

Ethical Risk Management: Practical Tips on Using Innovative Resources to Safeguard Your Organization's Reputation

A Guide to Enhancing Ethical Compliance for Attorneys.

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OVERVIEW:

News reports of ethical misconduct and criminal investigations are increasing while at the same time Federal Ethics laws and regulations have become increasingly more complex. This high-energy session will identify ethical risks facing organizations and their attorneys and provide new innovative social media tools as well as practical tips that attorneys implement right away to mitigate reputational risks for their clients. Stuart Bender, USDA's Director of Ethics will share the tools that he and his team have implemented, including the USDA Ethics App (available for free on any smart phone by searching "USDA Ethics" on any app store).

This presentation will include a discussion of case studies and various Federal laws including the Conflict of Interest statute (18 U.S.C. § 208), the Standards of Ethical Conduct for Executive Branch Employees (5 C.F.R. Part 2635) and the ABA Model Rules of Professional Conduct governing Confidentiality and Conflicts of Interest (Rules 1.6, 1.9, and 1.11).

Important Note: This training focuses on Federal Criminal laws and the American Bar Association (ABA) Model Rules of Professional Conduct. For individual State Bar rules, attorneys should always comply with the specific rules of the State Bar(s) for the jurisdiction(s) in which the attorney is licensed. State Bar Counsel are generally available to answer questions on specific State Bar rules.

OUTLINE:

I. Ethical Risk Management: Two Case Studies

A. First Case Study: The Lawyer, the Law Firm, Tobacco Litigation and the Disqualification of the Entire Law firm.

- i. In *United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27 (D.D.C. 2004), the Federal Government had brought a fraud and RICO suit against nine cigarette manufacturing companies and two tobacco trade associations.

- ii. A former U.S. Department of Justice (DOJ) attorney had, during his Federal service, provided legal advice to the Food and Drug Administration (FDA) and the Department of Health and Human Services (HHS) during FDA's Youth Tobacco rulemaking proceeding and then participated on behalf of the government in defending the FDA's regulation in court.
- iii. The DOJ attorney left Federal service to join a large law firm. At the law firm, he filed a motion to intervene on behalf of an Australian affiliate of a British American Tobacco company in the fraud and RICO case. The government filed a motion for disqualification of the former DOJ attorney.
- iv. In ruling on the government's motion for disqualification, the court was persuaded that information obtained by the former government attorney in the FDA litigation would assist him in developing strategy and arguments to rebut the Government's claims, and the court refused to accept that the risk of misusing Government information was nonexistent. *Id.* at 42-43. Instead, citing the *Brown* decision, the court said that any case involving close questions about whether particular confidences would be pertinent require disqualification of former government lawyers. *Id.* at 45. See, D.C. Bar, Ethics Opinion 343, "Application of the "Substantial Relationship" Test When Attorneys Participate in Only Discrete Aspects of a New Matter." <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion343.cfm>.
- v. **The court disqualified the former DOJ attorney and went on to disqualify his entire law firm from the litigation.** Citing District of Columbia Rule 1.11(b), the court ruled that the disqualification of a former government attorney because of his personal and substantial participation in a matter required the concomitant disqualification of the law firm by which he has become employed.
- vi. The court noted that the law firm could have potentially avoided the imputed disqualification if the disqualified lawyer's law firm had followed the provisions of Rule 1.11(c) and (d). Those paragraphs of Rule 1.11 require that the attorney notify his former government agency and all parties to the case of his personal disqualification, and that he will be screened off from any participation in the currently pending matter. Such notice of personal disqualification and screening must be issued *before* the current representation begins. See D.C. Bar Legal Ethics Committee Ethics Opinion 279 (1998); *In re Asbestos Cases*, [514 F. Supp. 914](#) (E.D.Va.1981). The court found there had been no compliance with Rule 1.11(c) and (d) in this case. No such notices were sent to the Department of Justice or any parties to this case and he was not screened off from any

participation in litigation. Therefore, the court granted the Motion to Disqualify the entire law firm from the fraud and RICO litigation.

