

**ETHICAL CONSIDERATIONS IN
LAND USE PRACTICE**

Presented by
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INTRODUCTION

What is Ethics?



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THE USUAL SUSPECTS

- Municipal attorneys
- Developer's attorneys
- Neighborhood or other stakeholder attorneys
- Elected and appointed officials
- Staff and consultants

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NUMEROUS LEGAL REQUIREMENTS GOVERN ETHICS AND CONFLICTS

These are designed to:

- Protect the City and its employees
- Protect appointed and elected officials
- Protect and inform the public
- Ensure financial resources are spent appropriately and without regard to influence

MISSOURI SUNSHINE LAW

- Every regular, special or called meeting of a governmental body must be open to the public and comply with the _____ Open Meetings Act.
- Daisy Chain
- Boards, Commissions, Committees: Always post if the committee is routinely followed
 - when in doubt, better to post
- Social Gatherings, Conventions, Seminars

AGENDA REQUIREMENT

- Must contain the time, date, and location of the meeting, and the items to be discussed, including notice whether action will be considered
 - Notice of Possible Quorum
- Must post in a conspicuous place available to the public: Internet includes a web page
- Items must be posted with enough specificity so that individuals will know what will be discussed.

HOW SPECIFIC IS SPECIFIC ENOUGH?

- Identifying ordinances and resolutions.
- “Public Comment” is enough—however, the body is not to discuss the item with the individual
 - *Unless: Statements of Fact/Policy
- Items of Community Interest:
- Staff or official’s comments:
 - Staff or city manager report—identify topics
 - Councilmember or commissioner comments—if you know ahead of time what the comments will be, or know it is an issue of public interest—post it.

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MEETINGS

- Must be open to the public.
- All actions must be taken in open session.
- Limited authority for closed sessions
- Exceptions

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RECESS: CATASTROPHE

- Can you recess until the next day?
- Catastrophe:
 - Fire, flood, earthquake, hurricane, tornado or wind, rain or snow storm
 - Power failure, transportation failure, or interruption of communication facilities
 - Epidemic; or
 - Riot, civil disturbance, enemy attack or other actual or threatened act of lawlessness or violence

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RECORDS OF MEETING

- Approved Minutes are official record of an open meeting
- Executive sessions
- These are NOT open records, and are reviewable
 - Only upon a court order
 - By an authorized attendee

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PUBLIC DOCUMENTS

- Missouri Sunshine Law
- General rule: If you can write it, receive it, read it, send it, or draft it, anyone can get a copy
- Provides procedures for requests, charges for documents, interpretations from the Attorney General.
- Some exceptions, but very limited.

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HOT TOPIC: E-MAIL

Email's problems

- Used for ease and rapidity of communication
- Seems more informal; insufficient thought often given to content
- Can and will be used against you in a court of law
- Can constitute a violation of the open meetings act if sent to and used for discussion among a quorum of members
- Text messages

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SOLUTIONS

- ✓ Use city email addresses for officials
- ✓ Use only for administrative matters, not deliberations or opinion-sharing
- ✓ Important to include in your records retention program

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CONFLICTS OF INTEREST

- Missouri Constitution
- Chapter 105, RSMo.
- Local ethics ordinances may also be in effect or Home Rule Charter requirements

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FINANCIAL GAIN

IF a conflict exists, what must the official do? Should the official file an affidavit with the secretary and abstain from discussion and voting?

- Must they leave the room?
- Must they leave the dais?
- Can they make a comment as member of public?
- Can you abstain if no conflict exists under the statute?

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VENDORS

- Applicability to Vendors and other persons
- Conflicts Disclosure Statements
- Record Retention
- Local Lobbying Ordinances

BRIBERY, GIFTS & MISUSE OF GOVERNMENT PROPERTY

Offense for a public official to:

- Solicit or accept a benefit, pecuniary gain or advantage,
- Including a benefit to another person whose welfare he has substantial interest in,
- From any person known to be subject to regulation by the public entity.

THERE'S ALWAYS AN EXCEPTION:

- A gift given on account of a relationship independent of official status.
- Food, lodging, transportation, or entertainment accepted as a guest—and to which the donor accompanies the official.

