REPORT OF THE COMMITTEE ON ETHICS*

I. INTRODUCTION

On July 23, 1991, the Office of Government Ethics proposed a massive overhaul of the "Standards of Ethical Conduct for Employees of the Executive Branch" (Standards).[1] The purpose of the revision was to create a uniform set of standards for the officers and employees of the federal government.[2] The proposal addressed a wide range of topics: gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities,[3] The final rules were promulgated on August 7, 1992, and became effective on February 3, 1993.[4]

These regulations are important, not only to the hundreds of attorneys who are officers or employees of the executive branch, but to the thousands of private attorneys and other citizens who deal with these officers and employees. Questions of limitations on entertainment and gifts, questions regarding former, outside, and future employment, issues of appropriate speech topics or teaching activities, matters of financial disclosure, and concerns about involvement in professional organizations are all addressed in these Standards and related regulations.

The answers to ethical questions with respect to federal officers and employees are neither easy nor obvious. An awareness of the existence and location of these regulations is essential to any practitioner in the federal regulatory arena. Detailed knowledge of the regulations is needed by many, but is beyond the scope of this report. Our task has been to try to heighten the awareness of energy practitioners to a few of the facets of these regulations and some of the problems that attorneys may encounter in dealing with ethical matters under the scope of these regulations. We also want to make the energy bar aware that the federal ethical regulations have been strongly criticized by many respected commentators.

There are numerous pitfalls in the rules that could trap the unwary. For example, the federal ethics rules prohibited acceptance of any payment for outside activities, including activities unrelated to the duties of the employee, such as teaching music or speaking at a garden club. Nor did the new regulations achieve the goal of uniform ethical standards. As discussed *infra* section C, certain officers and employees of the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC)

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1. Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33,778 (proposed July 31, 1991) (codified at 5 C.F.R. § 2635) (1993).

2. 56 Fed. Reg. at 33,778.

3. *See, e.g.*, Letter from Sheila S. Hollis, President, Federal Energy Bar Association to Stephen D. Potts, Director, Office of Government Ethics (September 17, 1991) (transmitting the comments of the Federal Energy Bar Association opposing the proposal to ban federal employees participation in professional organizations).

4. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (1993).

remain subject to broader financial disclosure requirements than other federal employees, although the gap is narrowing. Other proscriptions run counter to the expectations of the legal community. Attorneys are generally considered to have some duty to engage in or support *pro bono publico* activities.[5] As discussed *infra* section B, the federal ethics regulations can seriously restrict such activities by government lawyers. In a number of areas, the scope and application of the regulations is left to employees of individual agencies, creating the likelihood of inconsistency and the opportunity for favoritism and over-zealous enforcement, for example, when an agency designee decides whether a spouse may accompany a federal employee to an event that the employee is attending without charge.[6] In some cases, the restrictions seem to lack internal consistency. For example, an Air Force attorney can be paid for teaching a procurement law course at an accredited law school but not for participating in a one-day procurement law seminar at the same law school.[7] The latter example was taken from the thoughtful, detailed, and scathing critique of the federal ethics regulation by the ABA Committee on Government Standards.[8] The purpose of the ABA Committee was to respond to disturbing trends that were viewed as adversely affecting government service, i.e., that public confidence in the ethics of government officials was eroding, that public service was no longer considered a high calling, and that conscientious government employees were being increasingly burdened with impractical and offensive ethical restrictions that did little to restrain true improper conduct. The ABA Committee's Report is centered on the fundamental proposition that complex, formalistic regulations are taking the place of supportive, institutional cultural values.

The ABA Committee did not merely complain that the new Standards and related regulations were overly broad, overly complex, and misguided, and then leave it to the Office of Government Ethics to remedy the situation. The ABA Committee's Report proposes to restructure the entire system of federal ethics standards. With respect to each ethical area regulated, the ABA Committee examines the rationale for regulation and the best means of implementing ethical regulations which reflect our societal values with the least restriction on the individual consistent with those goals. The

5. *See e.g.*, D.C. Rules of Professional Conduct, Rule 6.1 (1993).