- vii. The court in *Philip Morris* cited the leading case in the District of Columbia regarding the “substantial-relationship test,” *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc). In *Brown*, the D.C. Court of Appeals held that in the “revolving door” context, a showing that a reasonable person could infer that, through participation in one matter as a public employee, the former government lawyer “may have had access to information legally relevant to, or otherwise useful in” a subsequent representation, is prima facie evidence that the two matters are substantially related. If this prima facie showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer “could not have gained access to information during the first representation that might be useful in the later representation.” *Id.* at 49-50.

B. The Relevant Rules of Professional Responsibility:

- i. **ABA Model Rules of Professional Conduct, Rule 1.6:** A. lawyer shall not reveal information relating to representation of a client unless the client gives informed consent. This is a broad restriction and is not limited to confidences and secrets. The source of the information not relevant. Model Rule 1.6.
- ii. Under the ABA Model Rules, you may disclose attorney-client information under the following circumstances:
- When the client gives informed consent,
 - When the disclosure is implicitly authorized to carry out the legal representation, or
 - If you reasonably believe that disclosure is necessary to prevent reasonably certain death or substantial bodily harm. Model Rule 1.6(a), (b)(1), or
 - To prevent the client from committing a crime or fraud. Model Rule 1.6(b)(2), or
 - To secure legal advice about your compliance with these rules, or to comply with another law or a court order. Model Rule 1.6(b)(4).
- iii. **ABA Model Rules of Professional Conduct, Rule 1.9** spells out a lawyer’s duties to his or her former clients, and prohibits a lawyer who has

formerly represented a client in a matter from later representing another person in the “same or a substantially related matter” in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

- iv. **ABA Model Rules of Professional Conduct, Rule 1.11** imposes specific restrictions upon former government lawyers. If you obtained confidential government information about a person in your capacity as a government employee and you know the information is confidential, you may not use that information to the material disadvantage of the person in another case. Model Rule 1.11(c).
- v. Private law firms will need to implement screening mechanisms to ensure that their new attorneys are in compliance with the confidentiality requirements in Model Rule 1.11. See, D.C Bar Legal Ethics Opinion 312 (2002) “Information That May Be Appropriately Provided to Check Conflicts When a Lawyer Seeks to Join a New Firm” <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion312.cfm>.
- vi. Former government attorneys cannot participate in a matter (give advice to a client, discuss with other private sector lawyers) that he or she personally and substantially participated in as a government employee unless the former government attorney first obtains the consent of the former clients (i.e., the appropriate government officials). Model Rule 1.11(a).
- vii. As used in Rule 1.11, the term "confidential government information" means information that has been obtained under governmental authority and which the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.
- viii. Model Rule 1.11(a) imposes a ban against the disclosure of confidential or privileged information that precludes a former government lawyer from sharing information learned during the course of his or her Federal legal career. Model Rule 1.11 incorporates the bans in Rule 1.9(c) against using or revealing information learned with respect to a former client.
- ix. This restriction is in addition to the representational restrictions imposed by the Federal post-employment rules (18 U.S.C. 207). To ensure that

they are complying with all applicable restrictions, former government attorneys well advised to consult both their former Federal employer's Ethics Office as well as the Bar Counsel of the States in which they are licensed as well as the jurisdictions they seek to practice in (such as by pro hac vice).

B. Second Case Study: The Investment Firm, the Foreign Corrupt Practices Act, and the Power of Effective & Preventative Ethical Risk Mitigation:

- i. In April of 2012, Garth Peterson, the former head of Morgan Stanley's Shanghai office, was charged with criminal violation of the Foreign Corrupt Practices Act (FCPA) in a combined investigation and prosecution by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Mr. Peterson, a U.S. citizen, pleaded guilty to one count of conspiracy to evade the company's internal accounting control. He also settled with the SEC, and agreed that he violated bribery and books and records and internal control provisions. He agreed to the entry of an injunction and to pay disgorgement of \$250,000. In addition, Mr. Peterson gave up his interest in Shanghai real estate valued at about \$3.4 million.
- ii. Mr. Peterson's violations stemmed from his dealings with a Chinese state-owned entity involved in real estate. From 2004 through 2008 Morgan Stanley partnered with the Chinese state-owned entity on a number of real estate investments. Mr. Peterson negotiated and carried out secret arrangements for these deals which financially benefitted himself.
- iii. This prosecution was the first government prosecution under the FCPA. This was clearly a major case for the government.
- iv. Significantly, both the DOJ and SEC declined to prosecute Morgan Stanley, even though they could have done so based on the doctrine of *respondeat superior*. The decision not to charge Morgan Stanley was the first-ever publicly announced decision not to prosecute a company after an FCPA investigation.
- v. Even more significant was the fact that, in its charging documents, DOJ and SEC both publicly praised Morgan Stanley for its proactive ethical compliance program. Morgan Stanley's compliance team provided periodic live training sessions, web-based training, and reminders on the risks associated with giving

gifts, business entertainment, travel, lodging, meals, charitable contributions and outside employment.

- vi. Between 2002 and 2008, Morgan Stanley provided Mr. Peterson with seven FCPA trainings and issued reminders to comply with the Act on 35 occasions. DOJ could have prosecuted Morgan Stanley. Additionally, between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. When Mr. Peterson joined Morgan Stanley, the firm provided him with ethics and compliance training on his first day of work.
- vii. In declining to prosecute Morgan Stanley's leadership, the DOJ and SEC also noted that Morgan Stanley has invested significant resources into its ethics and compliance office. DOJ and SEC specifically noted that Morgan Stanley employed over 500 dedicated ethics and compliance officers and that the Compliance Department had direct lines to Morgan Stanley's Board of Directors and reported through the Chief Legal Officer to the Chief Executive Officer and other senior management committees.

C. Why is this Important to Your Company, Law Firm, Organization?

- i. For Federal departments and agencies, the need to maintain the public's confidence in the integrity and impartiality of government programs and initiatives has always been highly visible and is backed up by criminal conflict of interest statutes in 18 U.S.C. Section 201 through 209.
- ii. For the private sector, DOJ has issued its "Principles of Federal Prosecution of Business Organizations" in the Justice Manual which describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300.
- iii. These factors include "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000).
- iv. Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an

effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11).

- v. Moreover, the memorandum entitled “Selection of Monitors in Criminal Division Matters” issued by Assistant Attorney General Brian Benczkowski instructs prosecutors to consider, at the time of the resolution, “whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems” and “whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future” to determine whether a monitor is appropriate.

Reference: U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs*, updated April 2019, <http://bit.ly/2Z2Dp8R>.

Reference: Memorandum entitled “Selection of Monitors in Criminal Division Matters,” issued by Assistant Attorney General Brian Benczkowski on October 11, 2018, *available at* <https://www.justice.gov/criminal-fraud/file/1100366/download>.

D. Has your organization conducted an analysis, identifying its risk profile and the training and communications solutions to reduce those risks?

- i. One hallmark of a well-designed ethics and compliance program is appropriately tailored training and communications. Does your organization have periodic trainings for directors, officers, and relevant employees.
- ii. Is information relayed in a manner tailored to the audience’s size, sophistication, or subject matter expertise. (e.g., practical advice or case studies to address real-life scenarios, and guidance on where to go in the organization to obtain ethics advice on a case-by-case basis as needs arise.)
- iii. Is ethics and compliance information being widely disseminated to employees?
- iv. Is ethics guidance readily available? What resources have been made available to employees to provide guidance relating to compliance policies?

