Office of Government Ethics
84 x 1 -- 02/02/84

Letter to a DAEO dated February 2, 1984

This is in response to your request of November 29, 1983, as modified by subsequent communications of [your staff] with mine, in which the Department has asked this Office to review a proposal of [a] law firm. The proposal concerns the conditions under which [a former employee of the Department] and the firm might act on behalf of present or prospective clients of the firm consistent with applicable post-employment restrictions and codes of professional conduct.

Prior to leaving the Federal Government, [this former employee] most recently served in the Department as the Agent of the United States to the Iran-United States Claims Tribunal in the Hague (hereinafter the "Tribunal"). [He] is now serving as counsel to [the law] firm which represents a number of clients on matters before the Tribunal. [The former employee] and the firm are rightfully concerned that the firm be able to properly screen [the former employee] from matters in which he is prohibited from representing clients. While the criminal statute prohibitions apply only to [the former employee], the code of professional conduct considerations apply to the firm as well. Because these codes are not administered by this Office, we only have the authority to interpret the statutory restrictions of 18 U.S.C. § 207. As the Government Department formerly employing [the individual], you may review the law firm's proposed screening arrangement for adequacy under the appropriate court imposed codes of professional responsibility.

The position of Agent of the United States to the Tribunal was not designated under any provision of 18 U.S.C. § 207(d) as a Senior Employee position. Therefore [the former employee] is subject only to the restrictions of 18 U.S.C. §§ 207(a) and (b)(i). Both of these provisions prohibit a former executive branch employee from making a representation on certain matters to "any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof . . . ." (18 U.S.C. §§ 207(a)(1) and 207(b)(i)(1).) In March of 1981, this Office issued a letter opinion on another question involving the Tribunal in which we took the position that the Tribunal

itself was not one of the governmental entities of the United States covered by the statute.**1** Therefore, section 207 alone would not prohibit a former Government employee from representing anyone strictly before the Tribunal.**2** That opinion did not cover, however, the situation where an individual in making a representation to the Tribunal, would still be precluded from doing so to any executive branch employee, such as the present Agent or Deputy, who might also be involved in some manner before the Tribunal if the matter was once covered by the statute.**3** This situation could very possibly create practical bars to the effective representation of a client before the Tribunal.

The prohibitions in many state codes of professional conduct do not turn on whether an attorney will be making a representation to another party on behalf of a client or on to whom that representation is made. Generally, if the matter is one in which the attorney substantially participated as a Government employee, the attorney may not accept employment outside of the Government in the matter. While the criminal statute does not prohibit the former Government employee from being employed in a capacity in which he or she would not be required to make any representations (for example, as a counselor only), many state codes of professional conduct would. Therefore, determining the matters involved in the statutory prohibitions, without reference to whom the representations are made, is important to any determination under those codes.

Briefly, section 207(a) prohibits a former employee from representing anyone other than the United States on a particular matter involving a specific party in which he or she had personally and substantially participated while a Government employee. Section 207(b)(i) prohibits the former employee for a period of two years following termination of Government service from representing anyone other than the United States on a particular matter involving a specific party in which the United States has an interest and which was actually pending under his or her official responsibility within a period of one year prior to the termination of such responsibility.

A "particular matter involving a specific party or parties" certainly includes each claim before the Tribunal. Therefore, as the law firm has stated, it is important to determine in which claims [the now former employee] had participated "personally and substantially" and which additional claims were within his "official responsibility" during the last year he served as

Agent.**4**

The law firm in its letter and the [head of the Department's Washington office for Iranian claims] in his November 26, 1983 review of the factual content of the firm's letter, both indicate that as the U.S. Agent, [the now former employee] was either personally and substantially involved in all claims involving disputes between the governments of the United States and Iran filed by the date of his departure or they were pending under his "official responsibility." These have been designated as "A" or "B" claims depending upon the basis of the claim.**5** Given those facts, we agree that either the bar of subsections 207(a) or (b)(i) would attach to each of these "A" and "B" claims depending upon his personal participation.

The law firm has identified two "A" cases in which it may wish to participate as amicus curiae or some other manner. In each of those cases the Department has confirmed [the former employee's] "personal and substantial" participation. Therefore, the section 207(a) prohibition attaches, [the former employee] may not make any representations to the U.S. Government on those cases, and the law firm rightly must consider appropriate screening procedures. [The head of the Washington office] has identified additional "A" cases and "B" cases in which he believes [the former employee] was personally and substantially involved. You may share this list with the firm if you wish, but please be advised that given the second full paragraph of text on page 2 of his memo, we believe [the head of the Washington office] may have used a somewhat stricter test for personal and substantial participation than what might normally trigger the prohibitions in section 207(a). Sharing responsibility for a matter does not necessarily negate the substantiality of the participation.

