



# ETHICS FOR LAWYERS IN THE LAND USE PROCESS

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# ETHICS IN LAND USE

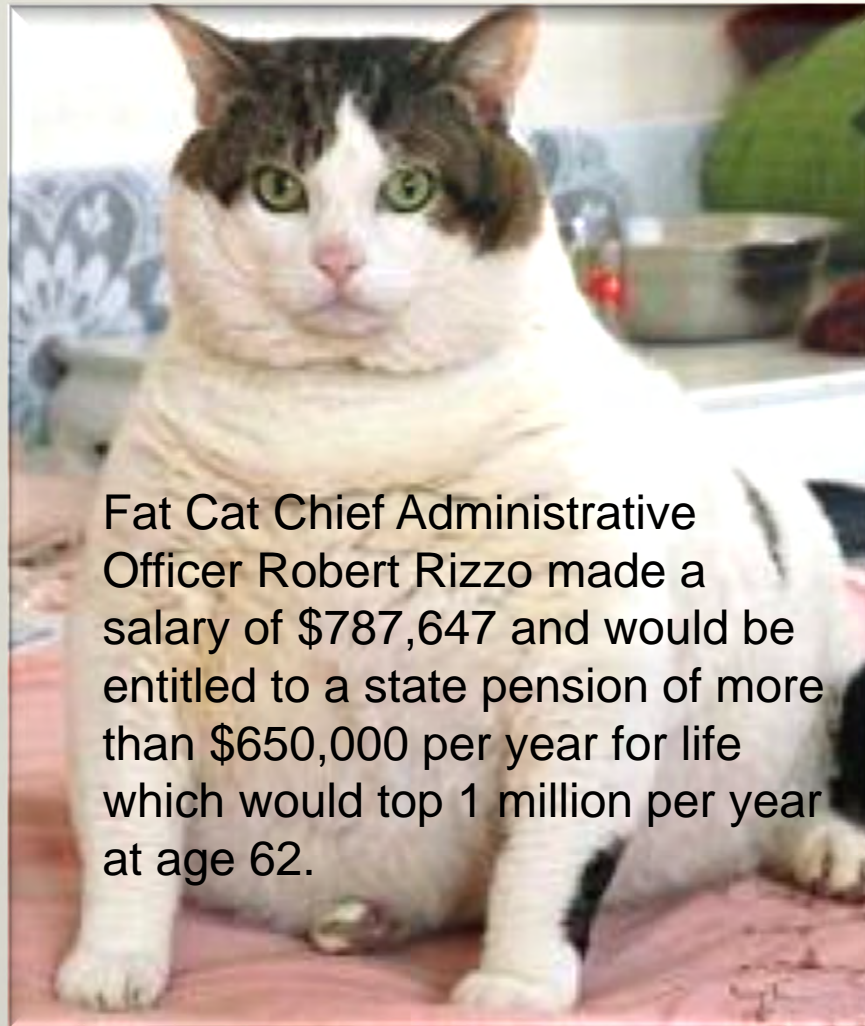


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Fat Cat Chief Administrative Officer Robert Rizzo made a salary of \$787,647 and would be entitled to a state pension of more than \$650,000 per year for life which would top 1 million per year at age 62.





4/8/2011



# Ethics in Land Use

- Over 20,000 convictions for public corruption over the last two decades on a federal level. Averaging about 1000 per year.
- Notable recent examples:
  - Connecticut Governor's chief of staff pled guilty to accepting gold in return for government contracts (which he buried in his back yard).
  - Detroit Mayor Kwame Kilpatrick sentenced to five years for lying under oath about an affair with his chief of staff and allowing his wife to use city car for personal vehicle.
  - Illinois Governor Rod Blagojevich charged for trying to sell Obama's senate seat.
  - NJ mayors of Hoboken, Ridgefield and Secaucus arrested in corruption probe. Probe involved bribes and the black market sales of kidneys and Gucci handbags.
  - What about 2010?
  - Union County, South Carolina: County sheriff, tax supervisor and assessor sentenced for accepting a bribe to purchase a county building (which was then used as a stash house for a cocaine ring)



