ETHICS FOR LAWYERS
IN THE LAND USE PROCESS

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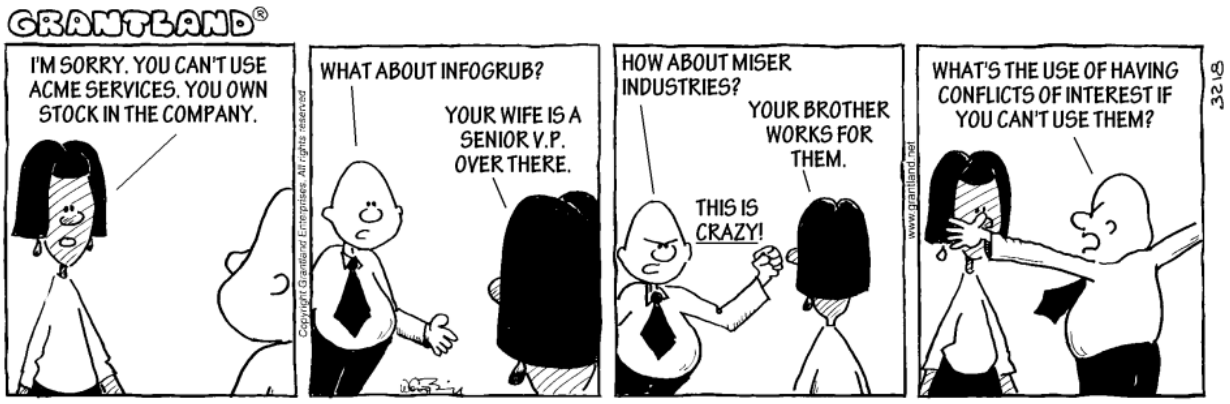
Bryan Treu
J. Thomas Macdonald



I. Introduction

A) The application of the Rules of Professional Conduct and ethical rules governing public officials in the land use process sometimes strains the framework of those rules, leading to puzzling results.

B) For example, this year, the Supreme Court held that the recusal provisions of the Nevada Ethics Code, as applied to a city councilman voting on a land use application, did not implicate the First Amendment because "the act of voting [in a legislative body] **symbolizes nothing**." Nevada Commission on Ethics v. Carrigan, 131 S.Ct 2343, 2350 (2011) (emphasis added). It is, therefore, not protected speech. Id.

C) In a concurring opinion, Justice Alito took issue with the conclusion that a legislative vote did not have a symbolic element, stating:

> The Court's strange understanding of the concept of speech is shown by its suggestion that the symbolic act of burning the American Flag is speech but John Quincy Adams calling out 'yea' on the Embargo Act was not. Id. at 2354 (Alito concurring).

D) Echoing Justice Alito's puzzlement, critics of the Court may ask how it is that "John Quincy Adams calling out 'yea' is not speech," Id., but corporate expenditures are speech? See Citizens United v. Federal Election Comm'n, 130

S.Ct. 876 (2010) (holding certain restrictions on corporate expenditures violate the Free Speech Clause).

E) Although Citizens United is not a land use case, the Court's view that "[p]olitical speech [including the expenditure of money] is 'indispensable to decision-making in a democracy'" may have unintended consequences in the land use process.

F) Another recent Supreme Court case also may have significant impacts in the land use process. In Capterton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2265 (2009), the Court found due process to have been violated when a member of the West Virginia Supreme Court of Appeals refused to recuse himself even though one of the parties to the appeal had made approximately $3,000,000.00 in campaign contributions and independent expenditures supporting the election of the justice.

i) The Court concluded that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level." Id.

ii) What amount of a contribution in a city council race is so extreme as to require recusal when the contributor appears before council?

G) Participants in the land use process will look to lawyers to explain how to apply ethical codes to particular situations.

H) So the lawyer needs to be aware not only of the rules governing attorney conduct, but also with the statutes and codes governing the conduct of public officials involved in the land use process.

I) In most states, the rules governing attorney conduct are based on some form of the ABA Model Rules of Professional Conduct (the "Model Rules"). See ABA/BNA Lawyers' Manual on Professional Conduct., § 01:3 (2010) (listing the following states in the Rocky Mountain region as having adopted the Model Rules with some variations: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming).

J) Many states also have statutes governing the conduct of public officials. See, e.g., Colo. Rev. Stat. §§ 24-18-101, et seq. (statutory code of ethics for government officials); Nev. Rev. Stat. §§ 281A.420 (code of ethical standards for public officers and employees).

K) The purpose of this outline is to explore how these various codes and rules are applied.

