

Office of Government Ethics
84 x 4 -- 04/06/84

Letter to a Private Attorney dated April 6, 1984

This letter refers to our meeting of April 6, 1984 and your subsequent correspondence of the same date.

Your letter, as well as our discussion, addressed the question whether your appointment as Independent Counsel pursuant to Title 28 U.S.C. § 593 might follow the form of an order entered by the United States Court of Appeals for the District of Columbia Circuit on February 12, 1982 at the request of Leon Silverman, Esq. You provided a copy of that order for our review.

Further, you sought our explanation of the supplementation of salary prohibition of Title 18 U.S.C. § 209. You also asked whether a special Government employee is forbidden to represent a client in a criminal case.

We have again reviewed the specimen order, and we reiterate that it is our position that the order would be proper to follow in obtaining special Government status pursuant to Title 18 U.S.C. § 202.

Under the Federal conflict of interest laws, the term "special Government employee" is defined as a person who is retained, designated, appointed, or employed, either with or without compensation, to perform temporary duties for not to exceed 130 days out of any period of 365 consecutive days. (Title 18 U.S.C. § 202(a)). A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular day. Even if it becomes apparent, prior to the end of the 365 days, that you have not been accurately classified, you will nevertheless continue to be considered a special Government employee for the remainder of that 365-day period. A new estimate should be made at the expiration of each 365 days thereafter. Federal Personnel Manual, 735-C-02.

Pursuant to Title 18 U.S.C. § 209(a), it is unlawful for a Federal officer or employee to receive any salary, or any contribution to or supplementation of salary, from a private

source as compensation for his services to the Federal Government. However, this prohibition does not apply to a special Government employee who serves with or without compensation. (Title 18 U.S.C. § 209(c)). Therefore, as a special Government employee, you or a member of your staff appointed pursuant to 28 U.S.C. § 594(c) may continue to be compensated by your law firm even during the time that you are performing services for the Federal Government. However, as explained, there will be an independent restriction on your sharing in compensation received by the law firm in matters pending before the Department of Justice.

The restrictions on your outside activities in matters involving the United States are contained in Title 18 U.S.C. §§ 203 and 205. The former prohibits a person from receiving, agreeing to receive, or soliciting compensation for services rendered by himself or another before a Federal Department or agency at the time he is an officer or employee of the United States. Section 205 prohibits an officer or employee from acting as agent or attorney for anyone before a Federal agency or in court in a matter in which the United States is a party or has a direct and substantial interest and from receiving any gratuity or interest in a claim in consideration of his assistance in the prosecution of a claim against the United States. However, sections 203 and 205 both have a more limited application to special Government employees.

A special Government employee is subject to sections 203 and 205 only in relation to a particular matter involving a specific party or parties (1) in which he, at any time, participated personally and substantially while in Government or (2) which is pending in the Department in which he is serving. Moreover, the latter prohibition applies only to a special Government employee who has served in the Department for more than 60 of the preceding 365 days. You have not served in the Department of Justice during the last year. Therefore, the prohibition against your acting as agent or attorney in matters pending in the Department of Justice and receiving compensation for services rendered before a Federal Department in relation to such matters will not go into effect until you have actually performed services as Independent Counsel on all or part of 60 of the next 365 days. Until that time, you could personally represent clients in matters pending before the Justice Department, and you could share in your law firm's fees for its services performed in matters before the Department.

If you should perform duties as Independent Counsel on all or part of 60 days, however, you would be barred from personally representing a client in a matter "pending in" the Justice Department, and your firm would have to take measures to ensure that any compensation you might continue to receive from the firm was not attributable to services the firm performed in relation to matters pending in the Justice Department and was not compensation for any advice or assistance you might render to your partners or associates who were prosecuting claims pending in the Department.

A case or other matter is not regarded as pending in the Department for purposes of these restrictions if it is within the jurisdiction of a court. Thus, if an information or indictment has been filed in a criminal case or a complaint has been filed in a civil case, the matter is no longer pending in the Justice Department. Even after expiration of the 60-day period mentioned above, then, you could personally represent a client in court or before the Department in such criminal cases, and your partnership draw could include fees for these cases. The prohibitions mentioned above would only apply to a grand jury or other investigations or discussions with the Justice Department prior to the filing of an information or indictment in a criminal case and to administrative and civil matters pending in the Department prior to the filing of a law suit.

Please feel free to contact me if you wish to further discuss these matters.

Sincerely,

David H. Martin
Director