



Ethical Ethics Advice: A Department of Defense

Department of Defense Ethics Rules are often complex; their application, however, does not need to be. Whether the product of poor ethics advice or a misunderstanding and misapplication of the ethics rules, many of the transgressions mentioned within this article were, in the final analysis, likely preventable if more care, thought, and effort had been proactively applied. Further, just as DOD leaders and personnel must act ethically, DOD ethics counselors must act ethically when crafting ethics advice. Simply put, ethics counselors must provide ethical ethics advice.

BY COL. JOSEPH P. "DUTCH" BIALKE

Counselor's 12-Minute "Light Read"

"Relativity applies to physics, not ethics."
—Albert Einstein

Institutional Military Ethics and Leadership

Various ethical improprieties by a number of leaders and personnel within the Department of Defense have recently included, among other abuses, the acceptance of unauthorized gifts, misuse of government vehicles, unauthorized Official Representation Fund (ORF) expenditures, false claims and travel vouchers, misuse of Temporary Duty Assignments (TDYs), unauthorized upgraded travel, improper expenditures of appropriated funds, unauthorized upgraded hotel accommodations, inappropriate use of government property and resources, misuse of subordinates, improper non-Federal Entity (NFE) endorsements/fundraising/membership drives, unauthorized spousal travel, and unauthorized military air travel.¹

In accordance with the Joint Ethics Regulation (JER), the heads of Department of Defense component commands or organizations are personally accountable in maintaining their respective commands' ethics programs.² Given this responsibility, senior military officers and civil servants are expected to display personal leadership in the area of ethics and ethical conduct. Ethics is and must continue to be leadership-driven. Institutional ethics is first and foremost a commander's program. Leaders are charged with the affirmative duty and responsibility of promoting a strong organizational ethical culture. To effectively support leaders in this fundamental obligation, ethics advisors must consistently provide them ethical ethics advice.

"[W]e must vigilantly protect and reinforce ethics as a central element of our workplace culture. Even

the perception of unethical behavior or impropriety must be avoided ... I ask that you continue to ... be a visible role model of ethical behavior, hold yourself and others accountable, and ensure an ethical culture is a hallmark of the organizations you lead."

—Memorandum from Secretary of Defense Leon Panetta to the secretaries of the military departments, chairman of the Joint Chiefs of Staff, *et al*, Subject: Ethics, Integrity, and Accountability, 2 May 2012

Military Readiness and the Positive Impact of Ethics Compliance

"While we are guarding the country, we must accept being the guardian of the finest ethics. The country needs it and we must do it."

—Gen. Creighton W. Abrams Jr.

Institutional military ethics is a force-multiplier. Ethics compliance directly facilitates military efficiency and readiness. Within any functioning democracy, effectual public service at its very foundation is about public trust.³ To successfully accomplish our military mission, continuing public trust is an absolute imperative.

The CFR/JER, Department of Defense Ethics Fundamentals, and Fiscal Responsibilities

"Ethics is knowing the difference between what you have a right to do and what is right to do."

—Potter Stewart, U.S. Supreme Court justice

Department of Defense ethics, as a practical matter, are influenced and guided by a common rule set. The Code of Federal Regulations (CFR) and the JER⁴ provide explicit standards regarding personal conduct related to federal employ-

ment. These rules detail institutional right and wrong behaviors, as well as identify areas where appearances of improprieties can reduce public trust and confidence. They embody a code of professional conduct detailing what Department of Defense personnel can and cannot do. These rules are not malleable, nor are they mere guidelines or simply suggestions.

The Department of Defense—the Ethics Counselor’s Sole Client

Oftentimes, the specific rules regarding Department of Defense ethics are not entirely intuitive, and personally striving to “be ethical,” although admirable in its own right, does not necessarily ensure one is acceptably adhering to all of the applicable ethics rules. In other words, compliance with specific ethics rules is not necessarily the same thing as, in the abstract meaning, “being ethical.” Merely doing what a person thinks is right might not always be enough. Accordingly, to assist military and civilian personnel in relation to the many Department of Defense ethics rules and how they apply, designated attorneys are charged with providing, on behalf of the Department of Defense, both general and specifically-tailored ethics advice.

A Department of Defense employee appointed as an Ethics Counselor shall be an attorney.⁵ When providing ethics advice, our client is and remains the Department of Defense, never the individual counseled. To ensure objectivity, when an ethics counselor advises and counsels an individual commander or leader, the ethics advisor acts solely as a Department of Defense lawyer. The ethics advisor acts as a designated public official who, strictly on behalf of the Department of Defense, furnishes specific ethics compliance information.

