

Ethics Counselor Fundamentals



Background

- Emoluments Clause to the Constitution
- Conflicts (Civil War)
- Congress reactive
- Texas Gulf Sulphur
- Civil Service Commission authorized agencies to issue ethics regulations
- DoD origins 1961 but values back to 1800s
- Watergate
- Ethics in Government Act
- Iran Contra
- Office of Government Ethics
- Standards of Ethical Conduct
- 5 C.F.R. part 3601 and DoD 5500.07-R (JER) 1993
- Standards are in Chapter 2 of JER

REFERENCES (4 pillars)

- 18 U.S.C. 201-209
- 5 C.F.R. part 2635
- 5 C.F.R. part 3601
- DoD 5500.07-R -
The Joint Ethics Regulation (JER)



Other Relevant References

- Ethics in Government Act of 1978
 - 5 U.S.C. app. 101 et. seq.
- Executive Order 12674
 - “Principles of Ethical Conduct for Government Officers and Employees,” April 12, 1989

Other Relevant References

- Principles of Federal Appropriation Law (GAO Redbook)
- Joint Travel Regulation (JTR)

The Practical Side

- Ethics Counselor Deskbook
 - <https://dodsoco.ogc.osd.mil/>
 - “Ethics Topics”  Resources  Toolbox

Helpful Links

- Office of Government Ethics
 - <https://www.oge.gov/web/oge.nsf/home>
- DoD Standards of Conduct Office
 - <https://dodsoco.ogc.osd.mil/>

Basic Obligations of Public Service Under Executive Order 12674

- Public Service is a Public Trust
 - Employees have a duty to place loyalty to the Constitution, laws, and ethical principles above private gain. 5 C.F.R. 2635.101(a)
- Impartiality
 - Employees shall act impartially and not give preferential treatment to any private organization or individual. 5 C.F.R. 2635.101(b)(8)

Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. Part 2635)

- Gifts
 - Outside
 - Subordinates
- Conflicts
- Appearance of Conflict
- Seeking Employment
- Misuse of Office or Personnel
- Teaching, Speaking, and Writing
- Disclaimer requirement in 5 C.F.R. 3601.108
- Outside Activities and Fundraising

DoD Supplemental Standards of Ethical Conduct for Employees of the Department of Defense (5 C.F.R. part 3601)

- Seven parts
 - Designates 18 separate components for purposes of accepting gifts from outside sources and governing teaching, speaking, and writing.
 - Provides additional exceptions for gifts from outside sources at a community relations event sponsored by a state or local government or civic association (must be free attendance) or for scholarships received under certain criteria where the employee's performance or lack of performance does not affect the sponsor.

DoD Supplemental (cont.)

- Adds gift limitations such as the minimal value at 5 U.S.C. 7342 to use as the group gift limitation for an infrequent occasion and if the recipient knows the subordinate contributed; food, refreshment, and entertainment are not included in the minimal value group gift; and if a subordinate offers a gift to more than one donating group, then both groups are considered one group for purposes of the minimal value group gift rule.

DoD Supplemental (cont.)

- Prior approval for outside employment and business activities
 - Does not have to be in writing
- Disclaimer for Speeches and Writings Devoted to Agency Matters

Changing the Ethics Rules

- 5 C.F.R. part 3601, is the DoD supplemental regulation. Supplementation not permitted without approval by the Office of Government Ethics.

Joint Ethics Regulation

- Created by DoD Directive 5500.07, 8/30/93, amended 11/29/07 and 11/17/2011
- Single, comprehensive source of guidance
- Cancels all inconsistent instructions
- Prohibits supplementation without approval from DoD General Counsel
- Bolded provisions are punitive
 - Violation of general order punishable under Art. 92, UCMJ
- Change is coming

Designated Agency Ethics Official (DAEO) and Alternate

- Functional Authority to coordinate and manage the ethics program
- General Counsel is DAEO
- TJAG or Principal Deputy General Counsel is often the ADAEO

Deputy DAEOs

- Designated by the General Counsel (DAEO) or ADAEO

Ethics Counselors

- Defined at JER 1-212
- Shall be an attorney
- Communications received in EC capacity
NOT protected by attorney-client privilege

Deputy DAEO v. Ethics Counselor

- Deputy runs program, and EC assists
 - Provide ethics guidance
 - Training
 - Ensure Financial Disclosure Reports are filed
- NOTE: (1-202 of the JER) BOTH DDAEOs and ECs are “**Agency Designees**” for 0-7+ in command
- Practically, no difference but check the delegation of authority:
 - Certifying OGE Form 278?
 - Granting waivers of \$200 late filing fee?

