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# Staying Off the Warning Track

## *Ethics Tips for the Political Appointee*

While growing up in Boston, my father would sometimes take me to see the Red Sox play in venerable Fenway Park. Once I remember gazing out at the 37-foot-high left field wall, known as the “green monster,” noticing for the first time the reddish brown dirt between the wall and the field. My father explained to me that this was the “warning track” that tells the outfielder, as he attempts to catch fly balls, that he is about to hit the wall and could get hurt.

As I now contemplate the ethics challenges that all political appointees face, I am reminded of the notion of an ethics “warning track.” In the ethics arena, hitting the proverbial wall in Washington could mean going to jail. Like outfielders taking heed when they feel the soft dirt of the track beneath their feet, I believe that political appointees should not only learn to avoid hitting the wall, but also endeavor to stay off the “warning track” altogether.

### **Ethics Laws**

In recent history, every President has come to Washington with the pledge that his administration will be more ethical than those that came before. As President George W. Bush begins his second term, he will undoubtedly reiterate his expectations to the heads of all executive departments and agencies for high ethical behavior during his presidency. It is not enough, however, that the President demands high standards of integrity and ethics in his administration; political appointees must also be provided with the information and good counsel they need to meet these ethical expectations.

Most political appointees enter office unprepared for the fishbowl environment into which they are appointed. They are often unaware of the scrutiny that they will be subject to by “warning track” inhabitants that include the press, their political opponents, special interest groups, a myriad of nongovernmental organization watchdogs, the Office of Government Ethics, and of course, the ever-present Inspectors General.

A clear understanding of how to navigate the ethics outfield is therefore imperative. In reality, few political appointees will ever hit the wall because our ethics laws tend to set the bar very high and virtually anyone with the intention to stay within the letter of the law can do so. In my experience, Federal prosecutors are very hesitant to charge any Federal official for ethics or integrity violations because, in part, the law as written is somewhat nebulous. A January 2001 Government Accountability Office study cited an average of fewer than 30 ethics cases are prosecuted annually by the Department of Justice’s Public Integrity Section, the entity that prosecutes ethics violations. In fact, of that number, most of the cases cited were against career government employees not political appointees. However, while few political appointees will ever face prosecution and potential jail time for ethics violations, they can and often do stumble on the ethics “warning track.” Unfortunately, in the Washington fishbowl, a stumble can often be as nasty as a fall.

As a Federal employee with well over 3 decades of government service and as the Inspector General for a department rich in scandal—Tea Pot Dome and Indian Trust to name just two—I am often asked by political appointees for advice about staying out of ethical trouble. I believe that a detailed knowledge and understanding of ethics laws and regulations will help, but it will never substitute for exercising sound judgment and common sense. In that vein, I offer the following advice.

## Ethics Tips for Political Appointees

### ***1. When in doubt, seek advice, and always go to the proper source.***

The first part of this tip is easy to understand. It means to always err on the side of caution and seek ethics advice before engaging in an activity that presents even the slightest possibility of an appearance of a conflict of interest. The standard here should be the old adage: if you do not want to read about it on the front page of the *Washington Post*, then seek advice before doing it.

The second part of this tip is a little less obvious. The only advice that will actually protect an appointee is advice from the Designated Agency Ethics Official (DAEO). A classic mistake made by many political appointees is to seek advice from someone other than their DAEO. The most common error made by appointees is to depend on a department or agency lawyer who may know something about potential conflicts and ethics laws but whose advice, under the regulations, does not protect anyone. All ethics advice is not created equal. While anyone with some ethics knowledge (particularly attorneys) can offer ethics advice, it should only be accepted from someone who is formally designated to provide it. For political appointees, the most prudent ethics advice comes from a DAEO.

In most cases, unofficial ethics advisors and lawyers may prevent you from hitting the wall, but they may not be able to keep you from slipping onto the “warning track.” Those who are not fully immersed in ethics laws and regulations tend to interpret the law generally and answer only the “Can I do this?” question instead of “Should I do this?” Too often, such well-intended advice ends up putting an appointee in the middle of the “warning track,” which becomes rich fodder for the press, and political or ideological detractors. Giving ethics advice for them is, at best, a collateral duty not a full-time job. To prevent yourself

from slipping onto the “warning track,” you want to seek ethics advice only from your department’s DAEO.

Finally, when seeking advice from the DAEO, ensure that a written record of the question presented and the advice provided are documented. Assuming you follow the DAEO’s advice, this will resolve any questions about your actions in your favor.

**2. Always recuse yourself from matters in which you have even the slightest appearance of a conflict of interest.**

In regard to executive branch employees, recuse means the act of not participating in certain governmental matters. If your son or daughter works for the company seeking a government contract, recuse yourself. If you own stock in a company doing business with your department, recuse yourself. If your former law firm is representing a matter before your department, recuse yourself. If the state government from which you come has a matter pending before your department, recuse yourself. The obligation to recuse is ultimately the responsibility of the individual Federal official, and working under a recusal is simply the safest place to be. The bottom line is when in doubt, recuse!

