

Office of Government Ethics

89 x 20 -- 12/21/89

Letter to Former Employee dated December 21, 1989

This is in reply to your letter of November 16, 1989, in which you requested guidance concerning your proposed testimony as an expert witness in certain state and Federal court proceedings. We understand that you earlier discussed issues relating to your expert testimony with [an attorney in] this Office and that you wish written confirmation of [that] advice.

Since you served in an Executive Level position [at your former agency], you are considered a former "Senior Employee" for purposes of the post-Government service employment restrictions set forth in 18 U.S.C. § 207. As a consequence, you are subject to each of its four distinct restrictions applicable to former Government officials.

Section 207(a) permanently bars you from acting as agent or attorney for, or otherwise representing, any other person (other than the United States) to the United States concerning any "particular matter involving a specific party or parties" in which you participated "personally and substantially" while employed by the Government. This restriction prohibits formal or informal appearances. It also prohibits all oral or written communications made with an intent to influence. Section 207(b)(i) is a two year restriction prohibiting you from representing another (except the United States) by formal or informal appearance before the United States in connection with any particular matter involving a specific party or parties that was actually pending under your official responsibility during your last year [of Government service]. It similarly extends to oral or written communications made with an intent to influence. The statutory two-year period is measured from the date your official responsibility over a particular area ended, and not necessarily from the termination of your appointment with [your former agency]. The third provision with potential applicability to you is section 207(b)(ii). It is applicable only to former "senior" officials. This provision prohibits you for a period of two years after terminating employment with [your former agency] from aiding by your personal presence any other person (except the United States) in a representation before the United States concerning any particular matter involving a specific party or

parties with respect to which you participated personally and substantially as a Government official. For purposes of all three of these restrictions, the representation must be concerning a particular matter involving a specific party or parties "in which the United States or the District of Columbia is a party or has a direct and substantial interest." Moreover, the appearance or communication must be made to the "United States." The statute defines "United States" as "any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof."

The fourth restriction differs in significant respects from the previous three. Section 207(c) is a one-year bar restricting former Senior Employees from making formal or informal appearances, or communications with an intent to influence, to "the department or agency in which he served as an officer or employee, or any officer or employee thereof." It is not necessary that the Senior Employee be representing another person in order for the section 207(c) bar to apply. As the former head of [an agency within a department] this one-year bar applies to representations that you would make not only to [that agency] but also to any representation that you would make to the Office of the Secretary or to any agency within the [Department.] See 5 C.F.R. § 737.13. Another significant distinction is that section 207(c) applies to appearances and communications relating to "particular matters" and not just to "particular matters involving a specific party or parties." Moreover, this restriction will bar your representations to [the Department] concerning a particular matter even if that matter was not pending at [the department] during your tenure. It is only necessary that the matter now be pending before the Department (or an agency within [it]) or that it be a matter in which the Department or a component agency has a "direct and substantial interest."

According to your November 16 letter, your firm has been retained by [a corporation] for the purpose of testifying in private litigation on its behalf in state and Federal courts concerning issues relating to [your former official responsibilities]. The purpose of your expert testimony "would be to provide factual information, and my own opinion concerning the reasons for federal regulatory actions involving such questions." You also may be retained for similar purposes by other private parties in the future.

You will continue to be subject to the section 207(c) bar through May 15, 1990. Because it only applies to appearances and communications that you would make to the Department or an employee thereof concerning matters either pending before [the Department] or in which [the Department] has a direct and substantial interest, it is unlikely that section 207(c) would impede your expert testimony in private litigation. We caution, however, that section 207(c) could come into play should [the Department or your former agency] become a party or intervene in state or Federal litigation. In Office of Government Ethics (OGE) informal advisory letter 80 x 6 (copy enclosed), OGE cited legislative history in determining that section 207(c) could apply to representations even though made in a forum other than the individual's former agency. "Thus contact is proscribed, even though the matter is pending elsewhere and not before the agency itself, provided that the agency has a 'direct and substantial interest' therein." S. Rep. No. 127, 95th Cong., 2nd Sess. 75 (1978). OGE informal advisory letter 80 x 6 involved a former Government attorney covered by section 207(c) who was hired to represent a plaintiff in a civil suit naming the attorney's former Department as defendant. OGE stated that:

any communications made by this attorney in court on behalf of his private client would, even though addressed to the court, have the additional unavoidable intent of attempting to influence and persuade the defendant in the lawsuit. The role of the plaintiff's lawyer is in large part to have the defendant [Department] change its position as a result of what plaintiff argues in court. Equally as important, it is unrealistic to assume that plaintiff's lawyer will be able to avoid direct contact with [the Department's] lawyer during the trial

