers in the planning process in any manner prohibited by law or by agency rules, procedures, or custom."*

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- Rule #17 – *"We shall not use the product of others' efforts to seek professional recognition or acclaim intended for producers of original work."*
 - Rule #18 – *"We shall not direct or coerce other professionals to make analyses or reach findings not supported by available evidence."*

Resources for Planners

- AICP Code of Ethics
www.planning.org/ethics/
- State Ethics Laws
www.ncls.org/programs/ethics/e_ethicsURLs.htm
- Center for the Study of Ethics in the Professions
<http://ethics.iii.edu/codes/index.html>

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- "How to Write a Code of Ethics/Conduct" by Geoffrey Hunt at www.freedomtocare.org/page25.htm
 - Local Government Institute "Ethics: Honesty and Fairness in the Public Service" at www.lgi.org/Publications/Ethics.htm

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- New York State Ethics Commission provides many resources including training at www.dos.state.ny.us/ethc/ethics.html
 - City of Santa Clara, CA – "Code of Ethics and Values" at www.ci.santa-clara.ca.us/city_gov/city_gov_ethics_bkg.html
 - Patricia Salkin, Associate Dean and Director of the Government Law Center of Albany Law School

Recommendations*

- Develop an Ethics Checklist and review it regularly
- Municipalities and counties – develop a code of ethics and keep it current
- Encourage training and awareness

Hypothetical #1 Open meetings & sunshine laws

In the middle of a public hearing on a controversial development application, the Chair wants to close the meeting in order to discuss the matter in private. What is the planner's obligation? What should the planner do if the applicant asks for a private meeting with city council members?

Hypothetical #2 Conflict of interest

A site development application is deemed complete and a planning commissioner is a neighbor. Should the planning commissioner recuse himself? Should the planner raise the issue? What if the planner or the planning director owns property next to the site?

Hypothetical #3

A planner at city hall and a developer socialize and have lunch together occasionally. The next time the developer is before the city council, how should the planner behave?

*The Public Trust and the
Public Interest Is In Our
Hands!!*

**ETHICAL ISSUES FACED IN
THE LAND USE REGULATORY CONTEXT**

Ethical dilemmas face lawyers with surprising frequency in the land use context. Below are reprinted six separate rules which are part of the Colorado Rules of Professional Conduct which seem to have particular relevance, and which sometimes raise particular problems, for attorneys (whether they are representing a governmental entity or are representing a private person) who are involved in the land use process.

While it is clear that these Rules apply only to attorneys, it is helpful for laypersons, especially elected officials, to understand the ramifications of these Rules as well as the reason for their being in place.

A. Rules of Professional Conduct.

RULE 1.13 -- ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents, and the lawyer owes allegiance to the organization itself, and not its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a

violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to

result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders and other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, but only in those instances in which such representation will not affect the lawyer's allegiance to the entity itself, and also subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 3.5 -- IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

RULE 3.6 -- TRIAL PUBLICITY

(a) A lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it is likely to create a grave danger of imminent and substantial harm to the fairness of an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceedings that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraph (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

- (7) in a criminal case:
- (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

RULE 4.2 -- COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

RULE 4.3 -- DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall state that the lawyer is representing a client and shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give advice to the unrepresented person other than to secure counsel.

RULE 4.4 -- RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

B. Examples of Problems.

1. Staff Contacts. At some level in the zoning process, an attorney for an applicant needs to contact an employee of a governing body. Usually this employee is a staff person in the planning and zoning department, probably the staff person who will be reviewing plans or making the staff presentation to the governing body. It is strongly suggested that contacts with the staff of the governing entity are essential to the presentation of a successful application.

The ethical problem for a lawyer is how often, and in what detail, can that staff person be contacted without contact being made with the governing body's attorney?

Clearly, the entity's attorney has the entire organization as a client (Rule 1.14), and the staff person, as a member of that organization, is represented by that counsel (Rule 4.2). Is direct contact by an attorney of that staff person a violation of either of those Rules of Professional Conduct?