# Ethics in Land Use

- Notable recent examples (cont.):
  - Director of Sewer and Water Board for New Orleans sentenced to 21 years for paying his own companies over 3 million to clean up after Hurricane Katrina (work that was never done).
  - Alamosa Housing Authority director sentenced to 37 months in prison for paying over \$400,000 to her family members with housing authority checks.
- What are the most corrupt states?
  - Mississippi (#1)
  - North Dakota (#2)
  - Louisiana (#3)
  - Alaska (#4)
  - Illinois (#5)





# Ethics in Land Use

- What are the least corrupt states?
  - Colorado (#46)
  - Iowa (#47)
  - N. Hampshire (#48)
  - Oregon (#49)
  - Nebraska (#50)





# Ethics in Land Use

- Not all conflicts and ethical issues are so easy to spot.
- What is legally required is not always the same as what is required by the electorate.
  - Bell police chief and others not arrested. Making exorbitant salaries is not a crime. Obtaining them illegally is.
- Hard to prove ethical violations.
- Despite difficult prosecution, elected officials should be held to a higher standard. It is up to us. Shouldn't someone have questioned \$800,000 salary for a city manager?



# Ethics in Land Use

- Colorado Legislative Declaration: 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.
- Who is best to ensure compliance with this trust?
  - Attorneys?
  - Planners?
  - Engineers?
  - Elected Officials?
- Let's look at the qualifications.





# Ethics in Land Use

- Attorneys - 7 years of education, licensing requirements, continuing legal education requirements (45 credit hours every 3 years);
- Planners – 4-6 years of education, licensing requirements, testing, continuing education requirements (32 credit hours every 2 years for AICP accreditation);
- Engineers – 4-6 years of education, licensing requirements, testing, mandatory tutelage;
- Elected Officials?



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# Ethics in Land Use

Or should we rely on those with business before the government, who, after all, are responsible for the following definition of a politician:

*An honest politician is one who,  
when he is bought, will stay bought.*

Simon Cameron, US financier & politician (1799 - 1889).





# Ethics in Land Use

- Members of county commissions, city councils, and planning commissions are often the least qualified to know the ethical rules governing their conduct.
- They must behave as impartial judges, but have little or no judicial or government experience in the area.
- Up to us (staff, applicants, professionals) to make sure the rules are followed.
- What are the rules?





# APPLICABLE RULES

- THOSE GOVERNING LAWYERS:
  - Model Rules of Professional Conduct adopted in most states
- THOSE GOVERNING PUBLIC OFFICIALS
  - For example: Colorado Code of Ethics, C.R.S. 24-18-101, et seq.





# Ethics in Land Use

- Quasi-Judicial Hearings v. Legislative or Administrative Acts.
- If administrative or legislative, the same due process and ethical protections will not apply. A judge shouldn't talk to a plaintiff or defendant about a case in front of her, but certainly can talk to them about the general application of justice.
- Quasi-Judicial actions are those with state or local laws requiring:
  - that notice be given before the action is taken;
  - that a hearing be conducted before the action is taken;
  - that the action results from application of prescribed criteria to the individual facts of the case;
  - examples include zoning change to a single piece of property, rezoning, subdivisions, conditional and special use permits, and variances.



# Statutes on Conflicts

- Ethical Codes. Some local governments rely on handbooks and other locally adopted codes or regulations. Are these extraneous? The Colorado Revised States include requirements that govern conduct for elected and appointed officials.
  - **Practical Application Alert**
  - Be wary of officials who want to adopt ethical rules in addition to what is provided in statute.
- Colorado Standards of Conduct. C.R.S. 24-18-101 et seq. Comprehensive code of ethics adopted in 1988.
- Some actions represent per se conflicts and are strictly prohibited, while other actions may or may not create a conflict depending upon the surrounding circumstances. Standards provide both mandatory rules as well as guidelines.





# Statutes on Conflicts

- The Standards are inherently convoluted. Common sense needed. Problematic when asking politicians to apply common sense application of rules written by attorneys. What is right and what is legal are often times not the same thing.
- Need to keep in mind the underlying legislative reason for the Standards: "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."



# What is Prohibited

- 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);
- 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);
- 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);





# What is Prohibited

- 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)

# HYPOTHETICAL NO. 1

## The Invitation



You have just been elected to City Council. Your college roommate represents a developer who is active in your community. You and your roommate have remained close since college. Your families socialize together, and you have always exchanged gifts on birthdays and holidays. Your roommate is now turning forty and has planned a ski weekend in Vail for a birthday bash. Your roommate has invited your family to stay in his family's condominium for the weekend. Can you accept the invitation?







