

**Office of Government Ethics**  
**85 x 6 -- 05/16/85**

**Letter to a Former Employee dated May 16, 1985**

This is in response to your letter of March 15, 1985, in which you requested an informal opinion on whether your representation of a contractor in its claim against [an agency] violates the post employment restrictions of 18 U.S.C. §207(b). You indicate that when the Regional Solicitor [of your agency] first raised the question of a possible conflict of interest in a discussion with you on February 5, 1985, you wrote to [an] ethics official at [your former agency] for a determination of the issue. [The ethics official] determined that your proposed representation of [a company] would violate 18 U.S.C § 207(b)(i). Because [your former agency] refuses to process your client's claim until this conflict of interest issue is resolved, you request that the Office of Government Ethics render a written opinion on this matter.

**Facts**

During the summer of 1978, [a specific] Regional Solicitor's Office became involved in a dispute between the [the agency] and [a company], an [agency] contractor hired [for a specific service]. When you came to the Regional Solicitor's Office in June 1979 as a staff attorney, you had no role in the matter. In October 1980, when you became Assistant Regional Solicitor, you still did not participate in the matter or have supervisory authority over the persons handling the contractor's claim. Then, in March 1981, you became Deputy Regional Solicitor. In that position, you had general supervisory authority over all matters in the Regional Solicitor's Office, including contract claims. You held the position of Deputy Regional Solicitor until October 1983, when you left Federal service to practice law.

In support of your contention that the matter was not pending during your last year as Deputy Regional Solicitor, you discuss two documents. The first, an [agency] Memorandum to the file, dated February 4, 1980, explains that the [agency] had not received any correspondence from [the company] or its attorneys for three months and had notified the Solicitor that the file on the [company] contract had been officially closed. A second document, the June 5, 1981, Regional Solicitor's status report,

May 30, 1981. It refers to the claim of [the company] and states that:

After holding the matter open for a substantial period of time, it appears that the contractor will not challenge the position of the Regional Solicitor's Office, and the claim is deemed withdrawn.

However, no final decision had been rendered in the case, and the statute of limitations on the contractor's claim had not run by the time you left the Regional Solicitor's Office in October 1983.

In December 1983, [the company] came to your firm with its claim against [the agency]. On September 7, 1984, you reinstated the contractor's claim against [the agency]. The Regional Solicitor first raised the conflict of interest issue with you on February 5, 1985, at which time you contacted the [agency's ethics official] for advice.

## **Discussion**

Based upon the information you have provided to us, we agree with [the agency ethics official's] determination that the particular matter in which you now wish to represent [the company] is the same particular matter that appeared before the Regional Solicitor's Office during your years of service in the office. That matter was a claim under the contract between [the agency] and [the company] for [a particular service]. You state that you merely "reinstated" that claim in September 1984, an indication that the matter had not been concluded prior to your departure.

In determining whether 18 U.S.C. § 207(b)(i) applies to your representations for [the company], we must answer the following two questions:

1) Would the contract dispute in which you now wish to represent [the company] have been under your "official responsibility" as Deputy Regional Solicitor?

2) If so, was this particular matter "actually pending" before the Regional Solicitor's Office during your last year of service?

To answer these questions, we must look at the language of 18

on representations before the Government by a former Government employee on a particular matter involving a specific party in which the United States is a party or has a direct and substantial interest, and which was "actually pending" under the employee's "official responsibility" within a period of one year prior to the termination of such responsibility.

In order to understand the scope of § 207(b)(i), we must consider the purpose behind this section of the conflict of interest statutes. According to the legislative history, this provision addresses the concern that former officers and employees might have disproportionate influence upon Government decision making in their former agencies when they return as representatives of nongovernmental groups before those same agencies.<sup>1</sup> Even when a former employee did not personally and substantially participate in the matter while with the Government, he or she is still subject to a two-year bar with respect to matters under his or her official responsibility during the year prior to the termination of his or her Government position. The only limitation on this prohibition discussed by Congress is that "matters that occur and conclude prior to that time are excluded."<sup>2</sup> The bar applies whether or not the former employee knew while employed by the Government that the matter was pending under his or her official responsibility.<sup>3</sup>

According to the post employment regulations at 5 C.F.R. § 737.7(b)(2), the "scope of an employee's official responsibility is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority." The position description for the Deputy Regional Solicitor indicates that he or she has broad authority for administering all aspects of the Regional Office operations and for supervising "all attorney/advisors in matters involving litigation. . . ." Further, it states that the Deputy Regional Solicitor is the "principal legal advisor and counselor to the [specific part of your agency that is involved]." Consequently, the contractor's claim against [your former agency] would have fallen within your "official responsibility" as Deputy Regional Solicitor under your broad authority for office matters as well as under your authority as principal legal advisor to the [specific part of your agency that is involved in this matter].