My answer to that question (which is truly not hypothetical) is that contacts which are for the purpose of gaining information or imparting

information in preparation for the presentation to the governing body are not violations of any of the Rules of Professional Conduct. A different result, however, might obtain if the attorney for an applicant or a protestant is seeking to influence the specific recommendation which is to be made by the employee, specifically since that recommendation may influence the final decision applicable to the attorney's client's application.

This problem is easily resolved by the applicant's attorney calling the entity's attorney. From personal experience, I can advise you that in approximately 99% of the cases the entity's attorney will have no problem whatsoever with the applicant's attorney dealing directly with staff. Assuming the entity's attorney has properly trained the staff member, the staff member will call the entity's attorney when that attorney's advice or intervention is needed.

A simple rule of thumb to consider in the context of determining whether or not to contact a person who you know to be represented by counsel is this -- would you want the other attorney contacting your client directly, without your participation, in the same situation? If you even have to think about that answer, don't make the contact with the staff member until you have contacted the entity's attorney!

2. Representations Made to a Planning Commission or a Council. A lawyer owes a duty of honest dealing with tribunals. It is not only unseemly, it is probably unethical for a lawyer to stand before a planning

commission or governing body and make a representation about which the attorney is unsure. It is clearly not a violation of the Rules of Professional Conduct to state an opinion, but it is at least deceitful and deceptive to try to couch that opinion or belief as a fact which should be acted upon.

The best rule of thumb to follow in this context is to remember that the words of you, as an attorney, are part of the record on appeal. If you would not make the statement directly in a courtroom, do not make that statement in front of the tribunal, because the statement will wind up as part of the record before the court.

3. How to Treat Those Opposed to Your Application. Rule 4.4 requires that attorneys display respect for the rights of third persons. Does this general statement imply that an attorney cannot zealously represent his own client's position, including challenging the position of a protestant, before a tribunal? Of course not. What the Rule does require, however, is that no embarrassing, delaying, or burdensome tactics be used, and, pursuant to Rule 4.1, that truthfulness be employed on behalf of your client.

Aside from being an ethical consideration, treating protestants with respect is just a smart hearing tactic. You have no way of knowing, in most cases, who the people are who stand before the hearing tribunal, or what their motivation is for appearing. Your case should stand or fall on what you have to say, not on the basis of minimizing what others have to say.

4. When Litigation is Threatened if a Particular Result is Not Obtained. If you think it is unusual for an attorney to stand before an entity's governing body and threaten, either directly or impliedly, that a lawsuit will be filed if a particular result is not obtained, then you have not watched many rezoning hearings. Some city councils, and perhaps some boards of county commissioners, perceive the very presence of an attorney at a rezoning hearing as a threat to litigation.

The attorney's duty is to represent his/her client fairly, not to bully or intimidate others. A fair presentation to the hearing tribunal which is based upon, and which establishes, legal principles which may later be litigated is not only highly ethical, it is the goal to which all presentations should aspire. But the naked assertion that failure to act in a particular way will result in litigation is, in this speaker's opinion, not only counterproductive, but borderline unethical.

5. Particular Problems if You Represent the Governmental Entity.

(a) A government lawyer must remember, pursuant to the provisions of Rule 1.13, that the organization is his/her client. There will be many instances in which the position adopted by the governing body will not have unanimous approval, and the government attorney must give competent, good faith advice to all members who seek his/her advice. Often, among dysfunctional governing bodies,

questions will be asked or opinions sought of the attorney for the sole purpose of embarrassing another member of the body. At times such as these, the governmental attorney must remember that it is the organization which is the client, not the individuals who sit on the governing board.

(b) Sometimes it's your advice which is on trial. Often, the governing board will request input from the governmental attorney regarding the form a resolution should take, or the basis upon which a resolution should be made. At those times, if an appeal is taken, it is in fact the attorney's opinion that is on trial.

(c) How much should the attorney advise the governing body during the course of a hearing? A government attorney must always remember that is all (s)he is -- an attorney. Unless you live within the jurisdiction and have been elected to a position, you do not have a vote, nor should you. The professional duty of an attorney is to give advice, which may or may not be followed.

A much harder situation, however, is involved when an attorney knows that litigation is likely to ensue from a decision being considered. How much should the attorney interject at that point?