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Continuing Education Course

The Ever-Evolving World of Legal Ethics

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KIDDER'S ETHICAL CHECKPOINTS

1. Recognize there is a problem.
2. Determine the actor(s).
3. Gather facts.
4. Test for right versus wrong issues (stench test).
5. Test for right versus right issues.
6. Apply ethical standards and perspectives.
7. Look for a third way.
8. Decide.
9. Revisit and reflect on the decision.

DESCRIPTION

This course reviews the foundations and tenants of ethics. Historical and contemporary schools of ethics are examined, and ethical decision-making and behaviors are reviewed. Ethics as a component of leadership is also addressed, and several frameworks to address ethical decisions and dilemmas are presented.

Ethics in the legal profession is typically focused on lawyers, but applies equally to all staff and paraprofessionals in all settings — in law firms, corporate settings and the judicial branch. No organization, regardless of size or setting, is exempt from obligations of ethical behavior.

COURSE OBJECTIVES

- Define ethics and its importance.
- Describe several systems of ethical thought.
- Identify how ethics are formed at individual and organizational levels.
- Apply the importance of ethics to professions and codes of ethics.
- Identify and describe a framework for ethical decision making and ethical dilemmas.
- Provide suggestions for development of organizational ethics.

ETHICS DEFINED

Ethics is the branch of knowledge and a system that deals with moral principles, and the rules of conduct recognized with respect to a particular class of human actions, or a particular group, culture, organization or profession. Throughout this course, ethics and morality will be used equally.

IMPORTANCE OF ETHICS

Ethical behavior is important to the stability of society and the success of organizations. For each of us in a leadership or a management role, ethics are important as a guide for our actions and behaviors. We've seen numerous examples of behaviors that were unethical and often illegal — Ponzi schemes, fraud, falsified tax reports or financial reports, for example. These actions can have widespread implications by causing individuals to unknowingly lose large sums of money, or organizations to implode.

Ethics are important to us to help us know right from wrong, decide and then act in ways appropriate and just to our society and groups. Ethics also affect our personal and professional relationships as we seek to establish trust and build integrity with others, and within the organizations and group to which we belong. Honesty, virtuousness and principled are a few of the most common terms often associated with ethical behavior. Being dishonest and/or disrespectful is unethical, undermines trust, demonstrates lack of integrity and undermines culture.

THE FOUNDATION OF ETHICS

Multiple ethical systems can be identified, and Craig Johnson in his book *Meeting the Ethical Challenges of Leadership*, highlighted several of the well-established systems summarized below. These serve as a foundation for understanding ethics, and for application to leadership and management.

Altruism is based on the premise of love your neighbor, and is seen by some as the ultimate ethical standard. This perspective is a universal value promoted across cultures in all parts of the world. It shares much in common with virtue ethics — high moral character grounded in compassion, hospitality, empathy, generosity and concern for others rather than self. This approach is ancient, yet has contemporary applicability. It is an important construct for society and leaders, and is powerful in its message and inspiration. Yet, it is difficult for all needs to be met, and it is difficult for many to act as if they indeed "love thy neighbor."

Utilitarianism is based on the premise that ethical choices should be based on their consequences. This is often referred to as "do the greatest good for the greatest number of people." Formalized by English philosophers Jeremy Benham and John Stuart Mill in the 18th and 19th centuries, the focus was on the best decisions generate the most benefit as compared to their disadvantages, and benefit the largest number of people.

There are four steps to conduct a utilitarian analysis of an ethical issue:

1. Identify the actions or issues under consideration.
2. Specify all those who might be affected by the action (e.g., the organization, local community, professional group, society), not just the individuals involved.
3. Determine the good and bad consequences for those affected.
4. Summarize the good and the bad consequences.

The action is morally right if the benefits outweigh the costs. While utilitarianism is easy to understand and helps one to think through decisions, it may not anticipate all the consequences if self-interest or bias for ourselves is weighed too heavily in the considerations. The greatest good

may be confused with selfish interests. Decision makers may also reach different conclusions as they evaluate and weigh actions and consequences, and those affected.

The term **virtue ethics** is a more contemporary description used today to focus on character ethics. Aristotle spoke of excellence or virtue of character through his *Nicomachean Ethics* in the 4th century, as how to achieve what is more important, or the excellent activity (see bibliography, Mariska Leunissen, 2012). Similar perspectives are found in Confucianism in ancient China. Aristotle also believed the man who possesses character excellence will be morally responsible; they will do the right thing, at the right time and in the right way. Bravery and acting temperately were considered excellent activities. Being virtuous required the experience of the actions of life and doing virtuous things; the study and knowledge of what virtue is did not lead to virtuousness.

