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Ethics Newsgram

Annual Ethics Conference

Approximately 485 ethics officials attended this year's Ninth Annual Government Ethics Conference, in Williamsburg, Virginia, from September 13-15. Although forced to end a day earlier than scheduled due to the threat of Hurricane Floyd, the conference still featured a wide variety of informative speakers and panel sessions.

The conference commenced with a plenary session by OGE Director Stephen Potts. Mr. Potts emphasized the key role of ethics officials in maintaining the vitality of the executive branch ethics program as well as the need to make a determined effort to advance the ethics program into a new era. Mr. Potts also stressed the steps that ethics officials could take toward building a stronger ethical culture and toward promoting a positive vision of the ethical principles that underlie public service. Finally, Mr. Potts praised the ethics community for its accomplishments and highlighted the importance of incorporating information technology, reaching out to the private sector, and working through consensus and cooperation, in order to meet the challenges of the twenty-first century.

At an afternoon plenary session, Robert M. McNamara, Jr., General Counsel for the Central Intelligence Agency (CIA), discussed the importance of ethics as "the thread of the fabric which holds together our daily lives" and outlined three important elements for a successful training program, including involvement by top-level officials, meaningful and interesting training materials, and utilization of creative technology. When training employees, Mr. McNamara stressed that employees need to understand that it is easier to keep them out of trouble than to get them out of trouble. Mr. McNamara was then joined by Paul Kelbaugh, the CIA's Senior Ethics Counsel, who presented the CIA's innovative and interactive computer-based training program, "The Ethics Files," which has been widely acclaimed by CIA employees who receive ethics training.

Michael G. Daigneault, President of the Ethics Resource Center (ERC), a nonprofit organization that strives to be a leader and a catalyst in fostering ethical practices in individuals and institutions worldwide, spoke at another plenary session. Mr. Daigneault addressed how the ERC Fellows Program identifies and examines the critical ethical questions confronting organizations today, and then attempts to meet those challenges through practical insight, advanced understanding, and building new knowledge. Among other areas, he also discussed the shift in the workplace from compliance to values-based ethics orientation.

The final speaker of the conference was Dr. Luis N. Ferreira, Director of the National Office of Public Ethics of the Argentine Republic. Dr. Ferreira discussed the ethical dilemmas that have historically plagued his country, explained how the Argentine Government engaged in a systematic fight against corruption, and elaborated the tremendous changes implemented in the government after

1996, when the Argentine Government participated in the Inter-American Convention against Corruption.

Conference participants were again free to select from a variety of sessions during each of the 90-minute concurrent sessions. Some of the sessions this year included: "How to Identify Disqualifying Financial Interests," "Travel and Ethics-Related Issues," "Side by Side with Contractors: Ethical Dilemmas," "Running an Effective and Efficient Ethics Program," and "Preparing for the 2000 Elections: A Hatch Act Survival Guide."



For the third consecutive year, Mr. Potts presented the Distinguished Service Award. This year, he recognized a group of individuals whose dedicated work had contributed to the success of the executive branch ethics program—the Interagency Ethics Council, a group of ethics officials who strive not only to improve their own ethics programs, but also those of other agencies. OGE also presented awards to agencies, departments, and military installations for outstanding achievement in developing and managing strong ethics programs.

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Director's Column

It is unfortunate that Hurricane Floyd cut short our Annual Government Ethics Conference in Williamsburg this year. We are currently scheduling as many of the canceled sessions as possible in the Washington, DC area. Before the flood-generating rains arrived, however, we did have an opportunity to spend some very productive days together discussing current ethics concerns.

One topic that was explored in a number of sessions at the conference was the use of information technology to make the ethics program more effective. The enormous potential of this technology for training, research and information exchange has already begun to be tapped. We should continue to find creative and improved uses of this technology. We can, for example, do more to improve Web sites for our ethics programs and create better links between sites.

Another topic that ran through several sessions related to the ethics considerations that are raised by the process of privatizing Government activities, programs, or components. This is a trend



that is likely to become even more prominent in the future. In a number of areas this may result in closer working relationships with the private sector that have the potential to generate ethics issues on both the government and private sector sides of the equation. We should be proactive

in our relationship with the private sector. We can, for example, foster a dialogue with the persons and companies doing business with the Government to deal with issues of common concern such as gifts.

The conference also presented a rich array of program sessions dedicated to providing ethics practitioners with the tools and information they need to manage an effective and efficient ethics program. Certainly the conference itself is an excellent example of the benefits that can be derived from our combined efforts. We should continue that cooperative effort throughout the year. For our greatest resource is the shared skill, knowledge, and experience of all the members of our ethics community.



Government Ethics Newsgram

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We welcome any news and information related to Government ethics that you wish to bring to the attention of OGE and the executive agencies as well as your candid critiques and suggestions. Quoting or reprinting materials contained in this publication is strongly encouraged and may be done without seeking OGE's permission.

The Director of the Office of Government Ethics has determined that the publication of this periodical is necessary to the transaction of the public business of OGE, as required by law.

