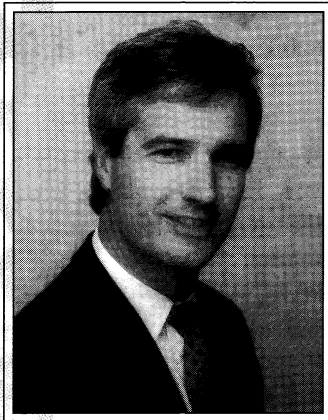


# A Question of Ethics

BY PETER C. KIEFER



## WORK LEFT TO BE DONE

In preparing a presentation on ethics for this fall, I have been collecting codes of ethics from various courts, state court systems, and associations. Nowhere near a complete taxonomy, mind you, but (in addition to the NACM and COSCA codes) my folder now includes codes from Maryland, New Jersey, Pennsylvania, Delaware, Chicago, Los Angeles, Oregon, and (of course) Phoenix, Arizona.<sup>1</sup>

As one would expect, these codes carry an array of common themes including the following:

- Protection of confidential matters
- Political activity
- Prohibitions against giving legal advice
- Use of public resources
- Avoiding actual, or even the appearance of, impropriety
- Conflicts of interest
- Outside employment
- Abuse of one's position
- Diligent performance of one's duty
- Nepotism
- Prohibition against gifts
- Compensation

We have made huge progress over the years creating a community of thought regarding ethical behavior, and for this we should be justifiably proud. And yet there is still work to be done.


At a NACM conference several years ago, I sat at a Knowledge Fair table prepared to speak ethics to anyone who sauntered by. A court professional did saunter by and commented, "Oh — ethics, we did that last year." Obviously ethics cannot be something we "did last year." There are still questions, and we still need to craft responses to those questions.

From reviewing the various codes, I suggest a number of questions with which we still need to wrestle.

### ***How should codes be framed?***

While some codes stand alone, most are a component of a larger set of personnel rules. A code as part of the personnel rules implies two things, 1) it is difficult to distinguish the code from the other rules, and 2) as part of the rules, the code falls under disciplinary and grievance procedures.

First, we need to analyze what distinguishes the code to employees. It is part of the overall rules. Yes, the code is usually entitled something like "Code of Conduct" or "Code of Ethics." Yet, should rules regarding dress code, eating at one's desk, displaying one's employee badge, or smoking within a specified distance



from the courthouse be held at the same level as acting with integrity as a representative of the court system? Ask some of our employees, and I seriously wonder if many could pick out the code and explain how it is intrinsically unique from the rest of the rules.

Rules, like the law, are often born from expediency and compromise, not careful contemplation of the core values of the courts as an institution. If all personnel rules are subject to disciplinary action, why would employees see the code as unique? If the code *is not* any different from the rest of the rules, why distinguish the code as something different at all?

Second, a code as a component of the rules implies a variety of procedural safeguards. Employees must be properly notified of an allegation and be allowed to respond; there is a required level of supporting proof; all aspects of each allegation should be proven; mitigation must be taken into account; there are appeal rights. I argue that formal disciplinary procedures actually increase the challenge of fostering accountability and lowers the bar on acceptable behavior.

This does not imply that employees should not have these rights, just that a Code of Ethics probably ought to be clearly separate from other rules, and possibly not even subject to a formal structure of discipline and review. One option is that the code can stand alone. The personnel rules might duplicate the code; it would be the *rule* not the *canon of the code* that would be the subject of discipline. In this manner we could clearly distinguish whether our behavior was ethical separate from how we determine if a specific action was within the rules.

#### ***Should a code inspire or caution?***

A document's tone is important in that it can either motivate or dissuade readers from taking action. Codes impart a tone depending upon a variety of subtleties, including the topics covered, the exceptions described, or the level of detail discussed. A significant element of tone depends upon whether a code calls us to a manner of behavior or warns us against prohibited behavior. Although codes are never totally at one extreme or the other, one can surmise the general tone by seeing how often it discusses behavior positively or negatively.

Codes that focus more on promoting behavior spurs us on to excellence. Although still important, the focus on avoiding misbehavior guides only to a minimal level of compliance.


#### ***How to educate our staff and the public?***

For a code to be effective at all, staff must see it, hear about it, and think about it. Tragically some jurisdictions develop a code only to place it to rest on a shelf. More proactive courts hold training sessions on ethics for new employees and sometimes continuing education for other employees (Although frequently these sessions focus largely upon statutory and regulatory prohibitions.)

Truly effective jurisdictions have explored a portfolio of strategies to get the message of ethics out to staff, other justice partners, and the public. Training for new employees, continuing education for seasoned staff, mentoring programs, regular e-mails, articles in the court newsletter, posters, and even testimonials during management meetings are ways to get the message out.

#### ***How to continually refresh the code?***

A well-crafted code does not need to change over time, however, we do need to show how the code applies to emerging circumstances. The advent of the World Wide Web, for example, fundamentally changed



how courts do business. This was a change not even envisioned when many codes were first developed. Codes should be timeless, but a regular thinking on how the code comports to new situations is vital. An option might be for a commission of experts in ethics and court administration to routinely meet and confer on the ethical implications of various changes in the landscape of court administration.

I do not want to imply that jurisdictions put on hold developing or revising its code if it happens to be involved in that process. Certainly a code should not be scrapped due to these questions. Rather, the struggle with these questions should be complementary to the process of developing, refining, and maintaining a Code of Ethics. I am sure we all can agree that how to present, frame, train, and revitalize the code is an ongoing concern we should engage.

I would love to hear from you on this or any previous column. Please feel free to email me at [pkiefer@superiorcourt.maricopa.gov](mailto:pkiefer@superiorcourt.maricopa.gov) CM

1. My thanks to Art Bernardino from the State of Delaware who researched many of the codes I now have from the eastern states.