Justice as fairness nurtures both individual freedom and the good of the community. There is an emphasis placed on democratic values and concern for the less fortunate, along with the view leaders should act consistently and treat followers fairly. John Rawls addressed questions around these issues in the late 20th century. He developed principles that would foster cooperation in a society of free and equal citizens, who at the same time must deal with inequalities.

This view differs from utilitarianism, as certain groups and individual may be disadvantaged through the greatest benefits for society. Rawls identified two principles grounded in justice as a way to decide. The principle of equal liberty protects certain rights that must be equal to what others have. The second principle has two parts, with the first focused on equal access (nondiscrimination) to office and jobs, and the education and training to prepare them for these roles. The second portion focuses on recognition that inequalities exist, but that priority should be focused on meeting the needs of disadvantaged or marginalized groups.

This approach only applies in democratic societies, and brings to the forefront disagreement about the meaning of justice and fairness. The application is challenged when there is lack of consensus about the most important rights.

Ethics are a system of moral principles, and the rules of conduct recognized in respect to a particular class of human actions, or a particular group, culture, organization or profession.

Communitarianism was a phrase utilized by Amitai Etzioni and a group of ethicists, social scientists and philosophers in 1990. This group was concerned about the state of American society, and their focus was on communal responsibilities. This approach to moral reasoning hits selfishness head-on, and encourages responsibility to common good as more important than individual rights.

Central to this approach are dispersed and collaborative leadership, and ethical dialogue focused on citizenship and civic responsibility in concert with rights and privileges afforded by society. This perspective may be seen more as a movement rather than a philosophy, but considers a shared

vision for common good, along with shared values reflected in rules and laws, and unwritten customs.

Character reflective of care, trust and teamwork are viewed as essential for healthy communities to create a sense of belonging, while still recognizing the rights of individuals and groups. This approach may be seen to repress individual rights, and place one set of values in a pluralistic society. It is also challenged to resolve competing community standards or perspectives.

Categorical imperatives was an ethical system developed by European philosopher Immanuel Kant in the 18th century. Kant argued that people should "do what is right, no matter the cost or consequences." Categorical imperatives are defined as "without exception," and duty and obligation may run contrary to our personal interests. Kant believed that what was right for one, was right for all. Truth telling and helping the poor are always right. Lying, cheating and murder are always wrong.

INDIVIDUAL ETHICS

Our individual ethics are a part of our being, and comprise the philosophy by which we live and act. We often hear the phrase "acting ethically." But what does this mean? And where do ethics begin? An individual's "moral compass" is often referenced. Acting ethically through one's moral compass reflects the natural feeling and ability a person has to judge right or wrong and act accordingly.

We develop our individual value systems or our fundamental truths and principles through our early upbringing. Our caregivers' approach and how they respond to needs influence the development of self as reflected through character and personality. Experiences and influence through religion, schools and community groups can also affect this development. Character traits and individual value systems become an outgrowth of these early childhood developmental processes, and moral development evolves with cognitive development and maturity in pre-adolescent years, and continues to evolve in adulthood.

These development experiences influence one's moral compass and moral character, and hopefully are reflected through moral actions.

MORAL ACTIONS

Four elements are key to moral actions:

Moral sensitivity refers to the recognition of a moral issue. You must examine perspectives, apply moral terminology, know of increased intensity around an issue, and be cognizant of moral emotions such as anger, disgust, guilt or sympathy. It also demands accepting personal responsibility, refusing to excuse misbehavior and practicing humility and openness to other viewpoints.

Moral judgment pertains to what is the right or wrong thing to do in this situation. Creating an ethical environment with ethical role models and guidelines helps to frame right or wrong behaviors. Education — particularly on ethics — is important, as is consideration of the needs and perspectives of stakeholders and application of accepted moral principles and guidelines.

Moral focus provides the fortitude to follow through on choices. It is the motivation to act, and can be achieved by rewarding ethical choices, responding to moral emotions and controlling negative

feelings that often accompany ethical dilemmas or problems.

Moral character speaks to the inherent virtue that ethical individuals must have. You must have control over events in your life, take responsibility for self and actions, and develop the knowledge, skills and experience to recognize right and wrong, and act ethically.

FRAMEWORK FOR ETHICAL DECISION-MAKING

Decision-making guidelines provide a systematic approach to help facilitate better ethical decisions. These approaches help individuals and teams define the problem, gather information, apply ethical standards and values, identify and evaluate alternative courses of action, and follow through on choices.

Many frameworks exist, such as Kidder's Ethical Checkpoints and the SAD Formula (situation definition, analysis, decision).

