

Office of Government Ethics

83 x 5 -- 03/29/83

Letter to a DAEO dated March 29, 1983

[A member] of my Office has been conferring with [a member of your Office] in an attempt to resolve the problem raised in your letter of February 2, 1983 concerning the legality of using expert testimony from a former Federal employee in pending court litigation involving the Government. Since there continues to be some difference of opinion between the Civil Division of the Department of Justice and your staff on this matter, we are setting forth our conclusion that the testimony may be given.

The facts as contained in your letter and amplified orally by [your staff member] are as follows:

The United States is a co-defendant in litigation involving exposure of workers to asbestos. The co-defendant would like to call as an expert witness a former employee of your Department who is a world-wide recognized expert in the field of industrial hygiene and toxicology. As part of his official duties while with your Department he visited worksites, took samples and reviewed results of dust analysis. He was not responsible for any aspects of asbestos litigation in general or of this particular litigation, which was not filed until after his retirement. He is being asked to testify on the development of the threshold limit values for exposure to asbestos established by a Government committee of which he was chairman, his discussions with industry representatives regarding their ability to meet the threshold limits and his review of the results of samples taken at the defendant's plant.

The query is whether the post-employment statute -- 18 U.S.C. § 207 -- would bar the former employee from giving expert testimony. Subsection (h) of this section exempts "testimony under oath" from the prohibition. Our Office's regulation -- 5 C.F.R. § 737.19(b) -- interprets this exemption to be applicable to expert testimony unless "otherwise barred under 18 U.S.C. § 207(a), (b), or (c)." Is the expert testimony in questions "otherwise barred" under subsection (a), (b), or (c) of section 207? Subsection (c) is not pertinent to this matter since the former employee was not within the classification of employees covered by that subsection.

You state that the attorney in charge of this litigation in the Department of Justice is concerned that the official duties performed by the former Government employee in setting threshold limits on asbestos would constitute a particular matter and as such bar his testimony under 18 U.S.C. § 207. This is not so. The phrase "particular matter" is restricted in scope to a particular contract, a particular case or proceeding or a particular claim. It was inserted in order:

to emphasize that the restriction applies to a specific case or matter and not to a general area of activity.

B. Manning, Federal Conflict of Interest Law 55 (1964) (emphasis added).

The phrase is additionally limited by the modifying language "involving a specific party or parties." Commenting on the import of this language, Mr. Manning stated: "it must involve a specific party or parties both at the time the government employee acted upon it in his official capacity and at the subsequent time when he undertakes to act as an agent or attorney following termination of his government services." *Id.* at 204.

Subsections 207(a) and (b) come into play only when the former Government employee was involved in a particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest. Our regulation -- 5 C.F.R. § 737.5(c) -- describes the phrase "particular matter involving a specific party or parties" in these subsections as follows:

Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, 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 (Underscoring ours.)

The presently sought expert testimony is not subject to the

prohibitions under 18 U.S.C. § 207 since the proceeding in which the testimony would be given was not a particular matter involving a specific party or parties when he was with the Government. During that period he worked on the policy for setting threshold limits on asbestos, not on the case in which his expert testimony would be employed. In fact, this case was not instituted until after his retirement.

You have agreed that in view of the need for an early resolution of this matter, a formal advisory opinion as provided for in 5 C.F.R. §§ 738.301-738.313 is not required.

Sincerely,

David R. Scott
Acting Director