THE STATUS OF FEDERAL EMPLOYEE DISCLOSURES TO AGENCY ETHICS OFFICIALS

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Federal executive branch departments and agencies have officials designated pursuant to the Ethics in Government Act who handle government ethics matters. There are many duties of designated agency ethics officials, and those working under their supervision in the government ethics area, who can be attorneys, personnel specialists or other professionals and those working under supervision in the government ethics area. One primary responsibility is to provide interpretation and advice for the agency and its employees regarding the agency standards of conduct,[1] Executive Order 11,222 of 1965[2] and the conflict of interest laws.[3] Additionally, government ethics training and education are provided for agency employees. Ethics officials also review financial reports filed by high-level executive branch employees under Title II of the Ethics in Government Act of 1978[4] as well as mid-level employees' reports required under executive order and agency regulations. Another important function of the ethics officials is to identify and resolve conflicts of interest. The various ethics duties can lead to tension between the roles of agency ethics officials. This article deals with the status of employee disclosures in government ethics counseling ses-

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1 The standards of ethical conduct for executive branch department and federal agency employees are set forth in the regulations of the respective agency. *See, e.g.*, 22 C.F.R. § 10.735-101 to -411 (1988) (Department of State); 17 C.F.R. § 200.735-1 to -18 (1988) (Securities and Exchange Commission). For the minimum standards of conduct required of all federal agency employees, see 5 C.F.R. § 735-101 to -411 (1988).

2 Exec. Order No. 11, 222, 3 C.F.R. 306 (1965), *as amended by* Exec. Order No. 11,590, 3 C.F.R. 153 (1972); Exec. Order No. 12,565, 3 C.F.R. 229 (1987), *reprinted in* 18 U.S.C. § 201 (1982 & Supp. IV 1986).

3 *See* 18 U.S.C. §§ 202—209 (1982).

4 5 U.S.C. app. 3 §§ 201—212 (1982 & Supp. IV 1986).

sions in light of this tension. Also discussed briefly is the topic of disclosures on employee financial forms.

Discussions by federal employees with their ethics officials focus on a variety of matters including financial interests, outside employment, gifts and post-government constraints. Sometimes, these discussions can be general and non-sensitive. At other times, employees seeking ethics guidance will reveal personal finances, conduct and future plans constituting private matters which should be protected from rebroadcast, except in narrowly circumscribed instances. Usually such disclosures will be used by the ethics official to help the employee understand applicable rules of conduct, avoid conflict situations or correct any existing problems without the need to divulge the information to a third party. However, when an employee discloses to the ethics official evidence which indicates commission of a crime or violation of the agency's conduct regulations, a question arises whether the communication is privileged or confidential, or must be disclosed to the appropriate law enforcement authorities.

Under the current state of law and practice among federal departments and agencies, the answer is clear—no attorney-client or other privileged relationship arises. Indeed, executive departments and agencies are required to report to the Attorney General information of violation by a government official of the federal criminal code.[5] Several of the larger departments have inspectors general who are empowered under law and agency regulations to conduct internal investigations of possible employee misconduct. The ethics official, since no privilege attaches to employee disclosures of criminal or other wrongful conduct, should inform the inspector general's office or other appropriate agency investigative unit of an indication of wrongdoing. The appropriate investigatory office would then review the matter and, if evidence of criminal misconduct were present, initiate a referral to the Department of Justice.

The need to disclose to investigatory authorities creates a dilemma for the ethics official. Some of the same considerations that led to the creation at common law of the attorney-client priv-

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[5] 28 U.S.C. § 535(b) (1982). This section provides the following general rule:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . . .

Id.

ilege are paralleled in the ethics counseling situation. Agency employees are encouraged to talk freely with the ethics official, in the counseling role, about government ethics matters of concern to them. In the course of candid discussion of ethical issues, an employee can come to trust the ethics official as an adviser. As previously noted, providing guidance is an important part of the ethics official's job. The trust engendered may well give rise to an expectation on the part of the agency employee, unless informed to the contrary, that matters disclosed to the ethics official will be held in confidence. These considerations will allow full and frank discussions on the part of employees. Yet as this free-wheeling discussion unfolds, there is a possibility of self-incrimination or statements against interest by an employee.

