

ETHICS ISSUES GROUNDED IN THE UNIFORM ACT AND OTHER TALES

I Introduction.

- A. The duty to comply with the ethical rules of your profession or your job is at base designed to maintain public confidence in our profession, our clients and the people we serve. This is true if we are in the private sector and/or are employees of a unit of government.
- B. Many of us think about ethics as a set of rules to obey;
 - 1. A list of do's and don'ts, a nuisance that we have to comply with to stay out of trouble.
 - 2. Something ancillary to our real work.
 - 3. This perception of ethics is fundamentally wrong and can lead to serious misunderstandings of what it means to be an ethical professional.
- C. To be truly ethical, one cannot be driven just by rules. Ethics must define one's approach toward one's professional and personal life.
 - 1. A colleague of mine during an ethics presentation said “ethics is how you behave when no one is looking.”
 - 2. When I taught ethics to government officials I used to say if you are thinking about doing something you don't want to read on the front page of the Arizona Republic, don't.
- D. This talk will begin with a discussion of the Uniform Act and why it is at base a statute about ethical behavior in government and those who work with the condemnation process.
- E. We will then veer off on related topics that include a discussion of the ethical responsibilities of those involved in a property acquisition transaction, and conclude with some thoughts about ethical behavior generally, and especially government employees and their contractors as well as other professionals when dealing with the public.
- F. I'll also tell some tales of my experiences.
- G. I encourage questions and comments while I am speaking.

II The Uniform Act

- A. The Uniform Relocation Assistance and Real Property Acquisition Policies Act was originally published in 1970.¹
1. The Uniform Act provides for both procedural protections and relocation assistance as a result of federal or federal aid projects.
 2. It succeeded a provision of the Federal Aid Highway Act of 1968, which provided both procedural protections for persons whose property was acquired as a result of a federal highway project. Some other federal programs had similar laws.
 3. The Uniform Act had three general goals: To make federal (and federal grantee) acquisition practices uniform, to ensure a set of procedural rights for those whose property is being acquired under threat of condemnation, and to define a set of benefits across all federal programs.
 4. Talk about FHWA's role and how it came to be the "lead agency" under 42 U.S.C. §§4633 and 4601(12).
- B. Why was the Uniform Act passed in 1970?
1. Interstate Highway System created in 1956. Other major construction programs established in the post war period as well.
 - a. Resulted in massive federally funded projects; moved thousands of people.
 2. Programs got into full swing in the 1960s and people began to complain
- C. Major environmental laws enacted at about the same time²
1. The massive impacts of the major public works programs and development around the country resulted in increasing concerns about the wisdom of these projects.
 2. Rising environmental concerns about government programs and increasing environmental damage in general – Rachel Carson published "Silent Spring."
 3. Many members of Congress shared these concerns. They turned these concerns into law.
 4. Environmental laws such NEPA, Section 4(f), Section 106, CWA, and many others were enacted as a result.

¹ *Changes in Existing State Law Required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, NCHRP Research Results Digest #32, June 1971, Highway Research Board, National Research Council. See also at more extensive discussion: *The Uniform Relocation Act: A Viable Solution to the Plight of the Displaced*, 25 Catholic L. Rev. 552 (1976).

² I discussed these changes in greater detail in *Surface Transportation and Administrative Law: Growing up Together in the 20th Century*, the 1996 TRB Distinguished Lecture, Transportation Research Record #1527, 1996.

5. Talk about Papago Freeway case.
- D. Scandals in the highway program in many states in the late 1950s and early 1960s
1. Shoddy or illegal appraisals.
 2. State employees in some areas were rewarded for lowballing offers and appraisals.
 3. FHWA began to exercise much tougher oversight of state right of way programs
 - a. Stricter internal management
 4. Phase J reviews by FHWA legal and right of way offices

III Impacts of Uniform Act on State law

- A. For federal aid projects, the Uniform Act was and is a federal grant requirement.
1. That means that it does not apply to individuals directly, but requires that state pass complying legislation as a condition of obtaining federal funding.
- B. All States passed such legislation.
- C. Effectively meant that immediately or over time, all real property acquisition was done with the Uniform Act setting the minimum standard.

IV How is this history related to ethical issues?

- A. The Uniform Act changed the focus of state and federal acquisition policies by setting standards for acquisitions. It was passed to help those adversely affected by public works projects.
- B. Thus, it directly helped reshape the level of trust between the people and the government. And increasing public trust is the basic purpose of almost all ethics laws, rules, and guidance.
- C. In some states, the Act added to the number and focus of parties typically associated with an acquisition or condemnation action, each with a different responsibilities and a different perspective.

