

A Question of Ethics

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Conflict and Opportunity

As court professionals, we are keenly aware that courts are an independent branch of government. The preamble of the new *NACM Model Code of Conduct for Court Professionals* spotlights the trust in the courts as an institution when it states, "The foundation of our society rests, in part, on the ability of the citizens to . . . acknowledge the integrity of the judiciary as a co-equal branch of our government. Court professionals, who work for the judicial branch and are faithful to these values, must be accountable to that trust."

Upholding that trust means we have a narrow path to walk in dealing with the public and with other governmental agencies. The various ethics codes approach conflicts of interest in slightly different ways. The *NACM Code of Conduct for Members* Article I (D) says, ". . . members may engage in outside employment as long as it does not conflict with the performance of their official responsibilities or violate this code." Canon 3.1 of the *NACM Code for Court Professionals* says, "The

court is a court professional's primary employment. A court professional shall avoid outside activities, including outside employment . . . that reflect negatively upon the judicial branch and on one's own professionalism."

The American Judicature Society (AJS) Code (paraphrased) lays down a number of specific requirements to avoid conflicts of interest involving outside employment. The outside employment must be outside of normal working hours and compatible with court duties. It cannot be for an entity that either regularly conducts business with the court, requires frequent contact with attorneys who regularly appear in court, requires the practice of law, requires disclosing confidential information, is in the judicial, executive, or legislative branch (without both employers' written consent), or reflects adversely on the integrity of the court. Finally, the employee must inform the appropriate designated authority prior to accepting the other employment.

This column's scenario looks at conflicts of interest and their implications even when agencies and employees might benefit. Does the role of the court supersede even employee benefits when no extra compensation is involved? Must interest conflicts be real and present, or can they be ill-defined potential risks?

THE SCENARIO

James is the municipal court administrator of a moderate-sized city where the city council hires and fires the municipal court judge. City Manager Ruth implements a Professional Staff Rotation Program where supervisory staff from various agencies can take a year-long rotation assignment away from their "home agency." The rotation program gives employees a learning experience and promotes succession planning for the city.

Staff selected to the program remain as employees and are paid by their home agency, however they receive day-to-day supervision from the agency to which they are assigned. Staff spend three months in the city manager office, three months in the mayor and council offices, three months at the city budget office, and three months in an agency of their choice (assuming the agency can use the employee).

James, concerned over conflicts of interest and separation of powers issues, confers with Judge Williams, arguing, "What if a court employee rotates to the city prosecutor's office or the police department? What if the employee works in the city auditor's office and discovers that the court is on next year's schedule for an annual audit?" Judge Williams misses James' concern, seeing that an employee sharing the audit schedule with court administration would be quite advantageous.

James finally persuades the judge that participation must be predicated on the understanding that sharing private or unfavorable court information could be grounds for dismissal. The judge still doesn't understand

what James is concerned about, until James reminds the judge that (contrary to the city's budget office request), the court informally "writes off" unpaid parking fines after 10 years. The judge begins to see the potential problem with employees blurring agency loyalties. James crafts a letter to City Manager Ruth from Judge Williams declaring that the court will not participate in the rotation program because it is a separate branch of government.

RESPONDENTS

I have asked Janet Cornell, court administrator for the Scottsdale Municipal Court in Scottsdale, Arizona; Jeff Amram, court administrator for the Clark County Superior Court in Vancouver, Washington; Frank Maiocco, court administrator for the Kitsap County Superior Court in Port Orchard, Washington; and James Murchison, trial court administrator for the Marion County Trial Courts in Salem, Oregon, to respond to the scenario.

QUESTIONS

What sort of ethical dilemma exists if staff from another agency rotates to the court while remaining employed by their "home" agency?

Frank Maiocco thought an ethical problem would exist if an employee rotates from a (1) law and justice department (prosecutor, law enforcement, public defense, etc.), or (2) from a city department that potentially exchanges sensitive, restricted, or confidential information with the court. "As a general rule, if the employee works for a 'home' department that could be accused of ex-parte communication with the court, then the employee should not be permitted to work temporarily for the court."

Jim Murchison said that crossing branches of government presents theoretical issues, which are essentially ignored in real life. In many small towns, for example, the clerk of court only works part-time, also working for the water department, for example, because the town cannot afford separate individual staff. Even though duties are often combined regardless of separation of powers issues, ethical problems still exist.

Jim noted that the AJS provisions for outside employment allow crossing boundaries, so long as both the court and the other agency consent in writing. "I have a problem with this code provision. I do not believe that it is acceptable to simply waive all issues relating to the separation of powers. Separate branches of government exist for clear reasons."

Janet Cornell saw the court's ethical dilemma mostly related to perceptions. "How can an employee remain employed by the court (the judicial branch) and continue the 'loyalties required by judicial codes of conduct' while being quasi-employed by a non-judicial branch function (e.g., the executive)?" She admitted there may be no direct conflict at the outset, but one could easily develop.

Jeff Amram agreed with Janet, citing that one could easily perceive that an employee from the city attorney, police, or a code inspector's office could have a conflict of interest even if the employee is never placed in a position to influence the court. "And while even court staff may actually be employees of those government entities for legal reasons such as employment or retirement status, interchanging staff for career development reasons seems unjustified when weighed against the appearance of conflict issue."

Is there a middle ground for the court rather than complete non-participation?