The Markkula Center for Applied Ethics at Santa Clara University provides once such model for ethical decision-making outlined below:

Recognize an Ethical Issue

- Damaging to someone or some group?
- Choice between good/bad, or two goods or two bads.
- Is the issue more than what is legal or most efficient?

Get the Facts

- Relevant facts of the issue.
- What is not known?
- Who has an important stake in the outcome?
- Are some concerns more important?
- Options for acting.

Evaluate Options

- Most good, least harm.
- Respects the rights of all with a stake.
- Treats people equally or proportionately.
- Best serves the community.
- Leads me to act as the person I want to be.

Make a Decision and Test It

- Consider all the options; which is best?
- If I told someone the option I chose, what would they say?
- How can the decision be implemented with greatest care and concern for all?
- How did it turn out, and what did I/we learn from it?

The key to address an ethical problem or dilemma is recognition, and then a systematic approach to perceive, understand, decide and act. Acknowledgement of factors that can influence right or wrong decisions are important: truth versus loyalty, self-interest versus the good of the group, short-term gain versus long-term negative consequences, and justice versus mercy (being fair and even-handed versus a desire to be compassionate and nice).

PROFESSIONAL ETHICS

Ethics is a component of virtually all professions, from massage therapists to accountants, medical practitioners to the legal industry. Many organizations and businesses incorporate value statements or codes of ethics into the foundation of their business. Plus, almost assuredly, ethical behavior is referenced in some fashion as fundamental to behaviors and operations.

The legal profession is grounded in ethical behavior. Legal ethics are used to describe the code of professional behavior owed to individuals and society by those who practice law, and by extension, by those who support the practice of law. *The American Bar Association Model Rules for Professional Conduct* outline specific steps to be taken to ensure attorneys conduct themselves within prescribed guidelines and rules. *ALA also has its own Code of Professional Responsibility*.

Most states provide similar model rules through their state bar associations or designated attorney oversight entity. While these may provide an outline for ethical behavior for attorney conduct or how to operate their business, ethics doesn't begin here, as we have discussed above. Ethics begins with individual value systems, knowing right from wrong and the subsequent behaviors and actions that result.

BUILDING AN ETHICAL ORGANIZATION

Leaders and their actions will set the tone for an ethical organization. The development and communication of a common value system that delineates ethical expectations, and the behaviors associated with these, is the first step.

Education must be ongoing. Most in the legal profession recognizes the annual or periodic requirement for attorneys to take a continuing legal education course on ethics or legal ethics. While this important step helps to ensure compliance with state licensing requirements, an organization can do and expect more.

The content and nature of the education is expansive, beyond just adherence to professional codes of conduct, or model rule expectations. Using situations and case studies can demonstrate the nuances of how decisions can lead to ethical or unethical actions and behaviors. And education should not be reserved solely for attorneys. Everyone within and organization has a responsibility for ethical behavior. Promulgation of values statements and expectations for ethical behavior are a start, but seminars and workshops help to ensure these are understood, can be applied and are reinforced as essential.

Checks and balances through audits, reviews and reporting are an important step to help identify issues and to create accountability. We typically see this in the financial side of most organizations through annual audits. That said, audits or review can be developed and applied to virtually any component of an organization by focusing on behaviors and actions of individuals, departments, teams or committees relative to stated values and expected ethical behaviors. The key to any audit is who conducts it, and ensuring the integrity of the review is objective, honest and transparent. Through an audit process, corrections can be made through the cycle of education and modifying systems and procedures.

Whistleblower policies encourage reporting of potential ethical or legal violations, and offer protections from retaliation for those who allege inappropriate activity. Federal and state statues provide many protections for public sector employees, while private sector employees are protected under law through anticorruption, freedom of information or employment laws.

Many private and publicly held companies extend these into steps employees can take to report suspected ethical or legal violations. Steps include confidentiality protection to the extent possible, to whom reports can be made — particularly when a manger or supervisor may be the issue — the protections afforded those who do, and actions when intentional false reports are made.

Whistleblower policies can serve to create an atmosphere of openness, rather than suppression of information due to fear of job loss or other adverse actions. They also reinforce expectations for an ethical culture.

Click here for a sample policy.

ADDITIONAL RESOURCES

ALA's Code of Professional Responsibility
ABA Ethics Tips Archives
ABA Center for Professional Responsibility
ABA Model Rules of Professional Conduct
ABA/BNA Lawyers' Manual on Professional Conduct
The Paralegal's Guide to Professional Responsibility, 4th Edition
Home Page for the ABA Committee on Paralegals
Markkula Center for Applied Ethics at Santa Clara University

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