6. 5 C.F.R. § 2635.204(g)(6) (1993).

7. ABA Committee on Government Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 324 (Summer 1993).

8. Professor Cynthia Farina, Reporter, Sally Katzen, Chair, Members: William H. Allen, Esq., Honorable Marshall J. Breger, Chief Judge Stephen G. Breyer, Kathleen A. Buck, Esq., Benjamin R. Civiletti, Esq., Stuart E. Eizenstat, Esq., Ernest Gellhorn, Esq., Honorable C. Boyden Gray, Honorable Erwin N. Griswold, Professor Geoffrey Hazard, James F. Hinchman, Esq., James P. Holden, Esq., Jerome G. Lee, Esq., Honorable James C. Miller, Alan B. Morrison, Esq., Steven R. Ross, Esq., Honorable John H. Shenefield, Honorable R. Gaull Silberman, Judge Walter Stapleton, Thomas M. Susman, Esq., Catherine Walker, Esq., W. Lawrence Wallace, Esq., and Honorable William H. Webster.

ABA Committee views that effective regulation must reflect the following characteristics:[9]

Moral Resonance. The system must reflect, not only the law, but societal views of right and integrity.

Clarity of Purpose. The connections between the goals of specific ethics regulations and the values that the regulations are intended to reflect must be clear.

Non-Triviality. The rules must not be perceived as "petty, mean-spirited, or hypercritical". Their thrust should not be diverted by "carping concern with peccadillos."[10]

Practicality. The regulations must be realistic in their expectations and enforceable.

Equity. The rules must operate fairly and rationally. The integrity of the ethics system is compromised when the application of the rules is tainted by political expediency.

Proportionality. The rules must reflect balance and appropriateness.

Based upon these principles, the ABA Committee scrutinized each major type of activity regulated by the new ethics Standards as well as a number of related statutes and regulations. The ABA Committee then proposed to revamp the entire scheme of ethics regulations to produce a coherent, uniform body of law that would maintain both the reality and perception of public office as public trust, without resort to the empty formalism that the ABA Committee fears is replacing our societal definition of integrity on the part of public servants.

II. Compensation for Appearances, Teaching, Speaking or Writing

The Standards ban compensation for speaking and writing that relates to an employee's official duties.[11] Related regulations[12] prohibit federal employees from accepting honoraria for any speaking, writing, or appearances whether or not related to the official duties of the employee.[13] The implementing regulations, illustrated in examples of prohibited conduct

9. 45 Admin. L. Rev. at 293-96.

10. *Id.* at 295.

11. 5 C.F.R. § 2635.807(a) (1993).

12. Limitations on Outside Employment and Prohibition on Honoraria, 5 C.F.R. § 2636.201-205 (1993); 1992 Ethics in Government Act, 5 U.S.C. § 501-5.

13. There are some narrow exceptions to this blanket prohibition: incidents of attendance; copies of publications; actual travel expenses unrelated to official duties; costs of production of an appearance, speech, or article; compensation for goods or services other than appearing, speaking, or writing; salary or wages of the employee's usual employer; teaching a government training course involving multiple presentations; teaching a regularly established course with multiple presentations at an institution of higher education; an award for artistic, literary, or oratorical achievement made on a competitive basis; witness fees; compensation for activities prior to January 1, 1991; payment for a series of three or more different but related appearances, speeches, or articles when the subject matter is not related to the official duties or status of the employee; or an appearance demonstrated or displaying an artistic or athletic skill or similar skill or talent. Limitations on Outside Employment and Prohibition of Honoraria, 5 C.F.R. § 2636.203(b)(1) (1993).

that are provided in the regulatory text, are very broad. Hypothetically, a Department of Justice attorney may not accept compensation for a speech concerning the design of a Victorian rose garden,[14] nor may a personnel specialist employed by the Department of Labor receive compensation for an article on collecting arrowheads.[15]