# What is Prohibited

- Accepting a gift:
  - which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties;
  - 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;
  - **Practical Application Alert**
  - This one is easier to violate than the bribe scenario. No “payment” or “bribe” required. Includes the golf invites, the show tickets, the private jet rides, the dinners, etc?



# What is Prohibited

- 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.
- Lots of big words: official action, financial interest, personal or private interest.
- Official action. Any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.
  - **Practical Application Alert**
  - This is broad enough to include planning commission. Are their recommendations quasi-judicial? I would apply the same rules.



# HYPOTHETICAL NO. 2

## The Stake



A developer with a controversial development application pending before city council is represented by a law firm in which a councilperson's daughter is a partner. If the development is approved, there will be a significant amount of legal work for the firm in connection with the development. Is the councilperson required to recuse himself?





# What is Prohibited

- 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.
  - **Practical Application Alert**
  - Payment not necessary for financial interest under this definition. A directorship in a non-profit can count.
- Personal or private interest. The decision maker stands to gain financially from the outcome of the decision. Examples:
  - Zoning matter in which the board member is or represents the applicant, and attempts to represent himself at the hearing;
  - Board member owns or has an interest in a business before the public body;
  - Board member has financial dealings in a business before the public body;
  - Board member has a financial interest in a business which is a competitor to the business before the public body; and
  - Board member is a creditor of the business which is asking for action from the public body.



# What is Prohibited

- NOT a personal or private interest:
  - 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;
  - Board member is neighbor of the applicant;
  - Board member is in same church, club, or other group with the applicant;
  - Board member is friends with applicant.





# What is Prohibited

- Safe Harbor Rule. May still vote only if necessary to obtain a quorum and if he/she notifies the secretary of state.
  - **Practical Application Alert**
  - This is an affirmative defense to a charge of breach of fiduciary duty. Will still subject the decision to civil challenge. It is not a safe harbor. Better going with an even number of board members. A 1-1 vote is the same as a denial.
- Disclosure of Conflict. There is an affirmative duty to disclose. 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).
  - **Practical Application Alert**
  - Recusing yourself does not give you the right to be an advocate or opponent.

# What is Prohibited (Constitutional Wrinkles)



- Amendment 41. In 2006, voters added to the Constitution precluding 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. There goes our fun.
  - No gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discount.
- Independent Ethics Commission.
  - 5 appointed members to hear complaints, issue findings, and fines.
  - Fines are twice the amount of the benefit.
  - 12 month limitation on complaints.
  - No safe harbors (i.e. notifying the secretary of state).
  - No real deterrent effect. Probably better suited for advisory opinions.



# Perceived vs. Actual Conflicts

- Most likely to see. Do not have the clear benefit of statutory “shall not” language found in financial gain situations. However, statutes make it clear that there are conflicts that do not require financial gain.
- The purpose of the Independent Ethics Commission provides:
  - 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;
  - They shall carry out their duties for the benefit of the people of the state;
  - 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;
  - Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust.





# DUE PROCESS

- Applicable to any quasi-judicial function.
- Impartiality of a tribunal is an essential element of due process.
- Presumption of honesty, integrity and impartiality on the part of decisionmakers.
- Substantial showing of bias required to disqualify.





# TWO WAYS TO OVERCOME PRESUMPTION

- Proceedings and surrounding circumstances demonstrate actual bias
- Appearance of impropriety due to adjudicator's pecuniary or personal interest





# Perceived vs. Actual Conflicts

- Prejudgment and Bias. Elected officials are members of small communities. They are generally incapable of 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. At least appear to be fair.
- Prior participation may be problematic.
  - No prohibition against commissioners also sitting on the planning commission;
  - County commissioners have been allowed to appoint themselves to the board of adjustments;
  - 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.





# Perceived vs. Actual Conflicts

- Having or stating an opinion may be problematic.
  - 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).
  - 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).
  - **Practical Application Alert**
  - What is permissible and impermissible is a matter of degree without clear guidance. Exercise caution!



