Assessor Ethics

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Property Tax and Valuation Team

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Standard Disclaimer

We cannot provide specific legal advice. We are providing general information only, and the information contained herein should not be relied upon without first consulting with a licensed Maine attorney.

Topics Covered Today

- Introductions
- What is Ethics? Why this course?
- Sources of Ethical Requirements for Assessors
- Deeper Dive on Selected Ethics Issues – Conflict of Interest, Bias, 706-A
- Fact Patterns & Discussion!
- (Updates from the field, time permitting)

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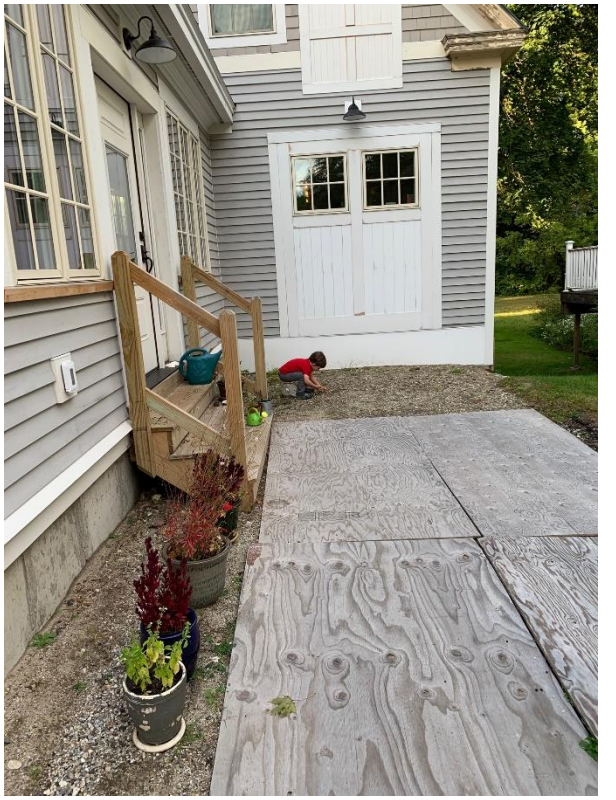
Meet Joel – Happy Dad

Renovating an old farmhouse in Lewiston!



My view vs. Bill Healey's view…

Why require ethics training?

- The State of Maine requires Certified Maine Assessors (CMA) to engage in 3.5 hours of ethics training every three years for renewal of certification.

- Ethics is like a muscle – you must regularly exercise it.
- Most if not all self-governing professional organizations require it.
- Some ethical violations are willful. Most are not.

What is ethics?

ethic

/ˈeTHik/ *noun*

1. the discipline dealing with what is good and bad and with moral duty and obligation

2. (a) a set of moral principles: a theory or system of moral values
   (b) the principles of conduct governing an individual or a group
   (c) a guiding philosophy
   (d) a consciousness of moral importance

3. a set of moral issues or aspects

A Framework: Questions to Ask Yourself

- Are you proud of the person you would become as a result of the action you are considering taking? Would others agree? Would you be comfortable with your decision becoming public?

- What obligations do you have (legal, situational, professional or moral) in this situation? To whom or what? Do any of your obligations conflict? What is the intention behind this action?

- If I proceed with this decision, what will the practical effects be in both the short and the long term? Will this decision produce the most good for the most people for the most time?

Questions to Ask Yourself (continued)

- What is in my self-interest? What consequences for my own life might result from this action? Are there any reasons not to act in a way that most benefits me?

- What agreements have you already pledged to uphold? Are there concerns that would cause you to willfully disregard any of these agreements? If so, why?

- Who/what is vulnerable in this situation? Is anyone or anything in need of care? How do the dynamics of power affect this situation? Whose voice or opinion is loudest? Why?

- What needs are being expressed by others? What can *I* do to meet these needs? Are there voices of others that are not being heard?

Source of Ethics Requirements for Assessors

- State of Maine Assessor Certification Requirements
- Constitutional & Statutory Requirements
- Uniform Standards of Professional Appraisal Practice
- Municipal Employment Code of Conduct
- Case Law
- Professional Norms
- “Would my mom agree?”

