A Question of Ethics

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A Surprising National Response

Peter Kiefer and I take turns on this column and so this one follows up on the issue-before-last, Vol. 17, No. 1. That was the story about beleaguered court administrator Clark Kent, who was ultimately fired — or "separated" to use the latest euphemism — after unsuccessfully navigating a minefield of difficult issues at his court. To my surprise, that column generated more response from across the country than any I've written before. For this edition, I've chosen to highlight the comments from court managers and staff in eight different states.

Reminder: The Scenario

To quickly recap, I thrust Clark into six different minefields, one after another. Clark was hired, and (some would say) had an ethical duty to address some unhealthy areas at his court in the state of New Columbia. Clark was confronted with courthouse phone habits that allowed rampant ex parte communication; completely uncontrolled Internet surfing by court staff; hiring practices loaded with favoritism and patronage; pressure to involve court staff in judicial elections; loose grant funding controls; and a judge whose alcohol problems were becoming all too obvious in the courtroom. Although trying to step carefully through each issue, even Clark couldn't survive the successive alienation of one constituency after another, and was ultimately fired.

As you might remember, when Clark ran into significant opposition, he usually shifted his focus to other issues, using a "pick your battles" rationale. Many of our colleagues who responded to me in person, especially at the recent NACM conference in Portland, often faulted Clark for being such a wimp, caving in whenever he hit resistance. Others had a different view.

Georgia

Nolan Martin is the 8th District administrator in Lyons, Georgia. Contrary to seeing Clark as a wimp, Nolan saw him as combative and insensitive to his organization:

"I have faced many of the ethical scenarios faced by Clark ... and survived. My observation from your section, Clark's Minefield, is that Clark failed to understand the organizational culture and the alternatives and options available to him. This confrontational and what appears to be even combative style doesn't win respect or points and can lower morale quickly. Just some food for thought."

Minnesota

On the other hand, some seemed to imply that Clark should maybe be given some credit for at least trying to step into sensitive areas that we often otherwise avoid. Mary McCormack is the court administrator for Lyon County in Marshall, Minnesota. On the issue of Clark's attempt to reduce ex parte communication Mary writes:

> "This is a topic that bears more discussion among court administrators, but we avoid it like the plague. Ex parte communication with judges is like the elephant in the room that no one talks about."

Missouri

Most of the reaction, however, faulted Clark pretty sharply, often for badly misreading his organizational landscape. Michael Devereaux is a far better golfer than I'll ever be, and the jury supervisor in the 22nd Judicial Circuit in St. Louis, Missouri. Mike's response was in the same ballpark as Nolan's, that is, that Clark didn't do himself any favors with his methods and his approach. Michael wrote:

"Was it coincidence that your article appeared in the same issue as the articles on turnaround management?[1] Clark needed to read those 10 tips listed on page 15, particularly 'Understand your role' and 'Go in with the backing of top leadership.' It seemed to me that Clark's ethical dilemmas were of his own making."

South Dakota

In the previous column, I made reference to the unusually public controversy in the federal courts last year over Internet monitoring, an idea that was ultimately withdrawn in the face of resistance from some judges, especially from the 9th Circuit on the West Coast.[2] Those of us in the state courts don't often hear from our federal colleagues, and so I was pleased to get a response on Clark's general predicaments from Joe Haas, clerk of the U.S. District Court, District of South Dakota. Like Michael Devereaux, Joe touches on some of the solid advice on turnaround management and establishing clear expectations at the beginning. Joe's perceptive and well-written reaction was:

"While I can empathize with Clark, I think I must be missing something. Clark was hired to 'clean up' a 'badly running court.' The column describes what Clark did when he saw a variety of problems but doesn't mention any attempt on his part to get any advance agreement from his judges that these were the kinds of problems that he had been hired to fix. Because the judges have the power to fire him, I assume that he was hired by these very same judges rather than by some outside authority. If that is the case, he doesn't seem to have used his relationship with the group of judges who hired him very effectively.

"I would suggest that anyone who is being hired to fix a broken court get the hiring judges to outline what they think is broken and what role they will play in the fix. A discussion of the problems and the judges' role in fixing them would have given Clark some idea as to whether he wants the job at all and, if he takes the job, where the judges expect him to start in fixing problems. By working on the issues the judges had already identified, he can hopefully build some momentum that will allow him to then raise issues he sees that the court hasn't yet identified as being areas that are broken.

