**Ethical Issues and Challenges in Court Administration**

Rev: January 18, 2021

***Introduction***

The purpose of these depictions of ethical issues and challenges is to provide context to the Model Code of Conduct for Court Professionals. The NACM Model Code of Conduct for Court Professionals does not exist in a vacuum; it is a response to real-world situations that court professionals confront while working for trial courts in the judicial branch. The judiciary performs a unique role and those of us who serve the judiciary face unique ethical challenges. The Judicial Branch in our nation plays an even more exceptional role due to our pledge to governmental independence and impartiality.

These depictions are intended to be a “living” chronicle of issues and challenges. They will be regularly updated with new additions and new information. They are also intended to be inclusive rather than exclusive, meaning that we have included interesting depictions even if the ethical implications might be minor. The most recently added issues and challenges are shown in bolded red.

The Ethics Subcommittee does not intend to recommend specific positions regarding these depictions. Doing so would clearly encroach on the NACM Board’s policymaking role. When research is practical, the Subcommittee will update depictions with background information regarding actions various courts have taken in reaction to the specific depiction.

The title makes a distinction between issues and challenges although we do not categorize the depictions as such. Generally, an issue is transitory, often involving technology. For example, inappropriate use of office telephones, once a significant ethical issue, is now almost anachronistic with the nearly universal use of Smartphones.

A challenge is considered a longstanding dilemma. The requirement that court professionals remain impartial even in the face of societal pressure is an example of a long-term challenge.

***Depictions***

Employee Use of Social Media

At what point does employee access to social media either jeopardize the court’s impartiality or impugn the court’s dignity? Can courts forbid employees from accessing social media during working hours? This question is particularly complicated by the fact that many judges and courts now use social media to communicate to staff and the public. Is it inappropriate for a court employee to “like” or “friend” a local attorney or process server on Facebook, LinkedIn, or some less popular platform? As a practical matter social media is now so diverse (e.g., Facebook, Twitter, Snapchat, Instagram, WhatsApp) is it realistic to think that a court could enforce an employee prohibition of all social media platforms?

Some state legislatures now offer electronic platforms that allow the public to submit testimony on pending bills.[[1]](#endnote-1) Is it ethical for a court professional to submit testimony on a bill as a private citizen? Is it inappropriate if that testimony runs counter to the position of the court? This ties to The Core Public Relations and Workforce Management modules. It is strongly related to [Canon 1.2](#Canon12) calling on court professionals to avoid both impropriety and the appearance of impropriety**.**

The Freedom of Information Act (FOIA)

What is the duty of a court professional if there is a request to release information that is unquestionably derogatory to the court? A possible example might be internal emails regarding a controversial administrative policy. This topic ties to The Core Purposes and Responsibilities module. This is primarily a legal issue but is somewhat related to [Canon 2.6](#Canon26) calling on court professionals to properly provide confidential information that is available to specific individuals authorized to receive such because of statute, court rule or administrative policy.

Public Access to Court Records

Many courts do not allow the public electronic access to publicly available court records unless they register with the court and are assigned an identification, sometimes pay an access fee, prove that they are a party to the case, or physically travel to the courthouse. Is it ethical for a court to logistically limit access to public documents? This topic ties to The Core Purposes and Responsibilities module. It is also somewhat related to [Canon 1.3](#Canon13) (Fairness) and [Canon 2.5](#Canon25) (Properly Maintained Records).

Recording Meetings

Recording events on smartphones and posting videos to social media is becoming commonplace. Some people say they do it for their own protection (legal or personal), some people say it is easier than handwriting notes during a meeting. When is it appropriate or even legal to record a meeting? This topic ties to The Core Workforce Management module. It is related to [Canon 1.4](#Canon14) (Respect for Others) and [Canon 2.6](#Canon26) (Legal Requirements).

Adherence to Court Policies

Occasionally courts have policies that are more often honored in the breach. An example can prohibitions against the use of smartphones by the public when attorneys, interpreters, court reporters, and even court staff might be seen using smartphones. Using a smartphone can very well be an integral part of one’s job. For example, an attorney might need to call to locate a need witness or an interpreter might need to call to determine where he or she is needed next. What effect does it have on the public’s perception of trust and confidence in the courts when someone can be seen on one’s smartphone in front of a sign prohibiting the of smartphones? This topic ties to The Core Workforce Management module. It is related to the Code’s Preamble (Incorporating Laws into the Model Code) and [Canon 2.3](#Canon26) (Misconduct of Others).