Constitutional & Statutory Requirements

- Definition of Just Value – Maine State Constitution
- Due Process / Equal Protection – U.S. and Maine State Constitutions
- 36 M.R.S. § 502: “April 1 Rule”
- 36 M.R.S. § 706-A
- 36 M.R.S.; subchapter 4: Exemptions
- Current Land Use Programs (Tree Grown, Open Space, etc.)

Uniform Standards of Professional Appraisal Practice (USPAP)

- USPAP is the generally recognized ethical and performance standards for appraisers in the United States.
- USPAP was adopted by Congress in 1989.
- Compliance with USPAPA is required for all state-licensed and state-certified appraisers.

Uniform Standards of Professional Appraisal Practice (USPAP)

- **Conduct**: An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

Uniform Standards of Professional Appraisal Practice

An appraiser:

- must not perform an assignment with **bias**;
- must not advocate the cause or interest of any party or issue;
- must not accept an assignment that **includes the reporting of predetermined opinions and conclusions**;
- must not **misrepresent** his or her role when providing valuation services that are outside of appraisal practice;
- must not communicate assignment results with the **intent to mislead or to defraud**;

Uniform Standards of Professional Appraisal Practice

- must not use or communicate a report or assignment results known by the appraiser to be misleading or fraudulent;
- must not knowingly permit an employee or other person to communicate a report or assignment results that are misleading or fraudulent;
- must not use or rely on unsupported conclusions relating to characteristics such as race, color, religion, national origin, gender, marital status, familial status, age, receipt of public assistance income, handicap, or an unsupported conclusion that homogeneity of such characteristics is necessary to maximize value;
- must not engage in criminal conduct;
- must not willfully or knowingly violate the requirements of the Record Keeping Rule; and
- must not perform an assignment in a grossly negligent manner.

Uniform Standards of Professional Appraisal Practice

- If known prior to accepting an assignment, and/or if discovered at any time during the assignment, an appraiser must disclose to the client, and in each subsequent report certification:
    - any current or prospective interest in the subject property or parties involved; and
    - any services regarding the subject property performed by the appraiser within the three-year period immediately preceding acceptance of the assignment, as an appraiser or in any other capacity.

Uniform Standards of Professional Appraisal Practice

- An appraiser must not accept an assignment, or have a compensation arrangement for an assignment, that is contingent on any of the following:

    1. the reporting of a predetermined result (e.g., opinion of value);
    2. a direction in assignment results that favors the cause of the client;
    3. the amount of a value opinion;
    4. the attainment of a stipulated result (e.g., that the loan closes, or taxes are reduced); or
    5. the occurrence of a subsequent event directly related to the appraiser's opinions and specific to the assignment's purpose.

- Confidentiality- protect the appraiser-client relationship.

Uniform Standards of Professional Appraisal Practice

- MANAGEMENT: An appraiser must disclose that he or she paid a fee or commission, or gave a thing of value in connection with the procurement of an assignment.

Municipal Employment Code of Conduct

- In Maine, municipal officers may adopt an ethics policy governing the conduct of elected and appointed municipal officials (30-A M.R.S. § 2605(7)).

- Such ethics policy would apply to assessors.

- Examples of provisions commonly in codes of conduct:
    - Conflicts of interest
    - Disclosure of interest requirements
    - Prohibitions against gifts and favors
    - Prohibitions against disclosure of confidential information without proper legal authorization
    - Prohibition against unauthorized use of municipal property and facilities

Case Law

- Biddeford v. Adams, 1999 ME 49, 727 A.2d 346
  - Board of Property Tax Review member visited neighborhood at issue in an assessment case after the Board took evidence but before deliberations. The parties were not informed of the board member's visit. "Because no notice was given to the parties of the site visit, they could not be present during the visit or provide a response to the evidence gathered from the visit. For this reason, the visit was improper." Because the record indicated that information gleaned from the improper visit was a factor in that member's decision, the Court held that the improper visit was not harmless.

