

What to Consider in Establishing an Ethical Code

Q Our association would like to establish an ethical code. Are there legal or policy issues we should consider?

A Many associations adopt and enforce ethical codes. As it develops such a code, however, the association should consider several issues. At the outset, the association should determine whether it wishes to adopt an ethical “code” or an ethical “guide.” As a general rule, a “code” prescribes or proscribes certain activity. Although certain associations pursue disciplinary action more aggressively than others, a code is considered an enforceable document. A “guide,” on the other hand, merely serves as an instructional piece on responsible professional behavior. It sets forth aspirational or inspirational goals toward which members should strive, not limitations or restrictions on conduct. While an ethical guide may encourage members to “maintain a commitment to the highest standards of professionalism in all business and volunteer activity,” a counterpart ethical code provision is more likely to be phrased in terms requiring members to “refrain from misrepresenting their credentials” or “refrain from knowingly making false or misleading statements about clients, competitors, the association or any other organization.”

In addition, whenever an association adopts a code, it

must take care to ensure that the provisions do not restrict individual activity in violation of state or federal law, particularly federal antitrust laws. For instance, while an ethical code may prohibit false and deceptive advertising or other fraudulent practices, it may not include blanket restrictions on advertising or any restriction that could be construed as a price-fixing agreement among the membership. Similarly, an association that wishes to adopt a code provision regarding expert testimony may require that the testimony be “truly expert and impartial” and prohibit members from testifying about matters with which they are unfamiliar, but it must exercise care in addressing matters relating to the expert’s compensation. For instance, a code should not prescribe or proscribe specific forms of payment (e.g., contingency or hourly fees). It may, however, state that an expert should not have an economic interest in the outcome of the controversy with respect to which he or she is providing expert testimony. What is the difference? While the first could be deemed an unreasonable restraint on a member’s ability to testify, the latter would likely be held to represent a reasonable restraint designed to avoid a conflict between the expert’s testimony and his or her personal interests.

Any association developing an ethical code also must consider the manner in

which it intends to enforce it. Specifically, the association should adopt bylaws that establish violations of the code of ethics as grounds for discipline, and it should adopt disciplinary procedures, pursuant to which alleged violations will be reviewed and enforced. Under principles of association law, bylaws constitute an agreement between an association and its members, whereby the association provides its members with the rights and privileges of membership in return for the members’ agreement to abide by the bylaws of the association. Thus, where grounds for discipline are incorporated into the bylaws, members agree that the association may restrict or revoke their membership on the basis of a disciplinary violation. Association law further provides, however, that members are entitled to “fair process” before any such restriction or revocation occurs. Therefore, an association intending to enforce a code of ethics should include or, at a minimum, reference disciplinary procedures in its bylaws. Such procedures should provide the association with an enforcement mechanism and protect the interests of any individual who becomes the subject of a disciplinary action.

Finally, an association interested in adopting an ethical code should understand that the code cannot be enforced against nonmembers. While an association has the author-

ity to suspend, revoke or otherwise limit an individual’s membership privileges, a nonmember has no such privileges to be revoked. Under limited circumstances, an association may pursue a claim against a nonmember when, for example, the nonmember uses the association’s name or logo without permission or wrongfully represents himself or herself as an association member. In those cases, however, the association must pursue its claim based on legal theories of fraud or violation of intellectual property rights, not based on a violation of the association’s ethical code.

Adoption and enforcement of an ethical code involves significant time and resources. As a result, any association interested in developing such a code should proceed only after determining that the activity is consistent with the organization’s mission and purposes. **N**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.

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