

FRIDAY SESSION: 8:45–10:15 AM

Land Use Ethics

8:45—10:15 a.m.

Friday, March 10, 2006

Sturm College of Law/Frank J. Ricketson Law Building

Learn from top experts in the field about land use ethics for professionals.

Moderator: **J. Bart Johnson, Esq.**

Director

Otten, Johnson, Robinson, Neff & Ragonetti

Aspen, Colorado

Panelists: **Lora Lucero, Esq., AICP**

Staff

APA Amicus Committee

Albuquerque, New Mexico

Gerald Dahl, Esq.

Partner

Murray Dahl Kuechenmeister & Renaud

Denver, Colorado

Fact Pattern No. 1

The Mayor owned investment property in the city and decided the time was right to build apartments on the property. He sketched his ideas out on a napkin and presented them to his friend, the Planning Director of the city. The Planning Director noted that the Mayor's proposal exceeded the # of units allowed on the property by code, as well as some other setback and parking issues.

1. What is the responsibility of the Planning Director in this situation?
2. If the application comes before the city council for consideration, what advice should the Planning Director and/or the City Attorney provide?

Fact Pattern No. 2

You are a City Attorney. The City is considering a land use application filed by a church that wants to expand onto neighboring property. One of the members of City Council is also an active member of the church's congregation who is on the fundraising committee for the church's proposed expansion.

1. Should you advise the City Council member to recuse himself or herself from considering the application?

Fact Pattern No. 3

The applicant wanted to build a solid waste facility in this small, rural community to serve the entire 3 county region. He had already received the necessary permits from the state environment department. Now he needed a special use permit from the 3-member village trustees. Without a planner on staff, the Village decided to hire a consulting planner to assist them with this project. The planner prepared his report with recommendations. On a daily basis, the trustees drove by the proposed site. One trustee stopped and talked with neighbors who opposed the project. Following a public hearing, the trustees voted (2-1) to approve the project.

1. What is the responsibility of the planner in this situation?
2. What advice should the Village Attorney provide the Trustees prior or during the public hearing?

Fact Pattern No. 4

You represent a private-property-rights advocacy group in a mountain resort community that is fighting a down-zoning of most of the rural lands in the county. During her election campaign, one of the new county commissioners stated that she wholly favors the proposed down-zoning and made a campaign promise to vote for the down-zoning if she won the election.

1. Can you require this commissioner to recuse herself from participating in the consideration of the down-zoning?

Fact Pattern No. 5

Neighbors upset about a Wal-Mart supercenter (200,000 sq.ft.) coming into their neighborhood, voiced their opposition at all of the public hearings for the variance and site plan applications. When they learned that the traffic consultant hired by the city was simultaneously involved in a business relationship with Wal-Mart for a project in a different state, and was also a partner with Wal-Mart in the current application, they cried "foul play." The city approved Wal-Mart's application and the neighbors sued.

1. Are there any conflicts?
2. What action should the neighbors have taken before the city's decision?
3. What action should the neighbors have taken after the city's approval?
4. What action should the city have taken before making the decision?

Fact Pattern No. 6

You represent a golf course developer who historically has only done projects in Colorado. Your client calls to explain that he is looking at a new project in Wyoming that will require a lot of entitlements work, including a PUD rezoning, subdivision and site plan review. He intends to hire local counsel in Wyoming but wants you to oversee the entitlements process and travel to Wyoming for all of the public hearings and important meetings with local officials. You are not licensed to practice law in Wyoming.

1. Can you take on this new project for the client?

Fact Pattern No. 7

A candidate for city council made "youth issues" a focus of her campaign. After she was elected, an application for a youth shelter came before the city council. She voted in favor of siting the facility in the residential neighborhood. Opponents to the project argued that she was biased and had prejudged the application, abolishing any chance of receiving a fair and impartial hearing on the matter.

1. Is there a conflict of interest? Appearance of impropriety?
2. If the applicant for the youth shelter contributed to the candidate's campaign, does your conclusion change?
3. What actions should elected officials take to avoid such problems?