# Perceived vs. Actual Conflicts

- Having or stating an opinion may be problematic (cont.)
  - “A decision maker 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 decision maker 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).
- Constitutional requirements:
  - Due Process entitles a person to an impartial and disinterested tribunal;
  - Bias of a board member renders his participation in the hearing constitutionally unacceptable;
  - Prehearing statements or actions by a decision maker are fatal to the validity of the hearing if the prehearing statements or conduct show that the decision maker 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.

# HYPOTHETICAL NO. 3

## The Campaign Pledges



Mountain County has a small population and a history of mining and agricultural. Although it does not have any ski areas, it is located in a beautiful mountain valley within a short commute from several top-notch ski areas. When the mines shut down, one of the old mining communities became home to an art community which generally resists development. Many of the older residents of the county tend to be conservative and to resent the newcomers. The older residents are in favor of anything that might revive the economy of Mountain County.

In early 2010, the Board of County Commissioners approved a highly controversial preliminary development plan for Golf Paradise, a large resort community, including two golf-courses and 500 single-family homes with an average size of 10,000 square feet. In November, two new commissioners were elected.

During the campaign, Commissioner A said she generally supported development and anything that will bring jobs back to Mountain County.

Commissioner B said "Golf Paradise is an abomination." He also said that because of his strong support for sustainable development that he would "never vote in favor of any development with houses larger than 5,000 square feet."

Now Golf Paradise is back for approval of its final development plan. Does either commissioner need to recuse himself or herself?







# EXAMPLES OF BIAS

Staton v. Mayes, 552 F.2d 908 (10<sup>th</sup> Cir.) cert. denied, 434 U.S. 907 (1977)

- Board of Education voted to dismiss superintendent
- Tenth Circuit reversed due to bias of tribunal
- In campaign for election, one member stated:
  - no progress could be made with school problems until there was a new superintendent
  - that he was pledged to seek new top level administration
  - that it was apparent trouble lay with superintendent
  - that he would vote to make necessary change
- Second member stated prior to hearing “Dr. Staton has got to go.”





# EXAMPLES OF BIAS (cont'd.)

McClure v. Independent School District No. 16, 228 F.3d 1205 (10th Cir. 2000)

- Bias was established when decisionmakers publicly stated their intent to terminate an employee prior to the hearing.



# EXAMPLES OF BIAS (cont'd.)



## Geer v. Stathopoulos

- Manager of Safety and Excise denied liquor license
- Applicant filed for certiorari review
- Manager moved to recuse judge
- Based on following statement in chamber and open court:
  - handling and administration of liquor licenses in Denver has been and is a rotten, stinking mess
  - the entire matter should be investigated by a grand jury
  - that he intends to reverse the decisions of the manager every chance he gets
  - that he will keep counsel busy appealing his decisions until a grand jury or someone does something to straighten the matter out
- Judge denied motion to recuse and reversed manager
- Supreme Court said it could make *de novo* review so did not need to determine bias
- Dissent—called decision a “mockery” and a “malignant travesty on the administration of justice”







# 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.
- 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)).





# APPEARANCE OF IMPROPRIETY (cont'd.)

- 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.





# APPEARANCE OF IMPROPRIETY (cont'd.)

- Those questions include:
  - What level of contribution or expenditure gives rise to a probability of bias?
  - How do we determine whether a given expenditure is disproportionate? Disproportionate to what?







# APPEARANCE OF IMPROPRIETY (cont'd.)

- How long does the probability of bias last?
- Does it matter whether the judge plans to run for reelection?





# APPEARANCE OF IMPROPRIETY (cont'd.)

- 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?

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

Or from the development community?

Or from a business competitor of the applicant?

Or from the inclusionary housing proponents?



# APPEARANCE OF IMPROPRIETY (cont'd.)



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

- Gibson v. Berryhill, 411 U.S. 564, (1973) (business competitors on Optometry Board give appearance of impropriety in action to revoke license).
- Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984) (marital relationship with party or counsel).







# APPEARANCE OF IMPROPRIETY (cont'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.





# Perceived vs. Actual Conflicts

- Constitutional requirements (cont.):
  - **Practical Application Alert**
    - What about applicants meeting with commissioners or trustees individually prior to an application? NO safe harbor for pre-submission meetings!
    - 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. Or better yet, don't do it.
    - What about attending community meetings on a topic that will come before you? Nothing good can come from this.