The ethics advisor provides only an “arm’s-length” legal opinion to the individual advised. It is an objective government-counsel advisory legal opinion that provides a Department of Defense interpretation of ethics rules as applied to the facts relating to an individual’s proposed conduct. The ethics advisor does not represent, or advocate for, the individual advised. Accordingly, although our ethics advice is usually individualized to the specific personnel we counsel, it is not protected by the attorney-client privilege and we must proactively and clearly so advise the recipient.⁶

Ethical Ethics Counseling

“Ethics must begin at the top of an organization. It is a leadership issue and the chief executive must set the example.”

—Edward Hennessy Jr., Fortune 500 company CEO

J.P. Morgan, American financier and banker in the late 1800s and early 1900s, famously said, “I don’t want a lawyer who tells me what I can’t do. I hire a lawyer to tell me how I can do what I want to do!” This leadership philosophy, in relation to the utilization of legal counsel in business, admittedly also has some relevance in various areas of military law practice in direct support and furtherance of the operational mission. However, this philosophy has little to no application to proper ethics advice because the facts or proposed action might involve a potential inappropriate personal gain, benefit or perk to the individual advised. Ethics counselors are federal government officials, not lackeys.

In fostering and maintaining an effective organizational ethical culture and value system, most senior Department of Defense leaders do not even want to bend, let alone break, ethics rules. Most leaders appreciate that if one chooses to continually run close to and alongside the ethical sidelines, one eventually will step out of bounds. Accordingly, the majority of leaders sensibly do not wish to be anywhere near where the ethical boundary line has been drawn. It follows that no ethics counselor is ever doing any senior leader a favor by being an ethical Gummy. Instead, we as ethics counselors are to assist effectively a commander in the development of a credible ethical culture within the organization through the implementation of the commander’s ethics program. Consequently, we must endeavor always to provide honest, accurate, objective, unambiguous, timely, and consistent legal ethics advice. That is, ethical ethics advice.

Ethics counselors should be forward-leaning and strive to foresee potential problems. At times, an individual seeking ethics advice might not be completely forthcoming and provide you all the salient facts. Before a competent ethics counselor provides advice, the counselor frequently must first “peel back the onion” and expose the underlying layers in order to determine and verify all the actual facts. An accurate and complete representation of the relevant facts is vital to render any valid ethics opinion. With legal advice, one specific factual detail may be dispositive. The adoption of incomplete, shaded or wrong facts in an opinion gives an unwarranted credibility to an event or action, not only for the current year, but for future years as well. With incomplete or inaccurate facts, we can only provide incomplete and likely inaccurate ethics advice.

Consequently, when asked an ethics question, avoid providing an immediate “shoot-from-the-hip,” “gut-sense,” or “knee-jerk” yes or no. In regards to professional ethics advice, relying upon common sense only or making an informed guess based upon the limited facts immediately before you might not result in the right answer. Discover the relevant facts, research the applicable law and rules, and craft an accurate, objective and complete answer.

“Divorced from ethics, leadership is reduced to management and politics to mere technique.”

—James MacGregor Burns, presidential historian

It is rarely if ever appropriate to engage in “legal gymnastics” and stretch ethics rules to the breaking point in an attempt to justify a perk or other personal benefit for a Department of Defense official. When a leader is personally advantaged due to receiving an unauthorized benefit or perk, it undercuts the leader’s moral authority which is essential and implicit to authentic and effective leadership.

In addition, when an ethics counselor gives dubious advice that purports to validate a questionable ethical practice, it encourages ethics advice forum-shopping. It promotes an unsound view that any ethical question can be legally justified within the rules to the direct personal benefit of the individual if one simply finds and asks the right acquiescent or sycophantic ethics counselor. Of further concern, if members of the command believe that almost every ethical issue can or will be legally justified by an ethics counselor, they will then be led to believe that ethics advice is unnecessary and, inevitably, will be less inclined to request it.

Advising the Ethically-Challenged

“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches people by example. If the government becomes the law-breaker, it breeds contempt for law and invites every man to become a law unto himself.”

—Louis Brandeis, U.S. Supreme Court Justice

Whenever faced with a “risk-taking” or a potentially ethically-challenged leader⁷ or team member, we as ethics counselors should deftly explain the possible or likely consequences of non-compliance or ill-advised, unduly flexible and expansive interpretations of ethics rules. In order to avoid ethical violations, we want our leaders and team members to proactively seek out our advice. Be accessible, always.

“If ethics are poor at the top, that behavior is copied down through the organization.”

—Robert Noyce, inventor of the silicon chip

“An ethical person ought to do more than he’s required to do and less than he’s allowed to do.”

