

RUNNING AN EFFECTIVE AND EFFICIENT ETHICS PROGRAM

I. GOAL OF THIS SECTION

A. 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 effectively and efficiently.

II. IDENTIFY YOUR CLIENT

A. Your client is your agency. (Not your agency head, supervisor, or any particular person.)

B. Ramifications:

1. Correctly identifying your client resolves apparent conflicts of interest and conflicts of loyalty (e.g.: your boss asks you to destroy records sought by the IG).
2. In ethics issues, there is no attorney-client relationship with employees, including your agency head. (5 C.F.R. 2635.107(b))
 - a. When employees start to tell you about things they “have done,” stop them and remind them that there is no attorney-client privilege. Tell them you can advise them about applicable laws and regulations.
3. As a Federal employee, you have a duty to report all violations of Title 18. (28 U.S.C. 535)
4. Federal employees are protected from disciplinary action when they rely in good faith on the advice of an ethics official. (5 C.F.R. 2635.107(b))
5. Bottom Line: The regulations are structured to encourage personnel to seek advice before they take actions.

III. FINDING THE RIGHT ANSWER THE FIRST TIME.

A. Build your own reference library:

1. Organize and tailor frequently-used materials to your own style. Start with the chapters for the DoD Ethics Counselor Deskbook.
 - a. Loose-leaf deskbook.
 - b. Files, folders, or binders

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Ethics Counselor's Deskbook
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c. Computer files and folders

d. Add to the Ethics CD or other computer memory device

B. 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.

C. Check the internet

1. DoD SOCO website: www.defenselink.mil/dodgc/defense_ethics (Be sure to subscribe and automatically receive email notices of all website updates.)

2. Army website: <http://ogc.hqda.pentagon.mil/Ethics.aspx>. or
<http://ogc.hqda.pentagon.mil/EandF/Documentation/guidance.aspx#P>.

3. Navy website:

Public site (open to all):

<http://ethics.navy.mil/>

Employee site (available to anyone with CAC access):

<https://donogc.navy.mil/Ethics/>

Legal Community site (restricted site only available to DON legal community and support staff):

https://ogconline.navy.mil/forum/communities_of_practice/cops_ethics_has_moved/default.aspx

4. Air Force website:

<http://www.safgc.hq.af.mil/organizations/gca/ethics/index.asp>.

5. Air Force Material Command website: <http://afmcethics.wpafb.af.mil/> (Be sure to sign up for automatic email updates from Mark Stone: Mark.Stone@wpafb.af.mil.

6. Office of Government Ethics (OGE) website: <http://www.usoge.gov/> (Be sure to sign up for OGE list serve and receive notifications of updates.)

7. Interagency Ethics Council (IEC) Journal: <http://www.iecjjournal.org> (This is a blog for Federal ethics officials and contains the most current ethics related information.)

D. Confirm your opinion before you deliver it. (Two-lawyer rule)

IV. HOW TO BECOME AN EFFECTIVE ADVISOR (AND GET YOUR CLIENT TO LISTEN TO AND BELIEVE YOU).

(Two facts of life: #1 Advice is best before decisions are made and actions taken.
#2 In many cases you are the only lawyer involved in the decision.)

A. Grab a seat at the table. Become part of planning apparatus. Become an essential part of planning meetings, strategy sessions, brain-storming meetings. Remember that you offer a unique competence and legal training that others don't have. You are needed to spot legal/ethical issues which managers and other specialists may not see. Ensure your presence adds value to the meeting.

(Practice Hint: To be effective at meetings, focus on adding value to the deliberations. Don't pontificate, don't be legalistic, and don't try to display everything you learned in law school.)

1. Ensure you are included in the distribution of agency documents, schedules of meetings for agency leadership, your customer's daily calendar, correspondence, daily reports from public affairs office, status reports, etc.

B. Make allies of 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.

1. How to make allies:

a. Meet them when they (or you) first join the organization. Schedule a meeting, introduce yourself, point out what issues at work you both share (e.g. gifts with the aide, speeches at non-Federal entities with the public affairs officer), 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.

C. 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. (Use a cell phone, Blackberry)
3. Be Responsive. Answer the question.
4. Protect the confidentiality of information and privacy of your customer.
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.

D. Assist your boss to accomplish your agency's mission. (Be a problem-solver rather than a nay-sayer):

1. Use your unique expertise, experience, training, perspective to facilitate accomplishment of the agency's mission.
2. Remember, you're the most qualified to spot legal and ethics-related issues.
3. Be a team player.
4. Consider more than just the strictly legal issues (for example: don't ignore decisions that may cause others to challenge your customer's judgment; Hotline complaints; IG investigations; adverse media attention; Congressional intervention, adverse impact on reputation and integrity).

However, in your advice, identify the legal factors as separate from matters of prudence.

5. Explain your advice in terms of cost benefit to the agency: benefits of following your advice and the costs of not following it. This is especially effective if your customer is a risk-taker and will use this same analysis to weigh your advice.
6. Be creative. (Look for solutions in addition to legal remedies.)