# Perceived vs. Actual Conflicts



- Ex Parte Contacts. 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. Other side is not present to hear or refute what is being said. Gives an appearance of impropriety. Avoid them!
  - **Practical Application Alert**
  - Make sure they are disclosed. You cannot cucumber a pickle!





# Perceived vs. Actual Conflicts

- Ex Parte Contacts (cont.).
  - Such contacts can invalidate the action of the decision makers.
  - Ex parte contacts violate Rule 4.2(b) of the attorney's Model Rules of Professional Conduct.
  - Contacts can be in person, by phones, via email, and through written letters. Form of contact is irrelevant.
  - Full disclosure must take place and an opportunity for cross examination given. Can be very unpleasant for a board member.
- Site Visits.
  - They serve a valid and necessary purpose. I still hate them.
  - Should only be used to acquaint the decision maker 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.



# Perceived vs. Actual Conflicts

- Work Sessions. These are worse than site visits.
  - 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); Walsenburg Sand & Gravel Co. v. City Council of Walsenburg, 160 P.3d 297 (Colo.App.2007).
  - Commission members must base their decision only on information contained in the record. Are these part of the record? Why not make them part of the process (either sketch or preliminary plan)?
  - All applicants and public should be invited to attend.



# RIGHTS PROTECTED BY DUE PROCESS

- Not every party subjected to a partial tribunal has a due process claim.
- The Due Process Clause does not protect mere procedural rights. Olim v. Wakinekona, 461 U.S. 238, 250 n. 12 (1983).
- “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).
- “A bad-faith violation of state law remains only a violation of state law.”







# RIGHTS PROTECTED BY DUE PROCESS

- 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.
- 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.
- Neighboring land owners opposing an application are even less likely to have a due process claim. Hillside Community Church v. Olson, 58 P.3d 1021, 1027-1028. (Colo. 2002).
- An 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. Id.





# Legal Challenges

- State claims. C.R.C.P. 106(a)(4) challenges the most likely culprit. 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.”



# Legal Challenges

- State Claims (cont.)
  - A required hearing not conducted fairly is tantamount to no hearing at all.
  - 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.
  - Rule 106 challenges are a review of the record. Any competent evidence in the record is the standard and very easy to meet.
  - Declaratory Judgment actions likely to go beyond the record and subject board members to depositions, discovery, etc.
  - 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.



# HYPOTHETICAL NO. 5

## The Simulation



BigBox is seeking approval of a retail development near your client's residential development. Your client believes that the proposed development will block mountain views from the residential development and have a negative impact on the value of the development. You have been engaged by your client to appear in opposition to the application. Your client's planning consultant has prepared a simulation showing how the views will be blocked. In talking with the consultant, you learn that the simulation is not based upon actual topographical and engineering data concerning the proposed development, but is merely an illustration of how views might be blocked.

Can you present the simulation?

If your client speaks before you and makes reference to the simulation, do you have any duty to correct any misstatements?





# MODEL RULE 3.3

## Candor Toward the Tribunal

- Model Rule 3.3 applies whenever a lawyer appears before a “tribunal.”
- 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.”





# MODEL RULE 3.3

## Candor Toward the Tribunal

- The Rule prohibits a lawyer from:
  - knowingly making a false statement of law or fact to a tribunal;
  - failing to disclose controlling legal authority; or
  - offering evidence known to be false.
- Rule requires a lawyer to take remedial action if the lawyer's client has engaged in criminal or fraudulent behavior.







# MODEL RULE 3.4

## Fairness to Opposing Party and Counsel

- A lawyer shall not:
  - unlawfully obstruct another party's access to evidence;
  - unlawfully alter, destroy or conceal document or material having evidentiary value;
  - falsify evidence or assist in such falsification; or
  - knowingly disobey a rule of a tribunal; except for an open refusal based on assertion that no valid obligation exists.



# HYPOTHETICAL NO. 1 (again)

## The Invitation



You have just been elected to City Council. Your college roommate represents a developer who is active in your community. You and your roommate have remained close since college. Your families socialize together, and you have always exchanged gifts on birthdays and holidays. Your roommate is now turning forty and has planned a ski weekend in Vail for a birthday bash. Your roommate has invited your family to stay in his family's condominium for the weekend.

Has your roommate violated the Model Rules?