Confidential Financial Disclosure News

The Program Review Division (PRD) has recently completed a single issue review focusing on the confidential financial disclosure system. In particular, the reviewers surveyed ethics officials to assess the use of the OGE Optional Form 450-A, to examine agency efforts at reducing the numbers of positions required to file confidential reports, and to collect ethics officials' opinions on whether or not the confidential financial disclosure system is meeting its intended purpose.

Responses show that 75 percent of the ethics officials surveyed allow the use of the Optional Form 450-A. Many indicated that they intend to use the OGE Form 450-A for annual filing in 1999. Overall, it appears that ethics officials at agencies which use the Optional Form 450-A are experiencing the intended benefits of it—that is, reductions in administrative burdens.

Interestingly, the majority of ethics officials interviewed are currently unconcerned about the number of designated filing positions within their agencies. Employees in designated positions file confidential reports to prevent potential conflicts of interest. At this time, it appears that ethics officials are not overwhelmed by high numbers of confidential filers.

In addition, more than half of the ethics officials surveyed believe that the confidential financial disclosure system is meeting its intended purpose—to serve as a tool to aid in identifying potential or actual conflicts of interest. Those who believe the confidential system is not serving its intended purpose suggested either a reduction in filing frequency or the elimination of some information currently required to be reported.

Ethics News Briefs

OGE and DOJ Raise the Ethics Act Civil Monetary Penalties

The Office of Government Ethics (OGE) and the Department of Justice have issued coordinated rulemakings to increase, effective September 29, 1999, the maximum civil monetary penalties that may be imposed in Federal district court actions brought by the Justice Department's Civil Division for certain violations of the Ethics in Government Act. The increases of ten percent across the board adjust for inflation as prescribed under the 1996 Debt Collection Improvement Act amendments to the 1990 Federal Civil Penalties Inflation Adjustment Act.

OGE's final rule amendments, as published at 64 Federal Register 47095-47097 (August 30, 1999), revise the pertinent provisions of its executive branchwide financial disclosure and outside employment/affiliations regulations at 5 C.F.R. parts 2634 and 2636. Four of the Ethics Act civil monetary penalties adjusted, from a maximum of \$10,000 to a maximum of \$11,000, are those for: (1) knowing and willful falsification of, failure to file, or failure to report required information on, an SF 278; (2) knowing and willful breach of a qualified trust by trust fiduciaries and interested parties; (3) misuse of an SF 278 public report; and (4) violation of the outside earned income, employment and affiliations provisions for covered noncareer employees. A fifth Ethics Act civil monetary penalty adjusted, from a maximum of \$5,000 to a maximum of \$5,500, is that for negligent breach of a qualified trust by trust fiduciaries and interested parties. After consultation with the Justice Department, OGE determined that the late filing fee for SF 278 public reports is not a civil monetary penalty as defined under the inflation adjustment laws. Thus, that fee was not increased and stays at \$200.

The Justice Department's final rule amendments at 64 Federal Register 47099-47104 (August 30, 1999) adjust the same Ethics Act civil penalties by the same amounts in a new part 85 of 28 C.F.R. In addition, the Justice amendments include a ten percent increase in the maximum civil monetary penalty, from

\$50,000 to \$55,000, that may be imposed under 18 U.S.C. § 216(b) for violation of various conflict-of-interest laws.

Final Rule Amendments to the Gifts Disclosure Waiver Provision

OGE has adopted as final, with a couple of minor clarifying revisions of its own, the amendments it proposed last spring to 5 C.F.R. § 2634.304(f) of the executive branchwide financial disclosure regulation. OGE did not receive any comments from the public or agencies on the proposed amendments. Section 2634.304(f) deals with waivers by OGE of the requirement for public disclosure by filers of the SF 278 of certain personal gifts. See 64 Federal Register 49639-49640 (September 14, 1999), effective October 14, 1999. For details on the amendments and the proposed rule changes, see the article on page 9 of the Summer 1999 edition of the **Government Ethics Newsgram**.

First Round Paperwork Notice for a Proposed Revised SF 278

In July, OGE published its first round paperwork notice of a proposed moderately revised SF 278 Executive Branch Personnel Public Financial Disclosure Report.

See 64 Federal Register 37536-37539 (July 12, 1999). In that notice, OGE has proposed to incorporate into the SF 278 report certain changes in the Ethics in Government Act regarding higher-category reporting for any assets, income, liabilities, and transactions over \$1,000,000 in value. OGE would also include the recently increased reporting thresholds for gifts and travel reimbursements (over \$260 aggregation level, with a \$104 or less de minimis exception). In addition, OGE would add a check-off box to the form for any filing extensions granted, would include a new transactions continuation page, and would update the reference to the civil monetary penalty for misuse of an SF 278 report (which was increased to a maximum penalty amount of \$11,000 as of September 29, 1999). Various other minor changes to the SF 278 also would be made.

Paperwork Approval Granted for Revised OGE Form 201

This past summer, the Office of Management and Budget (OMB) granted approval for an additional three years under the Paperwork Reduction Act of a slightly revised OGE Form 201, "Request to Inspect or Receive Copies of SF 278 Executive Branch Personnel Public Financial Disclosure Report or Other Covered Record." OGE had published a second round paperwork notice in June 1999 of its request for approval to OMB, with a 30-day comment period. See 64 Federal Register 32878-32880 (June 18, 1999).