II. Carrigan

A) Carrigan, 131 S.Ct. 2343, arose under Nevada's Ethics in Government Law.

i) That law states that a public officer shall not vote on, or advocate the passage or failure of, a matter with respect to which the independence of judgment of a reasonable person in the officer's situation would be materially affected by the officer's commitment in a private capacity to the interests of others.

ii) "Commitment in a private capacity to the interest of others" is defined as a commitment to a person:

a. who is a member of the officer's household;

b. who is related to the officer by blood, adoption or marriage within the third degree of consanguinity or affinity;

c. who employs the officer or a member of the officer's household;

d. with whom the officer has a substantial and continuing business relationship; or

e. any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

iii) By comparison, C.R.S. 24-18-109(3)(a), states that a member of a governing body of a local government who has a *personal or private* interest in any matter pending before the governing body:

a. shall disclose such interest, and

b. shall not vote thereon; and

c. shall refrain from attempting to influence the decisions of other members in voting on the matter.

iv) Unlike Nevada, the Colorado statute does not attempt to define a "personal or private interest." Prior to Carrigan, the general view was that it would not extend to any of the following examples.

a. Board member related by blood or marriage to the applicant but has no financial connection or potential of experiencing financial gain or loss. If a direct relationship (i.e. husband or son) then board member should step down based on bias.

b. Board member is neighbor of the applicant.

c. Board member is in same church, club, or other group with the applicant.

d. Board member is friends with applicant.

v) It is not clear that Carrigan will change that view.

a. The expansive interpretation of "commitment in a private capacity to the interests of others" was simply accepted by the Supreme Court for purposes of ruling on the First Amendment challenge.

b. Similarly, the decision of the Nevada Supreme Court was limited to consideration of the First Amendment issue, without considering the commission's interpretation. Carrigan v. Comm'n on Ethics, 236 P.3d 616 (Nev. 2010).

vi) Nevertheless, the Nevada Ethics Commission, views a disqualifying private interest quite broadly. Id. at 619.

a. Arguably, a Colorado tribunal construing the term "personal or private interest" in C.R.S. 24-18-109(3)(a), might look to the interpretation given by the Nevada Ethics Commission to the term "commitment in a private capacity," for guidance.

b. If so, then friendship, at least a long-standing and close friendship, may be enough to require recusal.

c. In addition, as the concurring opinion of Justice Kennedy, Carrigan, 131 S.Ct. at 2352-54, which is discussed below, makes clear, common membership in a church, club or other group may be enough if the members of the church, club or group are also active campaign supporters of the elected official.

B) Facts of Carrigan.

i) Carrigan was serving his third term as an elected member of the Sparks City Council. Id. at 618.

ii) His close friend and campaign manager in each of his elections was a consultant to an applicant seeking approval of a hotel/casino project. Id.

iii) Carrigan consulted with the Sparks City Attorney regarding the potential conflict, and was advised to disclose his relationship on record before voting. Id.

iv) He made the following disclosure on the record:

> I have to disclose for the record … that Carlos Vasquez, a consultant for Redhawk, … is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. Id.

v) Carrigan voted in favor of the project, but was in the minority. Id. at 632 (Pickering, J. dissenting).

vi) Upon receiving complaints following the vote, the commission initiated an investigation and concluded that Carrigan had violated the catchall provision of the statute by voting on the matter. Carrigan, 131 S. Ct. at 2346-47.

vii) It censured Carrigan, but did not impose any civil penalty because it found the violation was not willful. Id. at 2347.

viii) Carrigan then challenged the statute as violating his right to free speech. Id.

ix) The district court denied the petition, but the Nevada Supreme Court reversed, holding that voting was protected by the First Amendment and, applying strict scrutiny, the statute's catchall phrase was unconstitutionally overbroad. Id.

C) The Supreme Court, without dissent, reversed the decision of the Nevada Supreme Court. Id.

i) "'[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional.'" Id. at 2347-48 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002)).

ii) The Court noted that legislative recusal rules existed in 1791 and have been in place ever since. Id. at 2348.

iii) The Court then asked how it can be that restrictions upon voting are not restrictions upon protected speech? It then answered its own question by saying that a legislator's right to vote is not personal, but belongs to the people. Id. at 2350.

iv) The Court noted that the statute prohibited not just voting, but also advocating on behalf of or against an issue. But in a statement that will warm the hearts of those who have to control public hearings, it said that the right to speak in legislative sessions is limited to those with the right to vote. Id. at 2347.

v) The Court did not consider Carrigan's right of association claim because it had not been decided by the Nevada Supreme Court nor argued in Carrigan's brief in opposition to the petition for certiorari. Id. at 2351.

D) Justice Alito concurred in the result, but disagreed with the Court's opinion that a restriction upon voting was not a restriction upon speech.

i) "'Our history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril.'" Id. at 2354 (Alito, J., concurring) (quoting brief for Respondent).

ii) The vehemence with which Justice Scalia attacked this concurring opinion perhaps reflects his recognition of its strength.

iii) It is, in any case, a classic example of Scalia's acerbic wit.

> … How do they express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like '( ) I have a deeply held view about this matter; ( ) this is probably desirable; ( ) this is the least of the available evils; ( ) my personal view is the other way, but my constituents want this; ( ) my personal view is the other way, but my big contributors want this; ( ) I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye''? There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies, … But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor to be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication.
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> …
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> Even if it were true that the vote itself could 'express deeply held and unpopular view,' the argument would still miss the mark. This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. Id. at 2350-51.