V Parties to an Acquisition Under the Uniform Act and their Responsibilities

- A. Who are the parties to such a transaction?
1. The property owner, often represented by her attorney
 2. The tenant and his attorney

3. The ADOT right of way office
 - a. Does this include attorneys working for the Attorney General, or are they different parties?
- B. Outside counsel for the state and outside appraisers for the state.
- C. FHWA

VI Each of these parties has a different interest and a different perspective

- A. ADOT employees have multiple responsibilities.
 1. Implement the ADOT policy and law. Must follow standards in appraising and offering fair market value. Cannot “lowball” offer. Also, cannot offer too much (except under specified conditions). Also, protect ADOT’s interest.
 2. Are there more?
 3. Appraisers also follow their rules of professional responsibility.
- B. Attorney General attorneys have different responsibilities and are governed by the Rules of Professional Conduct. ADOT is not, strictly speaking, their client.
 1. Similar, but also follow directions of AG. Thus, to some degree, ensure that ADOT has followed the law.
 2. Represent the State in court. Thus, properly may consider such factors as witness credibility, soundness of state’s evidence, strength of opposing case, and other factors that may not be available to right-of-way professionals alone.
 3. Rules of Professional Conduct apply as well. Many apply though the course of the representation. Can we list some?
 4. When I worked for the FHWA, I often extended my advice to matters not strictly of a legal nature, but that grew out of my legal responsibilities. I often heard, this is not your business, it is not a legal matter. That problem is recognized in the Arizona rules. ER 2.1. The lawyer may also include other “considerations as moral, economic, social, and political factors, that may be relevant to the client’s situation”
- C. For private attorneys representing the state DOT, the DOT is a client. These duties may differ somewhat from an attorney who is an employee of the government.
 1. In some states, private attorneys are retained to handle condemnation proceedings. Is a private attorney answerable to the state DOT only? It may depend on how he is retained.

2. Rules ER 1.13 deals with organizational clients. This rule also applies to governmental clients. Note that the scope of the relationship can vary. This may also be the case for government employee lawyers.
 3. For federal lawyers, the “client” can be an abstraction, as no agency or agency employee is the client. This can get very confusing in practice. ER 1.13 recognizes this situation as well.
 4. In our infrastructure practice, we work almost exclusively for government agencies. In order to avoid difficulties, we always try to establish our relationship through either the agency chief counsel or through the attorney general. Sometimes we are subcontractors to engineering firms. When this is the case, our agreements make clear that the government agency is our client.
- D. Private attorney representing owners and tenant have a duty to obtain the best possible recovery from the state. When they do that, they are not necessarily being greedy.
1. Clearly, an attorney has to vigorously represent the interest of his or her client. However, the attorney may not knowingly represent a falsehood. ER 4.1
 2. I do not intend to discuss the entire attorney client relationship in this talk, but what are some rules that apply particularly to eminent domain situations?
- E. It is important for all parties to the transaction to understand where each party is coming from because it makes the whole process proceed more smoothly.

VII State and Federal Ethics Requirements for Government Employees

- A. Many of you are government employees. Whether federal, state, or local employees, your agency has rules of conduct that you must obey as a condition of your employment. Violating these rules can lead to embarrassment, unpleasant disciplinary actions or dismissal.
- B. Every new President issues an Executive Order soon after the start of his term in office. These orders typically set tougher new standards, especially for political appointees and make other changes. This is on top of federal statutes and the rules issued by the Office of Government Ethics.
1. The first President Bush issued an executive order that set forth “The 14 General Principles of Ethical Conduct” in 1989. They were later incorporated into the regulations that apply to all federal employees. They actually could apply to any government employee, irrespective of which level of government serve.
 2. I'm not going to recite them, but I've attached them to your materials. A couple of ideas that I find particularly interesting are:
 - a. Public service is a public trust.

- b. Employee shall put forth honest effort in the performance of their duties. In other words, doing the best work you can is an ethical responsibility, not just something you do earn a bonus.
 - c. Avoid the appearance of a conflict of interest.
 - d. Complying with law in the performance of your duties is particularly important.
- C. The rules that govern ADOT employees also contain these ideas. I've attached two documents—The ADOT Code of Conduct and an extract from ADOT's Policies and Procedures dealing with Conflict of Interest of Officers and Employees.
- 1. This is not your annual ethics briefing, so I won't go into them in detail.
 - 2. As noted in the introduction, I was FHWA's Ethics Officer for 18 years, so here is some advice:
 - a. Read these rules. If your job involves interacting with many people outside of ADOT, look at them regularly so that you remain aware of their requirements.
 - b. If you are dealing with someone who wants something from ADOT, do not accept anything, even a cup of coffee, except when the rules expressly allow you to do so. Provide example of procurement officer have lunch with prospective contractor.
 - c. *If you make a mistake, be sure you are the one to report it.*
- D. If you're someone who works a lot with ADOT employees, be aware of these rules so that you don't inadvertently put the employees in an embarrassing position.
- 1. Offering a gift or a meal they cannot accept is not a favor, even if you think that the government rules are ridiculous.
- E. Why are these rules especially important now?
- 1. In a society like ours, government exists to serve the people. Indeed, under the Constitution, government is an institution established by the people to work for the common good. There is supposed to be a relationship of trust between the government and the people.
 - 2. When misconduct, fraud and malfeasance undermine that trust, it weakens a critical link between the people and *their* government. If that trust is broken repeatedly, it can become corrosive, indeed.
 - 3. If one looks back at the development of both ethics rules and fraud prevention mechanisms, changes and expansions can generally be traced to events that led the public to conclude that things have gotten out of hand – that that implicit sense of trust was being endangered by serious abuses.

