Office of Government Ethics
86 x 11 -- 08/26/86

Letter to an Agency Ethics Official dated August 26, 1986

This is in response to your letter of July 17, 1986, in which you requested, pursuant to 5 C.F.R. § 734.605, a formal advisory opinion on two issues: (1) whether [an attorney in your agency] may co-author and accept royalties from two books on subjects involving her official duties and responsibilities; and (2) whether 18 U.S.C. § 208 applies to restrict her activities [at the agency on] matters in which her co-authors are involved. Since your request does not satisfy the two-pronged test set forth at 5 C.F.R. § 738.301 for the issuance of a formal advisory opinion, we will respond to your letter with an informal advisory letter.

According to your letter, the employee is interested in co-authoring two books on subjects related to her official duties. The first book would be based on work that the employee had done in 1983, before entering Government service. Prior to leaving a law firm to join [the agency] the employee, together with a partner in the firm, wrote a 200-page outline [summarizing] and [analyzing] the major statutes, court decisions, and regulatory actions affecting the involvement of banks in the securities industry and the involvement of securities firms in quasi-banking activities. The outline was published several times for use at various conferences, and the employee and the partner are the holders of a copyright on the outline. After the employee left the firm, the outline appeared in the partner's name alone or with the names of other co-authors who were also partners or associates of the firm. According to your letter, the first book would be an updated version of the original outline, listing the employee and other members of the firm as co-authors. You stated that the employee has informed you that the outline contains only publicly available information.

The second book also has its origins in 1983, prior to the employee's joining the agency. The employee and the same partner wrote an article that appeared in the [professional publication]. Although the article was copyrighted by the [publication], the authors retained the right to convert the article into an outline for use at conferences and seminars. After joining the [agency],

the employee adapted the article into an outline, which she has distributed on numerous occasions at conferences and seminars where she has been a speaker. The employee revises the outline on a regular basis to reflect current developments. The second proposed book would cover financial institution acquisitions and mergers. Under the proposal, the outline would form the basis of the section on [certain financial] institutions and mergers. The employee and two partners from the law firm would be listed as co-authors.

The employee's co-authors are from a law firm that represents [financial institutions] before the [agency]. The employee is responsible for the section in the Office of General Counsel that handles requests for interpretative advice and applications for [certain] acquisitions and conversions. In some cases, the firm's clients may be applicants or opponents to applications. You explained that the nature of the employee's position would make it extremely difficult for her to isolate herself from the firm's submissions.

The first issue is whether the [employee] may co-author and accept royalties from two books on subjects involving her official duties. In evaluating the permissibility of this activity, we must consider Executive Order 11222 and your agency's standards of conduct regulations. Executive Order 11222 sets forth the basic framework for standards of conduct regulations. Those standards have been implemented by this Office's model regulations at 5 C.F.R. Part 735 and by your agency's regulations at [citation deleted]. The regulations do not prohibit a Government employee from writing any book while employed by the Government. However, specific standards of conduct prohibitions impose restrictions on Government employees who seek to write and publish books that deal with their official duties or involve the dissemination of governmental information.

The [agency's] general provision on outside employment appears [in the agency's version of 5 C.F.R. § 735.203]. It prohibits an employee from engaging in outside employment or other outside activity that is not compatible with the full and proper discharge of the duties and responsibilities of his or her employment. The regulations define incompatible activities to include acceptance of compensation in circumstances in which such acceptance may result in conflicts of interest or the use of nonpublic information gained through Government employment. A review of the specific regulations applicable to the proposed

activity will be of assistance in determining whether the proposed activity is incompatible with the employee's Government duties.

First, while encouraging teaching, lecturing, and writing that is related to the agency's functions and responsibilities [the agency's version of] subsection [c] of [5 C.F.R. § 735.203] indicates that such activities must not be prohibited by law, Executive Order, or the standards of conduct regulations. The writing of a book related to the agency's functions may run afoul of several of the standards of conduct, including the prohibition on using one's public office for private gain at [the agency's version of 5 C.F.R. § 735.201a(a)]. That provision would come into play to prevent the employee from using his or her Government title on the book or in marketing the book.

A second consideration relates to the nature of the information contained in the book. The misuse of information is governed by [the agency's version of 5 C.F.R. § 735.206], which states that an employee shall not further a private interest by using official information, obtained through or in connection with his or her Government employment, which has not been made available to the general public.

Third, [the agency's version of 5 C.F.R. § 735.205] prohibits an employee from using, or allowing the use of, agency property of any kind for other than officially approved activities. Consequently, the employee may not use Government time, supplies, or equipment in writing the book. Specifically, she may not have her secretary at the [agency] do any work on the project, and she must do the work on her own time, using annual leave, if necessary.

Since the two proposed books involve different circumstances, you must analyze each proposal under the standards of conduct provisions discussed above. Based upon the limited facts we have before us, we cannot make a final determination as to whether the acceptance of royalties or participation in the projects would be permissible. However, we will try to give you guidance as to what concerns each project presents.