- Bryant v. Town of Wiscasset, 2017 ME 234, 176 A.3d 176
  - The Bryants objected to their neighbor's application for site plan approval and a permit for an addition to a storage facility. The neighbor was a member of the Planning Board and had recused himself from the proceeding. On appeal, the Bryants argued that the decision of the Board should be voided due to a conflict of interest. The Court disagreed, concluding that "[b]ecause [the neighbor] disclosed his interest and recused himself from voting on his application, and because there was no evidence of improper influence, the Planning Board's vote to approve [the neighbor's] site plan review application was not voidable. A contrary application of [Maine's conflict-of-interest statute] would deprive Planning Board members of the right to present their applications for site plan review and would discourage capable people from serving as members of municipal boards."

Professional Norms

- When considering a course of action in an assessment, as yourself:

> What would my peers expect as a **best practice** under these circumstances?

“Would my mom agree?”

Issue #1: Conflict of Interest

- **Conflicts of interests**, **bias** and **relationships** can undermine the integrity and sanctity of the assessment process.

- A commonly applied definition of “conflict of interest” is “any interest involving direct or indirect financial interest in a matter.”

- The actual standards applied and related to “conflicts of interest” under Maine law, however, are narrower and apply only to potential influence associated with pecuniary advantage.

- To protect decisions from challenges that the process or results were based on improper influence by an assessor with a conflict of interest, it is essential for assessors with a conflict to recuse themselves from ***any*** involvement.

Issue #1: Conflict of Interest – Perceived

- If an assessor has what could be perceived as a conflict of interest or the appearance of a conflict of interest, the assessor may either abstain or participate. If the assessor seeks to continue to be involved in the assessment, he or she must:
    - Identify the situation and circumstances on the record;
    - State that if he or she continues to participate that he or she will be impartial, receive the evidence with an open mind and base any decision on the record and in accordance with the applicable standards and law; and
    - Receive the permission of the Board after the Board discusses the circumstances on the record, solicits the views of the applicant as to the member's continued participation, and then by motion and vote determines that the member can continue to sit.

Issue #1: Conflict of Interest – Bias, Personal Interests & Relationships

- Assessors must conduct themselves in an impartial manner, rely on available information, and apply the standards to any issue before them.

- In circumstances where a concern of bias, predisposition or prejudice have been raised, the facts will help dictate the need for the assessor so accused to recuse themselves or continue to participate.

- Concerning the issues of relationship there is a statute that regulates situations where a relationship requires recusal (1 M.R.S. § 71(6)).

- An assessor related **by blood** (in the affinity of a second cousin or closer relationship) **or by marriage** should not participate in an assessment where the related party.
    - Consent to proceed under such circumstances is **not** appropriate.

Issue #1: Conflict of Interest – Incompatible Offices

- Maine statutes and common law dictate which municipal offices are "incompatible" – meaning that the duties of each are so inconsistent or conflicting that one person holding both would not be able to perform the duties of each with undivided loyalty.

- Statutory:
    - Town manager and assessor (30-A M.R.S. section 2632)
    - Assessor and tax collector or treasurer (30-A M.R.S. section 2526)
    - Assessor and county commissioner (30-A M.R.S. section 52)

- Common law:
    - Possible incompatible offices: assessor and state legislator; assessor and school administrative district trustee, etc.

Issue #2: FOAA

- What does FOAA cover (1 M.R.S. section 1 *et seq.*)
    - Public meetings
    - Public records

- What is a public record?
    - Written, printed, graphic, mechanical or electronic information
    - Possession or custody of agency, official, or association
    - Received, prepared or containing information related to transaction of public business

- There are some exceptions including, but not limited to, individual personal privacy, business interests, negotiations, public safety, and records designated confidential by statute.

Issue #3: Section 706-A

- One example of a statute designating certain records as confidential (thus exempted from the definition of "public record") is **36 M.R.S. section 706-A**.

- According to section 706-A, before making an assessment, the assessor may seek information from the taxpayer as to the "nature, situation and value of the taxpayer's property liable to be taxed . . . ."

- This is known as a "706-A Request."