E) In a thoughtful concurring opinion, Justice Kennedy, expressed concern that, while not properly raised in the case, the statute may well unconstitutionally burden protected speech other than voting.

i) He used the following hypothetical:

> Assume a citizen has strong and carefully considered positions on family life; the environment; economic principles; criminal justice; religious values; or the rights of persons. Assume, too, that based on those beliefs, he or she has personal ties with others who share those views. The occasion may arise when, to promote and protect these beliefs, close friends and associates, perhaps in concert with organized groups with whom the citizen also has close ties, urge

the citizen to run for office. These persons and entities may offer strong support in an election campaign, support which itself can be expression in its classic form. The question then arises what application the Nevada statute has if a legislator who was elected with that support were to vote upon legislation central to that shared cause, or, for that matter, any other cause supported by those friends and affiliates. Id. at 2352 (Kennedy, J., concurring).

ii) He noted that a statute of this sort is an invitation to selective enforcement that, even if undertaken in good faith, may create unacceptable dangers of suppression of particular speech or association.

III. Colorado Standards of Conduct

A) Colorado Standards of Conduct. C.R.S. 24-18-101 et seq., Comprehensive code of ethics adopted in 1988.

i) Interesting 1988 facts: George Bush Sr. elected President; Prozac introduced; CD's outsell vinyl records for the first time; Who Framed Roger Rabbit top grossing movie; Oprah Winfrey becomes #1 talk show host; gas cost .72 cents a gallon; Broncos lose to Redskins 42-10 in Super Bowl XXII; average median income $27,225; the Soviet Union ends its nine-year war in Afghanistan; U.S. unemployment rate 5.5%.

B) Legislative declaration. The Standards recognize that some actions represent *per se* conflicts for those with both a public and a private interest, while other actions may or may not create a conflict depending upon the surrounding circumstances. Standards provide both mandatory rules as well as guidelines for the conduct of those hearing files.

C) The holding of a public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, local government officials, and employees. They shall carry out their duties for the benefit of the people of this state. C.R.S. §24-18-103.

D) The Standards **prohibit** public officials or employees from:

i) Engaging in a substantial financial transaction for his or her private business purposes with a person whom he or she inspects or supervises in the course of his public duties. C.R.S. §24-18-108(2)(a);

ii) Performing an official act directly and substantially affecting a business to its economic benefit in which the official has a substantial financial interest or is engaged as counsel, consultant, representative or agent. C.R.S. §24-18-108(2)(d);

iii) Assisting any person for a fee or other compensation in obtaining any contract, claim, license, or other economic benefit. C.R.S. §24-18-108(2)(c);

iv) Disclosing or using confidential information acquired in the course of his official duties in order to further substantially his personal financial interests. C.R.S. 24-18-104(1)(a); and

v) Accepting a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

a. which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

b. which he knows or a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken. C.R.S. §24-18-104.

c. Exceptions include campaign contributions, non-pecuniary gifts of insignificant value, payment or reimbursement for travel expenses for attendance at a convention in which the official is participating, meals, lodging, travel expenses, or tickets to sporting, recreational or cultural events.

E) A member of the governing body of a local government who has a **personal** or private interest in any matter proposed or pending before the governing body **shall** disclose such interest to the governing body and **shall** not vote thereon and **shall** refrain from attempting to influence the decisions of the other members. C.R.S.§24-18-109(3)(a).

F) May still vote only if necessary to obtain a quorum and if he/she notifies the secretary of state. This is an affirmative defense to a charge of breach of fiduciary duty. Will still subject the decision to civil challenge.

G) What is an official action? Any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

H) What is a financial interest? Ownership interest in a business, employment or prospective employment in a business, ownership interest in property, a directorship or officership in a business.

I) What is a personal or private interest? The decisionmaker stands to gain financially from the outcome of the decision. Examples include:

i) Zoning matter in which the board member is or represents the applicant, and attempts to represent himself at the hearing;

ii) Board member owns or has an interest in the business which is before the public body;

iii) Board member has financial dealings with the business which is in front of the public body;

iv) Board member has a financial interest in a business which is a competitor to the business in front of the public body; and

v) Board member is a creditor of the business which is asking for action from the public body.

J) What else might constitute a personal or private interest? See II.A)iv) above.

K) Financial gain is generally easier to spot. Personal interest is harder to define.

L) The Standards strongly suggest that a public officer or employee should not:

i) Acquire or hold an interest in any business which the official has reason to believe may be directly and substantially affected to its economic benefit by the officer or employee's official action;

ii) Within six months of terminating public service, obtain employment in which the officer or employee will take direct advantage of matters which the officer or employee was directly involved with during public service; or

iii) perform an official act when the officer or employee has a direct business relationship with a competing firm. C.R.S. §24-18-105.

