

NATIONAL INSTITUTES OF HEALTH

Deputy Ethics Counselors / Ethics Coordinators' Meeting
Minutes: May 11, 2004 – 1:30 pm, 31/CR6

1. **New Attorney in OGC/ED**

Ms. Marilyn Rogalski was introduced as the new ethics attorney in OGC Ethics Division. She will be located at the NIH following orientation at the HHS office downtown.

2. **Activities with Foreign Entities**

Ms. Weaver discussed the issues involved with activities with foreign entities and the impact of the Emoluments Clause of the US Constitution. When an employee requests approval to conduct an outside activity with a foreign entity, first it must be determined whether that entity is part of the foreign government or a private entity, e.g., industry, private school, or other private organization.

If the foreign entity is an educational institution funded by the foreign government, the rationale in the University of Victoria decision by the Dept of Justice Office of Legal Counsel, can be used. In that decision, DOJ said that if an educational institution is sufficiently separate from the foreign government in its operations and decision making, it can be considered to be non-government for Emoluments purposes. When the Emoluments clause does not apply, an employee may engage in a compensated outside activity and accept travel reimbursement.

For other types of foreign government entities, there is less leeway. One must examine the management structure, funding sources, whether it issues stock and is traded on a foreign stock exchange, and who are the major share holders. Depending on the results of this investigation, the entity may or may not be considered 'foreign government.' For example, Air France is considered 'government' because the French government is the majority share holder of its stock. Even though one might consider it industry, because the French government holds most of the stock, the government then controls the company, and it is considered 'foreign government.'

Finding information is sometimes difficult. Search the organization's web site, the foreign government's web site, and obtain input from the individual inviting the NIH employee, to determine the government's level of control over the entity. Unlike the USA, most other countries control education. If the information is insufficient to justify it being a 'non-government entity' then the entity is considered governmental, and the employee could engage in the outside activity in a limited fashion, e.g., no compensation, no title, and the Foreign Gifts and Decorations Act applies. It is possible to have the foreign web site translated, but due to cultural differences and definitions, sometimes the translated text is not very helpful.

A new software named "Dialog" is available to help with searches, and to help find relationships between organizations.

ACTION: Ms. Ayres will send information about the new software to Ms. Weaver, who will review it for possible use.

ACTION: If a DEC makes a decision about a particular foreign entity, please send the decision and supporting information to the NIH Ethics Office (attn: Elton Croy) to be added to the NIH Ethics Program web site.

DECs and ECs must also be aware of issues relating to awards from foreign entities. Ms. Weaver discussed a document entitled “Lessons Learned: Awards” which mentions issues concerning awards from foreign entities.

ACTION: Ms. Weaver will share the handout with the ethics community.

3. **Self-Dealing with Private Foundations**

Ms. Weaver reminded attendees of the Internal Revenue Service code for prohibition for certain employees to engage in ‘acts of self dealing’ with private foundations. Covered employees include those whose salary is over a specified threshold (currently \$104,927 based on 2004 pay rates). Also covered are the special assistants, secretaries, and personal assistants to those covered employees. Acts of self dealing includes compensated outside activities.

When an employee requests approval of an outside activity with a foundation, it is imperative that you determine whether it is a private foundation. Check the NIH Ethics Program web site for the list of already evaluated foundations (Topics, Prohibited Compensation: Private Foundations). A link from that page to IRS Publication 78 permits you to search the IRS database for information on other foundations. In addition, you can contact the organization’s legal counsel to obtain a copy of the letter they received IRS designating them as private or not-private. If the foundation has multiple parts, e.g., several separate legal entities, the employee needs to provide an accurate name so the appropriate entity is identified and evaluated.

4. **NIH 2657, Supplement to the HHS 520**

Ms. Pohl discussed the issue of when the form is required, e.g., for compensated activities except for service on boards or committees. One of the choices in Part A is to choose type of activity, including Speaking. If the employee indicates that s/he is speaking, no other information is required. Therefore, there is no real need for this form except for consulting, legal consulting and/or testimony, and private professional health care practice.

