

# NATIONAL INSTITUTES OF HEALTH

## Deputy Ethics Counselors/Ethics Coordinators

Minutes – June 8, 2004

1:30 pm – Bldg 50, Room 1227

- 1. NIH 2657, Supplement to the HHS 520** Steve Hausman  
Is it necessary for Part D of the 2657 (agreement for professional health care practice) to be signed by the IC Ethics Official? Most DEC's apparently do not sign this section. Would the DEC signature on the 520 suffice?

**ACTION:** NIH Ethics Office staff will check into this to see if it needs to be signed or if the signature on the front of the 520 is sufficient.

- 2. Who Needs to Know about 520s?** Steve Hausman  
The issue discussed is who should know whether an employee has an outside activity besides the supervisor. It seems that there is variability across the ICs. In at least one IC, the Director wants to know about every outside activity that is proposed. In others, only the supervisor knows and not a higher level official. It was suggested that NEAC propose a process to ensure that the IC Director is in the loop to be notified, although not necessarily put into the routing process for approval. It was also mentioned that it is the job of the DEC to make sure that those who need to know are notified.

**ACTION:** NIH Ethics Office staff will discuss with NEAC to propose an NIH-wide policy.

- 3. Keeping IC Staff Informed about Ethics** Steve Hausman  
One way to keep the IC staff informed about ethics is to give presentations at meetings, such as at a retreat. Dr. Hausman just returned from the NIAMS intramural scientific retreat where he once again had a poster presentation on ethics. He will share the information with any interested DEC or EC.

- 4. NIH Ethics Office Update** Holli Beckerman Jaffe  
One purpose of the NIH Ethics Office is to be a resource for the IC ethics programs. Ms. Jaffe praised the NIH ethics community for the work they are doing, for their good communication, and their good working relationships with their employees. Such high level of competence is a plus for the overall NIH Ethics Program. Even though Dr. Kington is signatory for some IC employees, that does not decrease the role or importance of each IC DEC, EC, and ethics office functions. Ms. Jaffe indicated two specific action items:

**ACTION:** Each IC DEC/EC is asked to call Ms. Ward in the NIH Ethics Office (402-6628) to schedule a one-on-one meeting with Ms. Jaffe, and to bring a list of questions, pending items, and any other topics for discussion.

**ACTION:** IC ethics staff will please address all packages for the NIH Ethics Office to Ms. Mattie Ward, who will log them in and forward to the appropriate staff member for handling.

- 5. Review of SF 278s** Holli Beckerman Jaffe  
After reviewing Part D, Outside Positions, note in the "Reviewer's Comments" section that an approved 520 is in place for each activity. If an activity is listed but no approved 520 is in place, obtain and process the 520 package first. The report cannot be certified until all listed activities are

covered by an approved 520 because the review and approval process for the 520 confirms that no conflicts exist.

## 6. **Congressional Hearings / Spreadsheet Information**

Holli Beckerman Jaffe

Another hearing is scheduled for June 22, 2004. Even though the NIH informed Congress that the spreadsheets contained some confidential information, e.g., earnings, Congressional staff used the information in slides that were shared with the public and the press. It is imperative that the dates on the spreadsheet match the years of reported income. For example, an activity ended in 2001 but there was income reported for 2002. Therefore, it is necessary to report actual end dates not the original projected end dates for continuing activities.

The discussion included how to prove/disprove that a particular activity was approved at the time income was received. It is the employee's responsibility to ensure that each activity is approved prior to engaging in it. In addition, ethics staff are supposed to request that continuing outside activities are renewed annually (some ICs still use the old HHS 521 form; though use of the form is not required, obtaining the annual updated information is required).