In March, 1993, the United States Court of Appeals for the District of Columbia Circuit held that the ban on honoraria in the Ethics in Government Act,[16] and its implementing regulations,[17] were unconstitutional violations of the First Amendment rights of federal employees.[18] This case is all the more interesting because six weeks before, the same circuit upheld the Office of Government Ethics regulation that prohibited executive branch employees from accepting compensation, including travel expense or meals, for speaking or writing on matter that focuses specifically on their official duties.[19]

In *Sanjour*, employees of the Environmental Protection Agency (EPA) challenged regulations prohibiting executive branch employees from accepting any compensation, including travel expenses and meals, for speaking or writing on subject matter related to their official duties.[20] The employees frequently delivered speeches criticizing EPA policies and accepted reimbursement from the sponsoring organizations for the cost of travel and meals. They argued that the regulations violated their First Amendment right of free speech.

The decision, written by Judge Sentelle, rejected the appellants' challenge. The majority applied the balancing test from *Pickering v. Board of Education*,[21] weighing the government's interest in the regulation against the burden suffered by the individual as a result of the restriction of their rights.[22] The court then found that the government's interest in eliminating the appearance of impropriety through its regulation outweighed the burden to employees.[23] The court was convinced that the burden imposed by the regulation was minor. The regulation, in the view of the majority, did not prohibit speech itself, but only compensation for speech. The court did not address the extent to which ethics regulations regarding compensation for speech might be the vehicle for suppressing dissent.

Judge Wald dissented, chastising the majority for trivializing the regulation's intrusion on employees' First Amendment rights. Wald argued that government employees have modest incomes and, realistically, would not be able to travel to make speeches without reimbursement for travel

14. 5 C.F.R. § 2636.203(c) (example 1) (1993).
15. 5 C.F.R. § 2635.807(a)(1)(iii) (example 1) (1993).
16. 5 U.S.C. § 501-5.
17. 5 C.F.R. § 2636.201-5 (1993).
18. National Treasury Employees Union v. United States, 990 F.2d 1271 (D.C. Cir. 1993).
19. Sanjour v. EPA, 984 F.2d 434 (D.C. Cir. 1993).
20. 5 C.F.R. § 2636.202(b)(1992).
21. 391 U.S. 563 (1968).
22. Appellants had urged utilization of a strict scrutiny standard under which the government must prove a compelling interest to justify its restriction of constitutional rights.
23. *Sanjour*, 984 F.2d at 448.

expenses. In addition, she was not persuaded that the regulations were consistent in their approach to preventing the appearance of impropriety. She pointed out that the regulations prevented employees from accepting even train fare for unofficial speeches, while allowing EPA officials on official business to travel first class and dine at five star restaurants. Wald pointed out that the excesses of the latter would raise greater appearances of impropriety in the eyes of the public.[24]

Six weeks later, the D.C. Circuit[25] invalidated the portions of the Ethics in Government Act and its implementing regulations[26] that banned federal employees from accepting honoraria.[27] As in *Sanjour*, the court employed the balancing test of *Pickering*. Here, however, it concluded that the ban on honoraria significantly interfered with the First Amendment rights of federal employees. Although the *National Treasury* court agreed that the government retained an interest in guarding against the appearance of impropriety on the part of its employees, it found that the ban on honoraria "reaches a lot of compensation that has no nexus to government work that could give rise to the slightest concern."[28] Critically, the court pointed out that the statutory honoraria ban appears in legislation concerning Congressional pay and was never intended to apply to executive branch employees. The *National Treasury* court did not directly address the continued vitality of *Sanjour*. Thus, the current state of the law is that the ethical restrictions on compensation related to the exercise of the First Amendment rights of federal employees are valid only with respect to speech related to official duties.

III. Pro Bono Activities

In addition to establishing rules and guidelines with respect to the ethical considerations and prohibitions relating to executive branch employees' outside activities for compensation, the Standards also generally delineate rules for so-called "Outside Activities" that encompass *pro bono publico* work by government attorneys.