OGE has incorporated a minor change suggested during that second comment period to clarify which reports are being requested. Also, the reference to the civil monetary penalty for misuse of an SF 278 report has been updated to reflect the increase effective September 29, 1999 of the maximum penalty amount (\$11,000) assessable. At press time, OGE was in the process of distributing the new 10/99 edition of the OGE Form 201 for use by departments and agencies. This form is also available on the OGE Web site and will be included in future editions of The Ethics CD-ROM. Agencies and the public should now use the newly updated OGE Form 201 which replaces the previous edition.

Newsgram on the Net!

Get your Newsgram from the Web! If you have Internet access, you can download the Newsgram from OGE's Web site at www.usoge.gov. Look under "What's New in Ethics?" or "OGE Publications."

Address Changes?

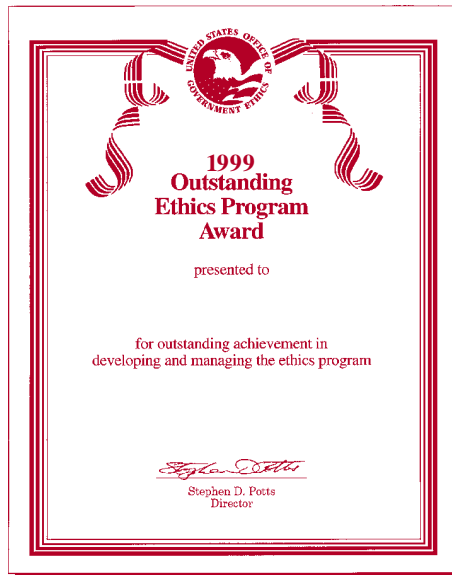
Please E-mail the Newsgram editor at dmcencer@oge.gov or call 202-208-8000, ext. 1188, with address changes or to be removed from the mailing list. Thank you for helping us keep our records up to date.

Ethics Programs Recognized

During the Ninth Annual Government Ethics Conference, OGE presented awards to 33 agencies, departments, and military installations for outstanding achievement in developing and managing their ethics programs. These awards are a credit to both the ethics officials who work so diligently and to the agencies which give them the time and resources to administer their ethics program, sending the message to employees that ethics is important. These awards are presented to agencies whose programs were reviewed by OGE's Program Review Division during the past fiscal year, if OGE generally concluded that the agency ethics program complied fully with OGE requirements and made no program recommendations.

Congratulations to all of the recipients:

Architectural and Transportation Barriers Compliance Board
Federal Retirement Thrift Investment Board
Institute of Museum and Library Services
National Endowment for the Arts
National Endowment for the Humanities
Pension Benefit Guaranty Corporation
Tennessee Valley Authority
U.S. Naval Home



Department of Justice
• Executive Office for the U.S. Attorneys

Department of Defense
• Ballistic Missile Defense Organization
• Defense Contracting Agency
• Defense Finance and Accounting Service
• National Imagery and Mapping Agency

- U.S. Central Command, MacDill AFB
- U.S. Special Operations Command, MacDill AFB

Department of the Air Force
• 6th Air Refueling Wing, MacDill AFB
• 15th Air Force Headquarters, Travis AFB
• 60th Air Mobility Wing, Travis AFB
• 325th Fighter Wing, Tyndall AFB

Department of the Army
• Headquarters, III Corps, Fort Hood
• 1st Cavalry Division, Fort Hood
• 4th Infantry Division, Fort Hood

Department of the Navy
• Fleet and Industrial Supply Center, Norfolk, VA
• Marine Corps Systems Command
• Naval Air Systems Command
• Naval Construction Battalion Center, Gulfport, MS
• Naval Criminal Investigative Service
• Naval Safety Center, Norfolk, VA
• Navy Public Works Center, Norfolk, VA
• Office of Naval Research and the Naval Research Laboratory
• Space and Naval Warfare Systems Command
• Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, MS
• U.S. Naval Academy

Employee Participation in A-76 Procedures

The Office of Government Ethics (OGE) recently reaffirmed the applicability of a regulatory exemption at 5 C.F.R. § 2640.203(d) which permits employees to participate in matters conducted under OMB Circular A-76 procedures without violating conflict-of-interest provisions in 18 U.S.C. § 208 or the Standards of Conduct. OMB Circular A-76 provides guidance to agencies regarding procedures for contracting out agency activities.

A question arose concerning the exemption after the Comptroller General issued a decision in *DZS/Baker LLC; Morrison Knudsen Corporation*, B-281224 (January 12, 1999). In that decision, the Comptroller General stated that employees violated the conflict-of-interest provisions under the Federal Acquisition Regulation (FAR) when Air Force employees evaluated the technical proposals of contractors who were bidding to do the work the employees

performed. In arriving at this decision, the Comptroller General did not consider the OGE exemption at 5 C.F.R. § 2640.203(d) or language in a FAR provision which would permit application of the exemption.