—Thomas Jefferson

Useful ethics advice is not merely the sterile recitation of a technical legal analysis. It is not limited to determining only whether a particular proposed action might be legally permissible. Depending upon the circumstances, an authorized gift may still be perceived reasonably as a de facto bribe or payola; an upgraded commercial air travel seat or hotel room might be perceived reasonably as spend-

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ing U.S. tax dollars extravagantly; or a commercial enterprise’s invitation to a Department of Defense senior leader to an expensive leisure event or extravagant dinner could be viewed reasonably as poorly disguised graft attempting to mask the central intent of the enterprise to garner access or influence illegitimately.

An ethics counselor should never ignore the appearance of impropriety which may accompany an event that, although potentially legal, should be avoided. When advising on ethical matters, an ethics counselor must provide a considered judgment of the potential for a negative public perception that could be generated by a leader’s participation in such an event. In ethics, where appearances are just as important as reality, events that can create appearances of impropriety are fraught with danger and could pave the way for subsequent ethical missteps, all with career-impacting ramifications to the doer.

To both the American public and a leader’s subordinates, per-

ceptions can credibly equate to reality. Accordingly, Department of Defense personnel should strive to avoid even the appearance of an ethical impropriety. Even if a particular course of action might be rationalized as meeting minimal Department of Defense ethical standards, if others could reasonably view the conduct as inappropriate, it still might be unwise or even patently stupid to do.⁸

Ethical Failures by Leaders and Ethics Advisors

“Even the most rational approach to ethics is defenseless if there isn’t the will to do what is right.”

—Alexander Solzhenitsyn

As previously mentioned, over the past few years, our military has experienced dispiriting examples of failures in leadership involving ethical violations. Unethical is synonymous with unprincipled, unscrupulous, and corrupt. Ultimately, those who willfully violate Department of Defense ethics rules are fittingly called “criminals.” Such regrettable cases have also, at times, involved attendant highly unfortunate and discouraging failures in the tendering of ethics advice. When a senior leader in our armed forces is implicated in an ethics scandal due to inaccurate ethics advice, the ethics counselor is then likewise culpable.

There are often reasons, other than simple incompetence, for the offering of erroneous ethics advice. Some incorrect “getting to yes” advice possibly involved an ethics advisor’s self-serving attempt to please or otherwise garner potential approval or favor from a senior officer. Some misguided or off-the-mark advice likely resulted from an ethics counselor’s subconscious rationalizations that a senior officer merited or was somehow entitled to an otherwise unauthorized gift, special privilege, or travel perk, or that such a personal benefit was expected or appropriate, due to that officer’s rank, status, or position. More likely, some misplaced ethics advice was provided due to an ethics advisor’s overly deferential unwillingness to speak truth to power or to ever advise “no” to a senior officer.

It is the unfortunate truth that in each of these situations, short-sighted ethics counselors failed to serve their respective commanders and leaders. Much more notably, they utterly failed to represent and serve their sole client, the Department of Defense. An ethics advisor’s role is to provide proper and accurate advice based upon the applicable facts and rules. Do not ever set up a senior leader for failure by giving deficient ethics advice because you might think it is what the leader “wants to hear.” Provide the correct advice that the leader “needs to hear.”

To be sure, ethical ethics counseling is not for the faint of heart who routinely seeks the path of least resistance and, despite the facts and rules, would reflexively aim to please the boss in each and every circumstance. As ethics counselors, we are charged with protecting the Department of Defense, our leaders and the rest of the Department of Defense team by providing correct advice consistently.

Model the Ethics Advice That You Give

“An ounce of practice is worth more than tons of preaching.”

—Mahatma Gandhi

Effective and ethical ethics counselors model the behavior they

advise. As ethical ethics counselors, we must never tacitly approve of any factual misrepresentation or engage in any institutional/corporate lying in attempts to manufacture compliance with ethics rules. That is not what “right” looks like.

“Every time we turn our heads the other way when we see the law flouted, when we tolerate what we know to be wrong, when we close our eyes and ears to the corrupt because we are too busy or too frightened, when we fail to speak up and speak out, we strike a blow against freedom and decency and justice.”

—Robert Kennedy

When an ethics counselor is apprised of improper conduct, the counselor has a professional duty to intervene proactively to provide the correct advice to senior leaders in order to set or maintain a proper ethical environment. This intervention may require a public statement by the senior leader or ethics counselor to ensure all members of the organization understand an activity or event was improper under our ethics rules.