"Granted, I work in the federal system, where court governance issues may differ, but I can't imagine making a decision to change the way the bar communicates with chambers [for example]...without discussing the implications with the chief judge of my court and to work with him to get the overall support of a majority of the judges. That isn't to say that if there are ethical issues that the court doesn't want to tackle that it ends there. I have always worked under the theory that it is my job to support the people for whom I work. If I disagree with them on significant issues, particularly issues with ethical implications, it is my job to try to change their minds through the use of logic and persuasion. If I am unable to convince them and can't support their policies, it is my obligation to move on to another organization to which I can give my wholehearted support. For Clark to battle over these issues without the support of the court is ineffective at best and self-destructive at worst. Clark only owed his court his best efforts: sacrificing his career and his family's well being is above and beyond the call of duty. After failing to get the court's support on his first three or four efforts, Clark needed an effective exit strategy."

Tennessee

Larry Stephenson is trial court administrator for the 20th Judicial District in Nashville. Larry not only concentrates on appreciating the organizational context like some of the other writers, but like Joe Haas, also concentrates on the need for clarity in Clark's role and the hiring expectations in the first place.

"After reading the scenario several times, it seems to me that neither Clark nor New Columbia were appropriately diligent in the search and interview process. Before accepting the position in New Columbia, Clark should have known, to some degree, what New Columbia's expectations were in the area of ethics and should have factored those expectations into his decision prior to accepting the position. Similarly, New Columbia should have had a better grasp of Clark's perspective on the job and factored that into their decision-making on the offer.

Clark obviously had no sense of what ethical culture he was moving into and the judges of New Columbia were derelict in determining how Clark's high ethical standards would fit into their culture. If Clark went into this position with his eyes wide open and determined to be an ethical change agent regardless, he was doomed from the beginning. At a minimum, he was rolling for very high stakes.

"In my judgment, if the marriage was to take place at all, Clark should have taken the time to establish himself, win allies, and begun his changes more subtly than he apparently did. It would have taken longer, but he very likely would have shown some success as opposed to none."

Arizona

My fellow columnist, Peter Kiefer, is currently the criminal court administrator at Maricopa Superior Court in Phoenix. Peter's well-organized response not only raises some interesting issues — I find Peter's item #2 especially provocative — but he also brings us back to the recurring issue about how far we can or should expect to pursue our ethics in our working environments. Many of the respondents concentrated on Clark's tactics, his approach, his actions — in other words, the means to his ends, rather than justifying his ends in the first place. Peter's response not only addresses Clark's actions, but the justifications for his ethical objectives as well. Peter writes,

"After reading the article a couple of times, I see the need to answer three questions in order to clarify my own understanding of Clark's dilemma, and also humbly offer a little advice.

1. *Is Clark imposing his personal ethics on the court as a whole?*

"No. The ethical obligations to which Clark is committed are not of his own making; they are universal obligations. As public servants working within a democratic government, we are obliged to be faithful to these duties: e.g., promoting fairness and the appearance of fairness in government decisions, promoting public accountability and proper use of public resources, as well as rewarding employees based upon merit. The fact that only Clark sees these obligations within his court does not preclude those obligations from being universal.

2. *Are the judges custodians of the court system's ethical standards as an institution of our government?*

"No. It is true that organizationally we, as court administrators, serve at the pleasure of the bench. But again, as public servants we are duty bound to uphold fundamental ethical standards of the courts as an institution of our government. As the court is beyond simply the bench, these standards are beyond the approval of the judges. We are obligated to adhere to these standards regardless of the view a few judges have of them.

3. *In the scenario, is Clark facing legitimate differences in ethical interpretation?*

"No. There is no comparison between a clerk agonizing over whether or not to process abortion clinic trespass documents and government officials maintaining an illegal and immoral patronage system. The clerk faces a legitimate moral dilemma, interpreting the conflict between serving a democratic institution and allowing that same institution to occasionally err. (If one sees prosecuting abortion protests as an error.) As an aside, I would contend that the question of how committed the clerk might be to upholding principle is the true dilemma here. For example, is the clerk committed enough to resign from the court rather than process an abortion trespass case? There is no conflict of moral principle in supporting an immoral patronage system; the alternative is just rationalization of self reward.