In *DZS/Baker*, 14 of the 16 evaluators worked in the activity that was potentially affected by any contracting out decision. The activity itself consisted of 495 employees. In the absence of the exemption or an individual waiver, the employees could not have evaluated the bids or proposals without violating 18 U.S.C. § 208. However, the exemption at 5 C.F.R. § 2640.203(d) permits employees who have a disqualifying financial interest that arises from their Federal Government employment to engage in such activities without violating the conflict-of-interest provisions in 18 U.S.C. § 208.

While an employee may not make determinations that individually or specially affect

the employee's own salary and benefits, the exemption does permit an employee to make determinations that affect an entire office or group of employees, even though the employee is a member of that group. Additionally, a determination that the exemption applies constitutes a determination under the appearance standard that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

OGE recommends that agency ethics officials share the recent DAEOgram with their procurement officials and with others involved in the implementation of A-76 procedures. See DAEOgram of September 9, 1999 (DO-99-035). OGE has written to the Comptroller General concerning this opinion.

IEC Receives Distinguished Service Award

The Interagency Ethics Council (IEC) received OGE's third annual Distinguished Service Award, at this year's Government Ethics Conference, in recognition of its demonstrated commitment to the ethics community. The award is presented annually to an ethics official, or group of ethics officials, who have not only successfully managed strong ethics programs within their own departments or agencies, but who have also contributed to overall ethics policy development.



The IEC serves as a forum for developing and promoting policies and programs, and it assists in the professional development of its members towards the goal of becoming better ethics officials.

The current officers of the IEC were present to accept the award from OGE Director Stephen Potts. As pictured from left to right, the officers are: John Szabo, Co-Chair (Senior Attorney, Nuclear Regulatory Commission); Steve Epstein, Co-Chair (Senior Attorney and Deputy

Director of the Standards of Conduct Office, Department of Defense); Patricia Zemple, Co-Chair (Ethics Specialist, Federal Reserve Board); and Charles Brown, Secretary (Designated Agency Ethics Official, National Science Foundation).

In his remarks, Mr. Potts noted that, since its formation several years ago, the IEC has successfully evolved through the dedicated ventures and contributions of not only the present officers and IEC participants, but also through the leadership and endeavors of former and past ethics officials who were instrumental in its initial development. He recognized all of the IEC members for improving the ethics program by sharing knowledge and strengthening the ethics community through their professional activities.

Best Practices

This feature appears periodically to share innovative ethics-related ideas with the ethics community. Look on OGE's Web site at <http://www.usoge.gov/bestprac.html#best> for more "Best Practices."

Conflicts Analysis System at NEH

National Endowment for the Humanities' (NEH) Office of General Counsel (OGC) and Office of Information Resources Management (OIRM) coordinated efforts to create a computerized conflicts analysis system to aid in identifying potential conflicts of interest based on the financial disclosure reports of NEH Council members. Council members advise the Chairman of the Endowment on grant applications to the NEH. This successful system has played an integral part in NEH's financial disclosure report review and conflicts analysis for over ten years. It is operated out of OGC and maintained by OIRM through the Grants Management System at NEH.

Not only is the system one of NEH's best kept secrets, but it is also an ethics official's dream come true because it reduces manpower hours to perform

analyses for conflicts on financial disclosure reports. When NEH was approached about their secret on timely reviews for Council members' financial disclosure reports, they were very receptive about sharing information.

The automated system checks for each Council member's affiliations in relation to conflicts of interest with grant applications. During this check, the system determines whether a Council member is affiliated with the listed institutions from which grant applications have been received. Ethics officials then cross-reference the Council member's list of affiliations with the list of grant applications. This process enables ethics officials to perform a more precise and timely conflicts analysis.

The system also allows ethics officials to update individual records and to review and modify the listing of Council members and institutions with whom they are affiliated. For instance, an individual member may have an institutional affiliation or other general affiliation that could be added to or deleted from an individual Council member's record.

NEH ethics officials are confident that this automated system has been effective in

conflicts prevention. This system has also provided an efficient strategy in the overall financial disclosure review process. If you are interested in learning more about NEH's effective use of technology and their computerized system, contact Virginia Canter, General Counsel and Designated Agency Ethics Official, at 202-606-8322 or Gillian Heagy, OIRM, at 202-606-8399.

NAVAIR's Tracking System Benefits Program

Another best practice that OGE's Program Review Division is particularly impressed with is the computer database at the Naval Air Systems Command (NAVAIR) that tracks not only the filing of OGE Forms 450 and 450-A, but also tracks annual training for 450 filers. Combining these two tracking systems relieves much of the burden that agencies face when required to account for the completion of all annual training for 450 filers and to ensure that all confidential financial disclosure filing has taken place.

NAVAIR has been able to simplify the management of a large disclosure program with this computer-based tracking system, *Continued on page 8, column 1*

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Be Our Guests

For this edition of the **Newsgram**, we are fortunate to have two separate guests. Be Our Guest appears as a periodic feature in the **Government Ethics Newsgram**. We invite you to be our guest and share with the ethics community your innovative ideas, anecdotes, helpful hints, or perspectives on implementing ethics programs or on other ethics issues. Contact the editor of the **Government Ethics Newsgram** at 202-208-8000, ext. 1188, if you have ideas, articles, or other submissions that you wish to be considered for publication.