Public Access and Electronic Content Management

If electronic content management (ECM) becomes widely used by courts, there may not be paper documents that correlate with some events or information. We as court professional have always viewed our ethical duty in the context of maintaining paper records. What happens to our duty when that information is maintained solely electronically? This topic ties to The Core Purposes and Responsibilities module. It is related to [Canon 2.5](#Canon25) (Properly Maintained Records).

Data Mining

As courts become increasingly automated, they offer opportunities for groups to search for information on individuals or trends in court decisions. Often this is data courts have traditionally either not produced (e.g., the sentencing records of individual judges standing for reelection) or not produced in a specific format (i.e., complete database dump). Can courts continue to refuse to provide data to the public simply because it has never been offered in a specific format before? This topic ties to The Core Operations Management module. It is moderately related to [Canon 1.3](#Canon13) (Fairness) and [Canon 2.5](#Canon25) (Properly Maintained Records).

Court Performance

Canon 1.1 calls court professionals to carry out their duties openly. Sometimes (often in moments of crisis), courts shun openness for decisive action. Can we justify casting aside the aggravation that openness entails in favor of determination in the face of an emergency?

A criticism of the current performance is that the measures were developed, not by the public, but by people working within or in support of the judicial branch. Can we claim that the performance measures reflect the courts’ responsiveness to the public when the everyday citizen was not involved in developing the measures? This topic ties to The Core Accountability and Court Performance module. It is related to [Canon 1.1](#Canon11). The comment section on openness calls for court professionals to ensure that the public can clearly understand how determinations (such as performance measures) have been made.

Problem Solving Courts vs. Traditional Adjudication

Many problem-solving courts (aka treatment courts or advocacy courts) focus on rehabilitating and reintegrating defendants into the community. Is there a point at which problem-solving courts violate the court values of impartiality and independence? This topic ties to The Core Purposes and Responsibilities module. It is moderately related to [Canon 2.1](#Canon21) (Independent Judgment).

Another aspect of many problem-solving courts is their close collaboration with the community often exhibited by partnerships with nonprofit financial support organizations (501(C)(3). At what point does a court’s collaboration become an improper influence by the community and businesses?[[2]](#endnote-2) This topic ties to The Core Budget and Fiscal Management module. It is moderately related to [Canon 2.1](#Canon21) (Independent Judgment).

Many courts, particularly problem-solving courts, hold events where multiple agencies in the criminal justice system assemble to process individuals with specific types of issues. Examples include veterans’ court “stand-downs,” homeless court warrant amnesty weekends, or even parking ticket amnesty days. As laudable as these events are, do they comport with the ethical precept that courts must provide equal treatment to all? Is it fair that a homeless person might receive different treatment on a warrant depending on which weekend he or she appears in court? This topic ties to the Core Purposes and Responsibilities module. It is moderately related to [Canon 1.3](#Canon13) (Fairness).

Gifts

Is it appropriate for law firms and other entities to make large donations to a court’s 501(C)(3)? Though it is inappropriate to give gifts directly to judges or staff, a 501(C)(3) support organization is only once removed from individual staff and judicial officers. Many judges make it known that they are fond of a problem-solving court or might even be its champion. Could this be perceived as a conflict of interest? It is closely related to [Canon 3.3](#Canon33) (Gifts, Donations, and Grants).

Political Pressure

There is no denying that the current political climate is more polarized and volatile than ever. The pressure on all branches of government, including the courts, is intense and can spark ethical decisions. What is the correct posture for a court professional if another entity (e.g., the legislature or the prosecutor) applies potentially inappropriate pressure? What is the correct response if the court itself veers in a potentially inappropriate direction? This topic ties to the Core Public Trust and Confidence as well as the Leadership and Court Governance modules. It is moderately related to [Canon 1.1](#Canon11) (Performing Court Duties).

One example was a situation when a state legislature attempted to override court policy forbidding firearms in courthouses and allowing members of the public to enter courthouses carrying firearms.[[3]](#endnote-3)

Another example included occasions when the Department of Homeland Security ICE agents venture into courthouses to search for and detain illegal aliens over the objection of court leadership.[[4]](#endnote-4) A third related example in described stories of local Sheriff’s Offices deciding to enter courthouses and serve outstanding warrants on citizens.

