

## **LEGAL BRIEFS**

This regular feature of **news@vhaethics** provides concise, up-to-date information on legal and regulatory issues in health care ethics. The current article clarifies the difference between health care ethics and government ethics.

### **Health Care Ethics vs. Government Ethics?**

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What distinguishes health care professionals from other people is not only specialized training, but also special ethical obligations to patients. Ethics standards are not set down in a single document, but arise from a variety of sources including codes of ethics, professional guidelines, consensus statements, published scholarly literature, and organizational policies. Within VHA, health care ethics (which encompasses clinical, organizational, and research ethics) is handled by the National Center for Ethics.

By contrast, "Government ethics" rules are law. Resulting from actions by Congress and the President, the rules are published as part of the criminal code or as standards of conduct regulations. The federal criminal code sections applicable to employees are generally contained in chapter 11 of title 18, US Code. The standards of conduct, published at Part 2635 of title 5 of the Code of Federal Regulations, are issued by the Office of Government Ethics under statute and Executive Order 12674(1989), as amended in Executive Order 12731(1990). Under these regulations and the Ethics in Government Act of 1978, each agency has a "designated agency ethics official" (DAEO). As part of his or her general ethics program responsibilities, the DAEO is responsible for advising employees on the criminal code provisions and the standards of conduct.<sup>1</sup> In the VA, the DAEO is the Assistant General Counsel (023) in the Office of the General Counsel in Washington. A Deputy Assistant General Counsel serves as alternate DAEO. Attorneys in the DAEO's office are authorized to provide ethics advice to VA employees and former VA employees, as are the 23 VA Regional Counsels.

Thus, government ethics and health care ethics differ in that government ethics refers to a specific set of legal restrictions that apply to federal employees, while health care ethics refers to the ethical responsibilities of health care professionals - including clinicians, administrators, and medical researchers. A person becomes subject to Government ethics as a consequence of voluntarily choosing to be a Government employee. Health care professionals in VA, already subject to health care ethics as a function of their professional roles, are also subject to Government ethics rules by virtue of their employment with the federal Government.

While the consequences of health care ethics violation include censure by colleagues, license withdrawal, negligence litigation, suspension of clinical privileges, or other sanctions, Government ethics violations may result in disciplinary action, including removal from employment, and civil and criminal penalties, including imprisonment. Government ethics rules and health care ethics standards are similar, however, in that they both are intended to encourage ethical behavior and help sustain public confidence.

### **Transaction Between a Government Physician and a Patient: Selling a Home**

The Government ethics office was recently asked for an opinion on whether a physician selling a house to a patient raises problems under government ethics regulations or other legal standards.

Nothing in Government ethics rules would specifically prohibit a clearly arm's length sale, i.e., one arranged through a real estate agent at the market price and financed by a mortgage lender at market rates. However, the transaction may involve details that implicate Government ethics rules. If the price is excessive, or if details of the financing favor the employee over the patient, the transaction may be determined to be a gift under the Government rules. Further, to the extent the sale involves any exploitation of the physician-patient relationship, the transaction may constitute the use of the physician's public office for private gain under Government rules. Such exploitation, moreover, may be a breach of professional ethics governing the physician-patient relationship (see the Ethics Rounds article in this issue for a discussion of the relevant ethical concerns about such a sale).

### **Government Ethics Rules on Gifts from Outside Government**

The Government rule on gifts, which is subject to exceptions, prohibits employees from accepting gifts from "prohibited sources," including entities doing or seeking official business or having interests affected by agency decisions.<sup>2</sup> The rule prohibits soliciting gifts as well as accepting them. The rule also prohibits accepting gifts from outside that are given because of the employee's official position.<sup>3</sup> A gift "because of position" is defined as one which "would not have been solicited, offered or given had the employee not held his or her position as a federal employee."<sup>4</sup>

There is no doubt that the Government gift rule regulates gifts between a patient and an employee, including an employee who is a physician. Because the term "gift" is defined broadly in the standards of conduct,<sup>5</sup> the Government gift rule may become applicable in a transaction such as the sale of a house by a physician-employee to a patient.

### **An Above-Market Price May Be Interpreted As a Gift**

Unless one of the exceptions applies, the rule on gifts from outside Government may cover any excess in the price paid by the patient. An exception that may

apply would allow gifts from patients to employees where a long-term, personal relationship between the patient and employee exists independent of the giver's status as a patient.<sup>6</sup>

### **The Potential for Disputes Indicates Caution**

In addition, the possibility of litigation arising between buyer and seller should be considered. Whatever the price or financing details, any resulting dispute would give rise to a "covered relationship" for purposes of the Government standards of conduct rule against the "appearance of a conflict of interest."<sup>7</sup> Depending on the status of the particular patient, the "appearance" rule might dictate that the physician not deal with matters affecting the patient while any dispute is ongoing. Having to avoid treating the patient for such reasons may be against the best interest of the patient.

### **Government Ethics Implications of Exploitation of a Patient**

Finally, the terms of the sale or the surrounding circumstances may give rise to concerns that the selling physician is exploiting the purchasing patient. If the physician is using his or her professional relationship with the patient as an advantage, the transaction may involve a use of the physician's public office for private gain, an activity that is prohibited under the standards of conduct.<sup>8</sup> It may also constitute conduct prejudicial to the Government, an offense made improper by a Government disciplinary regulation outside the standards of conduct.<sup>9</sup>

Depending on the details, the sale of a house by a physician to a patient at arm's length would probably not involve a breach of Government ethics rules. If the transaction constitutes a gift to the employee or exploits the patient, it may violate Government ethics rules. In any transaction as variable and "fact-specific" as the sale of a house, advice on Government ethics rules, which is readily available, should be sought.

### **Getting Advice on Government Ethics Rules**

Information on contacting a Government ethics counselor appears below. A regulation protects employees from Government disciplinary action,<sup>10</sup> and a Department of Justice practice protects them from federal criminal prosecution, for actions taken in compliance with advice from an agency ethics official.

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#### VA Designated Agency Ethics Official

Walter A. Hall  
Assistant General Counsel (023)  
Outlook Address "Hall, Walter A. (OGC)"  
202:273-6334  
Fax: 202:273-6403

#### VA Alternate Agency Ethics Official

Jim Adams

Deputy Assistant General Counsel  
Outlook Address "Adams, James E. (OGC)"  
202:273-6334  
Fax: 202:273-6403

To find out which Regional Counsel to consult, an employee can visit the VA Intranet ethics web page. Its address: <http://vaww1.va.gov/ogc/>.

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1. 5 C.F.R. §2638.203(b)(7).
2. 5 C.F.R. §2635.202(a), §2635.203(d).
3. 5 C.F.R. §2635.202(a), §2635.203(d).
4. 5 C.F.R. §2635.203(e).
5. 5 C.F.R. §2635.203(b).
6. 5 C.F.R. §2635.204(b).
7. 5 C.F.R. §2635.502(b)(1)(I).
8. 5 C.F.R. §2635.702.
9. 5 C.F.R. §735.203.
10. 5 C.F.R. § 2635.107(b).