The next consideration is whether the claim was "actually pending" under your official responsibility within a period of one year prior to the termination of that responsibility. To

understand the explanatory materials contained in the term. The regulations make sense only when read in that context. Black's Law Dictionary defines "pending" as follows: "Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is 'pending' from its inception until the rendition of final judgment." (Black's Law Dictionary 1021 (5th ed. 1979).)

Under the plain meaning of the term "pending," the contract claim of [the company] against the [agency] would be considered pending until a final judgment is rendered. The claim was sent to the Regional Solicitor's Office in the summer of 1978 and, although the two memoranda you submitted indicate that no action was taken on the claim between May 1980 and February 1984, it is clear that the Regional Solicitor's Office had not rendered a final decision in the matter. [The agency ethics official] indicates that, although the matter had not always been under active consideration at the [agency], the [agency] considered it a matter pending at the Regional Solicitor's Office on their behalf. In addition, the statute of limitations on the claim had not run before the termination of your responsibility as Deputy Regional Solicitor, indicating that the claim was still alive. Under the plain meaning of the term, the claim would be considered pending in the Regional Solicitor's Office from October 28, 1982 to October 28, 1983, the year prior to the termination of your responsibility as Deputy Regional Solicitor.

As you indicate in your letter, the regulations at 5 C.F.R. § 737.7(c) provide guidance on the meaning of the term "actually pending": "'Actually pending' means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been."

The discussion of this provision focuses on the term "referred to" because, as you indicate, the claim was not actually "under consideration" by the Regional Solicitor's Office from May 1980 to February 1984. The term "referred to" is used in the regulations to explain when a matter is under an agency's responsibility. Until the matter is referred to it or it is under consideration by the agency, even though it is of the type that could be considered by the agency, it cannot be pending under the agency's official responsibility. However, once the matter has been referred to the agency, it is pending until a

final judgment is rendered or until the statute of limitations has run, signaling the conclusion of that particular matter. This is the case even though the matter is not at all times active or "under consideration" by persons in the Office.

Example 1 following section 737.7(c) illustrates this point. There a staff lawyer in a Department's Office of General Counsel is consulted on a contractual matter involving Q Company, and he renders an opinion in the matter. From the time of the initial consultation when the matter was referred to the Office, the General Counsel has official responsibility for the determination of the Q Company matter. Although the same legal question may arise in later contracts with other companies, if the dispute is not referred to, or under consideration by, the Office of General Counsel, the matter does not lie within the Office's responsibility. The date of the referral is important only because it signals the date on which the agency's official responsibility in the matter begins.

## **Conclusion**

In this case, the Regional Solicitor's Office's official responsibility in the matter began on the date of the referral in the summer of 1978. Because there had been no final determination in the matter and the statute of limitations had not run before you left your position as Deputy Regional Solicitor, the contractor's claim was "actually pending" before the Regional Solicitor's Office during your last year of service. Furthermore, because you had general supervisory authority over all matters in the Regional Solicitor's Office, including contract claims, the contractor's claim against the [agency] was "actually pending under your official responsibility" during your last year as Deputy Regional Solicitor.

Based upon this analysis, the two-year restriction of 18 U.S.C. § 207(b)(i) applies to your representations in the particular matter involving the [agency] and [the company]. Although you are currently barred from representing [the company] in connection with this matter before any Department, agency, or court of the United States or the District of Columbia, the two-year period will terminate two years from October 28, 1983, the date on which you left the Regional Solicitor's Office. As of October 29, 1985, the restrictions of section 207(b)(i) will no longer apply, and you may represent [the company] before the Government in this matter. In the meantime, you may continue to

work on the matter by providing in-house assistance and advice in connection with the representation of [the company]. For example, while your partner or another attorney must handle the representation of [the company], you may prepare briefs and other documents for the case, as long as your name does not appear on them and you do not contact the Government in any other way that would constitute a communication with the intent to influence.

The provisions of section 207(b)(i) apply personally to you. However, the appearance in a matter by you or a firm with which you are associated may be precluded by the Model Rules of Professional Conduct of the American Bar Association or those of a state bar association. Since this Office does not have jurisdiction to render opinions on the specific application of codes of professional conduct which may pertain to you or your partners, you must consult the appropriate bar association office with any questions you have along those lines.

This informal advisory letter is the final administrative action available to you. If you wish to challenge this decision, you should look to 18 U.S.C. § 207(j) for guidance.

Sincerely,

David H. Martin  
Director

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**1** H.R. Rep. No. 800, 95th Cong., Sess. 32 (1977).

**2** S. Rep. No. 170, 95th Cong., 1st Sess. 152 (1977).

**3** 5 C.F.R. § 737.7(b)(4) (1984).