

Office of Government Ethics

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Letter to an Alternate Designated Agency Ethics

Official dated December 11, 1995

This is in reply to your letter of November 8, 1995, concerning the propriety of the General Counsel of [your] Department becoming an uncompensated member of the board of directors of a nonprofit advocacy group. More specifically, you are seeking guidance relating to the interpretation of 5 U.S.C. app., § 502(a)(2) as implemented at 5 C.F.R. § 2636.305(a)(2). Section 2636.305(a)(2) provides that a "covered noncareer employee," including a Presidential appointee, may not "[p]ermit his name to be used by any firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship."

You argue that this restriction would be inapplicable to the General Counsel if she were to serve as a member of the board of directors of [the advocacy group] since the [advocacy group] is not an entity "which provides professional services involving a fiduciary relationship." Thus, it is your view that such entities are "customarily organizations, such as law or accounting firms, that perform fee-based services in pursuit of narrowly-defined interests on behalf of paying clients." You emphasize in your letter that the [advocacy group] does not receive payment for its participation in cases and that it only represents parties in matters in which there is a broad public interest.

"Profession which involves a fiduciary relationship" is defined at 5 C.F.R. § 2636.305(b)(2) as:

a profession in which the nature of the services provided causes the recipient of those services to place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge of the practitioner. Such professions are not limited to those whose practitioners are legally defined as fiduciaries and include practitioners in such areas as law, insurance, medicine, architecture, financial services and accounting.

As we stated in the preamble to the interim rule promulgating this definition for purposes of the restrictions set forth in 5 U.S.C. app. § 502, we adopted an interpretation "intended to carry out the legislative intent to give these restrictions a broad rather than narrow application." We noted that the Bipartisan Task Force on Ethics that recommended

enactment of the restrictions had specifically expressed its intention that the term fiduciary should "not be applied in a narrow, technical sense" 56 Fed. Reg. 1721, 1722 (Jan. 17, 1991).

Given this legislative intent, we are unwilling to adopt your proposed distinction between legal services that promote a broad public interest and those that promote more narrowly-defined interests. The by-law provision quoted in your letter recognizes that the [advocacy group] may become involved in the "direct representation of litigants in actions between private persons" even when the "financial interests at stake would warrant representation from private legal sources." In any event, we cannot say that individual recipients of [advocacy group] assistance do not "place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge" of [advocacy group] attorneys. Moreover, we have no reason to believe that either the [advocacy group] or the recipients of its services would assume anything other than a relationship of trust between them, even though the [advocacy group] receives no direct payment from recipients for the legal services it renders. While it is possible, as you assert, that the professional entities referred to in 5 U.S.C. app., § 502 are typically compensated for their services, compensation is not an element of the regulatory definition of a "profession which involves a fiduciary relationship."

You also argue that Example 1 following 5 C.F.R. § 2636.305(a) supports your conclusion that the restriction at section 2636.305(a)(2) does not apply to public interest organizations. That example indicates that a covered noncareer employee may perform pro bono services for the elderly through her bar association. It appears primarily intended, however, to illustrate that the restrictions at sections 2636.305(a)(1)(i) and (a)(1)(ii) cannot be violated by an employee who receives no compensation for his professional services. Example 2 following section 2636.305(a), on the other hand, illustrates a common application of section 2636.305(a)(2). In that second example, an accounting firm is prohibited from retaining the name of a covered noncareer employee in the name of the firm.

From the fact that the employee in Example 1 can perform legal services for the elderly, you conclude that it must also be permissible for the General Counsel to permit her name to be used by the [advocacy group]. While you did not specify the uses to which the General Counsel's name would be used by the [advocacy group], we assume that her name might appear on the organization's letterhead or be used in connection with its fundraising efforts. We think that such uses of the General Counsel's name by the [advocacy group] are clearly distinguishable from the way in

which a bar association attorney might use his own name during the course of assisting or representing the elderly, such as by signing complaints or other legal documents. Given its brevity, Example 1 offers little basis to compare the use of the bar association attorney's name with the manner in which the General Counsel's name may be utilized.

Accordingly, we conclude that the General Counsel would have to comply with the restriction at section 2636.502(a)(2) were she to become a member of the board of directors of the [advocacy group]. We assume that your office will evaluate the propriety of the General Counsel's proposed service as a board member in light of other statutory and regulatory provisions, including those set forth in Subpart H of 5 C.F.R. part 2635. In addition, we expect that your office will wish to contact the Office of the Counsel to the President to discuss any policy considerations relating to the General Counsel's plans.

Sincerely,

Stephen D. Potts
Director