Outside Business

Court salaries are notoriously low, and many court professionals are forced to seek secondary employment to supplement their incomes. Securing secondary employment that does not, 1) conflict with one’s court employment, 2) negatively reflect on the judicial branch, or 3) negatively reflect on one’s own profession is always a concern. Court professionals must notify the appropriate authority prior to accepting secondary employment. Although unstated, presumably the appropriate authority has the right to prevent a professional from accepting certain jobs. Should there be more specificity regarding the types of secondary employment that are generally acceptable and unacceptable? This topic ties to the Core Workforce Management module. It is closely related to [Canon 3.1](#Canon31) (Outside Business).

An example describes a court professional who gets involved in a multi-level marketing (MLM) venture where he or she hosts parties to sell products to customers. What is the appropriate response if the professional inadvertently invites a defendant with an active criminal court case to one of these parties? Would it be permissible for that same court professional to bring some of the MLM products to work and show it to co-workers during lunch and breaks? Is it permissible for other employees to buy the product in the courthouse premises? This is closely related to [Canon 3.1](#Canon31) (Outside Business).

Business After Leaving Judicial Service

If an employee is forced to resign from a court, the Code says that the employee must still avoid employment that would impugn the court or the employee’s (now previous) professional career. Is it reasonable to expect a former employee, with presumably little loyalty to the court, to check with the appropriate authority before accepting a job that may pose a conflict of interest? What motivation does the employee have to follow this Canon? This topic ties to the Core Workforce Management module and is related to [Canon 3.1](#Canon31) (Outside Business).

Assisting Litigants

In some smaller courts, employees perform multiple functions. It is not unheard of for a county or city employee to give out information on court functions and calendars. Occasionally this advice might be incorrect; sometimes the advice could be construed as legal advice. Must county or city employees adhere to the Court’s code of ethics when providing information about the courts? This topic ties to the Core Workforce Management module and is related to  [Canon 1.7](#Canon17) (Assisting Litigants)

Transparency and Immigration

Today’s volatile political environment drives many to take questionable actions. A recent USA Today article describes a judge who allowed a defendant to avoid ICE by leaving the courthouse by a backdoor.[[5]](#endnote-5) Is there room for civil disobedience inside the courthouse? What responsibility do we have as court professionals to adhere to the rule of law and transparency? This topic ties to the Core Ethics module and is related to [Canon 1.1](#Canon11) (Performing Court Duties).

Maintaining Confidentiality

We as court professionals have access to a vast amount of information, which is often confidential. We can be tempted by others to divulge this information, which is unethical and usually illegal. A news story from television station WCPO in Cincinnati describing the sale of confidential search warrant information illustrates the potential for abuse.[[6]](#endnote-6) This topic ties to the Core Ethics module and is related to [Canon 2.6](#Canon26) (Legal Requirements).

Judicial Disqualification

The ABA recently issued an ethic guideline that states that a judge need not automatically recuse or be disqualified if a lawyer or party in a matter before the judge is an acquaintance or friend, however, recusal or disqualification is necessary when the judge is in a close personal relationship with a lawyer or party in a matter. This leads to several questions. What is the distinction between “acquaintance” versus “close personal relationship”? For example, are golfing buddies acquaintances or close personal friends? Do judges have to disqualify themselves if a party in a case before that judge contributed to a political action committee that favored the judge’s election (or reelection)?

Political Expression and Court Employees

The current political climate has provided several new situations that courts may face. Recently many jurisdictions have recently experienced protest marches. Some of those marches have either turned violent or endured violence against the marchers. The first Amendment to the U.S. Constitution guarantees freedom of speech and the freedom to peaceably assemble or petition for redress of grievances. On the other hand, court employees are court representatives. Participating in a protest march heightens the possibility that employees might be seen and recognized on television, or the internet. Even if employees reasonably assume that the chances of violence are low, events could get out of hand and they might be detained or even inadvertently involved in a violent altercation. Can court employees participate in a protest or do they give up that right when they agree to work for the court? If they can protest, what limitations does the ethics code place upon them because they represent the court? This topic ties to the Core Ethics module and is related to [Canon 4.1](#Canon26) (Refraining from Inappropriate Political Activity).

Teleworking

Telework used to be an occasional perk for a few employees; now with the Coronavirus it is widespread. The emerging issue of telework has raised ethical questions. Often telework is assigned to supervisory and management staff that perform analytical work. Given the need for widespread telework because of the Coronavirus pandemic, should it be allocated democratically to all employees? Since it is still considered a perk by many, should employees who are unable to enjoy telework be compensated in some other way?