M) Independent Ethics Commission. Another constitutional wrinkle. In 2006, Colorado voters added Article 29 to the Colorado Constitution. Creates new requirements in addition to the above. It precludes government officials, government employees, and their immediate family members from accepting any gifts in excess of fifty dollars unless equal consideration is provided in return.

i) Interesting 2006 facts: George W. Bush signs Patriot Act including a signing statement that he does not have to tell Congress how it is being used; House releases report assigning blame to Whitehouse for hurricane Katrina; Saddam Hussein is convicted of crimes against humanity and hanged; Iran successfully enriches uranium; Pittsburgh Steelers defeat Seattle Seahawks 21-10; University of Florida wins both the football and basketball national championships; U2 wins both album and song of the year; Germany edged the U.S. in the medal count in the Turin Winter Olympics; U.S. unemployment rate 4.6%.

ii) Examples of forbidden activity: gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discount.

iii) Independent Ethics Commission enforces this constitutional amendment. Five members that hear complaints, issue findings, and assess penalties.

iv) Penalty for violating is twice the amount of the value in question.

v) Twelve-month limitation on complaints. Local governments may ask for advisory opinions.

vi) No safe harbors (i.e., notifying secretary of state).

IV. Quasi-Judicial Hearings

A) Application of ethical laws depends on whether the matter to be considered is quasi-judicial vs. administrative or legislative. If administrative or legislative, the same due process and ethical protections will not apply.

B) Quasi-Judicial actions are those with state or local laws requiring that:

i) notice be given before the action is taken;

ii) a hearing be conducted before the action is taken; and

iii) the action results from application of prescribed criteria to the individual facts of the case.

C) Examples include zoning change to a single piece of property, rezoning, subdivisions, conditional and special use permits, and variances.

D) Administrative or legislative actions are those that affect large areas or multiple properties.

i) They set broad policy directives.

ii) Examples include adopting an entire land use code, general amendments, a comprehensive plan, adopting building codes, etc.

V. Perceived Conflict, Appearance of Impropriety and Ex-Parte Communication; The Limits of the Due Process Clause

A) The most likely conflicts are also the hardest to define. Conflict can be in the eye of the beholder.

B) Both the Standards and Independent Ethics Commission focus primarily on financial gain, but make clear that there are other types of conflicts.

C) The purpose of the Independent Ethics Commission provides:

i) The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;

ii) They shall carry out their duties for the benefit of the people of the state;

iii) They shall, therefore, avoid conduct that is in violation of their public trust **or that creates a justifiable impression** among members of the public that such trust is being violated; and

iv) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust.

D) When a public official performs a quasi-judicial act, the Due Process Clause of the United States Constitution also comes into play. See Hide-A-Way Massage Parlor, Inc. v. Board of County Commissioners, 597 P.2d 564 (Colo. 1979); Elizondo v. State, 570 P.2d 518 (Colo. 1977).

i) "Impartiality of the tribunal is an essential element of due process." Riggins v. Goodman, 572 F.3d 1101, 1112 (10th Cir. 2009) (citing Withrow v. Larkin, 421 U.S. 35, 46-47 (1975)).

ii) There is a presumption of honesty, integrity and impartiality on the part of decisionmakers, and a substantial showing of personal bias is required to disqualify a hearing officer or tribunal. Id. An adjudicatory hearing will be held to have been conducted impartially in the absence of a personal, financial, or official stake on part of the decisionmaker. Soon Yee Scott v. City of Englewood, 672 P.2d 225 (Colo. App. 1983).

iii) There are two ways to overcome the presumption of impartiality. Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995).

a. Proceedings and surrounding circumstances demonstrate actual bias. Id.

b. Adjudicator's pecuniary or personal interest in outcome of proceeding creates an appearance of impropriety that violates due process, even without showing bias. Id.

E) Prejudgment and Bias. Elected officials are members of small communities. They are human, and therefore, generally incapable of fully leaving their opinions and prejudices at the door when they come to work. Don't expect them to, but expect them to have an open mind. They should strive to be fair.

i) It is difficult to separate a Board's policy making function (why most politicians run) in which they are specifically required to make policy

statements from their role as a decisionmaker who is specifically required to apply standards to a particular fact situation.

ii) Participating in a prior decision on the same case may be problematic.

a. No prohibition against commissioners also sitting on the planning commission.

b. County commissioners have been allowed to appoint themselves to the board of adjustments.

c. Incompatible offices theory. In some states holding two public offices is automatically a conflict if one office is subordinate to the other. Not specifically recognized in Colorado but courts have expressed concern.

d. In Leverett v. Town of Limon, 567 F. Supp. 471 (D. Colo. 1983), the court found a denial of due process when a zoning enforcement official also served on the Board of Adjustment and had a personal and financial interest in the outcome.

e. However, "[m]ere familiarity with the fact of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker." Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976).