On the other hand, the two year prohibition of section 207(b) applies to matters under his "official responsibility." As discussed below, that term is very broadly defined. We believe, therefore, that all "A" and "B" matters pending before the Tribunal during his last year as Agent, regardless of their activity, may fall under his official responsibility.**6**

In addition to these "A" and "B" disputes, United States nationals involved in claims over $250,000 ("large claims") are represented by private counsel. Claims of U.S. nationals for less than $250,000 ("small claims") are presented to the Tribunal by the United States rather than by the claimants themselves.

The firm has identified three large claims in which the United States has also entered an appearance. They have indicated that in two of the cases, Claim No. 111 and Claim No. 51, [the former employee] personally and substantially participated on behalf of the United States in the case or in a matter involving the case. The Department has agreed to this characterization of his involvement and therefore we have no reason to dispute the application of the section 207(a) bar to these two cases.

In the third case, Claim No. 28, however, the firm has stated that the United States' involvement in the case came after [the former employee's] tenure as Agent and that no one in his office participated in the preparation of the memorial submitted by the United States while he was Agent. On the other hand, [the head of the Washington office] has contradicted this in his memorandum stating that the memorial was filed August 26, 1983 while [the former employee] was still with the Department and that the Deputy Agent had participated in its preparation while he was still Agent. The prohibitions of section 207(b)(i) apply to matters pending under his "official responsibility", which is defined in 18 U.S.C. § 202(b) as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." We believe that if [the Deputy Agent] was involved in the preparation of this memorial during his last year as Agent, [the former employee] is barred by section 207(b)(i) from representing any private party on Claim No. 28 for a period of two years following his termination of official responsibility for that matter.**7**

In addition to the large claims in which the United States entered a formal appearance, however, we understand from talking to [the head of the Washington office] and his staff that the Agent, his deputy or other legal staff at the Hague did meet with private counsel for a large claimant prior to any pre-hearing conference or hearing on that claim before the Tribunal. The Agent or deputy would, prior to this meeting with counsel, have read the submissions and at the meeting provided any strategic help as appeared necessary. This information would run from the basic procedures of how to turn on the microphone and who speaks when, to discussing particular trends in similar cases before the Tribunal and particular likes and dislikes of certain Tribunal members, etc. In addition, the Agent or deputy would then sit in on the pre-hearing conference or hearing, as the case may be, and

might, if necessary, interject themselves into the proceedings. An example which was cited to us was that if the Tribunal appeared to be applying a standard inconsistent with that settled in prior cases, the Agent would ask to be recognized and would point that out to the Tribunal. This would be information the Agent would be aware of, having either attended all prior proceedings or having had a member of his staff do so. The private attorney would not have had that benefit. [The head of the Washington Office] and his staff characterized this involvement as strategic advice (e.g., pointing out whims of individual members) or procedural assistance. To their knowledge, assistance was not rendered on the merits of the claims.**8** It was also pointed out that such assistance was not originally envisioned as part of the Agent's duties but became necessary shortly after the Tribunal began processing these claims.

It is not impossible that something may have occurred in these conferences or in the hearings that rose to the level of personal and substantial participation in a particular case. Since this service was clearly being offered by the U.S. Government through the Agent and his deputy it is action that would at least create a question under applicable professional codes of conduct. This is so even though it could be argued that in providing assistance on the merits of the case, the Agent or deputy might have overstepped his or her official authority. Depending upon the assistance provided, we believe the Agent's or deputy's participation in a matter may well be considered personal and substantial without the Government's formal intervention.

The question, of course, can only be answered by the participants themselves because the assistance was so specialized. If [the former employee] remembers assisting counsel in a case to any extraordinary extent or on any crucial procedural issue, he may wish to further review those facts with you before proceeding in that particular case.