Byard Q. Clemmons

Our first guest is Byard Q. Clemmons. Commander Clemmons is currently Chief of the Ethics Division and the Deputy Staff Judge Advocate at the United States Strategic Command. Prior to his current position, he served as Chief Judge of the Mid-South judicial Circuit of the Navy-Marine Corps Trial Judiciary. Commander Clemmons received his A.B. from Kenyon College and his M.S. from the University of Georgia. He graduated first in his class at the Oklahoma City University School of Law and received an LL.M. Degree from Harvard Law School.

Ethics: A New Appearance Standard

As William Shakespeare noted in Act II of *Hamlet*, "there is nothing either good or bad but thinking makes it so." Appearances are important, and they are critical in assessing behavior in the context of

Best Practices

Continued from page 5

in addition to verifying that all annual training has been accomplished. This system was made possible through the efforts of the NAVAIR ethics counselors and an exceptional computer support function at the Command. Other Federal agencies and departments who are eager to simplify the administrative task of tracking within their ethics programs may contact Bridget Jarvis, NAVAIR's primary ethics counselor, for more information about the database. She may be reached at 301-757-0583.

current requirements placed on Federal Government officials.

It has long been accepted and understood that public service is a public trust. The Standards of Ethical Conduct promulgated by the Office of Government Ethics state that "each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain." Ethics concerns loyalty, professionalism, and fairness. The public has a right to the undivided loyalty of its officials, unfettered by conflicts of interest. Clearly established ethical rules and guiding principles are essential to ensure that every citizen can have complete confidence in the integrity of the Federal Government.

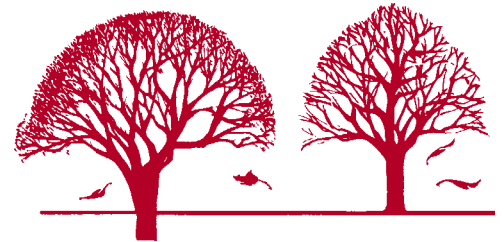
I will discuss the basics of ethical conduct, including a historical perspective. I will specifically address the appropriateness of proscribing conduct that contravenes an appearance of impropriety standard and issues regarding the presently applied standard. In conclusion I will recommend a change to the present standard.

Ethics: A Historical Perspective

One might question whether we need regulations establishing the parameters of ethical conduct for government officials. I will briefly review the teachings of the ancient Greek philosophers Socrates, Plato, and Aristotle, the common meaning of the word ethics, and current events and practice in answering this question.

First, let us consider the teachings of the Athenian philosopher Socrates. The concept of ethics as we currently know it had its origins in ancient Greece, arising from the Greek "ethikos." Fundamental to Socrates' ethics was the principle that all vice is ignorance and that no man is willingly bad. For Socrates virtue is knowledge, and the man who knows right will act rightly. Although Socrates himself wrote no great works, his ideas have been recorded. William S. Sahakian notes in his *History of Philosophy* that, according to Socrates, if a man were to do wrong, it would be the result of being unenlightened; no sane man would purposefully do moral harm.

Plato, a disciple of Socrates, also placed a premium on the benefits of knowledge. According to Plato's views of man and his ethics, man has as a central purpose and motivation transforming himself into a closer approximation of the good. Again, for Plato, knowledge of what is just and good is essential for right action. Plato, in *The Republic*, wrote of "good action, and the knowledge which presides over it, wisdom, and ... unjust action, and the opinion which presides over it ignorance."



Aristotle, who wrote most extensively regarding ethics, was educated under Plato. Mr. Sahakian, again in his *History of Philosophy*, notes: "It is true," said Aristotle, "that man's inner lack of knowledge, as well as external restraints, may prevent him from performing free, moral actions, but certainly whenever no such obstacles confront him, the individual can deliberately and intelligently choose and follow a proper course of moral action." Aristotle rightly recognized, in his *Rhetorica* and *Ethica Nicomachea*, the utility of codes and conventions for establishing particular laws "which each community lays down and applies to its own members."

The Nature of Man and the Need for a Code of Ethics

Antisocial personalities or psychopaths aside, I basically agree with Socrates, Plato, and Aristotle. The vast majority of Government officials, people with an adequately developed conscience structure, have their hearts in the right place and want to do the right thing. A set of guiding principles delineating proper ethical conduct for Government officials is at the very least helpful, and more likely essential. In teaching ethics, I often present a "Calvin and Hobbes" comic strip

Be Our Guests

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that has as its punch line, "I never really thought of ignorance as a quality of life issue." The point to be made is that, given the proper guidance, people generally will do what is ethical.

The propriety of an appearance standard in an ethical code of conduct was highlighted in remarks by Charles F.C. Ruff, then Counsel to the President, during the 1997 Government Ethics Conference in Williamsburg, Virginia. Mr. Ruff, in a delightful presentation, highlighted classical ethics and distinguished actual ethical conduct from apparent ethical conduct. In this regard, he discussed the classic example of the character, Tom Jones, who, while outwardly bawdy, was internally quite ethical, and Dr. Blifil, who appeared to be the personification of conscience itself, was inwardly most unethical. I was reminded of the character Eddie Haskell from the old "Leave It to Beaver" television series, who was the ultimate sycophant. Eddie was always instigating inappropriate behavior in others while feigning to be the paradigm of ethical conduct and propriety when in the presence of parents, teachers, and other adults.