f. In Riggins, 572 F.3d at 1112, the court explained that in small public agencies, personnel often wear multiple hats, and to hold that any combination of the adjudicatory and investigative function necessarily violates due process would conflict with the Supreme Court's clear desire to leave employment decisions in the hands of the bodies duly elected to make them.

g. Query how far this deference extends to other adjudicatory decisions?

iii) Having or stating an opinion on a matter that subsequently comes before them may also be problematic.

a. Prehearing statements or actions by a decisionmaker are fatal to the validity of the hearing if the prehearing statements or conduct show that the decisionmaker has 1) made up his or her mind and will not listen to the evidence with an open mind, or 2) will not apply existing law.

b. The mere fact that a council member has learned facts or expressed an opinion is not sufficient in itself to demonstrate that a hearing is unfair. Johnson v. City Council of the City of Glendale, 595 P.2d

701 (Colo.App. 1979) (holding that it was not impermissible for board members during a personnel appeal to receive evidence at a prior "informal hearing" and then make a final decision after a subsequent formal hearing).

c. The Johnson case is tough to square with Booth v. Trustees of the Town of Silver Plume, 474 P.2d 227 (1970) (holding that the town trustees denied a liquor applicant a fair and impartial hearing when some of the trustees investigated the application prior to the hearing and recommended against issuance of a license). What is permissible and impermissible is a matter of degree without clear guidance. Exercise caution!

d. It is generally not improper for a government official to take a position on a policy question and then later participate in a quasi-judicial decision in which that policy question becomes an issue. It only becomes a problem when the official actually prejudges a particular set of facts. For example, it is fine to express opposition to development generally but not to a particular project.

e. "A decisionmaker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is no showing that the decisionmaker is incapable of judging the particular controversy fairly on the basis of its own circumstances." Mountain States Telephone and Telegraph Co. v. Public Utilities Commission, 763 P.2d 1020 (Colo. 1988).

f. However, in Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977), the Tenth Circuit held that actual bias was proven with respect to a hearing on the termination of a school superintendent because of statements made by three school board members during their election campaigns.

g. Similarly, in McClure v. Independent School District Number 16, 228 F.3d 1205, 1215-16 (10th Cir. 2000), bias was established where decisionmakers publicly stated their intent to terminate an employee prior to the hearing.

h. Does bias matter when the biased decisionmaker is acting in an intermediate appellate capacity?

(1) In Geer v. Stathopulos, 309 P.2d 606**,** 609 (Colo. 1957), the Colorado Supreme Court declined to consider whether a district court judge who had expressed animus toward the defendant liquor licensing authority in a Rule 106 appeal should have disqualified himself.

(2) It noted that the district judge's ruling was limited to a review of the administrative record, and it had the identical record before it, and therefore could make an independent judgment concerning the underlying decision. Id.

iv) Other Actions to Avoid.

a. What about applicants meeting with commissioners or trustees individually prior to an application? There is NO safe harbor for pre-submission meetings!

b. What about pre- or post-submission work sessions with the planning commission or commissioners? Be very careful of what you say. Speak in general planning terms and philosophies.

c. What about attending community meetings on a topic that will come before you? Nothing good can come from this.

F) Appearance of Impropriety. Even in the absence of actual bias, the Due Process Clause may be violated if the appearance of impropriety is too great. Stivers, 71 F.3d 732.

i) The Court must ask whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" Capterton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2263 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

ii) In Caperton, the Court found due process to have been violated when a member of the West Virginia Supreme Court of Appeals refused to recuse himself even though one of the parties to the appeal had made approximately $3,000,000.00 in campaign contributions and independent expenditures supporting the election of the justice. The Court concluded that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level." Id. at 2265.

iii) Chief Justice Roberts wrote a dissenting opinion, predicting that the majority's "probability of bias" standard would prove unworkable, listing forty questions that future courts will be required to address. Those questions include:

a. What level of contribution or expenditure gives rise to a probability of bias?

b. How do we determine whether a given expenditure is disproportionate? Disproportionate to what?

c. How long does the probability of bias last?

d. Does it matter whether the judge plans to run for reelection?

e. What if the candidate draws "disproportionate" support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?

(1) Applying the Chief Justice's question to the land use arena, does it matter if a decisionmaker drew disproportionate support from environmental groups?

(2) Or from the development community?

(3) Or from a business competitor of the applicant?

(4) Or from inclusionary housing proponents?

f. Should we assume that elected judges feel a "debt of hostility" towards major opponents of their candidacies?

g. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?

(1) The Nevada Ethics Commission obviously thinks it does. Carrigan, 131 S.Ct. at 2347.