4. At the end of the 19th century, the spoils system of government employment was largely eliminated because it had led to an intrinsically corrupt bureaucracy. Even as late as the 1960s, it was relatively easy for Federal political appointees to move into the career civil service – something that does not occur today.
 5. The rules that protect civil servants from political pressure and limit their ability to participate in many political activities are also the direct result of these abuses.
 6. As lobbying of both the Executive and Legislative branches has increased, gift rules have become much tougher. Similarly, conflicts of interest rules have come from the perception that government officials sometimes further their own interests over those of the public.
- F. I fear that there has been for some time a crisis of confidence in our public officials that affects both for elected officials and career employees.
1. You only have to listen to the campaign rhetoric to realize this.
 2. Oddly, people demand high service from the government (Federal, State or local), but don't expect it. They are surprised when they get efficiency and responsiveness, because they expect incompetence or indifference. Why?
 3. Many officials, when they are charged with abuse of one sort or another do not respond with shame or regret, but with "I didn't break any laws." Often, they are correct and they and their allies believe them thus to be vindicated. Is that a problem? Why?
 4. Poor management of government projects is regarded as the norm, and "on time" and "on budget" is regarded as an extraordinary accomplishment. *Why is this ethical concern?*
 5. The enormous disdain for elected officials shown in poll after poll and the relatively low regard for government generally comes from these attitudes.
 6. For lawyers in the public sector, it is particularly bad because while many people would be proud to send their kids to law school, lawyers as a group are held in low esteem as well.
 7. People almost expect corruption and incompetence as the norm.
 - a. Every headline of misconduct by a government employee of any level, no matter how rare, serves to confirm this perception.
 - b. Delivering a project on time and on budget is seen as a surprising event.
 8. I am sure that many of you have felt the distrust. Many people seem to assume that the government simply will not offer fair compensation for their property..

VIII The Hatch Act

- A. The Hatch Act imposes limitations on political election activities on federal employees and on employees of state and local agencies receiving federal funds. We are, as you might have noticed, in a presidential election year, so a few remarks about the Hatch Act seem in order. I will not cover the Act as it applies to federal employees, as I don't think that there are any here. I've attached a copy of the restrictions on federal provisions just for your interest
- B. Its history stems back from the patronage days of the late 19th century, although the Act was passed in 1939. .
- C. The Hatch Act for state employees is much more forgiving, especially since amendments in 2012 allowed most employees of agencies receiving federal funds to run for public office.
- D. Unfortunately, if you are so inclined, this is not permitted under Arizona law. Simply stated, you may not run for any paid public office, belong to a committee of a political party, nor participate in the management of a political party. Don't do anything political at your place of work. Any attempt to force an employee to do anything political is a crime. I've attached a section of the State Employee Handbook for your information.
- E. In my experience, don't kid around with this. The most innocuous actions by federal employees have gotten people into a lot of trouble.

IX Miscellaneous

- A. Still more issues with new technology. I've attached an ethics opinion of the Tennessee Bar dealing with data storage on the Cloud. It relates to issues of confidentiality. ER 1.6
 - 1. It is consistent with all other opinions I've seen about use of modern technology. Using these devices is legal, but the lawyer must be responsible for understanding the implications of the technology she or he is using.
 - 2. Also attached is a short article about the things to watch for in contracting for Cloud services.
 - 3. Also attached are three Ethics Opinions of the Arizona Bar, two from 2007 and another from 2009. While these are rather old in the face of new technology, they say the same thing. If a lawyer uses electronic data storage, then he or she must understand the limits of his or her own knowledge and take appropriate measures to secure client confidentiality.
 - a. Interestingly, the 2009 opinion makes this an issue of competence (ER1.1)

- b. Also note that in Arizona, there are specific duties about handling material inadvertently transmitted from another lawyer. These duties differ from the ABA Model Rules.
- 4. When teaching ethics for the federal government, I used to say “email is paper.” The same is true for Facebook, Twitter, and their newer analogs. I worry about these things because older lawyer don’t know how to use them and very young lawyers may be inclined to abuse them. Tell story about applicant for judicial clerkships.
- B. Present a couple of unbelievable ethics stories about overzealous and not so zealous lawyering.

X A final word.

- A. Unethical behavior and even criminal misconduct does not start over night. Rarely does a public official wake up one morning and say “today, I think I’ll take a bribe.” The same is true for those seeking unlawful benefits.
- B. Rather, problems start when institutions and people don’t place high importance on ethical behavior, when the rules aren’t taken seriously, and responses to misconduct are indifferent or lax.
- C. Little by little, what starts as a free round of golf, a fancy meal, a ticket to a ballgame, or a less than arm’s length relationship with a contractor, spins out of control and leads to an atmosphere where something much more serious becomes inevitable.
- D. I’ve seen it happen at FHWA and it has happened in many states.
- E. Ethical behavior is at the core of being a real professional.