Written recusals provide the strongest defense because they are the showstoppers. The DAEO may require that you provide written documentation of a recusal, or you may request this yourself. By putting your recusal in writing, disseminating it to the appropriate officials, and filing it in your ethics file, you have fully acknowledged that you may have a conflict of interest, and you have a written account of your decision. You may also communicate your decision orally to others, which is the second best defense because witnesses can attest on your behalf that you intended to recuse yourself. The weakest recusal is when you simply tell yourself that you will remain unbiased in a given situation. In essence, you simply believe that

you will always act appropriately in matters that may involve a conflict of interest. Again, this is a very weak defense and will not only put you on the “warning track,” it may put you right up against the wall.

**3. Designate a screener whom you can trust to act objectively and who has been properly trained.**

After exercising a written or oral recusal, it is sometimes advisable to designate a screener for the recusal. A screener will keep matters in which you have a conflict of interest from reaching you in the first place. If a company for whom you used to work prior to government service is seeking business with the department or agency to which you are appointed, a screener should recognize the potential conflict of interest and protect you from any knowledge of the matter. In this example, the screener should forward the company’s representatives to the most appropriate government official, such as a department procurement officer.

You must be careful, however, in designating a screener. Screeners, to effectively serve the purpose for which they are designated, must genuinely redirect matters of potential conflict and not simply substitute their decision for that of the recused appointee. A screener should do only that—screen matters for potential conflict and reflect them away from you. A screener should never be a substitute decision-maker. In the example above, the screener must not facilitate a contract award based on the assumption that this is what you would want to do if you were allowed to be involved. Not only will such an arrangement not pass the straight-face test, but it also runs afoul of the guidance on screeners published by the Office of Government Ethics. These provide, in part, that “[Recused] employees should understand that they are always personally responsible for ensuring that a commitment or a requirement to recuse is fulfilled. That responsibility does not shift . . . to an individual who screens matters from the employee.” To avoid such potential problems, ensure

that your screener knows how and what to screen. Your department or agency ethics office should be in a position to train screeners, and you should make sure that your screener attends training.

#### **4. *Abide by your recusals.***

Now that you know whom to seek for advice, you know when to recuse yourself from matters, and you've designated someone to be your screener, you must remember to abide by your recusals. This may sound easy, but many political appointees are sometimes confronted with situations in which it is unclear what actions and responses are appropriate. For instance, a common mistake that many political appointees make is attending meetings or briefings with former associates or that involve matters from which they are recused. You should avoid any situation that deals with specific or general matters stated in your recusals in which former associates may have an interest, including attending meetings as well as corresponding (orally or in writing) with former associates. Remember that you live in a fishbowl and the appearance of an ethics violation can be just as detrimental as actually committing one. Such appearances erode public trust. Over the years, I have seen officials get into ethical trouble not because they weren't decent people but because they failed to recognize that they were confronting an ethics issue. Again, avoid falling onto the "warning track"—abide by your recusals.

#### **5. *Do not mix official government business with politics or pleasure.***

Remember, as a government official, you are always in view and under the scrutiny of the press, the public, ideological detractors, and your political opponents. Although socializing with business associates is both acceptable and very common in the private sector, it is often considered unacceptable or inappropriate to do so in the public sector. Simply stated, do not mix government business with pleasure or partisan political activity. Become

well versed on the rules and regulations governing travel, gifts, and attendance at outside activities and social events. What may seem innocent may easily be construed as unethical behavior, particularly by those who do not have all of the facts. Having dinner with former associates may seem harmless, but you must be very cautious in your position as an appointed government official. Questions such as "Who paid for the meal?" and "What was being discussed at dinner?" can and will be asked. Holding a public position means you can no longer allow former business associates to pick up the tab or discuss matters that fall under your purview. Having entered the public sector, you can no longer mix business with pleasure or politics and you should avoid even the appearance of doing so.

#### **6. *Distance yourself from former employers and associates.***

Once you become a government official, you will be recused from participating in matters before your agency or department involving your former employer and business associates. After being sworn into office, you are well-advised to publicly distance yourself from your former employer and business associates. Many political appointees stumble onto this part of the "warning track" by attending functions sponsored by former employers and participating in exclusive social events with former colleagues. The ethics rules do not govern purely personal relationships with former colleagues, but such relationships will always be burdened by the potential for a perception of conflict of interest. Regardless of how innocent or well-intentioned, meeting or socializing with former employers and colleagues who may have matters before your agency or department will be viewed with skepticism by even the most objective outside observer, although it is unlikely that the objective outside observer is the one watching you. One very common mistake that new appointees make is attending a going-away party or reception in

their honor after being appointed to their government position. Although attendance at such events may seem trivial, do not subject yourself to unnecessary suspicion and criticism by accepting such a post-appointment tribute.

The recent World Series win by the Red Sox reminded me of how close the difference between

winning and losing can often be. The same holds true for public service. Become familiar with Federal ethics rules so that you can maintain the public trust and remain in the game through the last inning. If you follow these tips, they will help you stay off the “warning track” and hopefully you will never come face-to-face with the “green monster.” 🦖