

RUNNING AN EFFECTIVE ETHICS PROGRAM

I. GOAL OF THIS SECTION

Recognizing that for most DoD ethics counselors, providing ethics advice is only part of their duties, this chapter offers techniques and practices to help you carry out your ethics counselor duties and manage your ethics program effectively and efficiently.

II. IDENTIFY YOUR CLIENT

A. Your client is your agency. (Not your agency head, supervisor, or any particular person.) While we often refer to individual agency personnel as our “clients,” that is meant in terms of their official capacity as representatives of the agency, not in their individual capacity.

B. Ramifications:

1. In ethics issues, there is no attorney-client relationship with agency employees, including your agency head. (5 C.F.R. 2635.107(b))
 - a. When advising personnel concerning specific actions or issues, remind them that there is no attorney-client privilege. Your duty is to provide individuals with advice in order to protect the agency from adverse consequences stemming from employee failure to comply with ethics laws and regulations.
2. As a Federal employee, you have a duty to report all violations of Title 18. (28 U.S.C. 535)
3. Federal employees are protected from disciplinary action based upon the Standards of Conduct when they provide all relevant facts to and rely in good faith on the written advice of an ethics official. (5 C.F.R. 2635.107(b))
4. Bottom Line: The regulations are structured to encourage personnel to seek advice before they take actions.

III. FINDING THE RIGHTANSWER.

A. Build your own reference library:

1. Use online materials to the maximum extent practicable to ensure you are referencing the most current versions.
 - a. Clear browsing cache frequently to ensure you are not being routed to an older version of the site with incorrect information.

- b. The SOCO Website (<https://dodsoco.ogc.osd.mil/>) provides ethics program information and materials on a wide array of ethics topics. Each topic page includes an “Ethics Counselor’s Toolbox” page with guidance and materials specific to that topic, including the relevant Ethics Counselor’s Deskbook chapter.
 - c. The Office of Government Ethics (OGE) website (<https://www.oge.gov/web/oge.nsf/home>) also provides a plethora of useful information and forms.
 - 1) Be sure to sign up for OGE list serve and receive notifications of updates.
 - 2) Check out their Institute for Ethics in Government training site.
2. Organize and tailor frequently-used templates to your own style using your own contact information.
 3. Reach out to other experts
 1. Consult other ethics counselors within your agency.
 2. Build your “Brain Trust,” of other ethics counselors whose advice you trust
 3. For complex issues, confirm your opinion before you deliver it. (Two-lawyer rule)

IV. HOW TO BE AN EFFECTIVE ETHIC ADVISOR

A. Remember to be proactive not reactive:

1. Advice is best sought and received before decisions are made and actions taken.
2. In many cases, clients may not even spot the potential ethics issues, particularly if attorneys from other disciplines (e.g., acquisition or fiscal) have already reviewed and did not raise an issue.

B. Grab a seat at the table & be problem solver:

1. Become an essential part of planning meetings, strategy sessions, brainstorming meetings.
2. Ensure your presence adds value to the meeting – focus on the mission goals. Even if the client’s original methodology isn’t supportable, if you can find a way for clients to legally and appropriately achieve their mission goals you will be perceived as a problem solver vice a road block.

3. Sometimes, prudential advice is just as (or even more) valuable than technical advice. Help them identify and think about broader risks to the agency, such as negative media or Congressional attention.
4. Ensure you are included in the distribution of agency documents, schedules of meetings for agency leadership, senior leader calendars, correspondence, daily reports from public affairs office, status reports, etc.

C. Establish a Network:

1. Make allies of senior leader staff members, public affairs officials, protocol personnel, and administrative officers. the aide, executive assistant, Commander's secretary, public affairs officer, protocol chief, senior enlisted advisor, etc. Show them how you can make their job easier -- provide guidelines, checklists, training programs that are tailored to their duties and answer questions they are frequently asked.
 - a. Meet them when they (or you) first join the organization. Seek their assistance in keeping you informed so you can better advise them. Demonstrate that you are on the same team. Evaluate their knowledge of the rules and their willingness to comply with them.
 - b. Be responsive to their questions. (Respond the same day if possible.)
 - c. Provide them guidance, e.g.: tailored guidance, info papers, links to website, briefings at their staff meetings.
 - d. Get out of your office and rub elbows. Ensure people recognize you as the ethics official.

D. Know and practice those traits that are critical to your role:

1. Be candid. Disclose pros and cons. Disclose your level of confidence in your advice. (Don't bluff it!)
2. Be accessible.
3. Be Responsive. Answer the question.
4. Protect the confidentiality of information and privacy of your customer to the maximum extent that you can and be clear in disclosing when you can't.
5. Be precise, especially in your professional advice.
6. Display the courage to give the best advice even if you think that you may suffer because of it.

E. Use Real Life Examples

1. Distribute public information about real examples of employees who have been disciplined for violating conflicts of interest statutes or the standards of conduct. Include these examples in training, mini-briefings, employee newsletters, and the agency intranet.
 - a. Examples are available in the Encyclopedia of Ethical Failure: http://www.dod.mil/srch/search?searchview=d3&c=d5&changequery=1&s=1&template=%2Fdodgc%2Fdefense_ethics%2Fsearch%2Ftemplate.html&nd=cat&cat=defense_ethics&q=encyclopedia. Other examples are found in newspapers, OGE website, and agency IG reports.
 - b. Have the public affairs officer include media stories related to prosecutions for ethical failures in internal communications and news clips provided to leadership.
2. Key concept to convey to personnel: Good intentions are not enough!
 - a. Ethics laws and regulations can be complex and nuanced. Some are even somewhat counter-intuitive.
 - b. It is unreasonable to expect every individual to have a thorough knowledge of all of the laws and rules, but it is critical for them to know when to ask and to ask when in doubt to avoid missteps.
3. Encourage and assist leadership to publish memos addressing ethics issues. This guidance from the top, sets the ethical tone for the organization, publicly commits the organization's head, and reminds all personnel of their ethical obligations.