Failure to do so engenders the appearance of selectivity in application of the rules or worse, the ethics counselor’s tacit approval of the inappropriate activity. Averting one’s eyes will simply generate or amplify an exceedingly faulty perception that

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one is likely better off by simply not asking for an ethics opinion on an issue. Only “if it becomes necessary after the fact, then beg for forgiveness, but do not start out limiting yourself by asking for permission...” This calculated view that ignorance is bliss is inherently flawed.

Whenever ethics are at issue, it is unquestionably better for any individual to take the proper initiative to ask for an ethics opinion. That is what “right” looks like. On a practical level and as a matter of preventive law, through complete, accurate, and ethical ethics advice, ethics counselors can substantially contribute to Department of Defense collective efforts in proactively guarding against any circumstances involving ethics in which the Department of Defense, our leaders, and team members would be displayed prominently and negatively within the media and to the American public.

Fulfill Your Ethical Duty

“Always do the right thing. This will gratify some people and astonish the rest.”

—Mark Twain

Ethical ethics counseling perfectly aligns with and is embraced

wholly within a government attorney’s guiding principles of wisdom, valor, and justice. Wisdom encompasses knowing the law and how to adeptly apply it to the relevant facts. Valor is exemplified through citing the law, unabashedly, and even when unpopular. Justice is advanced by facilitating conformity to rightness in action and attitude. ☺

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Endnotes

¹See DoD Standards of Conduct Office (SOCO) website at www.defenselink.mil/dodgc/defense_ethics. Scores of real-world examples of unethical conduct by Department of Defense personnel are discussed in the Encyclopedia of Ethical Failure: Dep't of Def., Office of the Gen. Counsel, Standards of Conduct Office, Encyclopedia of Ethical Failure (2012), available at www.dod.mil/dodgc/defense_ethics/dod_oge/eef_complete_2012.doc.

²DoD 5500.07-R., Joint Ethics Regulation (JER), § 1-404, Change 7, Nov. 17, 2011.

³Executive Order (E.O.) 12731, “Principles of Ethical Conduct for Government Officers and Employees,” Oct. 17, 1990.

⁴Joint Ethics Regulation (JER) DoD 5500.7-R. The JER supplements regulations issued by the U.S. Office of Government Ethics (OGE) at 5 C.F.R. § 2635. 5 C.F.R. § 2635 is the controlling regulation that the JER augments. The complete text of the JER and 5 C.F.R. § 2635 is available at www.defenselink.mil/dodgc/defense_ethics/index.html. See also, DOD’s supplement to the Standards of Conduct, found at 5 C.F.R. § 3601 et. seq. See also JER, Chapter 2, Section 2; and DOD Employee’s Guide to Standards of Conduct.

⁵JER § 1-212.

⁶5 C.F.R. 2635.107(b); See also *U.S. v. Schaltenbrand*, 930 F.2d 1554 (11th Cir., 1991).

⁷For a recent egregious example of unethical conduct, review

the Report of Investigation: Gen. William E. Ward, U.S. Army, Commander, U.S. AFRICOM, Inspector General Report No. 11-119226-153, Jun. 26, 2012 at www.dodig.mil/fo/Foia/PDFs/Ward-ROI_Redacted.pdf. William E. “Kip” Ward is a former U.S. Army 4-star general, previously commander of U.S. Africa Command (AFRICOM) from 2007 to 2011. After a 15-month inspector general investigation, the resulting report concluded that Gen. Ward “engaged in misconduct related to official and unofficial travel by using military aircraft and receiving reimbursement for expenses when the predominant purpose of the travel was personal”; “misused a Government vehicle”; “misused Official Representation Funds”; “wasted Government resources”; “misused his position by permitting staff members to perform personal services for him and his spouse”; and “accepted free meals and tickets to a Broadway show from a prohibited source.” Memorandum for Acting Inspector General, Jun. 26, 2012. Gen. Ward was demoted to the grade of lieutenant general for retirement and was required to repay approxi-

mately \$82,000 in improper expense payments. *See* Donna Mills, *Panetta: Ward Ruling Recognizes High Standard for Leaders*, American Forces Press Service Nov. 14, 2012, at www.defense.gov/news/newsarticle.aspx?id=118538.

⁸*See* Memorandum from Deputy Secretary of Defense to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, *et al*, Subject: Ethics, Integrity, and Accountability, 21 Dec 2010:

[C]onsider the appearance of your actions—whether they set the right example for peers and subordinates, and how they portray the Department in the eyes of the public. This is especially true for supervisors and managers, whom I expect to lead by example and whom I charge with creating an ethical culture in the workplace. We simply cannot tolerate ethical deviations or shortcuts.



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