Although in this instance the former Government employee was serving as an attorney in the litigation, we believe that your testimony as an expert witness would be intended to have similar persuasive impact on [the Department] were it to become a party or to intervene in the litigation. You would be providing your testimony with an intent to influence the other parties or intervenors in the litigation.

We are similarly of the view that 18 U.S.C. §§ 207(a),(b)(i), and (b)(ii) will not preclude your expert testimony in state courts. Again, however, we caution that these provisions may

preclude your expert opinion testimony should [the department] or some other agency of the United States become a party or intervene in the litigation. In OGE informal advisory letter 82 x 13 concerning the application of 18 U.S.C. § 207(a) (copy enclosed), one of the issues discussed was whether a former Government attorney handling a case in state court might find herself making representations to the United States during the course of the litigation. Citing OGE informal advisory letter 80 x 6, OGE concluded that if a Federal receiver were to become involved in the state's litigation, the attorney would be unable to continue in the matter. As to your service as an expert, we believe that if the United States were to become a party or intervene in state court litigation, you would be providing your expert testimony with an intent to influence all parties and intervenors. It would be clear that you were acting on behalf of another person by virtue of your acceptance of compensation from that other person. Finally, however, it is emphasized that even were the United States to become a party in state court litigation, your expert testimony would not be barred unless every other element of sections 207 (a),(b)(i), or (b)(ii) were satisfied.

As to the application of sections 207 (a), (b) (i), and (b) (ii) to your expert testimony in Federal courts (or before officials of the United States at an agency or state court proceeding), you may not by virtue of sections 207(a) and 207(b) (ii) appear to provide your expert testimony relating to a particular matter that involved specific parties if you ever participated personally and substantially in the matter as a Government official. Section 207 (b) (i) prohibits you for two years from providing your expert opinion on any particular matter that involved a specific party or parties that was under your official responsibility during your last year [at the agency]. Thus, you correctly note in your November 16 letter that if you had supervisory responsibility for an enforcement proceeding involving a particular manufacturer, [product], and alleged defect, you may not provide your expert testimony on behalf of any party except the United States in cases involving the same manufacturer, [product], and alleged defect. As stated in 5 C.F.R. § 737.5(c), a particular matter involving a specific party or parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." You are not barred from testifying with respect to particular matters that did not involve a specific party or parties at the time of

your personal and substantial participation or at the time the matter was pending under your official responsibility. As explained in 5 C.F.R. § 737.5(c), "a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding." Example 3 at 5 C.F.R. § 737.5(c) is illustrative:

Example 3: An employee is regularly involved in the formulation of policy, procedures and regulations governing departmental procurement and acquisition functions. Participation in such activities does not restrict the employee after leaving the Government as to particular cases involving the application of such policies, procedures, or regulations.

Finally, even if subsections 207 (a), (b), or (c) apply to bar your testimony, we must still consider the effect of 18 U.S.C. § 207(h).

Section 207(h) provides:

[n]othing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

This provision has been implemented in 5 C.F.R. § 737.19(b). Section 737.19(b) states that section 207(h) does not allow a former Government employee otherwise barred under 18 U.S.C. § 207(a), (b), or (c) to testify on behalf of another as an expert witness unless the testimony would fall within one of two exceptions. First, the regulation provides that a former employee "may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the employee participated, utilizing his or her expertise." This Office does not interpret this exception to permit compensated expert opinion testimony. The second exception set forth in § 737.19(b) permits an expert witness to testify despite the applicability of any of section 207's four restrictions:

in any proceeding where it is determined that another expert in the field cannot practically be obtained; that it is impracticable for the facts or opinions on the same

subject to be obtained by other means, and that the former Government employee's testimony is required in the interest of justice.

We trust this information concerning 18 U.S.C. § 207 will be of assistance to you.

Sincerely,

Donald E. Campbell
Acting Director

Enclosures