F. Provide your opinion in writing.

1. It can be tempting to try to answer questions and put out fires on the spot, but avoid doing "drive by" opinions. It is in everyone's best interest to have a record of both the facts that were given by the client and the resultant opinion.
2. There will be times where you must give a verbal opinion. Always follow up any substantive verbal opinion with an e-mail to confirm the facts and reiterate the opinion based on those facts.
3. You may receive requests for advice from staff on behalf of a senior leader. Always at least copy the individual for whom the advice is intended to ensure that they receive the exact advice you gave versus a filtered or summarized version. This protects the leader from well-intentioned staff who may see their

responsibility as “get to yes” vice protecting the agency and the individual from ethics violations.

G. Be sure to include the “why it matters.”

1. Helps employee understand why adherence to ethics is beneficial to the agency.
2. If they understand the rule, employee may embrace the advice rather than oppose it.

H. When your customer won’t take your advice.

1. Talk to others, whom your customer trusts. They may be more persuasive or lend the weight of their opinions.
2. Offer to seek advice from higher echelon or authority. Guidance from higher authority may be more difficult for your customer to reject.
3. Provide the opinion in writing.

V. PRESERVING AND PROTECTING YOUR ADVICE.

A. When providing ethics advice:

1. Know the authority under which you are advising.
 - a. Delegated authority from DAEO (5 C.F.R. 2635.102(c)).
 - 1) Section 1-212 of DoD 5500.07-R, (Joint Ethics Regulation) requires designations to be in writing. DoD ethics counselors must be attorneys.

B. Effect of advice: 5 C.F.R. 2635.107(b) provides that no disciplinary action may be taken against personnel for actions they have taken in good-faith reliance on advice of an ethics counselor after full disclosure of relevant circumstances. However, for violations of 18 U.S.C., good faith reliance does not bar prosecution, but will be weighed heavily by the Justice Department.

C. Protect uniformity of advice: (You are not the only ethics official in town.)

1. Coordinate advice within local area, especially for events which will involve multiple organizations. (If we use same rules, why do we provide different answers?)
2. Coordinate advice up and down your organization’s chain of command.

3. Help your shipmate. Don't wait for questions, if your advice will be considered by other organizations; give their ethics counselors a warning. (Examples: widely attended gathering determination, providing speakers for a civic event.)
4. Beware of forum shopping!

VI. MINIMIZING ETHICAL LAPSES, IG INVESTIGATIONS, ADVERSE PUBLICITY, CONGRESSIONAL HEARINGS, & ASSORTED IRRITANTS.

A. Identify the greatest ethical threats to your agency/department/client: (Take a preemptive strike.) Ask, "Where are we vulnerable?"

1. Common threats:
 - a. Common problems for your organization – different missions tend to have different common issues. Figure out what yours are.
 - b. Sensitive issues – what is your IG substantiating on a regular basis?
2. Identify your risk tolerant clients. Also, those who think the rules don't apply to them or those who like to play close to the edge.
3. Evaluate and analyze organization weaknesses
 - a. Identify causes of weakness. Conduct an audit. Seek assistance from your internal review division.
 - b. Take remedial action
 - c. Eliminate or consolidate the program.
 - d. Change procedures.
 - e. Develop options that will eliminate the weakness.
 - f. Educate personnel. Raise the consciousness of personnel about these specific problems.
 - 1) Provide information papers, guidebooks, tailored guidance.
 - 2) Give tailored briefings to affected personnel. Add brief discussions of the vulnerabilities to staff meetings.
 - 3) Build awareness throughout the organization of the weakness through internal communications such as intranet and employee communications.

- 4) Brief incoming personnel.
- 5) Include these issues in Annual Ethics Training.
- 6) Seek reinforcement from organization's head

B. Maximize the benefits of ethics training:

1. Focus training on threats identified above.
 - a. Consider training as a unit:
 - 1) Reinforces common acceptance.
 - 2) Allows subordinates to see where the boss stands.
 - 3) Raises and resolves common issues.
 - 4) Facilitates consistency in local practices.
2. Integrate ethics issues into other training, such as travel, BRAC, deployment preparations, contracting, advisory groups.
3. Studies indicate that the most effective medium for training is small groups with a leader. Promote discussion among employees, not just a lecture.
4. Conduct training for leaders and supervisors. Surveys indicate they set the ethical tone for their unit/workplace.

C. Review and utilize financial disclosure reports to benefit the agency:

1. Identify possible conflicts of interest, impartiality issues or appearances of such conflicts/issues. Be sure to consider the following:
 - a. Direct and imputed financial interests
 - b. Current and former employment and employment related interests
 - c. Outside activities
2. Caution employee (and supervisor) of potential conflicts.
3. Identify common vulnerabilities that should be addressed agency wide?

D. Communicate and coordinate with:

- a. Other ethics officials.

- b. Compliance officers of entities doing business with/seeking action from your organization.
- E. Actively seek feedback from many sources.
 - 1. What you don't know can hurt you.
 - 2. Just because there is guidance, doesn't mean everyone is complying with it.
 - 3. Become part of organization's internal review process. (Audits, inspections, reviews, etc.)