



United States
Office of Government Ethics
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November 17, 2005
DO-05-019

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Marilyn L. Glynn
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SUBJECT: Documenting Ethics Advice

The purpose of this memorandum is to share some concerns and observations about when and how ethics officials should document ethics advice.

There are several reasons why this is a good time to address the issue of written documentation. First, now that it is routine to communicate in the workplace using e-mail, our Office has observed through program reviews that over time written documentation of ethics advice is rendered using e-mail more often than formal written memoranda. It is also clear that with the advent of e-mail some routine advice is documented that may not have been the subject of formal written documentation in the past. Also, for some time we have heard concerns expressed by law enforcement officials, including OIG investigators and prosecutors, that cases involving ethics laws can succeed or fail depending on the efficacy of the written documentation maintained by ethics officials.

There are obvious advantages to documenting ethics advice. Such documentation protects employees who, in good faith, seek and follow advice from their agency ethics officials. The Standards of Ethical Conduct for Executive Branch Officials specifically provides that "[d]isciplinary action for violating [the Standards of Ethical Conduct] or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances." 5 C.F.R. § 2635.107(b). Fully documenting the facts and analysis considered in developing ethics

advice for an individual employee also protects the integrity of the ethics program when that employee's conduct is called into question. Full documentation also supports supervisors and investigators who are trying to determine whether an employee's conduct has violated any ethics rules.

With limited exceptions, OGE does not compel agencies to maintain written documentation of ethics advice -- and we do not anticipate doing so in the future. In general we appreciate the fact that it would not be administratively possible for ethics officials to prepare written documentation of all oral ethics advice, nor do we believe it is necessary. Agencies must exercise their own judgment in this regard. However, we do believe there are some basic factors that should be considered in making a determination about whether oral advice should be documented, and what such documentation should include.

Tips on When to Take Notes

Although it is not possible to document every bit of oral advice, ideally you want to have written documentation in circumstances where it is most likely questions could arise concerning the conduct at issue. Each ethics office will develop its own policies, whether formal or informal, on when to document advice, but we believe there are certain circumstances that weigh in favor of reducing ethics advice to writing. These factors are not exhaustive, and are not meant to imply that written documentation should not be prepared in other circumstances.

Advice regarding Senior officials. The more senior the official, the more important it is to create written documentation of ethics advice. For the most senior officials, it may even be good practice to document even the more routine advice.

Advice regarding employees involved in procurement. In light of recent issues regarding conduct by Government procurement officials, it is generally a good practice to document ethics advice given to employees involved in procurement and implementation of contracts, including procurement officials and contracting officers. This would

be particularly true where the advice relates to seeking employment with a contractor, or post employment issues involving work for a contractor.

Advice on sensitive matters. Generally, the more sensitive a matter is, the more likely it will be the subject of a high level of scrutiny, both inside and outside the Government. Therefore, it is generally a good practice to document ethics advice provided to officials involved in these matters.

Applying the criminal statutes to specific facts. It is probably always a good idea to develop written documentation when advising an employee on the application of any of the criminal statutes to a specific set of facts.

Complicated ethics issues. Writing down relevant information regarding complicated ethics issues can be a vital part of the analytical process. Should conduct that is consistent with the advice be questioned, thorough written documentation can be essential in sorting out whether any violation occurred.

Tips on What to Include in Notes

Once an ethics official has determined that written documentation of ethics advice will be prepared, it is important that the documentation be complete and thorough. In our program reviews we have, on occasion, reviewed written documentation of advice that reflected only the conclusion of the analysis. Generally, it is good practice for written documentation of ethics advice to contain: (1) an indication of when the advice was given; (2) a summary of the relevant facts as described by the employee; (3) citation of the applicable legal authority; (4) an analysis describing how the law applies to the facts; and (5) a conclusion.

I hope that you find these thoughts and observations helpful. Please feel free to contact our office if you have questions or concerns about documenting ethics advice.