Ethical Rules and Considerations for Planners, Plan Commissioners, and Lawyers

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Roadmap for Today

• State and Local Ethics Regs
• AICP Code of Ethics and Professional Conduct
• Ethical Rules for Lawyers
• Common and New Issues
• Hypotheticals
• Questions
ETHICAL RULES FOR PLANNERS/COMMISSIONERS
State and Local Ethics Regs

- Public Ethics Laws for Gov’t Officials
- Gift Ban Acts – e.g., 5 ILCS 430/1-1 et seq.
- Planning Commission’s own ethics and procedural rules
AICP v. Other Professional Organizations

- AIA
- ASLA
- NSPE
2005 AICP Update, Revised 10/2009

- 4 Sections to AICP Code:
  A. Aspirational Principles and Ideals (21)
  B. Rules of Conduct (26)
  C. Procedures (17)
  D. Rules for Planners Convicted of Serious Crimes
Aspirational Principles & Ideals (21), § A

- Primary obligation: serve the public interest - § A.1

“Our primary obligation is to serve the public interest and we, therefore, owe our allegiance to a conscientiously attained concept of the public interest that is formulated through continuous and open debate.”
Aspirational Principles and Ideals (21), Cont.

- Responsibilities to clients/employers - § A.2

“We owe diligent, creative, and competent performance of the work we do in pursuit of our client or employer’s interest. Such performance, however, shall always be consistent with our faithful service to the public interest.”
Aspirational Principles and Ideals (21), Cont.

- Responsibility to the profession - § A.3
  - Fairly Comment on the work of other professionals
  - Voluntary professional activities

“We shall contribute to the development of, and respect for, our profession by improving knowledge and techniques, making work relevant to solutions of community problems, and increasing public understanding of planning activities.”
Rules of Conduct (26), § B

- Subject to investigation, enforcement procedures
- Possibility of sanctions, loss of license
Rules of Conduct (26), Cont.

- **Conflicts of Interest** - § B.6

“We shall avoid a conflict of interest or even the appearance of a conflict of interest in accepting assignments from clients or employers.”

§ A.2(c)
Rules of Conduct (26), Cont.

- Misrepresentation - § B.10

“We shall neither deliberately, nor with reckless indifference, misrepresent the qualifications, views and findings of other professionals.”
Code Procedures (17), § C

- How to obtain a formal or informal advisory ruling
- How charges are filed, investigated, prosecuted, adjudicated
- Complaint or request for guidance must be sent by phone or mail
Rules for Planners Convicted of Serious Crimes, § D

- Most recently added section
- **4 Procedural Provisions:**
  1. “Serious Crime” = Automatic Suspension
  2. “Serious Crime” = Notify Ethics Officer
  3. Petition for Reinstatement
  4. Publication of Conviction for Serious Crime
Ethics Officer = Executive Director of APA/AICP (James Drinan)

- Only ED Can Give Formal Advice
- **Formal v. Informal:**
  - **INFORMAL**
    - No investigation or report
    - No determination based on evidence.
  - **FORMAL**
    - Findings within 21 days
    - Go to ethics committee
Important Considerations

- Rules for Lay Planners v. Rules for Commissioners
- Responsibility to Clients and Profession
Common Mistakes by Planners, Commissioners

- **Conflicts of Interest:**
  - Board member worked for applicant years ago
  - Board member (lawyer) does closings
  - Board member (lawyer) went to firm that represents applicant
  - Land ownership conflict
Common Mistakes by Planners, Commissioners, Cont.

- **Confidentiality/Communications:**
  - Do not use confidential info to personal advantage
  - No private discussions in the planning process
  - Be careful with e-mail and social media!
Common Mistakes by Planners, Commissioners, Cont.

