



Will Your Code of Ethics Get Your Association in Trouble?

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Overview

We will:

1. Define a Code of Ethics
2. Differentiate a Code of Ethics from a standard
3. Examine why Association and Professional Societies establish a Code of Ethics
4. Review a series of recent Federal Trade Commission Consent Orders outlawing certain major sections of national associations' Codes of Ethics.

Overview

5. Consider how recent actions by #MeToo and the NFL has focused public attention on Codes of Ethics.
6. Distinguish between a non-enforced (voluntary) Code of Ethics and an enforced (mandatory) Code of Ethics
7. Outline how to build an enforceable Code of Ethics
8. Discuss how to enforce a Code of Ethics
9. Have an Interactive Question and Answer Session

Define “Ethics”

- ▶ Moral principals that govern a person’s behavior or activity.
- ▶ An area of study that deals with what is good and bad behavior.
- ▶ A branch of philosophy defining what is morally right or wrong.

Define “Ethics”

However, the definitions of “right” and “wrong” or “good” and “bad” are not absolutes.

1. Definitions will evolve based on time and circumstance: *i.e.*, spanking a child vs. a “time out”
2. Definitions are often subjective: *i.e.*, Clinton vs. Trump

Define “Ethics”

In entering the Code of Ethics arena, an association must recognize that it is accepting a responsibility to continually evaluate and revise its Code of Ethics based on changing and often competing societal understandings of what is “good,” “bad,” “right,” or “wrong,” new legislation and regulations and Court decisions interpreting existing laws and regulations.

Defining A Code of Ethics

Codes of Ethics include practices that should be followed by members of an industry or profession in dealing with both competitors and the public.

- I. May be very idealistic and general, such as:
 - a. Treat everyone with dignity and respect
 - b. Promote the industry and profession
 - c. Adopt the highest safety standards
 - d. Comply with all local, state and Federal laws
 - e. Not engage in false, misleading or deceptive practices.

Defining A Code of Ethics

2. Often followed by specific prohibitions:
 - a. Do not establish a personal (sex based) relationship with professional clients
 - b. Serve all prospective clients/customers in a non-discriminatory manner
 - c. Do not agree with any competitor regarding pricing, bidding or customer or territorial allocation

Defining A Code of Ethics

- d. Comply with state licensing laws.
- e. Stand while the National Anthem is being played.
- f. Do not criticize the employer on the employer's website.

Why Do Organizations Establish Codes of Ethics – The Good Reasons

1. Educate the public about their industry or profession
2. Educate members about “doing the right thing”
3. Upgrading industry or professional practices
4. Establish an enforceable mandatory Code of Conduct for association members
5. Affirmatively promote equality and diversity

Why Do Organizations Establish Codes of Ethics – The Bad Reasons

1. Keep prices up - - price fixing
2. Stop price cutters - - more price fixing
3. Limit customer's ability to shop for services - - advertising
4. Limit customer's ability to switch - - non-solicitation

Why Do Organizations Establish Codes of Ethics – The Bad Reasons

5. Making sure all competitors get a fair share of the market - - bid rigging – boycotts
6. Stop employee poaching
7. Violate individual's civil rights by enforcing subjective personal viewpoints.

What is the Antitrust Problem?

1. Section I of the Sherman Act
2. Conspiracy statute
3. *Per Se* violations – price fixing, customer and territory allocation, bid rigging and group boycotts are “*per se*” illegal
4. Criminal sanctions

What is the Antitrust Problem?

Section 5 of the FTC Act – any unfair or deceptive act or practice in interstate commerce is illegal

1. Includes all of Sherman I
2. Includes much more
3. FTC remedies

When Did Problem Start?

Seminal FTC case is 1941 Supreme Court case: *Fashion Originators Guild v. FTC* –

1. Association of Dress Manufacturers set up a Code requiring retailers to agree not to sell dresses that were copies of any dresses manufactured by Association members.

When Did Problem Start?

2. Retailers who violated Code were fined
3. If the fine didn't work, they were boycotted.

When Did Problems Arise?

In the last 60 years, almost every major profession has had antitrust Code of Ethics issues.

1. Architects – standard contract
2. Engineers – no competing on price
3. Lawyers Minimum Fee Schedule

When Did Problems Arise?

4. Dentists – price advertising
5. Legal Aid Lawyers – price fixing
6. Medical Doctors – no antibiotics without an exam, telemedicine

Recent FTC Cases

In past five years FTC has moved against many associations

1. Music Teachers National Association (20,000 teachers, 500 chapters) – Code provided it is “unethical to solicit work from clients of other music teachers or offer to teach at a lower price.”

More FTC Cases

2. California Association of Legal Support Professionals – Code prohibited competing on basis of price or soliciting employees.
3. National Association Residential Property Managers (4,000 managers) – Code prohibited soliciting accounts of competitors, limited competition, advertising.

More FTC Cases

4. National Association of Teachers of Singing (7,300 vocal arts teachers) – Code prohibited soliciting students of other teachers
5. Professional Skaters Association (6,400 skating teachers) – Code prohibited members from soliciting students of other teachers or communicating with parents or students of other teachers

More FTC Cases

6. National Association of Animal Breeders – anti-competitive restrictions important research information September, 2017.

