

Nebraska Planning Conference Kearney, Nebraska

Ethics for Staff and Planning Commissioners

David C. Levy

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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
 - Lawyers: Model Rules of Professional Conduct and Responsibility
 - Planners: Nebraska Political Accountability and Disclosure Act (NPADA); AICP Rules of Conduct
- Codes of Ethics
- Local Rules or Ordinances
- Case Law
- Commercial Fiduciary Duties
- Ourselves and Our Professions

Identifying an Ethics Problem

- Half the battle!
- Most common in land use law:
 - Conflict of interest/disclosure
 - Duty of honesty
 - Duty of loyalty
 - Confidentiality

Conflicts of Interest

- What to ask yourself: "From the outside looking in, does it look like I, or someone close to me, could personally gain from the transaction/decision?"
- Similar rules for lawyers and planners
 - **Lawyers:** Business transactions with clients require disclosure and consent. Actual or prospective conflicts of interest (as against a client's interests) require disclosure, consent and possible disqualification from representation.
 - **Planners:** Always must disclose (potential and actual conflicts of interest) and sometimes must abstain (actual conflicts of interest) from the decision-making process.

Conflicts of Interest

- *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137 (1982).
 - Attorney acting as both the city attorney and attorney for corporate client entered into purchase agreement on behalf of corporate client for land that he knew the city was interested in purchasing to further its comprehensive plan.
 - Supreme Court ruled that the attorney's actions constituted both a conflict of interest and a breach of his fiduciary duty to the city.
 - "An attorney cannot purchase or negotiate for an interest in land in which his own client is interested."
 - How can attorney protect the public interest and public trust if also working on behalf of a private party in the same matter?

Duty of Honesty

- What to ask yourself: "Is what I am saying truthful and could reliance on it betray public or private confidence in me?"
- A lawyer cannot:
 - Accept kickbacks
 - Knowingly lie to a third party as to a material fact
 - Fail to disclose a material fact to a third party when disclosure is necessary to avoid a criminal or fraudulent act by a client
- To whom does a planner owe a duty of honesty?

The Duty of Honesty

- *In re Cammarano*, 98 A.3d 1184, 1185 (N.J. 2014).
 - Lawyer-turned-mayor accepted kickbacks from developer in exchange for expediting zoning approvals.
 - Mayor found guilty of conspiracy and extortion and sentenced to prison.
 - With regard to his capacity as a lawyer, New Jersey Supreme Court found that he had betrayed the public confidence and Mayor was disbarred from practicing law in New Jersey.
- Quiz: If city attorney knew of pay-for-play scheme and did not disclose it, could he/she be subject to a claim of professional misconduct?
 - Answer: Yes. Must disclose client fraud or could be deemed a participant.

The Duties of Loyalty and Confidentiality

- What to ask yourself: "Who is my client and what duties do I owe them?"
 - 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

- NYSBA Ethics Opinion 450 (1976)
 - **Question:** Can a city attorney or special counsel for a city represent private clients in matters relating to real estate within the town when the client may be required to apply for permits, zoning approvals and other licenses?
 - **Answer:** Usually no. An attorney should not accept employment where his professional judgment and responsibilities to his client may be subject to conflicting influences and loyalties. Under these circumstances, it is foreseeable that the private client may encounter legal difficulties in securing permits and licenses, creating a directly adversarial scenario. Accordingly, it is difficult for the attorney to remain loyal to both the private client and the city.

The Duty of Confidentiality

- *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.
 - Court 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).

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?

David C. Levy, Esq.

Baird Holm LLP, Omaha, Nebraska

Phone: 402-636-8310 (O) / 402-213-9063 (C)

Website: www.bairdholm.com

E-mail: dlevy@bairdholm.com