With regard to the small claims, [the head of the Washington office] pointed out in his memo that [the former employee] did file an umbrella memorial concerning all the small claims in October of 1981 and, from time to time thereafter, made representations to the Tribunal regarding various procedural and other aspects of the small claims. In addition he submitted a June 9, 1983 letter over his signature to the Tribunal proposing a procedure which the Tribunal might wish to consider following

in handling the small claims. We understand that he and his deputy presented this proposal orally as well. Further, his deputy was involved in selecting test cases and devising an efficient case management system for all the small claims. While it is clear that [the deputy's] involvement with the small claims would give [the former employee] a two year bar under 18 U.S.C. § 207(b)(i) for all small claims pending during his last year as Agent (inasmuch as [the deputy] was involved with her activities regarding these claims during that entire year), we were concerned that the October 1981 memorial and the June 9th letter might trigger the permanent bar of 18 U.S.C. § 207(a). [A member of my staff] discussed with [the head of the Washington office] and his staff [the former employee's] participation in this aspect of the cases and read the documents involved. Based on her analysis we do not believe that [the former employee's] participation in the October 1981 memorial concerning all small claims should be considered personal and substantial participation in a particular small claim. The June 9th document and oral presentation raise other questions however. In that document, [the former employee] set forth a case management scheme for the small claims, and the United States characterized the issues involved in over 60 specific small claims. The document further recommended that the Tribunal select three test cases for each of six issues as a way of initiating the proposed procedure.

While [the now former employee] and his deputy were recommending a method by which to resolve the issue of handling all the small cases, identifying and characterizing specific cases for initial consideration by the Tribunal did have the effect of personalizing his participation in those cases. Further, his efforts through proposing this procedure did result in the Tribunal selecting the concept of using this test and, more importantly, did result in the Tribunal's selection of 18 cases from the June 9, 1983, submission. While the Tribunal did not have to select any of the cases used in the submission in order to test the proposed system, it did in fact select all 18 of them from the submission, accepting as well the United States' characterization of the cases. We believe this proposal of a method of case management is a particular matter. In addition, because the proposal specified and characterized approximately 60 individual cases, recommending that they could be used in a test of the proposal, it was a matter involving specific parties. Finally, it is our opinion that [the former employee's] personal participation in signing and orally presenting the proposal to

the Tribunal was substantial in that matter.**10** He is therefore prohibited by 18 U.S.C. § 207(a) from representing any person to the United States on any of the 18 cases now selected for the test or any of the remaining approximately 42 cases listed in the June 9th document. Consequently, the firm will need to consider instituting screening arrangements for these small claims if the firm has any involvement in them.

We do not believe that the rest of the small claims not specified in the June 9th document (approximately 2400) should be considered a part of the proposal even though the institution of a case management system would have an effect on them all. The proposal was a matter involving specific parties; the instituted system of case management does not, we believe, fit within that concept.**11** This does not affect our determination that all small claims are subject to the two-year bar of section 207(b).

Sincerely,

David H. Martin
Director

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1 See Letter from OGE to a Designated Agency Ethics Official dated 1/20/81 and numbered 81 x 13.

2 The opinion pointed out that the codes of conduct applicable to attorneys could be read more broadly, however, and cautioned the attorney in that instance to review carefully those provisions. [The law firm] has quite clearly done so in this instance.

3 See Letter from OGE to a state official dated 8/31/82 and numbered 82 x 13.

4 The operative term in most rules of professional conduct is "substantial responsibility," which, as discussed in ABA Opinion 342, is more narrow than "official responsibility."

5 Cases which have been designated as "A" involve disputes between the Governments of the United States and Iran concerning interpretation of the Algiers Accords. "B" cases involve claims between entities of the United States Government and the Iranian Government arising out of contractual arrangements for the purchase or sale of goods.

6 They may not, however, all be interpreted to be ones for which he had "substantial responsibility," depending upon the level of his personal participation.

7 Again, his "official responsibility" in this matter might not rise to the level of "substantial responsibility," which would require that he be screened from Claim No. 28.

8 [The former employee's] work requirements dated July 1982 state that he was to: "Maintain contact with American attorneys whose clients have cases before the Tribunal for purposes of providing them with information and advice on matters of general applicability (not the merits of their cases), including Tribunal procedures." (Emphasis added).

9 A member of [the head of the Washington office's] staff provided us with the following numbers assigned by the Tribunal for the 18 cases selected. Chamber I: Case Numbers 11713, 10199, 11309, 10514, 11614, and
10517; Chamber II: Case Numbers 10087, 10913, 10155, 10502, 10035,and 12434; and Chamber III: Case Numbers 10335, 11135, 10103, 10729, 10173, and
10096.

10 See 5 C.F.R. § 737.5(d).

11 See 5 C.F.R. § 737,5(c)(1).