When evidence of violation of criminal laws or other misconduct is divulged, another role of the federal ethics official is brought into play, that of an agency attorney (or other professional) who has a duty to identify and resolve conflicts of interest or even refer the matter to the proper law enforcement authorities through appropriate agency channels. The ultimate allegiance of the ethics official is not to the employee, but to the United States government department or agency. In this role, the ethics official may well be perceived by employees as a law enforcement officer or an informant.

In the counseling session, the transformation of the ethics official from adviser to agency representative can occur almost instantaneously once the employee appears ready to make damaging statements. In light of the perception by many employees of the ethics official as an impartial adviser, rather than as an investigator or informant, the potential role reversal calls for some explanation in advance in order to make the situation clear to the employee seeking government ethics guidance.

A warning that any evidence of ethics or criminal violations which the employee discloses will have to be revealed to investigatory authorities would seem appropriate. The usual ethics counseling situation bears little resemblance to a custodial interrogation in which a particular individual is under suspicion so as to create a right to legal counsel. Thus, full *Miranda*-like warnings do not seem necessary. Rather, adequate notice of the dual roles of the ethics official and the lack of privilege or confidentiality should be given. The timing of such notice is important.

Some agencies include this notice in their conduct regulations.[6] This is a good idea and constitutes constructive notice to employees. Even so, the matter should also be addressed in any counseling session in which an employee appears ready to make damaging statements. An employee may not have read the regulations or may have misunderstood the notice or forgotten it. Actual notice explained in person when appropriate will focus attention on any written regulatory notification. If the agency does not have such notice in its regulations, notice on the spot becomes all the more important. A warning notice given at the commencement of each counseling session would in many cases be awkward and might inhibit recourse to and frank discussions with ethics officials by certain agency employees. Giving a warning immediately upon the first indication that an employee is about to incriminate or make statements against interest seems preferable, especially since most counseling sessions do not get into areas of potential employee liability. Should the topic of the status of disclosures come up during a counseling discussion, notice would then be appropriate as well.

A related matter is what should be done if an employee does make incriminatory or other statements against interest even after notice of the consequences is given. The ethics official should probably halt the interview, perhaps with some advice that the employee consider consulting a private attorney. In addition, of course, the inspector general's office or other agency investigative unit should be involved at this point. This combination of actions by the ethics officials would avoid any possible harm to an employee's legitimate interests or to the agency's investigatory process should an ethics official, who usually will not be an experienced investigator, attempt to explore areas of potential criminal or other wrongful activity with an employee. It seems best to leave such matters to the proper agency investigatory authorities.

The issues encountered with respect to employee disclosures to ethics officials in counseling sessions are also present as regards information provided on personal financial reports required of high-level and mid-level federal employees under the Ethics in Government Act of 1978,[7] Executive Orders 11,222[8]

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6 *See, e.g.*, 17 C.F.R. § 140.135-16(d), n.28 (1988) (commodity Futures Trading Commission).

7 5 U.S.C. app. 4 §§ 201-212 (1982 & Supp. IV 1986).

8 *See* Exec. Order No. 11,222, 3 C.F.R. 306 (1965), *as amended, reprinted in* 18 U.S.C. § 201 (1982) (Supp. IV 1986).

and agency regulations.[9] Some information called for on the report may reveal conflicting interests or activities (a financial holding, gift or trip) which violate an agency's ethics regulations or organic statute or even the federal criminal conflict of interest laws. Moreover, truthful responses must be given on the financial report.[10]

The instructions to the Ethics Act financial report form, Standard Form 278, give notice of the false statements statute and of the $5,000 civil money penalty provision for knowing or willful falsification or failure to file or report required information.[11] Notice is also given that refusal to comply with the reporting requirement can subject the employee to any appropriate administrative disciplinary action. The subject of incriminatory or other statements against interest is not discussed on the report form. In light of the considerations set forth in this article, a question arises whether that subject should also be addressed on the form. A refusal to provide information required, even on such a basis, could be grounds for the administrative sanctions noted, subject to due process protections and any constitutional right against self-incrimination that might be present in the circumstances.

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9 *See, e.g.*, 5 C.F.R. § 735.401-.412 (1988) (providing minimum standards for non-public finanical reports by certain mid-level agency employees). Revised regulations on this subject are being prepared by the Office of Government Ethics.

10 *See* 18 U.S.C. § 1001 (1982) (prohibiting knowing and willfully false statements on Federal Financial Reports).

11 *See* 5 U.S.C. app. 4 § 204 (1982).