(2) Is the commission's evaluation "a realistic appraisal of psychological tendencies and human weakness," Caperton, 129 S.Ct. at 2263, therefore requiring recusal in such circumstances to protect due process?

h. Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?

i. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought?

j. What procedures must be followed to challenge a state judge's failure to recuse? May Caperton claims only be raised on direct appeal? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983?

k. What is the proper remedy? After a successful Caperton motion, must the parties start from scratch before the lower courts?

l. Are parties entitled to discovery with respect to the judge's recusal decision?

iv) Consider the interplay of Caperton, 129 S.Ct. 2252, and Citizens United, 130 S.Ct. 876, in the following scenario.

a. A corporate developer spends $50,000 on independent advertisements for a pro-growth council member, and the members of an environmental group contribute $60,000 in the aggregate to an anti-growth council member. Each candidate's aggregate spending is $100,000. Both are elected.

b. In a hearing on the developer's application for approval of a new development, which is opposed by the environmental group, should recusal be required of either council member?

c. If recusal is required of the pro-growth council member, but not the anti-growth council member, has the developer's right of free speech been impermissibly impaired? Citizens United, 130 S.Ct. 886 (government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether).

(1) Citizens United involved an outright ban.

(2) But it is well settled that the government also cannot unduly burden protected speech. See Near v. Minnesota, 283 U.S. 697 (1931) (rejecting argument that First Amendment protection limited to prohibition against prior restraints).

(3) Is the corporation being punished for speaking more loudly than the opponents?

v) Other situations in which an appearance of impropriety violated due process.

a. Gibson v. Berryhill, 411 U.S. 564, (1973) (business competitors on Optometry Board give appearance of impropriety in action to revoke license).

b. Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984) (marital relationship with party or counsel).

(1) However, Justice Scalia determined that recusal was unnecessary in Bush v. Gore, 531 U.S. 98 (2000), even though Bush was represented by a law firm in which Scalia's son was a partner.

(2) This despite a federal statute requiring recusal in any case in which a judge's child has an interest that could be substantially affected by the outcome of the proceeding or in which the judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455.

(3) The same restrictions are found in Rule 2.11 of the Colorado Rules of Judicial Conduct. In interpreting that rule, the Colorado Judicial Ethics Advisory Board takes a more expansive view of when recusal is required. Colo. J.E.A.B. Op. 05-02.

(a) It noted that "[t]here is no *per se* rule requiring disqualification when a partner or associate of a relative lawyer appears before a judge." Id.

(b) But the board said that the determination of whether the judge's impartiality might reasonably be questioned is based upon an objective standard. Id.

(c) Accordingly, the board determined that a county court judge in a small jurisdiction should disqualify himself any time any member of his brother-in-law's firm appeared in his court. Id.

c. In the Matter of Jacobi, 715 N.E.2d 873 (Ind. 1999) (significant appearance of impropriety existed where judge granted restraining order to Town without certification of Town's attorney regarding notice made to opposing party, failed to make simple inquiry of opposing party's attorney and had significant contacts with Town's attorney and Town Board president with whom the judge has close personal relationship with and contact on the previous day).

d. Leverett v. Town of Limon, 567 F. Supp. 471 (D. Colo. 1983) (denial of due process occurred when zoning enforcement official also served on Board of Adjustment and had personal and financial interest in outcome). However, in Applebaugh v. Bd. of Cty. Comm'rs, 837 P.2d 304 (Colo. App. 1992), the Court found no denial of due process in a rezoning hearing in which the Board was both the applicant and decisionmaker.

G) Ex-Parte Contacts. These are communications between board members and a party or member of the public that takes place outside a noticed public hearing on a topic to be heard in a formal hearing. Very problematic because the other side is not present to hear or refute what is being said. It gives an appearance of impropriety that undermines the integrity of the decision making process. Avoid them!

i) Such contacts can invalidate the action of the decisionmakers.

a. Leverett, 567 F. Supp. 471 (ex-parte communications between zoning official and Board of Adjustment "poisoned the well").

b. Wells v. Del Norte School Dist. C-7, 753 P.2d 770 (Colo. App. 1987) (ex-parte communication between hearing officer and counsel for school district required remand for hearing before impartial hearing officer).

ii) Ex-parte contacts violate Rule 3.5(b) of the attorney's Model Rules of Professional Conduct.

iii) Also consider Model Rule 4.2 which prohibits communication with a person represented by counsel without consent, and Model Rule 8.4(d) which provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.

iv) Contacts can be in person, by phones, via email, and through written letters. Form of contact is irrelevant.

v) Best to avoid them in general. If it happens, full disclosure must take place and an opportunity for cross examination given. Can be very unpleasant for a board member.

vi) Site visits are particularly troubling. They serve a valid and necessary purpose but are fraught with problems. Should only be used to acquaint the decisionmaker with the physical layout. Should not be an opportunity to discuss or ask questions of the applicant or members of the public. Should not be an opportunity for board members to discuss the application amongst themselves. Should be carefully monitored.

vii) Pre-application communications. Again there is no safe harbor for communications that occur prior to the submission of a file. Arguably the board member is not exercising quasi-judicial functions at that time, but good luck selling that one. Should consider how general the conversation is. Is it inevitable that a file will be forthcoming, how much project-specific detail is being presented, etc.

H) Examples and Other Cautionary Tales.