- **Pro Bono**
  - Take on only what you can do

- **Bias/Prejudice**
What To Do If You’re Unsure

- Consult with Boss/Supervisor
- Request informal guidance from Ethics Officer
- Consult AICP Ethics Committee’s Advisory Rulings
- Use Common Sense
ETHICAL RULES
FOR LAWYERS
Distinct Areas of Law/Regulation

- Common-law privilege of confidentiality
- Common-law (then codified) work product doctrine
- Attorney codes of conduct and professionalism
- State public ethics laws
Attorney-Client Privilege

- Applies, where legal advice of any kind is sought...
  - from a professional legal adviser in his/her capacity as such,
  - to the communication relating to that purpose,
  - made in confidence
Work Product Doctrine

- Documents, notes, mental impressions of attorney in anticipation of litigation
- Protects the interests of the attorney and the client
ABA Model Rules of Professional Conduct

- Client-Lawyer Relationship
  - Confidentiality (MR 1.6)
  - Conflicts of Interest
  - Duties to Prospective Client
- The Role of the Lawyer
- Public Service
ABA Model Rules of Professional Conduct

- Info about Legal Services
  - Communication
  - Advertising
  - Misrepresentation
- Maintaining the Integrity of the Profession
Provisions Parallel to AICP

- Duties to the Profession
- Misrepresentation
- Conflicts of Interest
- Ex Parte Communications
Important Points on Model Rules

- Responsibility to Clients and Profession
  - Confidentiality
  - Pro Bono
- “Shock the Conscious” Standard
Common Mistakes Made by Lawyers

- Conflicts of Interest
- Client Confidences
  - Confidentiality
  - Pro Bono
- What to Do if Unsure:
  - Report to Supervisor
  - Meet with Ethics Partner
  - Document!
Key Issue: Identifying the Client

- The board?
- The council or other legislative body?
- The chief elected official?
- The manager?
- The planner?
- Every citizen in town?
Social Networking: An Issue for Planners and Lawyers

- How is it used in land use?
- Advantages
  - Transparency
  - Public participation
- Disadvantages
  - Truthfulness and accuracy
  - Sources and copyright
  - What about non-users?
  - Ruins confidentiality, ACP
Social Networking: An Issue for Planners and Lawyers, Cont.

- Ethical Considerations for Planners:
  - Unintentional Discrimination
  - Soliciting prospective clients
  - Misleading info
  - Private communication
  - Open meetings and public records laws
Social Networking: An Issue for Planners and Lawyers, Cont.

- **Ethical Considerations for Lawyers:**
  - Inadvertently creating attorney-client relationship, *MR 1.18*
  - Candor, *MR 3.3*
  - Misleading communication/advertising, *MR 7.1-7.2*
Social Networking: An Issue for Planners and Lawyers, Cont.

- **Ethical Considerations for Courts:**
  - Maintaining impartiality
  - Creating a “public record”
  - E-discovery
RECENT CASES
Planners Who Are Lawyers

- Avoid conflict among competing codes
- Dual Role
  - County attorney advocated against an application while advising the board. *Davenport Pastures* (Kan. 2010)
Personal Conflicts of Interest

  - A close business, personal, and social relationship with applicant’s attorney requires disqualification of a zoning board member.
Personal Conflicts of Interest

- **Kane Properties, LLC v. City of Hoboken (N.J. 2013)**
  - To determine a municipal attorney’s alleged conflict, *the appearance of impropriety standard* applies.
  - This standard may apply in your state.
Bribery & Corruption

- *United States v. Plowman* (7th Cir. 2012)
  - Land use agency member cannot accept money to “lobby” on behalf of applicant seeking zoning approval for strip club
HYPOTHETICALS
HYPO 1

- You work for city’s planning dep’t and are on the city committee on comprehensive plan...
- Your BFF is a strong contender...
- He calls to plan your birthday dinner...
HYPO 2

- You head long-range planning in a small city...
- You were asked to examine computerizing the zoning code...
- You prepare a RFP...
- You want to quit your job and set up a consulting firm to do it...
HYPO 3

- You are the planning director preparing a report about housing opportunities...
- There is a lack of affordable housing...
- Planning commission fears public’s negative reaction...
HYPO 4

- You are a local land use lawyer...
- Your client was just denied a permit...
- ZBA affirmed the denial...
- Your case goes to the superior court...
- Opposing party wants to “friend” you!
Questions and Comments
THANK YOU!

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