# MODEL RULE 3.5

## Impartiality and Decorum of the Tribunal



- A lawyer shall not:
  - seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or
  - communicate ex parte with such a person during the proceeding.
- Also consider:
  - Model Rule 8.4(d) (prohibition against conduct prejudicial to administration of justice).
  - Model Rule 8.4(e) (prohibition against stating or implying ability to influence improperly a government official)







# MODEL RULE 3.5

## Impartiality and Decorum of the Tribunal

- 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.
- 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).





# OTHER EXAMPLES OF IMPROPER INFLUENCE

- Obviously, any action that would be criminal, such as bribery, threats or blackmail.
- “A threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking the name of the attorney from the rolls of attorneys practicing in the court.” Bradley v. Fisher, 80 U.S. 335.





# Campaign Contributions

- Caperton addresses only the issue of whether the client can make a campaign contribution without violating the Due Process Clause.
- A cautious lawyer should read Rule 3.5 as being more restrictive than the Due Process Clause with respect to campaign contributions.
- And again, also consider:
  - Model Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice, and
  - Model Rule 8.4(e) which prohibits a lawyer from stating or implying an ability to influence improperly a government agency or official.





# HYPOTHETICAL NO. 6

## The Critic



You are representing an environmental group that is opposing a special use application by Good Steward Mining Co. to develop a rare earth mine and processing facility. Good Steward has been working with the county planning staff for more than two years to make sure that its proposed facility will properly designed and built to safely treat the radioactive tailings and toxic acids used in the refining process. Its plans meet or exceed the rigorous federal, state and local regulations governing the proposed operation. In short, there is no legitimate basis for denying the application. However, your client's executive director has discovered that one of the principals of Good Steward is a great grandson of a Nazi war criminal. The director wants your help in mounting a publicity campaign about this issue in the hopes of defeating the application.

Can you talk to the press about the issue?

If so, what can you say?



# MODEL RULE 3.6

## Trial Publicity



- Applies to “adjudicative proceedings.”
- The term “adjudicative proceeding” is not defined in the Model Rules.
- But the definition of tribunal describes when a legislative body is considered to be acting in an “adjudicative capacity.”
- 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).
- Almost all reported decisions under Model Rule 3.6 relate to criminal trials.



# ELEMENTS OF A MODEL RULE 3.6(A) VIOLATION



- Lawyer is or has been involved in investigation or litigation of a matter;
- Makes an extrajudicial statement concerning the matter;
- Lawyer knows or reasonably should know that:
  - The statement will be disseminated by means of public communication, and
  - Will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
- Communication does not fall into one of the safe harbors of Rule 3.6(b).







# SAFE HARBOR

- Model Rule 3.6(b). A lawyer may state:
  - Claim involved and identity of the persons involved (except when disclosure of identity otherwise prohibited);
  - Information contained in public record;
  - That an investigation is in progress;
  - Scheduling information;
  - Warnings; and
  - Certain additional information in criminal matters.



# MODEL RULE 3.6



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

- 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 trial.
- Statements included:
  - horrible and shocking things were going on at the trial
  - a fair trial was impossible
  - all rules of evidence were being scrapped so the government could prove its case
  - unless the trial was stopped, new crimes would be created
- United States Supreme Court reversed:
  - plurality opinion
  - finding unsupported by evidence
  - suggestion of First Amendment concerns
  - one justice concurring and four dissenting stated that the First Amendment does not immunize a lawyer from discipline for extra-judicial statements



# MODEL RULE 3.6



Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L.Ed.2d 888 (1991)

- Attorney disciplined by Nevada Supreme Court for extra-judicial statements concerning a criminal trial
- Client, who was an owner of a storage facility in which undercover police stored cocaine and cash, was charged with its theft
- Immediately following the arrest, the lawyer called a press conference and stated:
  - police detective is person in most direct position to have stolen drugs and money
  - evidence will establish detective took drugs and money
  - other victims were drug dealers and money launderers and not credible
- Supreme Court reversed
  - five justices found the Rule, as applied to discipline the lawyer, void for vagueness
  - Rule allowed comment on general nature of claim or defense notwithstanding specific prohibition on statements about witness credibility
  - five justices found Model Rule 3.6 not facially unconstitutional
  - statements relating to alleged governmental misconduct are “at the core of the First Amendment”







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