VI. Rights Protected by Due Process Clause

A) The Due Process Clause does not protect mere procedural rights. Olim v. Wakinekona, 461 U.S. 238, 250 n. 12 (1983).

B) "What the Due Process clauses of the Fifth and Fourteenth Amendments protects [sic] is 'life, liberty, and property,' not the procedures designed to protect life,

liberty, and property." Montgomery v. Carter County, 226 F.3d 758, 768 (6th Cir. 2000) (citations omitted).

C) If the governmental body has discretion as to whether to approve or deny a land use application, the applicant has no property interest in receiving any approval. See e.g., Gardner v. City of Baltimore, 969 F.2d 63, 71 (4th Cir. 1992); Silver v. Franklin Township Bd. of Zoning Appeals, 966 F.2d 1031 (6th Cir. 1992); RRI Realty Corp. v. Village of Southhampton, 870 F.2d 911, 918 (2d Cir. 1989); Hillside Community Church v. Olson, 58 P.3d 1021, 1027-28 (Colo. 2002).

D) Therefore, even if a zoning hearing is tainted by bias or some other procedural irregularity, a land use applicant may not have a due process claim. River Park, Inc. v. City of Highland Park, 23 F.3d 164, 166-67 (7th Cir. 1994) ([T]he Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution." (citations omitted)); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1105 (8th Cir. 1992) ("A bad-faith violation of state law [requiring public notice before enactment of zoning ordinances] remains only a violation of state law.").

E) Neighboring land owners opposing an application are even less likely to have a due process claim. Olson, 58 P.3d at 1028 (ordinance granting neighbors notice and an opportunity to participate in hearing on special use application did not create property right protected by Due Process Clause).

VII. Other Legal Challenges

A) State claims remain. In most circumstances, a C.R.C.P. 106(a)(4) challenge is the most likely avenue to challenge procedural irregularities in a quasi-judicial hearing. This challenge provides for judicial review of a decision of any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions for the purpose of determining whether the body or officer exceeded its jurisdiction or abused its discretion. An abuse of discretion occurs when a governmental body issues a decision that is not reasonably supported by any competent evidence in the record. "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority or failure to follow applicable law."

i) A required hearing not conducted fairly is tantamount to no hearing at all.

ii) If the governing body does not conduct a hearing fairly, then it has abused its discretion by not following the requirements of its own laws.

iii) Rule 106 challenges are a review of the record. Any competent evidence in the record is the standard and very easy to meet.

iv) Declaratory Judgment actions likely to go beyond the record and subject board members to depositions, discovery, etc.

v) Failure of one board member to properly address bias, prejudgment or conflict is invalidation of the action of the entire body. You can't just ignore and not count that vote.

VIII. Other Areas of Concern

A) Executive Sessions and Open Meetings. Any meeting where a majority of commissioners discuss public business or take formal action. Must be open to the public at all times. This includes electronic communication. The exception to this rule is executive sessions called for the purpose, among other things, of receiving legal advice and discussing matters subject to negotiations. It is privileged communication that can only be waived by action of the entire commission. Many boards will use this as a mechanism to discuss the merits of a particular case and game plan how to conduct a hearing. Fraught with abuse potential. Should be limited to specific legal implications. See Wright v. Golden. Nothing you can do about it?

B) Work Sessions. Ugly stepchild of the planning process. May be conducted but cannot be used as a substitute for a regular meeting. Bagby v. School District No. 1, 528 P.2d 1299 (Colo. 1974); Walsenberg Sand & Gravel Co. v. City Council of Walsenberg, 160 P.3d 247 (Colo.App. 2007). Commission members must base their decision only on information contained in the record. Are these part of the record? Avoid the punch and make them part of the record. Have them part of the land use process (either sketch or preliminary plan). Why create another type of hearing. All applicants and public should be invited to attend. Town of Vail case.

IX. Model Rule 3.3: Candor Toward the Tribunal

A) Model Rule 3.3 applies whenever a lawyer appears before a "tribunal."

B) Model Rule 1.0(m): "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." (Emphasis added).

C) Model Rule 3.3(a) prohibits a lawyer from:

i) knowingly making a false statement of law or fact to a tribunal;

ii) failing to disclose controlling legal authority; or

iii) offering evidence known to be false.

D) Model Rule 3.3(b) requires a lawyer to take remedial action if the lawyer's client has engaged in criminal or fraudulent behavior relating to the adjudicative proceeding before the tribunal.

X. Model Rule 3.4: Fairness to Opposing Party and Counsel

A) A lawyer shall not:

i) unlawfully obstruct another party's access to evidence;

ii) unlawfully alter, destroy or conceal document or material having evidentiary value;

iii) falsify evidence or assist in such falsification; or

iv) knowingly disobey a rule of a tribunal, except for an open refusal based on assertion that no valid obligation exists.

XI. Model Rule 3.5: Impartiality and Decorum of the Tribunal

A) A lawyer shall not:

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

ii) communicate ex parte with such a person during the proceeding.

