

Office of Government Ethics

87 x 8 -- 05/21/87

Letter to an Agency General Counsel dated May 21, 1987

This is in response to your April 24, 1987 letter to [this Office] inquiring whether [attorneys of your agency, a regulatory commission] can hold official positions with the Bar Association [for individuals practicing before or employed by the agency]. According to the background information you have provided, the stated purpose of the [Association], a nonprofit corporation, is to promote the proper administration of Federal laws relating to [those matters regulated by your agency]. Any person who is a member in good standing of the bar of any state, territory, district or possession of the United States and who practices before [your agency] is eligible for [Association] membership. Although most of the [Association's] members, who number in excess of 1,400, practice in the District of Columbia, the remaining members practice in approximately 35 states.

Among its functions, the [Association] files comments with [your agency] on topics of concern to [member] lawyers. It is this function of the [Association] that raises issues of potential conflicts of interest.

When the [Association] amended its constitution to make federally-employed attorneys eligible to join, you addressed these issues and concluded that mere membership by [agency] attorneys in the [Association] would not violate Federal conflict-of-interest statutes and would not create the appearance of a conflict of interest. Any [agency] attorney belonging to the [Association], however, would be required to recuse from participation in any matter before the [agency] involving the [Association].

OGE Informal Advisory Letter 86 x 19 (copy enclosed) sets forth our views on the distinction under 18 U.S.C. § 208(a) between "mere membership" in and serving as an officer or director of an outside organization whose financial interests may be affected by an employee's official actions. We concluded that the distinction is based on the language of § 208(a), which prohibits an executive branch employee from participating in a particular matter in which "he, his spouse, minor child, partner, organization in which he is serving as officer, director,

trustee, partner or employee . . . has a financial interest." We noted that while section 208 refers specifically to serving as an officer or director, it does not refer to mere membership in an organization. In line with this reasoning, an [agency] attorney who serves on the Executive Committee or otherwise as an [Association] officer is required under section 208(a) to recuse from participation in any particular matter before the [agency] in which the [Association] has a financial interest.

As stated in 86 x 19:

The analysis of whether recusal is required does not end with a determination that the type of affiliation is not covered under section 208(a) [T]here may be situations in which 18 U.S.C. § 208(a) would not bar the employee from taking action, but the standards of conduct would.

In our view, one example of such a situation would be an instance in which an [agency] attorney who serves on the [Association's] Executive Committee was called upon to evaluate or consider [Association] comments filed with the [agency]. Even though the [Association] might not have a financial interest in any matter related to the comments, a recusal might be advisable for appearance reasons. Another example would be an instance in which an [agency] employee who is only a member of the [Association] was called upon to participate in an [Association] matter. Again, a recusal could be required. A third example would be the situation discussed in OGE Informal Advisory Letter 85 x 14 (copy enclosed). In that advisory letter, we advised that an employee's participation in a matter in which his brother's law firm was representing a company with a substantial stake in the outcome of the litigation could present an appearance problem and that recusal might be necessitated, even though interests of siblings are not covered under section 208(a).

In any of these three situations, participation by the employee could create an appearance of impropriety in the sense of giving preferential treatment or of losing independence or impartiality, in violation of the model standard of conduct regulation at 5 C.F.R. § 735.201a.

In each of these instances, however, the decision on whether to require recusal rests with the agency.

We hope this information will prove helpful to you.

Sincerely,

David H. Martin
Director

Enclosure