

## F. ETHICS

### OVERVIEW:

According to the ABA Standards of Professional Conduct “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” In representing the GC in ULP proceedings, the Trial Attorney is always mindful of his/her role as the “public prosecutor.”

In addition, § 554(d) of the APA, 5 U.S.C. § 554(d), contains the general prohibition regarding **ex parte** communications: “Except to the extent required for the disposition of **ex parte** matters as authorized by law, [the ALJ] may not--(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. . . .” [Part 2414](#) of the Authority’s Regulations governs **ex parte** communications. In addition, Executive Order No. 12674, and the Authority’s Regulations at Part [2415](#), govern matters relating to the ethical conduct of Authority employees.

### OBJECTIVE:

To provide guidance concerning the Trial Attorney’s role as the “public prosecutor” and other ethical matters that may arise during the course of litigation.

#### 1. THE TRIAL ATTORNEY’S ROLE AS PUBLIC PROSECUTOR:

- a. *General Prosecutorial Obligations--The Trial Attorney considers the following:*
  - Are the charges in complaint supported by probable cause?

- Is there evidence sufficient to establish a prima facie case?
  - Is there a good faith argument for application, extension, or modification of existing law in support of the Trial Attorney's theory of the case?
  - Is the remedy sought appropriate for the violation?
  - Do the prosecution and remedy effectuate the purposes of the Statute?
- b. *Relationship with Charging Party:*
- Avoid actions that create the appearance of partiality.
- c. *Relationship with Respondent:*
- Avoid actions that create the appearance of partiality;
  - Know how to communicate with Respondent concerning evidence, witnesses, and law that contravene your position and/or support Respondent's position; and
  - Make the proper disclosures before communicating with Respondent's witnesses.
- d. *Relationship with the ALJ and the Authority:*
- Be mindful of the general requirement of candor;
  - Know how to communicate when evidence, witnesses and law that contravenes your position and/or supports Respondent's position arises; and
  - Fulfill responsibility to file exceptions, cross-exceptions, and corresponding supporting briefs.

## 2. EX PARTE COMMUNICATION:

[Part 2414](#) of the Authority's Regulations governs matters relating to **ex parte** communications.

a. *What is an **ex parte** communication?*

An **ex parte** communication is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 C.F.R. § [2414.3\(b\)](#).

b. *Refrain from **ex parte** communications:*

When prosecuting a ULP case the Trial Attorney refrains from partaking in communications prohibited under § [2414.5](#):

- Communications, when written, if copies are not contemporaneously served by the attorney on all parties to the proceeding as required; and
- Communications, when oral, unless advance notice is given by the attorney to all parties to the proceeding and adequate opportunity to be present is afforded.

See, e.g., Department of Veterans Affairs, Finance Center, Austin, Texas, 48 FLRA No. 21, 48 FLRA 247, 251-52 (1993) (ALJ's discussion with one party's counsel during an **in camera** examination of a requested report that related to the merits of the case was a prohibited **ex parte** communication under Part 2414 of the Regulations).

c. *Report prohibited **ex parte** communication:*

A Trial Attorney who is involved in an **ex parte** communication reports such prohibited communication as required by § [2414.8](#). The Authority may invoke a penalty if a Trial Attorney has knowingly or willfully violated the prohibition against **ex parte** communications. § [2414.9\(c\)](#).

- d. Under § [2414.6](#), the following oral or written communications are not **ex parte**:
- Matters which relate solely to what the ALJ or Authority is authorized by law to entertain or dispose of on an **ex parte** basis;
  - Requests for information solely concerning the status of a case;
  - Matters which all parties agree, or which the ALJ or Authority rules, may be made on an **ex parte** basis;
  - Matters that concern proposing settlement or an agreement for disposition of any or all issues in the proceeding; and
  - Matters of general significance to the field of labor-management relations, i.e., not related to any specific proceeding.

### 3. OTHER EMPLOYEE RESPONSIBILITIES AND CONDUCT:

All OGC employees are required to follow the requirements for employee responsibilities and conduct set forth at:

- Part [2415](#) of the Authority's Regulations;
- Exec. Order No. 12674, 54 Fed. Reg. 15159 (1989), as amended Exec. Order No. 12731, 55 Fed. Reg. 42547 (1990), 5 U.S.C. § 7301 note, which governs the ethical conduct of government officers and employees.

See [Part 2, Chapter O](#) to learn how to handle purloined documents and other "Improperly" obtained evidence.

Q [Part 1, Chapter I](#) concerning Relationship with Charging Party Representative; and  
[Part 2, Chapter O](#) concerning Purloined Documents and Other "Improperly" Obtained Evidence.

RESERVED