B) In the land use context, what means of influencing a public official are prohibited?

i) Obviously, any action that would be criminal, such as bribery, threats or blackmail.

ii) What about loans or gifts?

a. Model Rules rejected the outright prohibition contained in DR 7-110(A) of the Model Code of Professional Responsibility against loans or gifts to a judge, regardless of the giver's intent.

b. Gifts that fall within the boundaries of everyday hospitality are not prohibited. ABA/BNA Lawyers' Manual on Professional Conduct 61: 805; Illinois Ethics Op. 94-3 (1994) (village counsel may invite elected officials to firm-sponsored social events such as holiday parties and summer picnics so long as events can be considered as ordinary hospitality).

iii) What about campaign contributions?

a. Caperton addresses the issue of whether the client can make a campaign contribution without violating the Due Process Clause.

b. A cautious lawyer should read Rule 3.5 as being more restrictive than the Due Process Clause with respect to campaign contributions.

c. You should also consider:

(1) Model Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice, and

(2) Model Rule 8.4(e) which prohibits a lawyer from stating or implying an ability to influence improperly a government agency or official.

XII. Model Rule 3.6: Trial Publicity: The Limits of the First Amendment

A) Applies to "adjudicative proceedings."

i) The term "adjudicative proceeding" is not defined in the Model Rules.

ii) But the definition of tribunal describes when a legislative body is considered to be acting in an "adjudicative capacity."

iii) It does so "when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." Model Rule 1.0(m).

iv) Almost all reported decisions under Model Rule 3.6 relate to criminal trials.

B) Elements of a Model Rule 3.6(a) violation:

i) Lawyer is or has been involved in investigation or litigation of a matter;

ii) Makes an extrajudicial statement concerning the matter;

iii) Lawyer knows or reasonably should know that:

a. The statement will be disseminated by means of public communication; and

b. Will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

iv) Communication does not fall into one of the safe harbors of Rule 3.6(b).

C) Model Rule 3.6(b). A lawyer may state:

i) Claim involved and identity of the persons involved (except when disclosure of identity otherwise prohibited);

ii) Information contained in public record;

iii) That an investigation is in progress;

iv) Scheduling information;

v) Warnings; and

vi) Certain additional information in criminal matters.

D) In re Sawyer, 360 U.S. 622, 79 S. Ct. 1376, 3 L.Ed.2d 1473 (1959).

i) Attorney, who represented defendant in a criminal trial under the Smith Act, was disciplined by the Hawaii Supreme Court for impugning the integrity of the Court in statements made at a political rally during the trial.

ii) Statements included:

a. horrible and shocking things were going on at the trial;

b. a fair trial was impossible;

c. all rules of evidence were being scrapped so the government could prove its case; and

d. unless the trial was stopped, new crimes would be created.

iii) United States Supreme Court reversed:

a. Plurality opinion.

b. Finding unsupported by evidence.

c. Suggestion of First Amendment concerns.

d. One justice concurring and four dissenting stated that the First Amendment does not immunize a lawyer from discipline for extra-judicial statements.

E) Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

i) Attorney disciplined by Nevada Supreme Court for extra-judicial statements concerning a criminal trial under Model Rule 3.6.

ii) Client, who was an owner of a storage facility in which undercover police stored cocaine and cash, was charged with its theft.

iii) Immediately following the arrest, the lawyer called a press conference and stated:

a. Police detective is person in most direct position to have stolen drugs and money;

b. Evidence will establish detective took drugs and money;

c. Other victims were drug dealers and money launderers and not credible; and

d. Strongly implied detective used cocaine.

iv) Supreme Court reversed.

a. Five justices found the Rule, as applied to discipline the lawyer, void for vagueness.

b. Rule allowed comment on general nature of claim or defense notwithstanding specific prohibition on statements about witness credibility.

c. Five justices found Model Rule 3.6 not facially unconstitutional.

d. Statements relating to alleged governmental misconduct are "at the core of the First Amendment."

F) 1994 Amendments to Rule following Gentile.

i) Limited to lawyers participating in matter.

ii) Revised safe harbor provisions.

iii) Added new section (c) allowing a lawyer to respond to recent publicity not initiated by lawyer or lawyer's client as necessary to protect client from substantial undue prejudicial effect.

iv) Comment amended to state that the nature of the proceeding should be taken into account in determining prejudice:

a. Criminal jury trial require most care;

b. Civil trials somewhat less; and

c. Nonjury hearings and arbitration proceedings even less.

G) 2002 amendment to rule adopted reasonable lawyer standard.

XIII. Model Rule 3.9: Representing Client in Nonadjudicative Proceeding

A) Must disclose appearance is in representative capacity.

B) Under Model Rule, must comply with requirement of Rules 3.3 through 3.5.

C) Colorado modified the model rule to remove the requirement to comply with Rule 3.3(a)(2) which relates to the disclosure of controlling legal authority.