Commenters in the past have complained that, broadly read, applicable federal statutes and regulations can be construed to severely limit, if not outright prohibit, government attorneys from rendering pro bono assistance even when such representation is wholly unrelated to that particular employee's government duties. For example, Lisa L. Lerman, in her article *Public Service by Public Servants*,[29] noted this problem and pointed out:

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24. *Id.* at 458. *Cf. Primetime Live* (ABC television broadcast on Jan. 21, 1994), (exposee of Congressmen and their staff being entertained at Florida resorts with all expenses paid by associations and lobbyists.)

25. National Treasury Employees Union v. United States, 990 F.2d 1271 (D.C. Cir. 1993).

26. 5 U.S.C. § 501(b); 5 C.F.R. § 2536.202 (1993).

27. As noted above, *honorarium* is defined as a payment of money or anything of value for an appearance, speech or article. 5 C.F.R. § 2536.203(a)(1993).

28. 990 F.2d at 1276.

29. 19 Hofstra L. Rev. 1141 (Summer 1991).

> The significant question is not the technical one of whether government service satisfies the duty to do pro bono work, but whether, as a matter of public policy, the federal government should prohibit, permit or encourage its attorneys to donate some services to indigent individuals or groups who need lawyers or to participate in other public service activities.[30]

The new Standards do not directly address the subject of pro bono legal representation. However, subpart H, which deals with "Outside Activities," specifically covers "uncompensated activities"[31] and contains numerous sections that, when broadly read, potentially limit, or at least discourage, a government attorney from rendering pro bono assistance. For example, § 2635.801(c) provides:

> Outside employment and other outside activities of an employee must also comply with applicable provisions set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee shall endeavor to avoid actions creating the appearance of violating any of the identical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

Theoretically, at least, this broad prohibition could discourage pro bono activities. Many commenters have lamented this chilling effect on pro bono representation and argue that Congress should develop a more narrowly tailored regulation "that better accommodates the legitimate interests and desires of employees, as well as of the government, in the pro bono area."[32] Subpart H of the Standards specifically cites 18 U.S.C. § 205, that contains a broad prohibition against any outside employment by any government employee, regardless of compensation, when the federal government is involved. A government employee is prohibited from:

> acting as agent *or attorney* for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in *any particular matter* in which the United States is a party or has a direct and substantial interest.[33]

Thus, a prospective pro bono government attorney is faced with determining whether the particular case triggers this statutory prohibition within the broad ethical considerations required by the new Standards. As part of this determination, a government attorney must 1) avoid any outside employment or activity that conflicts with his or her official duties;[34] and 2) when required by supplemental agency regulation, he/she must seek prior approval before engaging in outside employment or activities.[35]

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30. *Id.* at 1143.

31. Section 2635.801(a) states, in part, that: "This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to *uncompensated as well as compensated outside activities.*" (Emphasis supplied.)

32. *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 326 (Summer 1993).

33. 5 C.F.R. § 2635.801(d)(4) (emphasis supplied).

34. *Id.* § 2635.802.

35. *Id.* § 2635.803.

Even prior to the Standard's promulgation, Ms. Lerman noted that a government attorney, faced with the statutory prohibitions of 18 U.S.C. § 205, had no clear guidelines with respect to what exactly would constitute prohibited representation and what would not: "What is needed is a definition of client that avoids any actual or apparent conflicts but does not prohibit pro bono work that is not problematic."[36] Moreover, in the preamble to the final Standards, the Office of Government Ethics specifically declined to delineate even guidelines for what would be considered specific activities subject to agency approval.[37] Specific agencies are required to include any requirements for agency approval of outside activities in its supplemental regulations implementing the new Standards. Hence, government attorneys contemplating pro bono representation continue to have no clear guidelines to consider.

IV. CHANGES IN FINANCIAL DISCLOSURE REQUIREMENTS

A government-wide, confidential financial disclosure requirement, Form SF-450, became effective October 5, 1992, pursuant to 5 C.F.R. § 2634.901-907. Through an exchange of letters, the Office of Government Ethics granted a temporary waiver from the government-wide reporting requirements to the employees of the DOE and the FERC because of conflicting financial disclosure requirements in the Department of Energy Organization Act.[38] FERC and DOE employees, however, may be required to file Form SF-450 in 1994.