- Information provided by the taxpayer in response to a 706-A Request "that is proprietary information, and is clearly labeled by the taxpayer as proprietary and confidential information, is confidential and is not a public record for the purposes of Title 1, chapter 13."

Section 706-A Requirements for FOAA Exemption

For 706-A protections to apply to documentation provided by the taxpayer in a 706-A Request, two separate conditions must be met:

- Documentation must be clearly labeled as proprietary and confidential *at the time documentation is submitted*; and

- Documentation must also actually include “proprietary information”
    - Proprietary information is “a trade secret or production, commercial or financial information” which, if disclosed, would harm the competition position of the taxpayer and result in a disclosure of information not otherwise publicly available. § 706-A(3).

Recent Section 706-A Case Law

Blue Sky West, LLC v. Maine Revenue Services, 2019 ME 137, 215 A.3d 812

- Maine Revenue Services (MRS) initiated a 706-A Request in April 2016 to support the valuation of a wind power project in unorganized territory. The taxpayer did not label its response as proprietary and confidential. The submission included confidentially negotiated pricing with its vendors as line item costs.
- In December 2016, Somerset County submitted a FOAA request regarding the valuation. In response, the taxpayer sent letters to the state asserting that the 2016 submission was confidential pursuant to 706-A and attempting to "label" the 2016 submission as propriety and confidential.
- The taxpayer's 2017 submission, containing similar information as 2016, was labeled as confidential. The county submitted a second FOAA request for the 2017 submission.
- The state determined that the 2016 submission was not protected from FOAA, but the 2017 submission was protected. The taxpayer and county sought a determination from the Superior Court as to whether the records were subject to FOAA. The court upheld the state's decision.
- On appeal, the Maine Supreme Court said that because 2016 submission was not labeled as confidential when submitted, the 2016 submission *was not protected* from FOAA and did not qualify for a trade secret exemption. However, the 2017 submission *was protected* from FOAA because it was labeled and contained confidential information.

FACT PATTERNS

Fact Pattern #1

- Ted is a professional appraiser hired by a taxpayer to conduct an appraisal of industrial property for use in an abatement proceeding in Maine. Ted conducts an exhaustive review of the property and preforms an objectively reasonable, USPAP-compliant report. Right before a State Board hearing commences, you (the assessor) hear Ted state loudly in the hall at lunch that he just remembered he never visited the property, despite his report saying that he did. He is about to testify.

- What do you do?

Fact Pattern #2

- Alan the Assessor is facilitating a municipal-wide revaluation. As part of that revaluation, he requests confidential information from assessors using Section 706-A. He receives a lot of information from taxpayers. In one packet of confidential information, he learns that the local widget making factory is about to close due to the impact of new tariffs on a specialized glue made in China. No one else knows this and the mill is otherwise profitable. Alan realizes that his son's entire college fund consists of stock held by the company that provides services exclusively to the mill. Alan is terrified that his stock price is about to collapse.

- Can Alan sell his stock? Can he tell his wife to sell that stock but not say why? What would happen if he did?

Fact Pattern #3: Out and About

- Alice the Assessor is conducting physical inspections of residential properties. The following happens:

A. Homeowner opens the door and Alice sees marijuana plants growing facility in the living room. It doesn't look, "legit." What should Alice do?

B. Homeowner offers Alice cookies and milk and states that his mother is really sick and the home is about to go into foreclosure. Property taxes are killing the family finances and the Homeowner is really worried and asks to working out a "deal" on the assessed value. Alice feels badly. What do she do?

C. Alice conducts a routine inspection and realize it's her very good friend's house. She takes an hour or so to catch up over a quick beer on the porch, but make no changes to the assessment because none are objectively warranted. She then moves on to complete the inspections. Okay?

Fact Pattern #3: Out and About (continued)

- Al the Assessor is conducting inspections in Town and the following occurs:

D. Al has a concern that a local warehouse is actually housing very specialized widget making personal property that is not being assessed. Al knocks on the front door to the business but no one is there. Al walks around the back and sees the door to the warehouse open, takes a “looksie,” and WHOA BOY, there’s a BILLION dollars in unassessed personal property. Discuss.