Jeff thought there are other ways to foster the kind of career development sought in this example. Everything from formal after work classroom training to 'brown bag' lunches with speakers from other city departments. Training CDs or online participation/observation could also be used. "The city could also consider formal reassignment of staff, say, for a year, with the understanding by all that traded staff become employees of the receiving departments with all the requisite training, departmental rule-adherence, and other responsibilities that come into play as a result."

Jim agreed with Jeff, suggesting that if James sincerely wanted to support employee professional growth and felt that the rotation program was sufficiently advantageous, it may be more acceptable to allow a court employee to take a leave of absence from the court and accept employment with the executive branch. The court could then "hire" executive branch employees on leave from their regular jobs to work with the court in return. "While this may seem like just form over substance, it is a cleaner delineation in relation to the issue of the separation of powers between the branches of government."

Janet thought career growth needed to be found somewhere other than in the executive and legislative branches, for example, through involvement in NACM and its committees or involvement in a local court association. Also, one or more courts could arrange for staff cross training or shadowing.

Frank thought James should be a gatekeeper, selecting potential candidates from a list after reviewing each candidate's home department and thoroughly evaluating the home agency's business relationship with the court. "Intrinsic to this analysis, James should also consider the level of information/access the employee will be exposed to while temporarily working with the court to ensure that sensitive, restricted, or confidential information is not circulated either with colleagues in his/her home court or with other departments that the employee works with during the program."

Is the concern over an employee finding potentially embarrassing information an ethical or a public relations problem for the court?

Jim saw someone obtaining potentially embarrassing information about the court as a public relations issue. Whether or not it was an ethical issue depended on the nature of the information and the role of the individual. "A non-court employee does not face the same ethical issues that a court employee would face."

Frank reiterated that it depended on the employee's "home" department. "If the proposed employee is coming from the prosecutor's office, public defense office, or the sheriff, one can readily recognize the conflict of interest that would arise as an appearance of impropriety. However, if the employee's 'home' department does not regularly or institutionally participate in the law and justice arena, then the concern is likely one of having the employee potentially uncovering embarrassing information."

Janet thought that any concern over an employee coming across potentially embarrassing information was more a public relations problem than an ethical issue.

Jeff pointed out that it may be both an ethical and legal problem if said "writing-off" violated state or local accounting rules, ordinances, or state statute. Jeff needed more background information before he could come to a conclusion. Are there criteria for the "write-offs?" What is the line of authority for the write-offs? Is a judicial officer actually dismissing the cases that are ultimately written off, or is this a clerical activity? Who or what is the moving party initiating the process?

Could an employee from another agency have an ethical obligation to reveal information if it was unethical or against regulations?

Janet saw that staff from another agency may have an ethical obligation to reveal unfavorable information. “Among the potential areas of concern with this overall scenario is the blurring of the lines — blurring in terms of loyalties, of reporting requirements, and of obligations to the organization. While the employee is an employee of the city, the employee has obligations to the judiciary, the judicial branch, which includes being held to a high standard in conduct.” Many courts administrators and judges take great care to ensure that newly hired employees understand the higher standards expected. The rotation program has the potential of easily confusing inherently different branch roles.

In Frank’s opinion, the more difficult question is to whom the employee should disclose the unethical conduct. Every employee (“loaned” or not), must report either direct (e.g., taking from the court till) or indirect (e.g., fraudulent timekeeping among court employees) theft; discrimination; harassment; or political activity. “With this in mind, it is imperative that James, in the context of first-day orientation, thoroughly explain the court’s chain of command and strongly encourage the employee to report any perceived, inappropriate conduct within the court’s chain of command first. James should also be mindful, however, that he does not formally supervise the employee, and that s/he has an equal obligation to report such conduct to his/her regular ‘home’ supervisor.”

Jeff said that an employee had the same obligation a permanent court employee would have, on the theory that while working for the court that employee is bound by the code of conduct applicable to court staff. “Employees may report such illegal or unethical behavior to whomever they report (temporarily or permanently), but are most likely to report such activity to whomever they most trust inside or outside the organization.”

Jim posed the circumstance that an employee of the auditor’s office worked for the court on rotation and found that staff did not maintain a proper segregation of duties in setting fines and handling payments or did not properly secure their cash drawers. “As a court employee, that individual should report those concerns to the supervisor or the court administrator. But as an employee of the auditor, the employee may also feel ethically compelled to report to the auditor. Even if the employee reports to the court administrator initially, when the job rotation is over, the employee returns to the auditor’s office and will probably at that point feel compelled to also advise the auditor. That may be uncomfortable from the court’s perspective, but if they have not addressed the underlying problem, it is still ethically appropriate for the employee to report the concerns to the auditor.”

Many professional organizations, including courts, are under pressure to provide enhanced employee career development. This pressure may increase in the years to come and spark the dilemma described in this scenario. Looking at this possibility now can better prepare us for the future. I want to thank Janet Cornell, Jeff Amram, Frank Maiocco, and Jim Murchison for their observations on how we can ethically handle conflicts of interest in this fascinating area. If you have a comment on this or any previous column, or if you have an issue you would like to share, please feel free to email me at pkiefer@superiorcourt.maricopa.gov.

ABOUT THE AUTHOR

Peter Kiefer is criminal court administrator for Maricopa Superior Court in Phoenix, Arizona. He has been questioning ethics for Court Manager since 1994.