Ease of Information

The Information Age continues to provide new opportunities, a new openness, and new problems. Canon 1.1 of the NACM Code calls us as court professionals to “faithfully carry out all appropriately assigned duties . . . honestly, truthfully and with transparency.” The code’s preamble discusses how some see “honesty as including the concept of being completely forthcoming, not holding facts back.” Others see the necessity of “protecting the truth” to protect judicial officers, court officials, and the institution of the judicial branch. Certainly we as court professionals must be as honest and forthcoming as possible, short of putting another person in jeopardy or “impugning the dignity of the courts.” The increasing ease of information gathering can bring these two differing points of view into sharp relief.

To be “honest and truthful,” must we be “forthcoming” even when the proffered information requires explanations — explanations the public may not appreciate or understand? Do we, out of necessity, call upon the great Mark Twain when he said, “I would rather tell seven lies than make one explanation”?1

The Scenario

For nine years, court administrator Carson’s trial court used a relatively sophisticated Case and Document Management Information System (CADMIS)2. One feature of CADMIS was that for each statistical report developed, it first had to be requested by a user; next analyzed, designed, developed, and tested; and then moved to production by analysts and programmers working for the court’s Information Services Division (ISD). The slow and laborious migration from concept to production has had a chilling effect on ad hoc information requests. As an example, although CADMIS captured detailed criminal sentencing information by case and judge, no one within the court had ever asked for a report analyzing sentences. Officially, court administration said that how cases were resolved was important (i.e. settlements, plea bargains, dismissals, and trials); what the sentences were — not so important.

From time to time outside groups have asked for sentencing statistics and even demanded the information through the state’s Freedom of Information Act. The court’s standard response has been that requestors could have the data in the format the court had it. Asking for it in any way other than how the court maintained it would require programming; programming cost money (“lots of money”); the court would have to prioritize the request; it would compete with all other system modification requests; and there was no guarantee what priority such a request would be given.

Privately, Carson was not anxious to have sentencing reports produced. For years the unchallenged conventional wisdom was that an unsympathetic media would use such data to smear judges and the court. This perception was supported by the fact that some alternative news sources had already tried this by attempting to hand-calculate individual judge’s sentencing histories, then branding them “soft on crime.” Carson also knew this type of data could become convenient grist for political opponents running against sitting judges during elections.

CADMIS was fast becoming an antique. ISD finished a complete refresh basically creating “CADMIS 2.0,” which included a data warehouse. The data warehouse permitted non-programmers to easily match multiple data elements and create their own ad hoc reports.

After six months of CADMIS 2.0 running smoothly, Carson receives another request from the city’s alternative newspaper asking for two years of sentencing data by trial judge. He dusts off the court’s usual reply and sends it to the newspaper.

The next day Carson and his assistant, Ethan, are chatting about a couple of administrative issues when Ethan mentions that the “usual response” thwarting sentencing information by judge really doesn’t work anymore. ISD had trained Ethan and several other court staffers on how to produce ad hoc reports from the data warehouse. Ethan can now put together the requested sentencing reports in less than 20 minutes, and he concludes that they are going to have to come up with a new and better reason to refuse to produce the reports.

Carson thinks for a minute, then tells Ethan, “You know that, and . . . now I know that . . . but the media doesn’t know that . . . and that’s the way we’re going to keep it.”
The Respondents

To comment on the ethical implications of public information access in an age of open statistical access, I recruited Jennifer Liewer, chief communications officer for the Arizona Administrative Office of the Courts, Phoenix, Arizona; Andrea Patterson, human resources manager for the Idaho Administrative Office of the Courts, Boise, Idaho; Mark Hinnen, chief deputy, Bankruptcy Court for the District of Oregon (retired); and Carla Smith, chief deputy judicial administrator, Orleans Criminal District Court, New Orleans, Louisiana, to respond to questions about the scenario.

Questions:

Do you think there are any legitimate political reasons for not wanting to produce the sentencing reports?

Andrea Patterson noted that the preamble to the code of conduct states, “The foundation of our society rests, in part, on ability of its citizens to wisely judge the value of our courts.” There are reasons for the judicial branch to deny information to the public or to reporters, including protecting public safety, minimizing the risk of injury to individuals (especially children and other vulnerable persons), protecting individual privacy rights and interests, protecting proprietary business information, protecting persons from financial or economic loss, protecting persons from defamation, and protecting the right to a fair trial. These reasons must always be balanced against the public's right to know.

Andrea considered several political reasons why Carson did not want to produce the sentencing reports. “He may believe that disclosure of a judge's sentencing decisions without giving the complete context of those decisions would give a misleading picture to the public. It might lead to disqualification of judges by prosecutors or defense counsel, resulting in administrative inconvenience and cost to the public. It might cause judges to sentence more harshly to avoid public criticism and possible defeat in an election . . . [E]ither individually or collectively, a judge or the judges may look to blame court administration for providing the sentencing reports after the reports have so long been unavailable . . . . None of these are legitimate reasons that would outweigh the public’s right to know.”

Looking at the question from a different perspective, Mark Hinnen noted that disseminating the sentencing reports could work to the judges’ advantage. Since judges “run on their record” even when they do not face an opponent, the reports could allow the electorate to make up its own mind on what the sentencing information indicates. “It also opens up the process of how sentences come about, in that many sentences are recommended by prosecutors depending on jurisdiction, which can become an issue. There are also sentencing guidelines in many jurisdictions that have to be considered.”