EX PARTE CONTACTS

- Absent local rules, Ex parte contacts with individuals with business before a public body are not necessarily prohibited.
- Are they smart?
- Ex parte contacts deprive other members of board and the public from hearing or rebutting the comments
- At a minimum, disclose them
- Contacts by Attorneys

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DUE PROCESS

- Many issues before governmental bodies require a fair and impartial hearing.
- Opportunity to be heard and cross examine opposing side.
- Open and closed—once closed, no further public comment should be taken.
- Establishes a record, provision of adequate notice and conduct of public hearing important in subsequent litigation.

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PUBLIC MEETING VS. PUBLIC HEARING

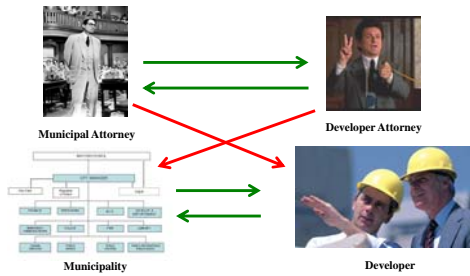
- All meetings must be open—but unless specifically required, does not mean that public has a right to address any item
- Public discussion may be managed and limited in time
- Public hearings are required by state or local law, and require specific notice of ordinance amendments
Example: Zoning Amendments; Plats; Replats; Budgets; Charter Requirements for Franchised Utilities.

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COMMUNICATION WITH ONE REPRESENTED BY COUNSEL: _____



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CONTACT BY PERSON REPRESENTED BY COUNSEL

- Plaintiff's attorney contacted individual councilmembers to discuss settlement offer.
- Limited to CURRENT managerial persons.

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QUESTIONS RAISED

- Former employees or councilmembers
- Does this apply only in litigation?
- Must outside counsel contact the city attorney for every communication with every senior staff or councilmember?

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PERSONAL BELIEFS

You have a client that hires you to help her develop a subdivision. As you get into it, you discover that the subdivision will be on land that you believe should remain a wildlife preserve. There is nothing illegal, fraudulent, unprofessional, or unethical about what your client wants you to do. You just don't like it, and the client won't change her mind. Can you withdraw after having first agreed to represent the client?

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CAN YOU WITHDRAW?

An attorney may withdraw if a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement.

*must take steps to the extent reasonably practicable to protect a client's interests, and refund any advance payments of fee that has not been earned.

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ATTORNEY'S POLICY VS. LEGAL ROLE

- Citizen only rental policies.
- Other regulations that may touch on immigration issues.
- Exclusionary, or non-affordable housing favorable housing regulations.
- Torture.

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CONFLICTING LOYALTIES

You represent two clients in different matters, who are not suing each other and have no claims against each other. However, the relevant law is unsettled and the legal positions you are taking in the two matters are inconsistent. What normally determines whether you have a conflict of interest that would require you to withdraw?

WITHDRAWAL/REMOVAL AS COUNSEL

- Assistant city attorney refused to withdraw as counsel because she was protected by civil service provisions of city charter, providing for removal only for cause.
- Must* the attorney withdraw if the client discharges the lawyers for any reason?

CITY BANKER/ATTORNEY

An attorney, who has been appointed city attorney, is also part owner and chairman of the local bank where the city banks, borrows, and invests its funds.

CAN YOU REPRESENT PRIVATE CLIENTS?

City attorney in private practice represents private clients.

- In matters not adverse to the city.
- For individual councilmembers' private matters.

ETHICS TEST

Often, issues of ethics and professionalism raise complicated questions, involve shades of grey, and require serious thought and contemplation to resolve. Sometimes, however, all it takes to figure out whether a given action or decision is the right one is to ask: "Is this stupid?"

—*David Argenter, attorney and member of the Illinois Supreme Court Commission on Professionalism, Dec. 1, 2011, Illinois Attorney Registration and Disciplinary Commission Matter No. 6274702*

NEW WEBSITE FOR CITIES!

TexasEthics.com



QUESTIONS ?

Missouri Ethics Commission

www.mec.mo.gov



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