Agency Designee

- First Supervisor above a GS-11
- Works with Ethics Counselor
- Determines agency interest in attending WAG
- Outside Activity Approval

DoD Employees (JER 1-209)

- Civilian officer or employee (including NAFI)
- Active Duty (AD) regular or reserve officers including warrant officers
- Active Duty enlisted
- Reserve member (AD, Title 10 status, or performing any reserve function)
- Student of any DoD academy, college, university, or school
- Foreign nationals working for DoD when consistent with agreements

Application of Ethics Rules to Enlisted and UCMJ

Application to Enlisted

JER 1-300(b), 5-301, 5-404

- Criminal conflict of interest statutes do not apply to enlisted, except for bribery
(18 U.S.C. 201)
- Application of ethics rules for enlisted is through JER

Applicability of 208 and 209 to Enlisted

Conflicts of Interest

- Applies financial interest and supplementation of salary conflict laws to enlisted (18 U.S.C. 208 and 209) (JER 5-301 and 5-404)
- Solicitation prohibitions (superior to subordinate) 5 C.F.R. 3601.106 (JER 5-409)

Training

(5 C.F.R. part 2638)

- Annual Ethics Training
- Ethics Letters
 - New employee
 - New supervisor

Enforcement

- What violations are reportable
 - See DoD Directive 5505.06, Investigations of Allegations Against Senior Officials of the Department of Defense
- When a violation is reportable
- How to report violations to the Inspector General (Chapter 10 of the JER)

Miscellaneous

- Presidential Executive Order authorizing Standards (JER, Chapter 12)
- DoD Employee Ethical Value Goals (JER, Chapter 12)
- Ethical Values and Decision-Making (JER, Chapter 12)

The Committee on Standards of Conduct

- Created to provide interpretive guidance to resolve conflicting ethics provisions, define vague terms, and identify and remedy inconsistencies in the application across the Military Services

Secretary Austin

“I will be mindful of not only the legal requirements that govern my conduct, but also of the appearances to ensure that the public has no reason to question my impartiality.”

Values-Based Decision Making 101

Evaluate the Big Picture

- ✓ Is it legally sound?
 - ✓ *Can* I do it?
 - ✓ *Should* I do it?
- ✓ Is it *right for the government*?
- ✓ How will it be perceived?

Remember your duty as a public servant

OGE Tips

- Procedures (JER)

- Delegations
- Agency Organization Chart
- Agency Mission
- Public and Confidential Financial Disclosure Program Tracking System
- Training
- Counseling
- Advisory Committees
- 208 waivers
- 1353 travel
- Relationship with OIG
- Job Offer and Supervisor ethics letter requirements

Ethics Calendar of Events

- Office of Government Ethics Publishes
- [https://www.oge.gov/web/OGE.nsf/0/283AF5A55E83F935852588F3006901F8/\\$FILE/2023%20Calendar%20of%20Important%20Ethics%20Dates%20and%20Deadlines.pdf](https://www.oge.gov/web/OGE.nsf/0/283AF5A55E83F935852588F3006901F8/$FILE/2023%20Calendar%20of%20Important%20Ethics%20Dates%20and%20Deadlines.pdf)

Training

- Check with who you report to
- OGE examples
- Secretary Austin letter requiring management be involved

Building an Ethics Office

- Turnover
- Call on superior
 - Field Activity
 - Combatant Command
- HR
 - Lists of Public Financial Disclosure Filers
 - Assist with Training
 - Organization Chart

Goal

- Proactive not Reactive



Finding the Answer

- No “Secret Law”
- JER
- Deskbook
- Google Standards of Conduct
- <https://dodsoco.ogc.osd.mil/>

Other sources

- Fellow Lawyers
- IEC
- OGE

How to be Effective

- Assert yourself early on
- Brief Commander
- Offer to review travel plans at weekly meetings of his staff or PR folks
- Work with Aides, Executive Assistants and secretaries
- Show your knowledge so they see value, but be humble
- Be available
- Be precise in advice
- Be creative in solutions, but avoid “get to yes”
- Look at an issue from Agency’s prospective; does this hurt agency

How to be Effective

- Walk the Halls
- Use a candy jar in your office
- Join the health club
- Join the softball team
- Provide in person training
- Brief people as they come in
- Use examples; get OIG cases
- Set up a log
- Coordinate advice
- Preserve advice
- Give tailored briefings
- Don't panic or cry wolf
- Seek feedback
- Work with OIG so you can report on enforcement

What We Will Cover

Gifts

- Gifts From Outside Sources
- Gifts Between Employees
- Gifts From Foreign Governments
- Gifts to the Department
- Gifts of Travel

Non-Federal Entities

- Endorsing
- Supporting
- Fundraising
- Official and personal participation

Travel

- Government Vehicles
- Rental Cars
- Commercial Air

Conflicts of Interest

- 18 U.S.C. 208
 - Regulatory and individual waivers
- Impartiality Standards
 - Authorizations
- Bribery, Representation, and Supplementation of Salary

Financial Disclosure

- Public Financial Disclosure
 - OGE Form 278
- Confidential Financial Disclosure
 - OGE Form 450

Post-Government Employment

- Seeking Employment
- Procurement Integrity Act
- Representation Statutes
 - 18 U.S.C. 207(a), (b), (c), and (f)
- Terminal Leave Issues
- Foreign Employment

Fundraising

- Fundraising in the workplace
- By your own, for your own
- Gambling
- Official support of fundraising
- Personal fundraising

Enjoy