E. Al knows that Joel has a new kitchen but Joel is being “cute” in all of his communications with the City. Al decides he’s going to find out once and for all and goes to conduct an inspection without notice. Al knocks but Joel refuses to let him inside, saying that’s weird. Al insists he has the right to conduct an inspection. Who is right?

Fact Pattern #4: 706-A Public Records

- An assessor has sent a large commercial property owner a 706-A Request, seeking more information for the year's assessment. The property owner responds to the 706-A Request by submitting a large number of documents. Some of these documents contain what the assessor deems to be proprietary information. The documents submitted in response to the 706-A Request are not labeled, however. One month later, a newspaper reporter submits a FOAA request for any public records related to the commercial property owner.

Are the documents submitted by the commercial property owner in response to the 706-A request "public records"?

Fact Pattern #4: 706-A Public Records

- Al the Assessor just received an abatement and knows there is a problem with the assessment. He makes a small change thinking it will be sufficient, but then stumbles across a few internal notes that the last assessor made last year. These notes are not helpful to Al's recent abatement decision, nor are they relevant to Al's analysis. Al wants to just pitch them to ensure the file is update to date. Okay?

Fact Pattern #5: 706-A line-drawing

- Al the Assessor is really frustrated with a large local taxpayer's abatement request. There is a long history with the Town. Al legitimately needs information from the taxpayer to conduct a review, however, so he sends a Section 706-A Request. Al decides that it's time to "teach them a lesson," so he includes an extra 25 relevant questions just to show the taxpayer "we mean business" this year. Okay? Extra 50 questions? 100?

- What if Al doesn't really "need" this information and could rely on what is in the paper file?

Fact Pattern #6: Language matters

Alice the Assessor is preparing to send a Section 706-A Request for information. Consider the following language:

A. "You are hereby commanded and required to produce income-related information pursuant to Title 36, Section 706-A of the Maine Revised Statutes, and to respond to the following questions below related to the nature, situation, and value of property relative to April 1, 2019. Failure to respond will bar any subsequent appeal. DO NOT DISREGARD THIS NOTICE.

B. "As your municipal assessor, I am writing to respectfully ask for your assistance in ensuring that all property is assessed according to its just value. To that end, each year I conduct a review of property assessments and gather important and relevant information and am requesting that you please respond to the following questions no later than May 31st. Please note that all information provided that is confidential and labeled as such will be kept confidential by this office. In accordance with Maine law, please note that failure to respond to this notice will prevent a taxpayer from later challenging the actual assessment. 36 M.R.S. § 706-A (copy attached). If you have any questions, please feel free to call me or stop by the Town Hall between 8-4 daily.

Best regards, Alice

Fact Pattern #7: Thou Shall Not Steal

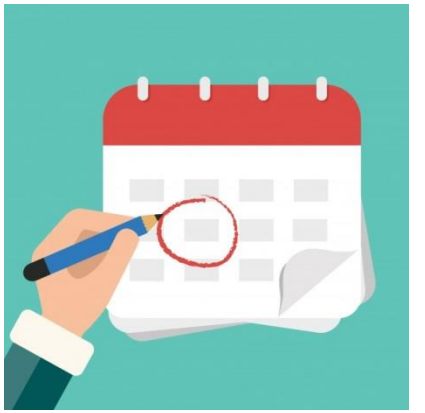
Al the Assessor is processing a request for information (FOAA) that was forwarded to his office by the City's FOAA Officer. The local ordinance allows the City to charge 25 cents per page, and the bill for the requested information is exactly $25.34. Strangely, that's the same amount that Al is about to submit a reimbursement request for following a lunch during a business trip, which is allowed. Al knows that his admin team is really busy, so he decides to just have the taxpayer pay him in cash for the FOAA and then he won't submit the reimbursement request. That would make a lot less paperwork.

Is that okay?

Fact Pattern #8: Don’t Get Cute

Alice the Assessors’ Agent does a lot of work for City on a contract basis and bills hourly. She works for four hours in the office, then gets in her car for 30 mins, 15 mins of which is spend talking to the City’s Town Manager about an assessment issue. She then spends the remaining 15 mins thinking about the pending appeal and her testimony. How much time should she bill? What about thinking in the shower? The “ah ha” moment while on a jog?