As you have described it, the first book would be an updated version of an outline the employee wrote before entering Government service, on which she holds a copyright. As a result, we are assuming that her work on the project is complete, except for some updating or reviewing. We are also assuming that, since

the outline predates her Government service, she has not used nonpublic Government information in preparing the outline, and she will not be doing so in the future. In essence, she would be receiving royalties from that copyrighted material which, under the assumptions we have made, would be permissible. However, she must avoid using Government equipment, time, or supplies while working on this book. In addition, she may not use her Government title or position on the book, except that any biographical information about the authors may include a description of her current position. Furthermore, she may not use her title in any promotion of the book.

Your discussion of the second book indicates that the basis for the section on [certain financial] institutions and mergers would be an outline the employee prepared after entering the Government, although that outline was based on an article she had written before joining the [agency]. The employee has distributed the outline at conferences and seminars where she has been a speaker. If she distributed the outline in association with speeches she gave in her official capacity, it might actually be Government property, and she should not receive compensation from another entity for the outline. Furthermore, since the subject matter is closely linked to her official responsibilities, her participation in this project while serving in the Office of General Counsel would create adverse appearances. Your description indicates that the second book would be part of a series and that it will not be the mere republication of an item the employee prepared before entering Government, as in the case of the first book. Because of the employee's position [at the agency], the potential for conflict is great, particularly since the attorneys involved in the project will be representing clients before the [agency]. Based upon our interpretation of the facts, it would appear that the employee should not participate in, or receive royalties from, the writing of the second book. If the other individuals use her outline as a public document, they could, of course, note for reference that they based the chapter on an official outline created by her in her official capacity, just as they should when citing any other public source.

The second issue you raised in your letter pertains to the scope of 18 U.S.C. § 208. In particular, you are concerned with whether the term "partner" in the statute would apply to the employee's co-authors, thereby prohibiting her from participating for the Board in particular matters in which those individuals were serving as attorneys.

Section 208 of 18 U.S.C. prohibits an executive branch employee from participating personally and substantially as a Government employee in a particular matter in which the employee, or the employee's spouse, minor child, or partner, has a financial interest. In addition, section 208 applies to particular matters in which an organization in which the employee is serving as an officer, director, trustee, or employee has a financial interest. In OGE's Informal Advisory Letter 81 x 19, dated June 12, 1981, we stated in a footnote that the word "partner," as used in 18 U.S.C. § 208(a), refers only to a general partner and not to a limited partner of the employee.

Based upon the facts presented in your letter and the information we obtained through a telephone discussion with a member of your staff, it does not appear that the employee and her co-authors are partners in the book-writing ventures. However, it is not clear whether they are general partners in any other ventures, such as investment partnerships. If they are, then 18 U.S.C. § 208(a) would preclude the employee from taking official actions on particular matters in which any such partner has a financial interest, such as a matter on which he or she is representing a client before the agency. Since none of the other relationships covered by the statute are present, i.e., officer, director, trustee, employee, the employee may continue to take official actions on matters involving her co-authors without violating 18 U.S.C. § 208(a), as long as none of her co-authors are also her partners, whether in the book-writing venture or some investment partnership.

Even if the prohibition of 18 U.S.C. § 208(a) is not triggered in this case, the standards of conduct might preclude the employee from participating in particular matters in which her co-authors are serving as attorneys before the [agency]. The [agency's] standards of conduct [version of 5 C.F.R. § 735.201a(a)] prohibit its employees from taking any action which might result in, or create the appearance of, giving preferential treatment to any person or losing complete independence or impartiality. If the employee were to participate in matters in which her co-authors were involved, there could be an appearance of a conflict of interest. As a result, the agency might wish to have the employee recuse herself from participating in such matters. With regard to particular matters in which other members of her former firm are serving as attorneys, she could continue to participate as long as a sufficient period of time had passed since she severed her ties with the firm. As a guideline, we suggest that agencies impose a

period of recusal with regard to particular matters in which the employee's former firm is involved in order to avoid any adverse appearances stemming from that earlier affiliation. (On this subject, you might wish to review Peter L. Strauss' article entitled "Disqualifications of Decisional Officials in Rulemaking, " 80 Colum. L. Rev. (1980), reprinted in 1980 Recommendations and Reports, Administrative Conference of the United States, at page 375.)

Another criminal conflict of interest statute that applies to partners of current Government employees is 18 U.S.C. § 207(g). That provision prohibits a partner of an executive branch employee from representing anyone other than the United States before a Department, agency, or court of the U.S. or District of Columbia in connection with a particular matter in which the employee participates or has participated personally and substantially as a Government employee, or which is the subject of the employee's official responsibility. For purposes of 18 U.S.C. § 207(g), OGE, in informal advisory letter 81 x 19, interpreted the word "partner" to include general partners as well as limited partners under certain circumstances. If the limited partnership is an investment vehicle for a large number of generally unrelated persons, non-government limited partners are free of section 207(g)'s restraint. But if the number of limited partners is small, the applicability of 18 U.S.C. § 207(g) must be judged on a case by case basis. If any of the employee's co-authors is a general partner or a limited partner of the employee of the type covered by section 207(g), that co-author would have to refrain from representing clients before the [agency] or any other Federal Department, agency, or court in particular matters in which the employee is or has been personally and substantially involved, or which are under her official responsibility. This would also apply to partners of the employee who are not co-authors on either of the proposed books.

We hope you find this information helpful. If you have any questions on the matters discussed in this letter, please do not hesitate to contact [this Office].

Sincerely,

David H. Martin
Director