Form SF-450's financial reporting requirements differ in several respects from DOE's Form 3735.1 that these employees have previously been required to complete. Importantly, the new Form SF-450 disclosure filings are confidential, while DOE's requirements under the previous regime were partially public.[39] In addition, under DOE's form, designated FERC and DOE employees specifically identified all of their financial interests in energy concerns and their monetary value in addition to reporting other financial interests.[40] Now, under Form SF-450, DOE and FERC employees will report for themselves, their spouses,and their dependent children: (1) assets values over $1,000 or, if personal savings accounts, over $5,000; (2) sources of income over $200 (other than government salary or retirement) or over $1,000 for a spouse's earned income, other than honoraria; (3) gifts or travel reimbursements from one source totalling $250 or

36. Lisa L. Lerman, *Public Service*, 19 HOFSTRA L. REV. § 1164. This substantial lack of clarity could, conceivably, render the criminal statute at least void for vagueness.

37. 57 Fed. Reg. 35,041, 35,034 (Aug. 7, 1992). In response to specific questions concerning expert witness testimony, the Office stated: "The diversity of cases in which employees may be called to expert witness service makes it impractical to provide a regulatory checklist to determine in every case whether a particular employee's testimony will serve the government's interest . . . this is a matter for determination on a case-by-case basis." It is unusual that the quoted statement refers, not to conflicts of interest nor to the appearance of impropriety, but to whether testimony *will serve the interests of the government*.

38. 42 U.S.C. § 7101; 10 C.F.R. §§ 401-07.

39. 10 C.F.R. § 1010.402(a).

40. 10 C.F.R. § 1010.403(b)-(c).

more, excluding gifts valued at $100 or less, gifts from relatives, or gifts from the United States government, anything given to the agency in connection with the employee's official travel, and food, lodging or entertainment received as personal hospitality; and (5) liabilities over $10,000 excluding mortgages on personal residences.[41] Employees will not be required to report the monetary value of individual assets or liabilities.

The number of employees subject to the new financial disclosure provisions may be smaller than those covered by the DOE regulations. Formerly, DOE's Form 3735.1 was filed by employees classified at GS-15 or below, unless the employee's grade series was specifically listed as exempted in 10 C.F.R. § 1010.403. In contrast, these employees now will need to file Form SF-450 only if their duties require personal and substantial participation in (1) contracting or procurement; (2) administering or monitoring grants, subsidies, licenses or other benefits; (3) regulating or auditing any non-federal entity; and (4) performing other activities having a direct and substantial economic effect on a non-federal entity.[42]

Nonetheless, DOE and FERC employees continue to be subject to certain additional requirements as part of the confidential filing. They must disclose certain outside positions held, whether or not compensated, excluding religious, social, fraternal, political, or honorary positions.[43] These employees, but not their spouses nor children, are also under a continuing obligation to disclose any arrangements for future employment, leaves of absence from former employers, continuations of payments by former employers, including severance, or continuing participation in an employee benefit plan.[44]

The new system will also see a change in timing. Previously, DOE's financial disclosure forms were filed in May of each year.[45] Now Form SF-450 must be filed by October 31.[46] Employees leaving federal service were required to file termination reports in the past.[47] These will no longer be required.

V. Conclusion

The scope of the new Standards and their related statutes and regulations are wide. The precise provisions are complex, occasionally inconsistent, and sometimes unexpected. Ethics was never an area to be approached casually; the new Standards have heightened the care with which a private attorney should give advice or a government attorney should act.

41. 5 C.F.R. § 2634.907.
42. 5 C.F.R. § 2634.904(a)(1).
43. 5 C.F.R. § 2634.907(a)(6).
44. 5 C.F.R. § 2634.907(a)(5).
45. 10 C.F.R. § 1010.403(b)(3).
46. 5 C.F.R. § 2634.903(a).
47. 10 C.F.R. § 1010.403(d).

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