This logically leads to a debate regarding whether it is better to be ethical or to seem ethical, and to the necessity of an ethical code of conduct that includes an appearance standard. We need not debate the wisdom of requiring ethical behavior of Government officials. We have discussed the benefit of and need for regulations governing the conduct of officials. And, it is essential that Government officials conduct themselves in accord with ethical principles. The issue is, should our code of conduct impose requirements regarding the appearance of impropriety and, if so, what the appearance standard should be.

Interestingly, at the same Government Ethics Conference where Mr. Ruff spoke, Howard R. Wilson, Esquire, Ethics Counsellor to the Government of Canada also was a guest speaker. In his remarks, Mr. Wilson noted that the Canadian Code of Conduct also imposes an obligation on officials to avoid the appearance of impropriety. Both the United States and Canada have determined that some appearance standard is needed.



Are we imposing a form over substance requirement or does the form requirement have a substance all its own?

In my opinion it is the latter. In Government Ethics, how a person's conduct appears has a reality and substance beyond mere form.

This takes us back to my original remarks regarding what is at the heart of a code of ethical conduct for Government officials. In a democratic society where public officials are elected and appointed to serve the people, public service is a public trust requiring public confidence. While actual ethical conduct is basic, public confidence is contingent on how conduct appears to

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the public. This goes beyond the reality of the conduct, and the internal machinations of the actor, to how the conduct is reasonably viewed by the governed public. An appearance of impropriety standard is integral to a code of conduct for public officials. So, if an appearance standard is necessary and proper, what is the appropriate standard?

The current standard applied in the United States Government is as follows: "Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts." I fully concur with the application of a reasonableness standard. I find the concept of the perspective of a "reasonable person with knowledge of the relevant facts" to be problematic.

The problem I have with the standard as presently drafted is that it is not an appearance standard. Taken to its logical conclusion, the appearance requirement is merely redundant with the actual conduct standard. Conduct is wrong if it in fact

violates one of the ethical or legal prohibitions. If it in fact does not violate an ethical proscription, it is not objectionable unless it gives the appearance of impropriety. But, under the present standard, appearance is determined based on a knowledge of the relevant facts. A person who knows all the relevant facts and reasonably applies them will correctly opine that no actual violation occurred. Said another way, if no actual violation has occurred, this will be abundantly clear to one with all the relevant facts. The logic supporting the current appearance standard is thus tautologous.

That said, what is the proper standard to apply if we are going to employ an appearance standard? And, as noted above, an appearance standard is necessary and proper. We need to apply a standard that is valid and reliable vis-à-vis the purpose of the standard. That is, a standard that is an accurate barometer of public awareness and public opinion. Accordingly, we need a standard that employs the perspective of "the reasonable person with the facts as presented to the public by the media," or "the reasonable person applying the facts as generally available to the public," or "the reasonable person drawing reasonable conclusions from the facts published to the public."

Because the crux of the matter is to ensure that "every citizen can have complete confidence in the integrity of the Federal Government," a standard which meets this requirement is needed. I recommend the second of my offerings above as the best: the reasonable person applying the facts generally available to the public. It is this person that best reflects the citizens with which we are concerned.

I don't claim to have the definitive or perfect answer to this problem area, but I believe I have framed the issue and presented it for consideration. The current standard is unsuitable. Simply stated, the public is never in possession of all the relevant facts. This lack of knowledge does nothing to assuage the concerns of the public regarding the trustworthiness of its officials.

In discussing a course of conduct with an official, we often ask them to apply "The Washington Post" or "New York Times" test; that is, how would a report of the conduct in question look in the media? *Continued on page 10 column 1*

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standard which will be a measure of public confidence in the integrity of the Government and its officials is required. The new standard I recommend will fill this need.

Arnold J. Haiman

Our second guest for this edition is Arnold J. Haiman. Mr. Haiman is the Assistant General Counsel for Ethics and Administration and the Designated Agency Ethics Official at the U.S. Agency for International Development (USAID), where he is responsible for managing the agency's worldwide ethics program and providing guidance and counsel to all levels of the agency. Prior to joining USAID in 1992, Mr. Haiman served in the Department of Housing and Urban Development, first as legal counsel to the Office of Ethics and then as director of that Office. He previously held a variety of positions with the Navy Department, providing legal counsel on logistics, personnel, fraud, waste and abuse, legislative affairs, procurement, and contracting. Mr. Haiman attended the National Law Center at George Washington University in 1982-1983 and was awarded an LL.M. in criminal law with highest honors.