Fact Pattern No. 8

You are an attorney in the office of the City Attorney of a city that is negotiating a public improvements agreement with the developer of a large new shopping center. You are expecting comments on the most recent draft of the agreement from the developer's lawyer. One day you receive a faxed memorandum from the office of the developer's lawyer. The memorandum has "Confidential" printed across the top, which you find odd. As you begin reading the memorandum, you realize that it is a memorandum from the developer's attorney to his client outlining a strategy for the next round of negotiations with the City.

1. What should you do?
2. Can you read the memorandum and use it to your advantage in negotiating with the developer's attorney?

Colorado Bar Association Formal Ethics Opinion 108:

ANALYSIS: Depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

If the receiving lawyer receives documents that appear on their face to be privileged or confidential, the receiving lawyer, upon realizing the privileged or confidential nature of the documents, has a duty to notify the sending lawyer that he or she has the documents.

If the receiving lawyer actually knows of the inadvertence of the disclosure before examining the documents, the receiving lawyer must notify the sending lawyer and also must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

TWO RATIONALES: (1) MRPC 1.15 concerning the obligation of an attorney, in connection with a representation, to hold the property of a client or third party separate from the attorney's own property; and (2) MRPC 8.4(c) prohibiting an attorney from acting in a dishonest manner.

Fact Pattern No. 9

The Mayor had long been a member of, and served as an officer, director, and spokesperson for, a homeowners association that was opposed to a land development application. In fact, the association had supported him for many years -- when he served as city commissioner and during his two terms as Mayor -- in exchange for his commitment to the goals of the association. The Mayor cast the tie vote denying the application.

1. Is there a conflict of interest? Appearance of impropriety?
2. What advice should the city attorney have provided prior to the vote?

Fact Pattern No. 10

You are working for a developer client on a complex and controversial land use approval. You have just received the 42-page staff report and recommendation from the county staff planner assigned to the case. From reading the staff report, you realize the staff planner misunderstands several aspects of your client's proposal that have led the planner to recommend denial. After conferring with your client, you both agree that you will call the planner to discuss the misunderstandings and try to convince the planner to change her recommendation.

1. Are you permitted to make this type of contact with the staff planner?
2. What if you are unable to convince the planner and you resort to calling the director of the planning department and the county administrator?
3. What if you call one of the county commissioners?

Is action legislative or quasi-judicial?

MRPC 4.2 prohibits communication with a party represented by counsel, unless the communication is otherwise authorized by law or made with the consent of opposing counsel.

Official Comment to MRPC 4.2 says this rule does not prohibit communication with government officials because of the importance of having access to the government—basically a right to petition.

CBA Ethics Opinion 93:

- a. Generally, it is not proper to make ex parte contacts with managerial government employees without consent of the government counsel. A managerial employee is someone who has the authority to commit the government to a position or whose acts or omissions can be imputed to the government or whose statements are admissible against the government.
- b. However, because of the First Amendment protections concerning petitioning the government, you can contact managerial employees who are not in positions of authority and whose conduct is not at issue in contemplated or commenced litigation or other proceedings.
- c. Beyond these groups, counsel is free to make ex parte contacts with government employees.
- d. At the outset of a permissible contact, the lawyer should identify himself or herself and state the purpose of the communication.

Can always make ex parte contacts with consent of counsel.

Legislative Matters. In matters which are not quasi-judicial, the policy of MRPC 4.2 must be weighed against the First Amendment right to petition elected officials.

Fact Pattern No. 11

You work as an assistant county attorney. You have been working with the planning department on a major PUD for a new shopping center, including the negotiation of a development agreement with the developer's attorney. You impress the developer's attorney. She asks whether she can take you out to lunch to discuss joining her firm.

1. Can you take her up on her offer?
2. Assuming you eventually join the firm, can you represent the developer in a dispute with the city over the development agreement three years later?

MRPC 1.11(c). A lawyer serving as a public officer or employee shall not:

Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, or

Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except if the lawyer is serving as a law clerk to a judge, other adjudicative officer or arbitrator.

LAND USE ETHICS

March 10, 2006

15th Annual Land Use Conference
ROCKY MOUNTAIN LAND USE INSTITUTE

University of Denver College of Law
Denver, Colorado

Presented by
J. Ben Johnson, Esq.
Gerald Dahl, Esq.
Lora A. Lucero, AICP, Esq.

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