

Office of Government Ethics

84 x 13 -- 06/15/84

Letter to a Private Attorney dated June 15, 1984

On June 4, 1984, this Office received your letter dated May 9, 1984 requesting that we confirm your understanding of the application of the criminal conflict of interest statutes to [an attorney associated with your firm]. [The attorney] has been appointed by the Independent Counsel appointed to investigate certain allegations relating to [a specific individual] to serve as an assistant Independent Counsel. During this same time, [the attorney] will continue to serve in an of counsel capacity to your law firm.

It is the position of this Office that the services provided by [the attorney] under his appointment as an assistant Independent Counsel pursuant to the authority in 28 U.S.C. § 594(c) are services provided to the Department of Justice for purposes of the conflict of interest statutes. [See 84 x 4.] For purposes of this response, we are assuming that [the attorney] was appointed as a special Government employee as that term is defined in 18 U.S.C. § 202. Therefore, the provisions within the criminal conflict of interest statutes that limit the application of those statutes for special Government employees to matters which are "pending in" the Department or agency which the individual is serving will apply in [the attorney's] case to matters "pending in" the Department of Justice. Moreover, you are correct that [the attorney] does not qualify for the even more limited restrictions of 18 U.S.C. §§ 203 and 205 for special Government employees who have served no more than 60 days in their Department or agency during the immediately preceding 365 day period. His service as a full time employee of the [Department] during any portion of that preceding 365 day period must be counted for purposes of determining whether he has served more than 60 days during that period.

Your understanding of this Office's interpretation of when a matter is considered to be "pending in" the Department of Justice is also correct. [The attorney] is prohibited by section 205 from representing any person to the Department on such matters and is prohibited by section 203 from receiving any compensation for represen- tational services rendered by anyone else on these matters. With regard to your statement that you believe he is

free to consult with other lawyers in your firm on these matters, you are correct that such consultations are not prohibited by section 205. Before engaging in any such consultations, however, [the attorney] may wish to review the standards of conduct applicable to special Government employees of the Department of Justice and all applicable rules of professional conduct for any additional restrictions which may apply.

For purposes of your section 203 analysis, while you state [the attorney] does not share in the profits of the firm and is compensated on a fixed salary basis by your firm, if at the end of the firm's fiscal year it determines that it will give bonuses to associates or persons serving in of counsel positions, [the attorney's] bonus may not be calculated on any amount that includes fees generated by the firm's representation of clients on matters "pending in" the Department of Justice while he served as a special Government employee of the Department. A bonus based in any part on these fees would be prohibited by that section in the same manner as a partnership distribution.

While the supplementation of a Government employee's salary by a source other than the Federal Government is prohibited by 18 U.S.C. § 209, subsection (c) of that section specifically exempts special Government employees from this prohibition. Therefore, there is no criminal conflict of interest provision which will prohibit you from supplementing [the attorney's] Federal compensation in order that he will not, by acting as an assistant Independent Counsel, receive less total compensation during that same time than the firm, prior to his appointment, had agreed to pay him for his of counsel services.

Finally, you are correct in your interpretation of the extent of restrictions of 18 U.S.C. §§ 207(a) and (b)(i) as they are applicable to [the attorney] once he terminates his position with the Department. We do not believe that his position as assistant Independent Counsel is one which is automatically a Senior Employee position pursuant to 18 U.S.C. § 207(d)(1)(A) and, given the level of position indicated by the daily rate of pay stated on his appointment, that position is not eligible to be designated as such by this Office under section 207(d)(1)(C). Therefore, it is our opinion that [the attorney] will not be subject to the restrictions of sections 207(b)(ii) and (c) upon leaving his position of assistant Independent Counsel.

If this letter raises further questions, please feel free to

contact this Office.

Sincerely,

David H. Martin
Director