

Office of Government Ethics

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Letter to an Agency Ethics Counselor

dated December 28, 1982

This responds to your inquiry whether the possible appointment of a former member of [your Commission] by a United States District Judge who is presiding over one of the Commission's law enforcement cases in connection with an aspect of that case which the former Commissioner participated in while a Government officer would be consistent with the restrictions of 18 U.S.C. § 207.

Your inquiry discloses that, while a member of the Commission, he participated as a representative of the Commission at meetings of [an International Committee]. Since leaving the Commission, [the former Commissioner] has been retained from time to time by the Commission as a special Government employee to continue his participation as a representative of the Commission in the activities of the International Committee. While retained by the Commission, [he] agreed not to represent clients before the Commission to eliminate any possible appearance of impropriety.

You state that [the former Commissioner] has been both a knowledgeable and influential member of the Committee and that his continued presence at Committee meetings is desired by other Committee members. However, [he] is currently engaged in the private practice of law (operating as a sole practitioner) and the limitation that he not practice before the agency while employed as a representative of the International Committee is restrictive.

You suggest that a possible solution would be for [the former Commissioner] to be appointed by [the] Judge [of the] United States District [Court involved] as a special representative of the Court or of the Judge. [The] Judge presides over the Commission's action involving the [liquidation of a number of related international companies] and has retained jurisdiction of the case. Should [the] Judge appoint [the former Commissioner], he would determine all arrangements for [the former Commissioner's] expenses and fees, if any. The Commission would play no role in those arrangements. The Commission has a regular employee assigned to this matter who has been and will continue

to be the Commission's representative at the meetings.

Based on your factual representations, we believe that 18 U.S.C. § 207 is not an impediment to a proposed appointment of [the former Commissioner] by [the] Judge as a representative of the Court or of the Judge. In pertinent part, section 207 provides criminal sanctions for:

(a) Whoever, having been an officer or employee of the executive branch of the United States Government . . . after his employment has ceased, knowingly acts as agent, or attorney for, or otherwise represents, any other person (except the United States) . . . to (1) any department, agency, court, court-martial, or any civil military, or naval commission of the United States . . . (2) in connection with any judicial or other proceeding...in which the United States . . . is a party or has a direct and substantial interest, and (3) in which he participated personally and substantially as an officer or employee . . . while so employed (Emphasis added.)

This provision is aimed at the former executive branch employee who participates in a particular matter while employed by the Government and then switches sides by representing a private person or entity on the same matter (see particularly 5 C.F.R. § 737.5). In the facts as you have related them, any representation by [the former Commissioner] would be on behalf of the Court or its presiding judge and would come within the exception quoted above to 18 U.S.C. § 207(a) which permits representational activities on behalf of the United States.

Having disposed of the main issue presented, we should also comment upon the impact of [the former Commissioner's] proposed employment vis-a-vis his representation of other clients before the Commission. Normally, such representation would be proscribed by the provisions of 18 U.S.C. §§ 203 and 205. Both of these sections limit the activities of officers or employees of the United States in the executive, legislative or judicial branches of the Government. However, you have represented and we accept for the purposes of this opinion, that [the former Commissioner's] employment by the Court in the capacity of a "special representative" will be based upon a contract which will clearly distinguish the degree of operational control exercised by the Court from that of an "employer-employee" relationship.

Therefore, we view the proposed relationship as being that of an independent contractor, not subject to the representational activities limitations envisioned by these provisions of the conflicts of interest laws.

Sincerely,

David R. Scott
Acting Director

(Ed. Note: The former Commissioner would not violate 18 U.S.C. § 207(a) in any negotiations with the Court concerning his appointment as a special representative of the Court because he would be representing himself. Further, the definition of special Government employee does not include an individual who serves in the judicial branch. Therefore, the former Commissioner must serve as an independent contractor to avoid the full restrictions of 18 U.S.C. §§ 203 and 205.)