

2017 Nebraska Annual
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Ethics for Planners and Attorneys

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Concepts

- Public interest
- Consumer protection
- Duty to public
- Conflict with client
- Fiduciary duty
- Compare law and planning
- Litigation duties and purposes

Sources of Ethical Responsibilities

- Rules of Conduct
- Codes of Ethics (Lawyers, Planners)
- Local Rules or Ordinances
- Case Law
- Commercial Fiduciary Duties
- Ourselves and Our Professions

The Duty of Honesty

- *State of Nebraska v. Boose*, 277 Neb. 1 (2009)
 - Attorney assisted public official in commission of a felony.
 - Felony involved the official using his position to advance a real estate deal.
 - Attorney failed to report the felony even though he had knowledge of it.

The Duty of Honesty

- *State of Nebraska v. Boose*, 227 Neb. 1 (2009)
(continued)
 - Attorney fined and sent to prison, and ordered to pay restitution.
 - Attorney suspended from practicing law in Florida for three years; disbarred in Nebraska.
 - Same facts, but different legal questions and different standards in criminal case versus disciplinary proceeding.

The Duties of Loyalty and Confidentiality

- Once a client, always a client?
- Once a lawyer, always a lawyer?
- The First Amendment and the right to seek redress from one's government.
- The scope of ethical duties and the burdens of proof regarding a breach.
- Planners' duties similar to lawyers' duties, even if codes and regulations are different?
- Who are a planner's clients?

The Duty of Loyalty

- *Oasis West v. Goldman*, 51 Cal.4th 811 (2011)
 - Attorney helped developer obtain approval of redevelopment project.
 - After the work ended, the attorney actively campaigned against the project.
 - Developer sued his former attorney.

The Duty of Loyalty

- *Oasis West v. Goldman*, 51 Cal.4th 811 (2011)
(continued)
 - California Supreme Court ruled against the attorney.
 - Court held the attorney's activity did not violate his ethical duty of loyalty.

The Duty of Confidentiality

- *Oasis West v. Goldman*, 51 Cal.4th 811 (2011)
(continued)
 - Court also held the lawyer's conduct did not breach his ethical duty of confidentiality because the plaintiff could not prove the lawyer used confidential information in opposing the project.

Fiduciary Duty to a Client

- *Oasis West v. Goldman*, 51 Cal.4th 811 (2011)
(continued)
 - Lawyer's conduct did breach his professional fiduciary duty because court could infer he used confidential information to the former client's financial detriment even though it could not prove he did.
 - Lower standard for this general duty versus the codified duty of confidentiality (proof versus inference regarding use of confidential information).

Jury Nullification

- *Oasis West v. Goldman*, 51 Cal.4th 811 (2011)
(continued)
 - The First Amendment did not protect the lawyer here because the unauthorized use of confidential information is not constitutionally protected speech.
 - The Court found a way to hold the attorney liable because the case so strongly reeked of disloyalty.
 - The punishment was damages for the cost of an attorney to pursue the against the first attorney.

Planner's Duties

- *Oasis West v. Goldman*, 51 Cal.4th 811 (2011)
(continued)
 - Would a planner have similar duties?
 - Would a court or regulatory body treat a planner similarly?
 - What punishments or remedies, legal and otherwise, might result?

Commitment to the Cause

- *Waverton Big Box*
 - City of Waverton is working on improving its urban design regulations, but has not yet formally adopted anything.
 - National chain applies for rezoning and conditional use for a new big box store.
 - Community is divided.
 - District councilwoman is supportive.
 - Neighboring district councilman is strongly opposed.

Commitment to the Cause

- *Waverton Big Box (continued)*
 - Planning Director assigns project to young planner.
 - Young planner is aware of the politics of the project.
 - Young planner is also committed to improving urban design in Waverton and has been working on potential new regulations.
 - Young planner proposes conditions of approval that he feels are appropriate, but which are not rooted in the current code.

Commitment to the Cause

- *Waverton Big Box (continued)*
 - Planning Director wants to support his employee and improved urban design goals and presses ahead with proposed conditions.
 - Divided City Council approves project with proposed conditions.
 - Big box store sues City and wins. City argues that public is on notice of coming regulations, and that is enough to support City's action. City argues that planning is an art, not a pure science, and the Planning Department has discretion. Court disagrees.

Commitment to the Cause

- *Waverton Big Box (continued)*
 - Did the young planner, the Planning Director or the City Council act illegally?
 - Did the young planner, the Planning Director or the City Council act unethically?
 - What are possible results for the young planner, the Planning Director and the City?

Moral of the Story

- If it feels unethical, it probably is.
- Illegal and unethical are two different things.
- Ethics goes beyond the applicable rules and codes.
- But those rules and codes also provide important and valuable guidance.
- Courts and governing bodies do not like disloyalty, but they really dislike dishonesty.
- Compare the various punishments.

Questions?

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