Office of Government Ethics
82 x 13 -- 08/31/82

Letter to a State Official dated August 31, 1982

On May 5, 1982, you wrote a letter to the Regional Administrator of [a Federal agency] seeking confirmation that it did not have an interest in an action by [your] State against [an individual] for violation of its state securities laws. The request was made so as to determine whether a former [agency] attorney, who is now employed by you, could participate in the State's case without fear of violating 18 U.S.C. § 207(a). Your letter was referred to the [agency's] Office of the General Counsel in Washington, D.C. and then, because the request dealt with a statute we now have the primary responsibility for interpreting, to this Office.

The post employment statute in question states, in part:

> Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States . . . after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to --
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> > (1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States . . . or any officer or employee thereof, and
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> > (2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States . . . is a party or has a direct and substantial interest, and
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> > (3) in which he participated personally and substantially as an officer or employee through

> decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed --
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> . . . .
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> shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The basic elements of this statute are that a former Federal employee must have been personally and substantially involved in a particular matter involving a specific party, that the United States is still involved or still has an interest in that matter, and that the former Federal employee now represents someone other than the United States Government in that same matter either to or before an entity of the Federal Government or a Federal employee.

You stated in your letter that while [the attorney in your office] was employed at the [agency] she was one of the primary counsel in an action taken by the [agency] against [the individual]. It is our understanding that the conduct of [the individual] on which the [the agency] based its case is the same as that on which [your] State wishes to prosecute [the individual]. Clearly, acting as primary counsel in a case in litigation involves personal and substantial involvement in that case. Further, the defendant in the Federal case and your impending State case is the same party, and the activity by that party which brought about the Federal case is the same activity about which the State is concerned. We have indicated in our interpretative regulations at 5 C.F.R. § 737.5(c)(4) that "[i]n determining whether two particular matters are the same, [one] should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest."

In applying this criteria to the matter at hand, it is our impression both from your letter and from the [agency] that your case will involve the same basic facts, related issues, the same defendant and the same confidential information. You, however, have expressed the opinion that there is no important Federal interest in a State prosecution of this type.

The regulations at 5 C.F.R. § 737.5(c)(5) describe in Example

1 a situation very similar to the present case.**1** In checking with the [agency], we have found that its case against [the individual] is still an open matter inasmuch as a receiver has been appointed by the court in the proceeding and is still completing his duties. Further, as pointed out in the example, the Government has an interest in preventing inconsistent results and the appearance of impropriety involved in having [its former attorney], who had access to all the Federal documents, files, and information surrounding this case, now serve as the State's counsel. While you might argue that there is no divergence of interests between the Federal Government and the State in this matter, they are clearly two different clients for [this attorney] and the two actions would not be brought if there weren't some varying interests involved. Finally, while we are in no position to resolve it in this letter, information arising out of the [agency's] case against [the individual] may also give rise to actions against him by other Federal agencies. Because that also is not a closed issue, the Government has a continuing interest.

There may, however, be an element in section 207(a) that may not be present in this case. That is, for the prohibition to attach, [this former Federal attorney] must represent the State to or before a Federal entity or Federal employee. The example cited above assumes the private matter was litigated in a Federal court. It is our understanding that the matter at hand will be conducted in a State court. If [this attorney] had no representational contact whatsoever with any Federal agency or employee in pursuing this matter for the State, then she would not be prohibited from doing so by section 207(a). The very practical difficulty with this is that not only would she be prohibited from contacting [her former agency] or any other Federal agency on this matter during its pendency, she would not be able to depose or use as witnesses in the trial any Federal officials. Further, if the Federal receiver were to become involved in the State's litigation on his own, she would be unable to continue in the matter.**2**

We feel it important in this matter to mention to you that there is nothing in 18 U.S.C § 207(a) that would prohibit [this attorney] from assisting a colleague in your Department in preparing and handling the State's case. The statute only prohibits her from representing the State if all other elements of the statute are present. After pointing this out, however, [she] should be careful to review the Code for Ethics of the Bar

of [your] State to determine if she is further restricted by its requirements. We should suggest she specifically review the State's equivalent of the ABA's DR 9-101(B) and Ethical Consideration 9-3.

If you have any questions concerning this letter or other matters, please feel free to contact this Office.

Sincerely

J. Jackson Walter
Director

Enclosure

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1 These regulations were based in part on precedent established by the Office of Legal Counsel(OLC) within the Department of Justice which was responsible for interpreting 18 U.S.C. § 207 until 1980 when that responsibility shifted to our Office. The example itself was based in part on a 1976 memorandum from OLC to the Assistant Attorney General for one of the Department's Divisions who had asked whether one of his former attorneys might represent a state in an appellate proceeding related to a cas in which the former division attorney had been involved while serving the Government.

2 We have previously discussed the difficulties of avoiding representations t Federal officials in trials in a letter dated 08-01-80 which we have excised, numbered (80x6), and placed in our library. While the statute involved in this letter is not the same, the discussion of representation in trial has some applicability here. A copy is enclosed for your information.