Consulting vs. Board Membership – when to use form NIH 2657

Also, ethics staff need to carefully review the type of activity to be sure the correct response is chosen. For example, service on a board pertains to activities such as an editorial board. Service on a Scientific Advisory Board is really consulting and the employee must complete Part B and obtain the signature of the outside organization. SAB membership is considered consulting because it is normally a ‘closed-door meeting’ and the employee is using professional expertise to advise the outside organization. This is not the same as editorial boards where the employee reviews manuscripts and recommends revisions or publication.

Ethics staff must carefully review the request package, look for consistency between the invitation letter and the request, and which part of the NIH 2657 is completed, e.g., did the employee indicate a speech would be given but the invitation letter asks for consultation, even if it does not use the word ‘consult.’ It is better to have a clean request than to try to clean it up after the fact.

Other Issues

A single, discrete speech usually does not trigger 18 USC 208, unless that speech is part of a job interview process (covered relationship with prospective employer). Sometimes an invitation letter indicates a speech and ‘other discussions’ and the other discussions are actually employment discussions. Advice to an employee about when a speech does/does not trigger 208 can be based only on information disclosed by the employee. It may be necessary to remind employees that violation of 208 is a criminal issue so the employee discloses all relevant information. If an employee gives a single, discrete speech not related to a job interview, there is no covered relationship under 208, though the employee still would have an appearance of conflict issue under 5 CFR 2635 if s/he

were involved in an official particular matter concerning the organization which invited him/her to speak during the one-year cooling off period after giving the speech as an outside activity.

5. What Constitutes a Position Description for Attachment to a HHS 520 Package?

Many employees do not have a standard position description because their pay mechanism does not require it, for example, Title 42 (AD, SBRS, etc). Attendees discussed what document would fill the requirement for employees who do not have a PD, including the following options:

- Performance contract, which gives information about expectations, but does not always address specific areas of work.
- One page or less succinct summary of current work and assignments, which provides relevant information about current work against which the outside activity request can be compared.
- The employee's 'old PD' prior to conversion under Title 42 to AD.
- For intramural, the "Z01" summary, which is available for all intramural researchers via the NIH intramural web site: <http://intramural.nih.gov/search>

6. Unnumbered Supplemental Information Form: What Constitutes an Adequate Response?

Question 1: Needs to indicate what the employee is actually doing now, not a general PD-type description. Language from the Z01 would be good for intramural staff, and similar language for extramural and administrative staff. If the DEC/EC cannot understand what the employee is really doing, then ask the employee to produce something else more descriptive and specific.

Question 2: Needs to indicate what the outside activity entails, e.g., the specific activity, topic, or function, in enough detail that the reviewer can understand the extent of the activity.

Question 3: Needs to compare the responses above and draw a conclusion why the requested activity is more appropriate as an outside activity. It is not sufficient to say "It's not in my PD" or "my official duties do not involve xxx." This response must compare, contrast, and conclude.

7. Brown Bag on Thursday, 5/13

This extra meeting is to permit discussion of the 'nuts and bolts' of running an ethics office, general implementation issues. Ms. Jaffe scheduled the brown bag meeting for every other Thursday to permit extra discussions. Future brown bag meetings will try to be planned for weeks other than the week when the regular DEC/EC meeting is held.

Thursday, May 13, 12:30 pm, Bldg 50, Room 5328

8. Recent Request for Voluntary Information re: Compensation for Outside Activities

Some ICs received information from more employees than was expected.

9. OGE Audit Report: The OGE analysts visited NIH during the week of May 3rd. No report has been issued.

10. GAO Audit: Focus is implementation issues, e.g., how has NIH implemented the statutes and regulations. The GAO staff will visit NIH later in the summer.

Next Meeting: Tuesday, June 11, 2004, 1:00 pm, Bldg 50, Room 1227