Fact Pattern #9: Deadlines



The deadline for abatements are rapidly approaching. Friday marks 185 days. The Taxpayer comes into the office on Thursday and asks to see his file.

A. Is the Assessor required to let the Taxpayer know that abatements are due tomorrow? Good idea anyway?

B. It's after hours and the Taxpayer comes to the Assessor's house at 9 pm and tries to serve paperwork for an abatement. Must the Assessor accept it? Good idea to do so?

Fact Pattern #10: Testifying

Alice is testifying about an assessment. During cross examination, she is less than forthcoming about the assessment's weaknesses, providing only short and direct answers.

Is that okay?

Fact Pattern #11: Bias

Al the Assessor has received an exemption application and the applicant is The Human Fund, a local nonprofit that provides money for people. Al is a longtime member of the Human Fund and wants to support this group, although the application is “on the fence” legally. Is it okay to just approve it?

Same facts but now it’s AAA and Al is a member. AARP? Does it matter?

Fact Pattern #12: Ex-Parte Communication

Al the Assessor will be testifying tomorrow about an assessment before the Board of Assessment Review. As he is preparing for the hearing, Al remembers that his neighbor is a member of the Board. Concerned that his nerves will get the best of him the next day and that he won't be able to eloquently articulate his approach to the assessment at the hearing, Al decides to call up his neighbor that evening to explain his theory behind the assessment in advance of the hearing.

Is it okay for Al to call the Board member to discuss the case?

Fact Pattern #12: Ex-Parte Communication (continued)

Same facts as the previous slide, but instead of calling the Board member, Al runs into the Board member at Hannaford the evening before the hearing. Al and the Board member say hello and chat about their kids' soccer team. At the end of the quick conversation, the Board member says "I'll be seeing you tomorrow at the hearing; it will be an interesting case." Al shrugs and says goodbye.

Was that conversation appropriate?

Fact Pattern #13: Education & Certification

Alice the Assessor knows that she has a 3.5 hour ethics requirement every three years, and therefore attends Joel Moser's ethics course. After about 25 mins, Alice gets super bored and tired of listening to Joel go on and on about the law. Alice sneaks out the back and plays golf instead but certifies to the State that stayed for the full course. Okay?

What if she didn't leave but was on her phone the entire time?

Fact Pattern #14: To Mask, or Not to Mask

Anytown, in conjunction with State regulations, requires that all municipal employees wear masks when interacting with the public. Al the Assessor doesn't like to wear a mask and feels annoyed he's being obligated to wear one. Whenever the Town Manager is not around, he doesn't wear his, and regularly interacts with the public in his office without wearing any face covering.

Ethical?

Fact Pattern #15: I'm fine. Really.

Anytown, in conjunction with State regulations, requires that all municipal employees to conduct daily health checks before entering the office. Alice the Assessor's Agent has just returned from camping in northern Maine. She takes her temperature before coming into one of her towns (she's a contract assessor) and it's 100.1, which is technically only .1 above the policy cutoff. Alice represents that it's only 99.9 because commitment is days away and she MUST complete her annual review. But she's not an employee and the requirements technically do not apply to municipal contractors. She only works in her office and wears a mask.

Ethical?

A framework: Questions to Ask Yourself

- Are you proud of the person you would become as a result of the action you are considering taking? Would others agree? Would you be comfortable with your decision becoming public?

- What obligations do you have (legal, situational, professional or moral) in this situation? To whom or what? Do any of your obligations conflict? What is the intention behind this action?

- If I proceed with this decision, what will the practical effects be in both the short and the long term? Will this decision produce the most good for the most people for the most time?

Questions to Ask Yourself (continued)

- What is in my self-interest? What consequences for my own life might result from this action? Are there any reasons not to act in a way that most benefits me?

- What agreements have you already pledged to uphold? Are there concerns that would cause you to willfully disregard any of these agreements? If so, why?

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Thank You!

- Joel Moser: jmoser@bernsteinshur.com