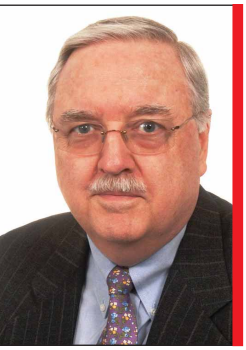
[INSIGHT] By Peter H. Bickford

Ethics, Conflicts and Justice Stewart

Being against ethical standards in our business is like being against apple pie or ice cream! Rooting for conflicts of interest is like a Yankee fan rooting for the Red Sox!

We all have rules that must be followed in our business and professional lives. These rules are generally set forth in the laws and regulations governing our businesses. But in addition to the rules of laws that we are required to follow, we also have codes of conduct or ethical standards that our respective disciplines issue as the proper way to conduct our professional activities. Some of these codes have serious consequences for violations, usually involving loss of a professional license, such as for lawyers or accountants. Other codes are more for window dressing or exist for their PR value with nominal consequences for breaches, such as the code of conduct for used car dealers.



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Most disciplines of the insurance industry have adopted serious ethical standards or codes of responsibility for their members including, underwriters, brokers, actuaries, claims professionals and others. Our brethren across the regulatory aisle – the employees at the state insurance departments – are also subject to codes of conduct. The codes for state employees, with a primary emphasis on addressing public trust, are generally found carved in stone in the state laws. An example is the statutory code of ethics for employees of state agencies in New York's Public Officers Law Section 74. It includes a laundry list of "standards" of conduct that are common rules of conduct found in codes of conduct everywhere. Some of these rules are straightforward, common sense rules, prohibiting state employees from:

- accepting other employment that could impair the employee's independence of judgment in the exercise of the employee's official duties;
- disclosing confidential information acquired in the course of the employee's official duties, or using such information to further the employee's personal interests; or
- using the employee's official position to secure unwarranted privileges or exemptions for the employee or others.

Then there are the more subjective "standards" prohibiting state employees from:

- engaging in any transaction with any business entity that might "reasonably tend to conflict with the proper discharge" of the employee's official duties;
- involving in conduct that would give "reasonable basis" for the "impression" that any person can improperly influence or "unduly enjoy his favor" in the performance of an employee's official duties;
- pursuing a course of conduct that would "raise suspicion among the public that [the employee] is likely to be engaged in acts that are in violation of his trust;" or
- having any financial or business interest, transaction or activity that is "in substantial conflict with the proper discharge of his duties in the public interest."

The application of these subjective standards often depends on the viewpoint or bias of those charged with their enforcement. Like former Supreme Court Justice Potter Stewart's famous definition of pornography ("I'll know it when I see it") people will have differing perspectives in determining that an action gives an "impression," "raises suspicion," is in "substantial conflict" with proper conduct, or (my favorite subjective test) whether any person might "unduly enjoy" the favor of a state employee.

However, too often these abstract concepts are used as weapons rather than standards of conduct. Too often these rules are used by government to stifle legitimate dialogue on issues between regulated and regulator. Too often these rules are used as cover for flawed government policy rather than as codes of conduct to ensure public trust with state employees.

The relationship between regulated and regulator in the insurance industry has undergone a transition from open and meaningful dialogue to a strict separation of interest. This is not a new development. It has been evolving over decades. Those of us who have been around for a while remember the days when the NAIC regularly used private sector working groups on major regulatory issues and initiatives. The NAIC leadership eliminated those working groups in the name of preventing undue industry influence over the deliberations by the regulators.

Likewise, there was a time when many states, including New York, regularly used private sector expertise in its training of staff professionals such as examiners. Back in the day I had the privilege, along with other private sector industry professionals, of being a panelist for the New York Insurance Department's associate insurance examiner oral test. There was no hint of concern for undue influence or improper association. It merely made sense to provide exposure to a broad business perspective for department professionals.

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That program, of course, fell victim to the growing dichotomy between regulator and regulated and long ago stopped using knowledgeable industry panelists, relying primarily on "experts" within the regulatory community.

These are but two examples of how the interaction between regulator and regulated has evolved over the years into a much more insular relationship. Some would argue that this change is appropriate – that there should be no "unnecessary" interaction between them that could in any way lead to undue influence, conflict of interest or interference with the independent judgment of the regulator. While recognizing that reducing the interaction between regulators and regulated is a goal of some industry critics, this isolation comes at the cost of a healthy dialogue between insurance regulators and the industry — a lost opportunity for better understanding of the issues and problems each face.

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Often under the guise of "ethical" considerations, regulatory overlords hide limited knowledge of the business they oversee through forced separation. Some of these efforts can be quite petty, including restricting attendance at conferences, seminars, roundtables, or other traditional educational forums, or even any meaningful contact with industry representatives. These petty restrictions often seem to evidence an insecure bravado by government leadership rather than any sincere concern for improper ethical conduct.

A total lack of dialogue was never the intention of the ethical standards for employees of state agencies, but more and more they are being used to restrict contact and dialogue. In the long run, this is a harmful environment for the development of meaningful regulatory schemes that will protect the public while allowing the insurance business to thrive. [IA]