One specific topic of interest to Congress is whether employees are appropriately disciplined for engaging in unapproved outside activities. Therefore, NIH needs to show progressive discipline, and verbal counseling can be the first step. Counseling is then documented, e.g., a note to file stating that the activity occurred, the employee was counseled about the requirement for advance approval, and approval was obtained (or the activity was disapproved if appropriate, and stopped). Generally, the first time this happens, the employee may keep the income already received, but if the employee continues to engage in unapproved outside activity, the DEC may require that the employee return the money. With the current changes and requirement to resubmit all continuing outside activity requests, employee activities should now be approved.

When an employee commences an activity without waiting for approval, Dr. Kington may approve the activity but disapprove the compensation. DEC's are also expected to take a proactive position and enforce the advance approval requirement and progressive discipline for infractions.

Some ICs already function in this manner, e.g., NCI requires the employee to send a copy of the letter accompanying the returned funds (but not a copy of the check), which is added to the 520 file.

## 7. **OGE Congressional Hearing**

Holli Beckerman Jaffe

On May 12<sup>th</sup>, the Acting Director of the Office of Government Ethics (OGE), Ms. Marilyn Glynn, testified before Congress. She discussed OGE guidance on awards. Her testimony was distributed via DAEOgram 04-011 (May 27, 2004) and is available on the OGE website:

[http://www.usoge.gov/pages/daeograms/dgr\\_files/2004/do04011.pdf](http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04011.pdf)

Ms. Glynn discussed the issue of an employee's performance affecting or not affecting the awarding organization, and lecture awards and some considerations for determining whether it is a request to give a lecture (possible outside activity) vs. a bona fide award, e.g., whether the organization advertises it as a named lecture or as an award.

## 8. **Recusals**

Holli Beckerman Jaffe

The Office of Government Ethics (OGE) recently released a DAEOgram regarding recusal documents, including a template for a recusal screening agreement. See DAEOgram 04-012:

[http://www.usoge.gov/pages/daeograms/dgr\\_files/2004/do04012.pdf](http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04012.pdf)

which expands on their earlier DAEOgram 99-018 regarding recusals:

[http://www.usoge.gov/pages/daeograms/dgr\\_files/1999/do99018.txt](http://www.usoge.gov/pages/daeograms/dgr_files/1999/do99018.txt)

It is important that employees understand what a recusal means. Recently, it was found that some employees think that because they signed “a document,” it gave them permission to participate in an official matter concerning the outside organization, treating the recusal like an authorization or waiver rather than disqualification. All three documents are legal documents, and if we require employees to sign when it is not required by statute or regulation, it then adds the legal requirement that was not there in the statute or regulation.

It was emphasized that ethics staff need to ensure that employees understand the requirements of all three documents, and the differences between them, and to require written recusals only when appropriate. In addition, the documents must be very clear about what is covered and the required and/or permitted employee action.

Attendees were reminded to contact OGC Ethics Division to review draft waivers before they are signed and implemented.

**9. Inspector General Investigation**

Holli Beckerman Jaffe

The Inspector General is now asking for financial disclosure reports covering 2003, though they understand that all reports may not be certified. Reports covering 2003 for all filers identified as of February 2004 will be requested in the near future.

**10. Update on OGE Equivalency Determination**

Gretchen Weaver

Ms. Weaver is continuing to work with the Department, human resources, and the OGE on the recently submitted request for an equivalency determination for over 500 positions and individuals at the NIH. The Ethics in Government Act specifically excludes GS employees from filing a public financial disclosure report (SF 278) but there are many extramural directors whose positions and responsibilities appear to be SES equivalent. Ms. Weaver will continue to work with all parties until OGE's questions are answered and a determination is made, probably within the next 60 to 90 days.

Many of the 508 individuals already file a confidential financial disclosure report, but the requirements of the public report are significantly more rigorous. Therefore, Ms. Jaffe indicated that she will consider providing some hand-on training for the employees to assist them to complete their New Entrant reports.

**11. FDA Outside Activities:** FDA issues a statement that they reviewed all of their approved outside activity requests and found no conflicts. FDA will probably also have more employees subject to filing a financial disclosure report, i.e, lowering the level for which all employees must file.

