Office of Government Ethics
83 x 2 -- 01/31/83

Letter to an Employee dated January 31, 1983

This is in response to your request of December 13, 1982 for an advisory legal opinion regarding the permissibility of the payment of certain personal legal fees and expenses you have recently incurred by the law firm of which you were a partner before assuming your present [Government] employment [in mid 1981].

It appears from your letter that (1) in the course of your practice at [the law firm] you represented and provided legal advice to a corporation which became the subject of a Federal grand jury investigation and which can be publicly identified by you only as the "John Doe Corporation," as designated in a decision of the U.S. Court of Appeals for the Second Circuit reported at 675 F.2d 482 (1982); (2) following the issuance of the decision, you acceded to a request by the Assistant U.S. Attorney in charge of the grand jury investigation that you permit him to interview you; (3) the John Doe Corporation (hereafter "Corporation") waived its attorney-client privilege in relation to that interview, which took place on May 18, 1982, and at which you had no personal counsel; (4) you retained a lawyer from a firm other than [the one from which you had come] on June 11, 1982, to assist you in preparing for an appearance before a Congressional Committee which the day before had asked you to testify before it in executive session with regard to the Corporation and, more specifically, obtained his services to advise you concerning the attorney-client privilege, which the Corporation declined to waive as to your forthcoming appearance before the Committee; (5) your counsel also provided assistance to you antecedent to your appearance on June 24, 1982, before the grand jury that was investigating the Corporation; and (6) he assisted you during an inquiry into the Corporation matter by the SEC staff which involved testimony on your part on September 10, 1982.

You pointed out in your letter to this Office that there has been "no allegation of wrongdoing or culpability [on your] part" and that the Department of Justice has confirmed that you are neither a "target" nor a "subject" of its investigation, but are a "cooperating witness."

You state that you have as yet made no payment to your counsel for his fees and expenses, that you anticipate the need for additional services on his part and that you have incurred personal expenses for airline tickets, etc., by reason of the Corporation matter. Finally, you state that [your former law firm] "has indicated to [you] that it is prepared in this case to follow its longstanding policy of paying expenses incurred by partners and employees of the firm which arise out of the performance of legal services on behalf of the firm and its clients," and you have attached a copy of [the law firm's] letter to you dated October 19, 1982, that "has reflected that policy." The letter informs you that the policy applies "not only to present [law firm] partners and employees, but also to the firm's former partners and employees to the extent their expenses relate to services performed while they were with the firm."

In sum, you have requested our opinion "as to whether it would be permissible for [the law firm] to pay the fees and expenses of [your counsel] and [your] personal expenses."

Our examination of the pertinent statutes, 18 U.S.C. §§ 203, 205 and 209, and the standards of conduct laid down by Executive Order 11222 of May 8, 1965, has led us to the conclusion that [the law firm] is free to make the proposed payments. Our reasons follow.

18 U.S.C. §§ 203 and 205

Section 203(a) in general prohibits a Member of Congress and an officer or employee of any of the three branches of Government from receiving compensation for services rendered by himself or another person before a Federal Department or agency (but not a court) in a particular matter in which the United States is a party or has a direct and substantial interest. Stated differently, the statute bars representational activities carried on for pay.

Insofar as relevant here, section 205 makes it unlawful for an officer or employee of any of the three branches of Government (but not a Member of Congress) to act as agent or attorney for anyone before a Department, agency or court in connection with a particular matter in which the United States is a party or has a direct and substantial interest. Section 205 is thus, like section 203(a), by its terms concerned with representational activities. As a practical matter such activities of a

Government employee himself in a non-official capacity need be examined only in the light of section 205 since it covers them whether they are carried on for compensation or not and whether they take place before a court, Department or agency. Accordingly, we shall consider only section 205 here.

In view of the Justice Department's characterization of your role in the Corporation matter after leaving [the law firm] as that of a "cooperating witness," it is apparent that you are not deemed by that Department to have been acting as an agent or attorney for either the Corporation or your former firm during the times when you answered questions or gave formal testimony. We therefore see no basis for invoking section 205 in connection with those activities. It should be noted also that so much of your testimony as was given "under oath . . . or . . . required to be made under penalty for perjury or contempt" is within the waiver granted by the last paragraph of section 205.