Mark recognized one real issue “ . . . the reports would compare the judges and could cause issues among the judges or the judges protecting an inept judge, which is always a touchy issue.”

Even though Jennifer Liewer appreciated Carson’s concern over his judges’ potentially negative reaction and the potentially negative publicity that might result from the sentencing reports, she responded “I do not believe [Carson’s] reasons for not providing the public information are legitimate.”

Carla Smith acknowledged that Carson’s political reasons were legitimate because of the mindset that is imbedded within the judicial community. If the judges regularly stand for competitive election, they will fear the negative perception the information might foster, and if opposed, they will fight to regain their credibility and position. This fear is intensified because often a judge’s hands are tied; the canons limit what a judge is allowed to comment on to the media.

Having said that, Carla reflected, “The world today wants transparency and accountability. The less proactive and progressive courts have to overcome the obstacles of supplying information that should not be hidden from the public. It is more beneficial for the court itself to supply the data because outside agencies will go to other sources, such as the district attorney.”

Does Carson need to be more forthcoming to the media?

Jennifer, Andrea, and Carla all definitely thought Carson needed to be more forthcoming and needed to discontinue using the same rationale. Jennifer said that avoiding transparency causes citizens to mistrust the system and weakens the court process. “As public employees, we answer to the public and are held to a higher standard when it comes to being completely honest in our day–to–day activities. As a court, transparency is a key component to justice.” Having said that, Jennifer believed that Carson could charge the media for producing the reports and appropriately prioritize report production.

Andrea remarked, “Using a 20-minute ‘cost’ as a reason to deny disclosure would result in the denial of a large number of public records requests, which would probably defeat the purpose of the Freedom of Information Act.”

Carla advised that having open communication with the media was a positive. “Whether the facts are reported in a positive or negative manner, the media will keep digging until they get something to report. It is better for the court to communicate and show good faith in supplying what they request if it is a feasible and ethical request.”

Mark realized that being able to produce reports so quickly and economically changes the stage. “This really speaks to
having a new policy for producing reports in general. If the ease of producing reports creates a flood of requests, this becomes an issue of how quickly reports can be generated per request or have court policy regarding limitations on requests.” Mark agreed with Jennifer that Carson could charge a fee for producing the report.

**How does Carson explain to his bench this new ease at providing sentencing information without getting fired?**

Andrea, Carla, and Jennifer thought Carson should show the bench the new format and place the information in a factual but positive format. Andrea thought Carson needed to bring his presiding judge up to speed on CADMIS 2.0’s enhanced capabilities regarding the accessibility of sentencing information. “… [Carson] should consider providing the judiciary with the sentencing reports that are now available so that the first time that judges hear of the new reporting capability is not through the news media.”

Carla warned that the media will eventually get the information, and it may be less favorable if it comes from another source. Carson should bring the “techies” along to explain the process and receive judicial input. “Denying access is probably a bad idea. It will appear as though the bench is hiding something from the public and not administering justice to the community.”

Jennifer declared that Carson needs to tell the judges “… that as a court employee it is important to him that he be responsive to the public’s requests, regardless if it is the media. He should also remind them that open proceedings are what our founding fathers wanted in creation of the judiciary, and it is our responsibility to uphold this legacy.”

Mark did not think this was an issue Carson should or would be fired over unless he is not following court policy in releasing information. “The new ability to produce reports speaks directly to the leadership of court (presiding judge, court administrator, and the bench) to set new policy, and if they do not wish to release sentencing information, the court administrator has backing to refuse producing the reports.”

**Can Carson refuse to produce the reports based on the presumption that the media will impugn the dignity of the court?**

Neither Jennifer, Mark, nor Andrea thought Carson could deny the request on the presumption that the media would impugn the court’s dignity. Jennifer said, “If the court is behaving in a way or if the report will demonstrate that sentencing may not be popular in political circles, there is nothing the court can or should do to withhold this information.”

Mark observed that the court’s power on how the media uses the information is limited. “This is an opportunity for Carson to sit down with the media, to explain the reports, and to affect the overall relationship with the media, which in turn can determine how the media may use the information.” Andrea thought Carson could work to provide clear and extensive information on how judges make sentencing decisions. “It may be difficult to do so in a way that will overcome the negative implications of some of the information that is released, but that is part of the challenge of Carson’s job. His task is not to shield judges from criticism, but to provide the information that the public has a right to see and to provide any additional relevant information that will make it possible for responsible members of the press and public to make a considered judgment of the sentencing process.”

Carla did think Carson could decide not to run the report, but that presumption should be kept within the confidence of the bench and not conveyed to anyone else. “It is not a good practice to refuse reports that may not impugn the dignity of the court and, actually, show the court is doing its job.”

My thanks again to Andrea Patterson, Jennifer Liewer, Mark Hinnen, and Carla Smith for their insights regarding the challenges we faces with our ever-expanding ability to access court data.

Be sure to visit the NACM ethics Web page at http://nacmnet.org/ethics to see previous ethics columns and to download educational ethics modules your court or state association can use to present ethics training in your state. If you have an ethical issue you would like to discuss or if you have comments on this or any of the previous columns, please contact me at pkiefer@superiorcourt.maricopa.gov.

**ABOUT THE AUTHOR:**

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**NOTES**

1. Mark Twain’s April 11, 1883, letter to John Bellows
2. CADMIS is a fictional information processing system. Any relationship of this depiction to any actual system is purely coincidental.