

OFFICE OF GOVERNMENT ETHICS

98 X 18

Letter to a Government Attorney  
dated November 16, 1998

This is in response to your letter dated August 31, 1998, regarding the propriety of employees of your agency writing letters of support on behalf of an individual who was once their supervisor. As we understand the facts, the letters were written or would be written in connection with a sentencing hearing pursuant to Rule 32 of the Federal Rules of Criminal Procedure. The employees' former supervisor was found guilty of multiple Federal felony charges following his trial in United States District Court.

Your letter asks whether applicable laws or regulations prohibit employees from submitting such letters in connection with a sentencing proceeding. In addition, assuming there is no general prohibition, it inquires whether the employees may write the letters on agency letterhead and sign the letters using their official titles. Based on the facts as set forth in your letter, we believe that the employees may write and submit the letters and that they may use agency letterhead and sign the letters using their official titles. Our reasons are set forth below.

The relevant authorities in this case are 18 U.S.C. § 205 and section 2635.702(b) of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635. Section 205, in relevant part, prohibits employees--

other than in the proper discharge of . . . official duties [from] act[ing] as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest.

18 U.S.C. § 205(a)(2). The term "covered matter" is defined to mean--

[A]ny judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.

Id. at § 205(h).

Section 205 does not apply in this case because submission of the letters you describe would not constitute "act[ing] as agent or attorney" for another within the meaning of the statute. It is well settled that section 205 does not cover self-representation; rather, it is aimed at prohibiting representational activity on behalf of another. The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, OGE Informal Advisory Letter 94 x 15. This representational activity on behalf of another, moreover, "entails at least some degree of control by the principal over the agent who acts on his or her behalf." Memorandum of October 17, 1990, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, to Michael Boudin, Deputy Assistant Attorney General, Antitrust Division, regarding Application of 18 U.S.C. § 207(a) to Pardon Recommendation Made by a Former Prosecutor (Luttig Memorandum). The fact that the communication is in support of another's position does not, in itself, suggest the person communicating is acting as agent for the other. Id.

In this case, while we assume that the letters would be in support of a sentencing recommendation favorable to the former supervisor, there is nothing in the information you provided that suggests the employees are now or would be subject to the control or direction of their former supervisor. To the contrary, the letters contemplated seem comparable to the character affidavit addressed in the Luttig Memorandum, supra. According to that Memorandum, submission by a former prosecutor of an affidavit in support of an applicant for a pardon did not constitute acting as an agent or attorney for the pardon applicant.<sup>1</sup> See also Letter of

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<sup>1</sup> The Memorandum asserted that the "information provided does not suggest, much less establish, that there was a professional, contractual, monetary, or any other agency relationship between [them]." We likewise assume that there is no contractual, monetary, or any other agency relationship between your employees and their former supervisor. As for the "professional" relationship, we do, of course, understand that there was at one time a professional superior/subordinate work relationship. Insofar as that relationship is now ended, however, we do not regard it as suggesting an ongoing agency relationship. While the Luttig Memorandum uses the past tense (there "was" no professional relationship) we believe it did so only because the affidavit had already been submitted. Thus, the point was not that a prior professional relationship might suggest a current agency relationship but that *at the time the affidavit was submitted* there was no professional relationship. Our understanding is that the

May 13, 1976, from Acting Assistant Attorney General Leon Ulman, Office of Legal Counsel, to Arthur Kusinski, National Science Foundation. (A witness, including an expert witness, does not act as an "agent or attorney" within the meaning of those words in section 205.)

As your letter notes, section 2635.702(b) of the Standards of Conduct also has relevance to your inquiry. In pertinent part, this section provides--

(b) *Appearance of governmental sanction.*  
Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. . . . He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

[Emphasis added.] Example 1, which follows section 2635.702(b), sets forth additional guidance. It provides, in part--

Example 1: An employee of the Department of the Treasury who is asked to provide a letter of recommendation for a former subordinate on his staff may provide the recommendation using official stationery and may sign the letter using his official title. . . .

Section 2635.702(b) and the accompanying example authorize the employees of your agency to use agency letterhead and their official titles in letters in support of their former supervisor. The regulation clearly sets forth a general rule to the effect that use of official title and other accoutrements of public office may

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employees at your agency were not or will not be in a professional relationship with the individual being sentenced at the time of their submission of letters in connection with the sentencing.

not be used in connection with unofficial activities, but then explicitly provides an exception for a character reference based on personal knowledge of an individual with whom an employee has dealt in the course of Federal employment. As you correctly note, such a character reference is not limited to a job recommendation. It also would cover a character reference in connection with a sentencing proceeding. Section 2635.702(b) then goes on to explicitly provide that employees may sign such letters using their official title. The implication, moreover, is that, in such a case, agency letterhead, a comparable "authority associated with public office," may also be used. Were there any doubt, example 1 makes clear that the rule contemplates use of letterhead in this situation. Therefore, notwithstanding the possible displeasure you anticipate on the part of the United States Attorney's Office, we conclude that use of letterhead and official title in the letters in question does not constitute misuse of position.

Regarding the two provisions you cite in the United States Attorney's Manual (Manual), this Office would not purport to decide whether the Manual applies to any of the attorneys in your agency. But even assuming, arguendo, that it does apply, it seems to us that neither provision calls for a different conclusion. The section on conflicts of interest simply refers to provisions of the criminal conflict of interest statutes and Standards of Conduct which, independently of the Manual, apply to all Federal employees. Given the facts you describe, however, the letters in question would not violate any of these provisions. As for the section in the Manual on use of title, while there is language in that section that might arguably be construed as precluding use of letterhead and official title in these circumstances, it seems unlikely that the provision was intended to supersede section 2635.702(b) because the latter provision is referenced in the conflicts of interest section of the Manual without any indication that it is not to be followed. In any event, in the absence of some specific underlying statutory authority, the section in the Manual on use of official title would not supersede section 2635.702(b). Section 201(a) of Executive Order 12674, as modified, 3 C.F.R., 1990 Compilation, pp. 306-311, at 308 (Oct. 17, 1990), directed the Office of Government Ethics (OGE) to establish a "single, comprehensive, and clear set of executive-branch standards of conduct" and OGE has done so in 5 C.F.R. part 2635, which includes among its uniform rules section 2635.702(b). While agencies retain limited discretion to supplement the uniform Standards of Conduct, they must do so in supplemental regulations submitted to OGE for its concurrence and joint issuance. See section 301(a) of Executive Order 12674, supra, 3 C.F.R., 1990 Compilation, at p. 309; 5 C.F.R. § 2635.105. The Department of Justice supplemental regulations, set forth in 5 C.F.R. part 3801, do not purport to supplement or vary section 2635.702(b).

If you have any additional questions, feel free to contact my staff.

Sincerely,

Stephen D. Potts  
Director