Ethical Decision-Making Seminars

The Office of Ethics and Administration in the Office of the General Counsel (GC/EA) at USAID has introduced a new and innovative program called Ethical Decision-making. This initiative is a series of seminars to guide the agency's workforce and organization toward understanding its core ethical values. This program, while utilized extensively in the private sector, had never before been conducted on a systematic basis by a Federal agency. The overall purpose of the training is to identify the ethical values of the institution and workforce and provide a forum for both staff and managers to discuss and integrate their core values. USAID conducts this training in addition to the training required by OGE's regulations.

The seminars instituted at USAID were modeled in part on the program created by the Josephson Institute. The USAID lawyers conducting these seminars successfully completed a curriculum designed for trainers and became certified instructors in the program. Carl Sosbee, the Alternate Designated Agency Ethics Official, and I led the seminars.

The program was originally created to deal with an apparent contradiction: although the core values of managers and staff are remarkably aligned (as demonstrated by empirical evidence across gender, racial, cultural and socio-economic lines), there is often a disconnect between these values and how staff perceives the values/culture of an organization.

The USAID Program is based on the belief that identification of core values assists managers and employees in understanding the criteria that will be supported, even rewarded, in making decisions involving a "right" and "wrong"—a judgment call where laws and regulations do not provide clear

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guidance. The actual curriculum boiled down to its quintessential parts involves a preliminary discussion and understanding by the participants of the difference between bottom-line rule requirements and actual ethical standards and issues.

After this initial discussion, participants engage in a process of identifying role models, persons in their lives who represent "greatness." They then identify and articulate the character and qualities of these individuals that make them admirable or worthy of emulation.

The initial lists include a large variety of traits and characteristics and qualities ranging from "charismatic" to "courageous" to "compassionate" and so on. Then the participants are required to whittle this list down. There are different approaches and processes to get the participants to reach a set of core values. Once the values are agreed upon, participants are actively

guided through the process of solving hypothetical ethical dilemmas (no guaranteed right or wrong answer). The formula in each hypothetical is to identify the stakeholders in the ethical dilemma; identify the values that are to be applied; and then discuss whether one value should be subordinated to another.

One example of a hypothetical dilemma is a situation in which a manager was advertising for a legal advisor in the criminal law department. This manager's supervisor's spouse applied for the position. After a competitive application process (in which the manager had no role), the supervisor's spouse did not get the position. Before the position was actually filled, it came to the manager's attention that there was a legal advisor working in the civil law department who was having a bad experience in her department through no fault of her own.

Because of the manager's concern over the career of the legal advisor in the civil law department, she canceled the job announcement for the legal advisor in the criminal law department and transferred the legal advisor from the civil law department into that position. The manager was comfortable in her decision to cancel the job announcement because the underlying motive was concern for an employee's career and had nothing to do with her supervisor's spouse not getting the position. However, there was skepticism in the office that the decision to cancel the job announcement was made because of the spouse not getting the job. The manager declined to explain her underlying motives out of a concern for the privacy of the employee who was having a bad experience in her job.

In discussing this hypothetical, there was an assessment of the values involved. The manager valued privacy in deciding not to disclose her reasons for canceling the job announcement. Other values that came into play were openness and transparency with regard to decisions made in the office. The stakeholders were then identified as the manager, the spouse and the supervisor. However, the seminar leader also identified an additional set of stakeholders, the other persons in the office who were not directly affected by the decision, but who had heard about the job announcement and were skeptical of the manager's motives. It was noted that in this type of

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Ethics Satellite Broadcast Blankets the Nation

As Government officials are increasingly asked to do more with less, they are compelled to make decisions about how to use resources most efficiently. As the Interagency Ethics Council will attest, the idea of working together or "partnering" within the ethics community is not a foreign one. More dramatically, the September 30, 1999 annual ethics training via satellite conceived by the Department of the Interior (DOI) Ethics Program demonstrated the power of partnering at an unprecedented scale.

Attrition and downsizing had in recent years decimated the DOI's cadre of experienced ethics officials, and the DOI ethics office needed a low cost way to reach and teach a new group of ethics counselors. Interior had the broadcast facility, housed in the Fish and Wildlife Service's National Conservation Training Center (NCTC) in Shepherdstown, West Virginia. What the Department lacked was a nationwide network of downlink sites convenient to its new counselors. With this in mind, DOI turned to the Department of Agriculture (USDA) ethics program, proposing a partnership that would produce a series of broadcasts aimed at training ethics counselors in both departments.

The scope and reach of the program mushroomed from there. DOI and USDA were joined by the Department of Veterans Affairs (VA), the Center for Disease Control, the Nuclear Regulatory Commission, the Office of Special Counsel, the General Services Administration, and the Department of Commerce. Providing additional downlink sites and subject matter instructors, these agencies joined in producing four programs during June, July and August 1999. These sessions explained how to administer an ethics program, how to run a financial disclosure system, and how to interpret the Standards of Conduct. Success was twofold; not only were new ethics counselors trained, but the four broadcasts also provided the necessary practice needed for the annual ethics training session on September 30.

Hosted by the Departments of Interior and Agriculture, the broadcast's success resulted from the efforts of ethics officials throughout the executive branch. Two hundred seventeen sites in 47 states, Puerto Rico, and the District of Columbia joined in downlinking the signal



originating from the NCTC in Shepherdstown. The broad availability of the broadcast resulted in part with assistance from the Bureau of Land Management and the VA in converting the NCTC's digital signal into an analog transmission.