E. Get into the mainstream of agency business. Know what is happening.

1. Get out of your office and rub elbows. Ensure people recognize you as the ethics official.

- a. Join agency bowling, golf, and softball teams. Use health club or gym.
- b. Walk the halls. Put a jar of candy in your office.
- c. Do “in person” training.

F. Use Fear

1. Drag in the Dead Bodies – Publicize 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=%2Fdodge%2Fdefense_ethics%2Fsearch%2Ftemplate.html&nd=c&at&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 installation internal communications and news clips provided to leadership.

Key concept to convey to personnel: You don't have to be evil to screw up. Many regulations and statutes are not well known, are counter-intuitive, and have been violated in the past. People violate them unintentionally and unwittingly. (e.g.: 18 U.S.C. 205, 18 U.S.C. 207(a)(2)).

2. Encourage and assist the agency or organization’s head 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.

3. Obtain from your IG examples of cases from your organization.

G. Provide your opinion in writing.

1. A written memo or email puts the decision-maker on notice that you're serious. (No wiggle room, no plausible deniability, and no, "He didn't tell me" defense.)

2. The fact that it is important enough that the ethics counselor took time to write the opinion means that this is serious and that the ethics official is building a record to cover him/herself.

H. Explain the principles as well as discuss appropriate rules.

1. Helps employee understand why adherence to ethics is beneficial to the agency. “Oh, so there is a reason for this rule!” Educate the employee.

2. If they understand the rule, employee may embrace the advice rather than oppose it.

3. Principles are located at 5 CFR 2635.101.

I. 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. Write an opinion and deliver it to your customer.

J. What do you do when the decision-maker, who knows your opinion, avoids asking the question?

V. PRESERVING AND PROTECTING YOUR ADVICE.

A. When providing ethics advice:

1. Know the authority under which you are advising.

a. Procurement Integrity Act (41 U.S.C. 2101-07, 48 C.F.R. Part 3 (Federal Acquisition Regulations)).

b. Delegated authority from DAEO (5 C.F.R. 2635.102(c)).

(a) Section 1-212 of DoD 5500.07-R, (Joint Ethics Regulation) requires designations to be in writing. DoD ethics counselors must be attorneys.

c. 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.

B. Memorialize facts and advice. Know when you need to memorialize. (cost-benefit analysis)

a. Benefits:

- (1) Creates a record
- (2) Resolves ambiguities
- (3) Protects you and protects your customer
- (4) Eliminates frivolous questions
- (5) Focuses issue and analysis

d. Vehicles for advice:

- (a) E-mail
- (b) Memoranda and letters between parties
- (c) Memo to the file
- (d) Personal computer log.

B. 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 agency's chain of command.
 - a. Prior coordination prevents higher authority from being “surprised” by your organization’s actions.
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: (gifts, travel, contracts, contractor personnel in the workplace, use of agency computers, partisan political activities).
 - b. Sensitive issues. (Most explosive: e.g., downloading porn).
 - c. Cowboys? (People who think the rules don't apply to them, and those who play fast and loose.)
 - d. Issues arising from spouses of senior personnel.
 - e. New challenges such as BRAC, A-76 competitions, new personnel system, budget cuts, hiring freezes
2. Evaluate and analyze the weakness
 - a. Identify causes of weakness. Conduct an audit. Seek assistance from your internal review division.
3. Take remedial action
 - a. Eliminate or consolidate the program.
 - b. Change procedures.
 - c. Develop options that will eliminate the weakness.
 - d. Educate personnel. Raise the consciousness of personnel about these specific problems.
 - (a) Provide information papers, guidebooks, tailored guidance.
 - (b) Give tailored briefings to affected personnel. Add brief discussions of the vulnerabilities to staff meetings.
 - (c) Build awareness throughout the organization of the weakness through internal communications such as intranet and employee communications.
 - (d) Brief incoming personnel.

- (e) Include these issues in Annual Ethics Training.
- (f) Seek reinforcement from organization's head (Caveat: must be sincere, honest, and knowing.)
- (g) Think of yourself as a teacher providing instruction of the rules

B. Maximize the benefits of ethics training:

1. Focus training on threats identified above.

Consider training as a unit (at least for high-level staffs):

- (a) Reinforces common acceptance.
 - (b) Allows subordinates to see where the boss stands.
 - (c) Raises and resolves common issues.
 - (d) 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 or appearances of such conflicts.
 - (a) Financial interests
 - (b) 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:

1. Other ethics officials who may be involved
2. Compliance officers of affected corporations (especially Defense contractors).

E. Actively seek feed back from many sources.

1. What you don't know can hurt you.
2. What you think is happening, may not be happening. Just because there is guidance, doesn't mean everyone is complying with it.

(a) "I don't understand how they could do this. The JER specifically prohibits it."

3. Become part of organization's internal review process. (Audits, inspections, reviews, etc.)

Please note. Affirmative action is required for this guidance to be useful. You must take preventative action now to reduce or eliminate remedial action later.