More FTC Cases

American Guild of Organists (AGO), Consent Order, May 26, 2017. Association of approximately 15,000 organists and choral directors with 300 chapters.

1. Complaint alleged that if you wanted to schedule a wedding, a funeral or other service at a facility served by an AGO member and you wanted another organist or choral group to provide music, consumer had to agree to pay both the incumbent and the consumer's chosen musician.

More FTC Cases

2. AGO had published compensation schedules and formulas.
3. Members and chapters had to agree to follow Code and compensation schedules and formulas.

A slam dunk for FTC.

More FTC Cases

AGO signed a Consent Order

1. Prohibited illegal restrictions
2. Required adoption of antitrust compliance policy
3. Notice to members and chapters
4. Consent Order placed on website.

More FTC Cases

5. Revision of Code of Ethics
6. Elimination of compensation schedules and formulas
7. Notice to members that it will not enforce prior Code
8. Adoption of antitrust compliance policy

More FTC Cases

9. Article in magazine
10. Termination of any chapter that does not comply
11. Appointment of Antitrust Compliance Officer
12. Annual Antitrust Training of Leadership and employees for 5 years

More FTC Cases

13. In-person presentation on antitrust compliance at each National and Regional meeting for next 5 years.
14. Discipline leaders, members and employees who do not comply

Estimate cost to the Association.

What Comes Next?

1. Large professional societies are not getting the message
2. FTC turns over the next big case to DOJ
3. DOJ files criminal case
 - a. Members of Board go to jail
 - b. Association staff leaders go to jail

Codes of Ethics – Civil Rights Issues

As Codes of Ethics expand from traditional competition and professional practice issues to individual rights issues, the definition of what is “acceptable” becomes more complex and enforcement of a Code of Ethics becomes more problematic.

Codes of Ethics – Civil Rights Issues

- I. If a state legalizes recreational use of marijuana (so far 8 states and D.C. have done so) can you sanction a member for marijuana use at an association meeting in one of those states?

Codes of Ethics – Civil Rights Issues

2. Sexual harassment awareness has increased dramatically in the past two years. In an association environment how are you going to deal with not only workplace harassment but hostile environment claims relating to activity at association social events?

Codes of Ethics – Civil Rights Issues

3. How will you deal with expressions of personal views such as kneeling during the National Anthem or personal statements on your website or on social media? Liberal/ conservative, pro-gun / anti-gun, pro-life / pro-choice?

Set Parameters

You need to:

1. Establish the scope of your Code of Ethics
2. Stay within the established boundaries until those boundaries are revised
3. Decide what your Code of Ethics is seeking to accomplish
4. Be careful about jumping on a moving train and then finding that you can't jump off without serious injury.

How to Establish a Code of Ethics

1. Define your objectives
2. Develop a rationale behind each segment of the proposed Code
3. Establish a means of measuring compliance
4. Perform an economic analysis – pro-competitive benefits vs. anti-competitive risks
5. Perform a safety analysis if safety issues are involved

How to Establish a Code of Ethics

6. Perform a civil rights analysis if civil rights issues are involved
7. Study effect of Code on consumers, employees and industry members
8. Use outside experts to provide impartial input where needed
9. Involve legal counsel at the beginning of the process for guidance on antitrust issues
10. Decide if and how the association will enforce the Code of Ethics.

Enforcing a Code of Ethics

1. Prepare a supplemental document providing a detailed explanation of exactly what compliance with the Code of Ethics requires
2. Publish the supplemental document on the Association website
3. Address the difficult issues and the “what if’s ...”
4. Ask for questions

Enforcing a Code of Ethics

1. Prepare a schedule of sanctions for violating the Code of Ethics
2. Warnings
3. Suspension from membership
4. Expulsion from membership
5. Fines
6. Remember – the old “slap on the wrist” or “take a time out” will not satisfy your critics.

Create a Code of Ethics Enforcement Board

1. Usually 3 to 5 qualified members
2. Responsible for considering allegations of Code violations
3. Must adopt procedural safeguards

Minimum Safeguards

1. Accused must be sent written notice of the charges
2. Accused must be given the opportunity to present written response to the charges

Minimum Safeguards

3. Opportunity for a hearing may be provided
 - a. At hearing evidence in support of charges usually presented by Association staff or Association counsel
 - b. If Association counsel presents the charges Accused should have right to be represented by counsel
 - c. Accused should be given a written description of the procedures that will be followed and possible sanctions

Minimum Safeguards

4. Prior to hearing – the hearing officer or panel of officers should make sure there are no conflicts of interests either relating to the complainant or the accused
5. After the hearing, the hearing officer or panel should issue a written opinion

Minimum Safeguards

6. Although an appeal process is not required, best practices include the right to appeal:
 - a. To an Appeal Board
 - b. To the Association Board of Directors
7. Counsel should closely monitor the entire process

Conclusion

1. Codes of Ethics can be of great value to an industry, a profession and to the public
2. Codes of Ethics can also be a means of enforcing illegal restraints on trade or promoting an individual's civil rights

Conclusion

3. As the public looks more and more towards means of evaluating vendors and professionals, Codes of Ethics will become more important
4. Your challenge is to create a continual evolving Code of Ethics that is both meaningful and legal



Questions?

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