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situation, there was no clear answer from the Standards of Conduct or other applicable rules. In addition, while there was no definitive right or wrong answer to this dilemma, a discussion of values and stakeholders led the manager to understand better that her actions affected all persons in the office and she began to re-evaluate her decision.

As in the above example, these exercises always result in exciting dialogues on absolute versus situational or relational ethics and cultural approaches to ethical problems. Participants come away with a much greater understanding of themselves, each other and their employing organization's values. The GC/EA trainers also provide guidance for follow-up work with people who are unable to attend these sessions.

GC/EA has conducted these seminars at USAID both domestically and abroad, and will now include USAID's development partners in this training. The response has been overwhelmingly enthusiastic, and as word has spread throughout the agency, the trainers are unable to keep up with the demand for these sessions.



Announcements

Annual Survey of Prosecutions

The Office of Government Ethics recently published its annual survey of conflict of interest prosecutions. The survey is a compilation of summaries of prosecutions of conflicts violations in the Federal Government, many of which are not elsewhere reported. This year's survey provides information on 15 new prosecutions by U.S. Attorneys' offices, the Public Integrity Section of the Department of Justice's Criminal Division, and an Office of Independent Counsel. See DAEOgram of July 19, 1999 (DO-99-032).

OGE Publishes Informal Advisory Letters

OGE recently published its informal advisory letters that were issued during calendar year 1998. In addition to these opinions, the new materials include an updated index covering guidance issued from 1990 through 1998, a new binder, and a label for volume III of the OGE guidance. These materials may be purchased through the Superintendent of Documents or at the Government Printing Office's bookstores. In addition, the 1998 guidance is available for viewing, searching and downloading on the OGE Web site at www.usoge.gov/opinions/opinlib.html.

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Many sites, including the Department of Agriculture and the VA, offered space to any Federal employee wishing to view the broadcast. The Environmental Protection Agency (EPA) demonstrated the power of distance learning by getting the word out to their entire workforce that the broadcast would fulfill the annual training requirement. Hundreds of EPA employees viewed the broadcast at several EPA sites. DOI, NASA, Department of Justice, the Department of Health and Human Services, Department of Defense, Department of Energy, and Department of Transportation all took advantage of the broadcast, making the training available to thousands of other Federal employees.

Since sites are still reporting attendance figures, it is impossible to calculate a total viewing audience. Early numbers indicate that over 10,000 employees participated in the broadcast in auditorium and classroom settings. Video streaming technology, in which video is fed through a Local Area Network (LAN) for viewing on computers, was employed at several locations. This technology may have added 40,000-50,000 to the total, since some employees could view the broadcast right at their desks. The ultimate viewership will surpass this figure, however, as many thousands more employees receive their annual training by viewing videotapes of the original broadcast.

With this broadcast, the ethics community saved thousands in taxpayer dollars. Development and transmission of the broadcast cost no more than \$10,000—at the conservative estimate of 10,000

Union Proposal Ruled Nonnegotiable

The Federal Labor Relations Authority (FLRA) recently held that a union proposal was nonnegotiable because it was inconsistent with an OGE Governmentwide ethics regulation. The union's proposal would have permitted FAA's Air Traffic Assistants (ATAs) to accept free air travel from air carriers controlled by and subject to the agency's regulations. The agency argued that the proposal was inconsistent with the Executive branchwide regulations regarding gifts from outside sources in subpart B of the Standards of Ethical Conduct.

In construing the ethics regulations, the FLRA held that the ATAs' acceptance of air travel in this case would be a "gift" from a "prohibited source" and that no exclusions from the definition of a gift would apply, including the exclusion for any gift accepted by the Government under specific statutory authority. The decision, *National Association of Government Employees and U.S. Department of Transportation, FAA*, 55 FLRA No. 146, was issued on September 24, 1999. The opinion can be found on OGE's Web site at www.usoge.gov, under "What's New in Ethics?"

students, this comes out to \$1.00/student! Compare this to the time and money spent by each ethics office to provide training just within its own jurisdiction.

How far did we reach? In one hour's time, thousands of employees received their annual training. Many of these, not surprisingly, were located in Washington, DC. However, equally impressive are the numbers received from classrooms across the country. Hundreds of employees at EPA Chicago, Army Corps of Engineers in Buffalo, New York, the VA Hospital Administration in Little Rock, Arkansas, the Fish and Wildlife Service in Albuquerque, New Mexico and the USDA Agricultural Research Service sites in College Station, Texas and Beltsville, Maryland participated.



A number of employees at the National Credit Union Administration viewed the broadcast at sites throughout the country. And in Anchorage, Alaska, several National Park Service employees received training. Apparently, the training was worth the five-hour time difference.

Best of all, this broadcast need not be a one-time effort. The technology is in place; training by satellite will be replaced soon by video streaming. A large cadre of knowledgeable and entertaining ethics officials are available to conduct training. They've been doing stand-up training for years—why not in front of a camera?

Special thanks to Art Bennett, Department Ethics Training Coordinator at DOI, for this article.

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