Telework means that court work will be performed outside of a court controlled environment. Is there a need for new rules to govern the teleworking environment? Is there a need for new rules to govern the communication links between teleworking sites and the courts?

Virtual Trials

For years, the concept of virtual trials has not been culturally accepted by courts, but the Coronavirus has forced us to reassess the way we select juries and conduct trials. If the virus suspends jury trials for as long as a year or more, will courts be compelled to perform trials by remote teleconferencing. If that occurs throughout the nation’s courts, how do we ensure that justice is administered fairly, and not to favor the technologically sophisticated? Can jury selection be conducted by teleconference and not end up unfairly handicapping defendants? Can witnesses appearing by teleconference not given less credence than witnesses who appear in person in the courtroom? How can the public easily access virtual trials?

Public and Employee Intrusion

The Coronavirus requires courts to take extraordinary measures to protect its employees and the public. This has raised ethical questions regarding privacy and personal liberty. Are there limits on the courts’ ability to evaluate employees and the public prior to entering the courthouse? Can courts require employees and courthouse visitors to submit to temperature scans and answer background questions? Can courts require employees and courthouse visitors to wear masks and goggles or face shields?

**On December 16, 2020, The Federal Equal Employment Opportunity Commission issued guidelines that employers are allowed to require employees to be vaccinated against the flu. As the vaccine is now becoming available, can and will courts require employees to be vaccinated? Can courts refuse to hire an individual who refuses to be vaccinated?[[7]](#endnote-7)** Can courts keep track of repeat visitors and exclude them from entering a courthouse? If a court can track repeat visitors for medical reasons, can courts track visitors for other conditions (e.g., active warrants)? At what point should courts discontinued such requirements?

**The CDC has issued a model that shows that 59% of COVID spread comes from asymptomatic transmissions. Should courts require all employees to be tested before coming to work?**

**Part-Time Employees**

**In many smaller local courts, it is not uncommon for employees to work only part-time for a court. Some of these courts might have only a single employee who works part-time both for the court and for the local police department or town government. There was one instance of a single employee working as the Town Clerk, Town Manager, and Court Clerk. What ethical obligation does an employee have who is working for multiple separate local government entities?**

1. The Arizona State Legislature now offers an electronic platform for the public to submit testimony called “Request to Speak.” Individuals must register to submit testimony. [↑](#endnote-ref-1)
2. A recent example of this potential problem was alluded to in the September 17, 2018, National Center for State Courts podcast episode, “Court Talk.” In that episode, Blake Kavanagh interviewed Andy Brown of the Ottawa, Michigan Judicial Circuit Court Drug Court on the need for good statistical data and how difficult it is to collect it. One reason was that funding bodies are not very inclined to fund data collection projects. This leads to the question, could private groups, such as nonprofits, fund such projects? Could such an arrangement lead to the funding source wanting to collect certain types of data or to use certain data collection methods that could lead to specific conclusions? [↑](#endnote-ref-2)
3. Passage of Iowa HF 517 left many questions unanswered regarding Iowans’ ability to carry concealed weapons into courthouses, but it does demonstrate legislatures’ willingness to disregard the position of judges on this issue. William Petroski, “Gun Bill's Passage Raises Questions over Guns in Iowa Courthouses, City Halls,” *Des Moines Register*, April 7, 2017. [↑](#endnote-ref-3)
4. Yesenia Amaro, “ICE ‘Surprise’ Arrest in Sacramento Courtroom Could have Chilling Effect Across State,” *Fresno Bee*, August 24, 2018 [↑](#endnote-ref-4)
5. [Joey Garrison &](http://www.usatoday.com/staff/53991/joey-garrison/) [Kevin Johnson](http://www.usatoday.com/staff/960/kevin-johnson/), “Feds Charge Mass. Judge with Obstruction for Aiding Undocumented Immigrant's Escape from ICE,” *USA Today*, April 25, 2019. [↑](#endnote-ref-5)
6. “Grand Jury Indicts Clerk of Courts Employee Accused of Leaking Information,” *WCPO Television*, Cincinnati, November 16, 2017 [↑](#endnote-ref-6)
7. Nathan Bromey, “Should Employers Force Workers to Get COVID-19 Vaccine? Some Experts Say They Should,”

   USA Today, August 26, 2020 [↑](#endnote-ref-7)