"Although I do not doubt Clark's moral stance, I do question his political acumen. At no time in the article does Clark consider asking anyone for assistance. Perhaps Clark could have shielded himself more effectively in a couple of his adventures if he had sought the advice of county counsel, the state's administrative office of the courts, or the attorney general's office prior to reviewing direct telephone numbers to judges and barring staff assistance in judicial campaigns. He might have sought assistance from the county auditor or the secretary of state's office (often this office has an audit unit) prior to strengthening the court's Internet policy and accounting procedures. Clark might have called upon the county human relations department prior to tightening recruitment and selection procedures. He might have consulted the presiding judge as well as the state's commission on judicial performance prior to intervening with an alcohol-abusing judge.

"We represent an independent branch of government. That does not require us to undertake such daunting tasks in isolation."

Oregon

Finally, James Giordano is a court analyst for the Oregon Judicial Department. James wrote a very thoughtful and wide-ranging response on the issue of how, when, and how far we can expect to pursue our morals and ethics in our public lives and at work. I may ask to use other portions of his writing in future columns, but for now, I'll excerpt some of his commen-

tary on the recurring issue of when and how far we ought to express our ethics and morals in our public roles. James writes,

"As there are fewer and fewer 'principles' or 'morals' that are agreed upon by society, we have less and less common ground or foundation on which society can stand. We are literally undermining our own moral foundations in the name of freedom.

"It is tough (no matter what a person's ideological, philosophical, or religious framework) to remain totally neutral and fair when it comes to questions such as the one you posed in your column.

"Suppose there is another court clerk in the same courthouse as the one with strong convictions against abortion. Suppose this other clerk is of the conviction that only homosexual couples ought to be able to adopt on the grounds that society excludes homosexuals from being able to formally get married and they naturally are unable to conceive children as a couple. So this clerk refuses to process any adoption paperwork for heterosexual couples. Or maybe this clerk hates Christians and feels they teach children to hate homosexuals. Therefore she will not process adoption papers if she knows the potential adoptive parents are Christian. Should we accommodate both clerks (the anti-abortion and the anti-heterosexual clerks) on account of their religious or moral convictions?

"The ironic thing here is that government cannot be 'neutral' here. It must decide which (neither, one, or both) convictions to accommodate. In so doing, it implicitly makes a substantive proclamation about which convictions are deserving of accommodation and which are not.

"If it chooses to accommodate no religious convictions, in effect government is saying that religious convictions are not valuable enough to accommodate or protect when there is a conflict between one's work and one's religious convictions.

"If it chooses to accommodate one and not the other, then government has made a value judgment, and this raises establishment questions.

"If it accommodates both, it says religious convictions are important and should be respected to the point of providing accommodations when one's convictions conflict with one's work duties. But since there is such great diversity in society now, do we run the risk of paralyzing government by saying we will accommodate any and every conviction?"

Thanks so much to all those who responded. However, after all this time and debate, I still haven't pinned down the clear line, the rational, logical distinction that Peter Kiefer seems to have found so firmly — that is, the ultimate difference between the ethical convictions we're encouraged to pursue on all levels (perhaps even over the objections of the judges we serve), and those that are private and not to be accommodated in our public roles. Why can we pursue some ethics and morals at the office — don't embezzle, don't surf porn on work computers — while other ethics and morals must be confined to our private lives, particularly when those "private" morals are often far more vital but less universally held? (Don't steal office paper clips, but if you oppose the death penalty, just be quiet and do your job.)

Surely the distinction must come down to more than just whether or not various ethical standards enjoy broad consensus. Ethics by popular vote? However, if that is the answer — and if James Giordano and Randy Cohen are right when they contend that consensus is gradually shrinking — what does that say about public ethics 100 years from now?

A few issues ago I had to apologize to Norman Meyer, whose well-known name I misspelled in a previous column. This time I have to apologize to Kevin Bowling, a fellow presenter and judicial educator, whose name I also misspelled in a prior column. As carefully as I proofread these columns, you can see why I'd never do well as social secretary at the White House.

As you can see, this column is at its best when some of you are able to respond so actively. I welcome your comments, however brief or informal, on this discussion. Please send your comments to:

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1. Mike is talking about *The Court Manager*, Vol. 17, No. 1, "The Art of Turnaround Management," by Janet Cornell and Sarah Shew.

2. "Plan for Web Monitoring in the Courts Dropped," *New York Times*, September 8, 2001.