



Regulating Conduct and Ethics While Minimizing Legal Risks



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Today's Discussion

- Introductions
- Regulating Conduct and Ethics—
 - Why should nonprofits care?
 - What are the legal concerns?
- Standards—Establishing and Perfecting Your Codes
- Procedures
 - Managing legal risks
 - Tips for managing efficiency
- Conclusion/Questions

“I don’t care to belong to any club that will have me as a member.”

– Groucho Marx

Regulating Conduct and Ethics

- Why should we care?
- What are the legal concerns?



Regulating Conduct and Ethics

- Why is this important?
 - High level:
 - Each professional should strive to act in the most ethical manner and members should be informed on the importance of ethics
 - Our profession/industry, in particular, should strive to improve the ethics of those who are part of it—for the good of the profession
 - Practical level:
 - We do not wish our organization to be tainted by the continued membership of John Doe
 - The more the public sees we care about these matters, the better our profession will look in their eyes
 - Membership will be more meaningful/valuable

Regulating Conduct and Ethics

- Conduct vs. Ethics
- Some groups separate out the two concepts
 - Conduct often refers to specific interactions at organizational programs, meetings, and outside of professional interactions
 - Ethics is often interpreted more as an aspirational or mandatory concept related to professional behavior in performance of work
- Trend is to regulate both

Regulating Conduct and Ethics

- Difficulty regulating activities in professional context
 - Governmental/quasi-governmental bodies (e.g., architects, lawyers, doctors, engineers)
 - Internal company policies
 - Confidential workplace issues
- What if we fail to act?
 - American Registry of Radiological Technicians: Hospital technician retains certification after being found passed out with needle in arm (*Doe v. Exeter Hospital*)
 - Failure to rein in bad conduct by members at meetings can present employment law risk, member relations issues, invite other claims

Regulating Conduct and Ethics

- Legal concerns:
 - Both standard and process should comport with legal standards (more on this to come)
 - Also—be mindful of competing legal concerns
 - Bylaws, state law
 - Employment issues
 - Duty to investigate

Standards

Establishing and Perfecting Your Code

Establishing and Perfecting Your Code

- What ethical standard will we hold our members to?
 - Aspirational vs. enforceable issues
 - To whom does it apply:
 - Trade association vs. individual member considerations
 - Non-members (e.g., meeting attendees)
 - Different rules for certification-holders
 - Make sure to get some type of agreement/acknowledgment that code will apply from all

Establishing and Perfecting Your Code

- Regional/National/International considerations
 - Culture considerations with ethics
 - Norms outside U.S. can differ
 - Still, imperative to maintain one standard

Establishing and Perfecting Your Code

- Best practices for establishing and updating codes
 - This is a standard-setting process
 - Lead with experts, assisted by a focused committee or team
 - Seek broad membership input throughout the process
 - Include counsel as process continues
 - Avoid getting too far with a problematic provision or framework
 - Get help on making code a workable document
 - Core values plus more detailed provisions—strike balance between too vague, too specific

Steps to Consider When Creating or Updating a Code of Ethics

- Association communications plan
- Member survey
- Interviews/focus groups
- Drafting committee
- Exposure draft
- Final reconciliation of comments
- Finalize for Board approval
- Procedures/committees to manage the process

Establishing Enforcement Procedures

- Legally Sound
- Practically Manageable



Enforcement Procedures

- Legal Considerations
 - First Amendment Protection—*Boy Scouts of America v. Dale*
 - Antitrust
 - Defamation
 - Confidentiality
 - Mostly—due process

Enforcement Procedures

- Antitrust

- In 2014-2015, the FTC published guidance and engaged in enforcement activity against trade associations that restrained competition among members without a legitimate business justification.
- FTC is very suspicious of ethics rules that restrict the ability to make fully independent business decisions (e.g., client solicitation and truthful marketing/advertising methods).
- Avoid having/enforcing code provisions on:
 - How members market themselves
 - Poaching
 - Territories
 - Bans on discounted rates or free services (i.e., competitive bidding)
- Restrictions on fraud or deceptive advertising are more easily supported

Enforcement Procedures

- Defamation
 - Public statements about members' / certificants' behavior present defamation risk
 - Risk can be managed by following process carefully
 - Limited privilege for private discussions in conduct enforcement procedures
 - Public reporting—risk vs. reward analysis

Enforcement Procedures

- Due Process
 - Check state law requirements (e.g., California, New York, processes)
 - Some states regulate how a membership organization can remove or suspend a member (usually other forms of discipline are not addressed)
 - Be careful about Board members, officers; different provisions address removal or suspension of group leaders
 - Tricky to apply to staff
 - Check Bylaws

Enforcement Procedures

- Due Process (continued)—in addition to statute, look to common law rights
 - Notice
 - Right to respond
 - Access to all relevant evidence
 - Impartial decisionmakers
 - Sufficient evidence
 - Reasonable punishment
 - Appeal (in some instances)

Enforcement Procedures

- Goal is to build procedures that recognize and manage due process risk while not being overly burdensome
 - Who can complain—only members?
 - What constitutes a formal complaint?
 - Form?
 - How detailed?

Enforcement Procedures

- Consider early rejection opportunity
 - Complaints about governance or policy decisions
 - Purely business disputes
 - Interpersonal complaints
 - Frivolous, vexatious matters
 - Anonymous complaints
 - Other proceedings or investigations
- Would a proven complaint constitute a code violation?
- How difficult would it be to get the needed proof?
 - Statute of limitations
 - Based on difficult-to-obtain, confidential information

Enforcement Procedures

- Other important considerations
 - Timing
 - How long to respond
 - Ethics Committee held to deadlines
 - Third parties (witnesses)
 - Language—only English or will translations be allowed
 - Counsel—when and how to include counsel
 - Decide solely on written matters or offer teleconference hearings
 - Thresholds for decision-making (simple majority, more?)
 - Make up of decision-making body (Board, Board committee, other committee)

Enforcement Procedures

- More considerations
 - What if someone resigns membership mid-consideration
 - Failure to cooperate
 - Addressing conflicts of interest

Enforcement Procedures

- Investigation
 - Committee assisted by staff and counsel
 - Seeking all relevant information, not just information that may lead to a finding of violation
 - Timing of when to seek response—pros and cons
- Confidentiality vs. getting the facts
- Another opportunity to dismiss
- Bring charges, give hearing option
 - Pay attention to statutory requirements
 - Preponderance of evidence

Enforcement Procedures

- Appeal?
 - Pay attention to applicable state law
 - Can limit appeals options to procedural wrongs, clearly erroneous situations
 - NO appeal for complainant—process is not a civil process
 - Should be separate body

Enforcement Procedures

- Sanctions

- Graduated sanctions concept—private reprimand, mandatory training, suspension, expulsion, removal of certain rights
- Suspend ability to attend future meetings
- Considerations for publication of findings
 - Keep language objective, short
 - Avoid identifying third parties
 - Publication on Internet lasts forever
- Careful with “specific performance” requirements

Questions?

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