**12. Blue Ribbon Panel Report:** Dr. Zerhouni is close to a decision regarding which recommendations he will accept, reject, and/or expand. Some of the recommendations require a regulation change, which could take several months.

**13. Processing Travel Orders and Official Duty Activity Requests**

Holli Beckerman Jaffe

Travel orders for IC Directors are signed by Ms. Colleen Barrow, Acting NIH Deputy Director for Management. Prior to submission of a travel request, the official duty activity needs ethics clearance, which is accomplished separately from the travel order approval. For now, obtain appropriate ethics clearance for your IC Director's official travel, and then submit the travel request. Some ICs are submitting the package together with an appropriate route slip to save time. This is acceptable.

Dr. Kington is considering the development of a 'blanket' approval for IC Directors for managing their own local official travel, such as an annual approval memo. This would reduce the review and approval work for Dr. Kington, for the NIH Ethics Office staff, and for the IC Director and ethics staff.

Suggestions for a workable process are welcome. Keep in mind that ethics clearance will still be required once the process is determined and implemented.

Other individuals for whom Dr. Kington is the DEC will still submit their official duty activity requests through the NIH Ethics Office. Following signature, the requests will be returned to the IC where the travel order is processed and approved internal to the IC.

**ACTION:** Members of the ethics community may submit their suggestions for the 'blanket' approval process to Ms. Jaffe.

**ACTION:** NIH Ethics Office staff will disseminate the new procedure once it is finalized.

#### 14. **Outside Activities with Law Firms**

Holli Beckerman Jaffe

Discussion centered on reaffirming that consulting for a law firm entails an outside activity with not just the law firm, but with the client of the law firm. Employees must divulge the client or the activity cannot be approved. In addition, an employee who is contacted in his/her private capacity as a health care provider to consult for a law firm must still obtain permission for the consulting activity; it cannot be treated as part of the outside health care practice. Permission for engaging in private health care practice applies only to the specific health care practice, not to other activities resulting from participation in the original outside activity.

Long term continuing consulting for a law firm is no longer permitted. Employees must seek and receive permission for each case in which they would be involved, even if with the same law firm with whom they had a previous activity. The same conditions apply for expert testimony, which requires approval for testimony for each case. Testimony includes a written report or other document.

For clarification, the following explanations/definitions are provided:

- **Expert testimony** is a short-hand term for "service as an expert witness," the terminology used in the Standards (5 CFR 2635.805). The term is broad enough to cover providing a written report (especially where that report, by rule or custom, will be shared with opposing counsel), appearing for a deposition, or otherwise providing information or testimony under oath, when the employee is not a fact witness.
- **Consulting with a law firm** is a fairly preliminary activity, and should not involve written reports or opinions. Law firms often consult as they formulate their theory of a case, identify issues, etc. These consultations are typically verbal, although the physician or other professional may have reviewed paper records before having the discussion with the attorney.

Attendees were reminded that employees must obtain separate approval to serve as an expert witness, unless it was included in the original request. For example, an NIH physician providing patient care in a local facility as an outside activity cannot be an expert witness based on that outside position. If the physician is asked to provide expert witness services as a result of that position, s/he must still obtain advance approval to serve as an expert witness. Emphasize to your employees the need to be thorough in describing the extent of consultation and expected activities with law firms to avoid unapproved expert witness service.

An employee who happens to be an attorney may receive approval to conduct private legal practice without identifying each client. The blanket approval would permit the attorney to practice in a state court, as long as no other statutes or regulations are violated (e.g., representational or partnership income resulting from federal case).

**Reminder:** Only the HHS DAEO can approve service as an expert witness in relation to a case pending or to be filed in Federal court. That request must receive approval by the supervisor and DEC prior to review/decision by the DAEO. See the sample memo distributed at the 2003 HHS DEC Workshop for requesting DAEO approval.

**Next Regularly Scheduled DEC/EC Meeting:** Tuesday, July 13, 2004; 1:00 pm  
Bldg 50, Room 1227