E. One Model for Risk Management: The U.S. Department of Agriculture’s Department-wide Ethics Program.

i. The U.S Department of Agriculture has over 100,000 employees who are geographically dispersed across 50 states and are stationed around the world. The USDA Office of Ethics is the sole office within USDA operating the Department's Ethics Program. Since 2010, USDA's Office of Ethics has successfully launched the following risk management initiatives, many of which can readily be replicated in other organizations.

ii. The USDA Office of Ethics, with a staff of 20, is one of the smallest ethics programs in the Federal government. Yet we have been able to use educational tools and technology is a force multiplier to expand our reach to USDA employees. Here are some of the most prominent USDA Office of Ethics initiatives:

- **“Ethics Moments” and “Ethics One-Pagers”** – The Office of Ethics presents regular short ethics moments focusing on topical issues, case studies, and reminders of the ethics rules which are delivered regularly at USDA's weekly Sub-Cabinet meetings, as well as separate leadership meetings led by Under Secretaries, Agency Head's and USDA's White House Liaison's Office for its weekly teleconference meetings with political appointees across the Department. These Ethics Moments are supplemented by 52 separate Ethics One-Pagers created and distributed to senior officials every year since 2010.
- **USDA Ethics App** – USDA is the first Federal agency to have successfully created a multi-media, multi-platformed Ethics App that provides a combination of text, videos, and resources to USDA employees all across the country. These resources are available for free to every USDA employee, every Federal employee, and every member of the public as a free resource that can be readily downloaded on any smart phone or tablet by searching for “USDA Ethics” in any app store. For USDA employees, they can phone or e-mail individual questions directly to the Office of Ethics without leaving the Ethics App.
- **Live Ethics Trainings** – USDA Office of Ethics advisors provided hundreds of hours of live ethics training via long-distance webinars, live in-person training, and tele-conference trainings with employees around the country.
- **Virtual Ethics Moments** – These are similar content to the Ethics Moments delivered live to USDA's leadership in Washington, DC, but

disseminated for all employees in short videos on USDA's Ethics webpage.

- **Long Distance Learning Videos** –USDA's Office of Ethics has created 26 videos, available to the public on USDA's Official YouTube page (search "USDA Office of Ethics Playlist" on YouTube). Included among these videos is the Federal government's first animated and illustrated video instructing employees how to avoid conflicts of interest (search "USDA Ethics Illustrated" in YouTube to locate the video.)
- **Ethics Clinics** – USDA's Office of Ethics sends small teams of Ethics Advisors across the country to conduct several training sessions in each location. Afterwards, Ethics Advisors meet with employees individually as a clinic to answer questions and proactively identify potential conflicts of interest issues.
- **Electronic Financial Disclosure Report Filings** – This creates a cost-effective and efficient way to review reports and timely identify conflicts while also providing an easier user platform for filers.
- **Science and Ethics Summit** – This is a no-cost internal USDA summit where senior ethics officials and senior scientists meet to discuss current issues in ethics facing scientists at USDA.
- **USDA Ethics Fellows Program** – This is the Federal government's first program to recruit new Ethics Advisors. The program is structured to provide graduating law students and others with a time-limited position, not to exceed four years, position within the Office of Ethics where they work along with a mentor assigned to assist them.

Presenter Bio: Stuart Bender serves as the Designated Agency Ethics Official (DAEO) and Director of the Office of Ethics at the U.S. Department of Agriculture (USDA). Mr. Bender reports directly to USDA's General Counsel. In 2016, Mr. Bender was awarded a Presidential Rank Award for Meritorious Service. In 2017, Mr. Bender led the creation of USDA's Ethics Mobile Application, a free, multimedia Ethics App available to the public by searching "USDA Ethics" on any smart phone's app store. Mr. Bender also led the creation of the Federal government's first animated Ethics Video "*Ethics Illustrated: How to Avoid Conflicts of Interest*" on USDA's YouTube page. Before joining USDA, Mr. Bender was the Designated Agency Ethics Official and Assistant General Counsel at the White House's Office of

Management and Budget (OMB). He also served as the Legal Counsel and Ethics Officer for the U.S. Holocaust Memorial Museum during its first decade. Mr. Bender has served as an attorney and ethics official in the Executive Office of the President's Office of Administration, and as a civilian attorney in the U.S. Navy. Mr. Bender received his J.D. degree, cum laude, from the George Washington University School of Law and his B.A. in Political Science, cum laude from Brandeis University. Mr. Bender is a member of the Maryland State Bar.