It is perhaps arguable that you were representing yourself either directly or with the aid of counsel in the course of some or all of your appearances as a witness and that section 205 might apply in that context. However, the statute is understood not to prevent a Federal employee's representation of himself before an agency or a court. See Capt. Tyler's Motion, 18 Ct. Cl. 25 (1883), where the Court indicated that precluding such pro se representation before a Federal agency would raise a constitutional objection. See also 16 Op. Att'y Gen. 478 (1880); 14 Op. Att'y Gen. 482 (1876).

18 U.S.C. § 209

Section 209(a) of Title 18 makes it an offense for an employee of the executive branch or an independent agency to receive any salary or supplementation of salary for his services as such from any source other than the Government, except a State, county or municipality. The question arises whether the proposed coverage by [the law firm] of your obligation to your counsel and of your own expenses would be a supplementation of your Federal salary for the purposes of section 209(a).

It has long been recognized that the element of intent is significant in a determination whether a payment by a private source to a Federal employee that is not engendered by his current services to that source is or is not in reality a form of salary or supplementation of salary within the meaning of section

209(a). See Manning, Federal Conflict of Interest Law, 166-68 (1964). From the information you have provided us, we have gleaned nothing to indicate an intent on your part or that of [the law firm] that would cut across the prohibition of the statute. However, we do not find it necessary to develop this point, for it is apparent that section 209(b) is controlling here.

Section 209(b) provides an exemption from subsection (a) by permitting a Government employee to "continu[e] to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer" (emphasis added). Although a member of a partnership (with some exceptions) is not an employee of his enterprise, once he leaves it for Federal service, the Justice Department and this Office deem it to be his "former employer" for purposes of section 209(b). From the October 19, 1982 [the law firm] letter to you and your own description of the firm's policy of saving harmless its current and former partners and employees, we find that this policy constitutes an element of its "employee welfare or benefit plan" and, accordingly, that the firm's proposed payments to you and on your behalf are permissible under the exemption afforded by section 209(b).

Executive Order 11222 of May 8, 1965

Executive Order 11222 picks up where the conflict of interest statutes leave off, proscribing conduct which, although falling short of criminality, might result in or create the appearance of conduct adverse to the Government. See section 201(c) of the Order.

Section 201(a) provides, among other things, that a Government employee may not accept anything of value from any person, corporation or group which (as does [the law firm] derivatively through its clients) "has interests which may be substantially affected by the performance or nonperformance of his official duty." Section 201(b) authorizes agency heads to issue regulations implementing subsection (a) and authorizes the agencies to provide for "necessary and appropriate" exceptions by reason of certain described relationships, including those of family, that do not exist here. Section 201(c) provides overarching guidelines to the agencies by stating that it is the intent of section 201 "that employees avoid any action whether or

not specifically prohibited by subsection (a), which might result in, or create the appearance of [among other things]

> (4) losing complete independence or impartiality of action
>
> . . . .
>
> (6) affecting adversely the confidence of the public in the integrity of the Government.

The barriers of sections 201(a) and (c) to your acceptance of [the law firm's] proffered payments for your benefit would be set aside by your compliance with the recommendations of your agency's Ethics Counsel, in her memorandum to you, dated November 8, 1982, that you recuse yourself from any matters that might otherwise come before you at [your agency] involving [the law firm] until a significant period of time has passed after its last payment to you or on your behalf in relation to the John Doe Corporation matter.**1** We recognize that your usefulness to [your agency] will be diminished to some extent by such action but believe that the inconvenience is necessitated by the Executive Order. We shall be glad to have your agency consult us at such time as you may contemplate setting aside your recusal.

Conclusion

To repeat, our answer to your inquiry whether it would be permissible for [your former law firm] to pay the fees and expenses of your counsel and your own personal expenses is in the affirmative, subject to your disqualifying yourself for a significant period of time from participating in any matter in which [the law firm] is involved that would otherwise reach you.

Sincerely,

David R. Scott
Acting Director

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1 [The agency ethics counsel] arrived at this conclusion in the light of [your agency's] regulations issued pursuant to section 201(b) of

Executive Order 11222. See[citaion to your agency regulations omitted]. Those regulations essentially mirror the provisions of the Executive Order described supra and need not be examined here.