

Office of Government Ethics

82 x 16 -- 11/05/82

Letter to a Former Government Attorney dated November 5, 1982

This is in response to your letter of October 21, 1982 and the telephone conversations between my staff and you and representatives of [an agency]. This letter also will confirm the telephone advice of October 27, 1982 given by [a member] of my Office to you and to [a member of the agency's staff].

The question which has been the subject of these conversations and the letter is whether a violation of 18 U.S.C. § 207(a) might occur if the [agency] were to hire your law firm to handle certain litigation on behalf of the Government and you were to be involved in (1) representing your firm to the [agency] in the negotiations concerning the firm's employment by [the agency] and/or (2) providing the services on behalf of the firm under its contract with [the agency] in pursuing the litigation on its behalf.

To briefly review the salient facts, from 1971 until June of 1979, you served as an attorney in the Department of Justice. You then left the Department of Justice, accepting a position [in the legislative branch]. In January of this year you became a partner in [a law firm].

During your service with the Justice Department, you investigated and prosecuted a number of individuals on racketeering charges stemming from their unlawful acts with regard to labor unions and labor union trust funds. Certain of these individuals were then serving in a fiduciary capacity to the [a certain] Pension Plan. This Plan later terminated voluntarily and did not have sufficient assets to pay all benefits. The [agency] took steps to become trustee of the Plan and as trustee was then covered by the fiduciary responsibilities of Title I of ERISA. [The agency] was therefore obligated to pursue those officials for violating their fiduciary duties and filed civil actions against them under the enforcement provisions of Title I, seeking to recover monies.

At first, [the agency] used its own counsel to pursue the cases. After some period of time [the agency] decided to hire

outside counsel and approached a number of law firms to see if any would be interested. [Your law firm] was one of the firms which indicated some interest. [The agency] again called the firm, this time reaching you to discuss the matter with more particularity. It is our understanding the [agency] set forth the number of attorneys and paralegals it thought the cases would take and asked about billing rates. The [agency] also asked you to see if the firm would give the Government a discount and you responded after presenting the request to your firm's managing committee. At [the agency's] request you also sent a list of the attorneys and paralegals who might work on the matter and showed the hourly billing rate of each.

Because you were involved in the criminal prosecutions of certain of these individuals for the conduct which is the basis of the action taken by [the agency] as trustee of this Fund, [the agency] telephoned this Office to determine if there were any impediments under 18 U.S.C. § 207 in hiring your law firm and obtaining your services in this matter.

The provision of law which is applicable to this question is 18 U.S.C. § 207(a) as it read prior to the effective date of the amendments to that section contained in the Ethics in Government Act of 1978. This is so because you left the executive branch in June of 1979, and the effective date of the amendments was July 1, 1979. The section read in part at the time you left --

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 anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed --

. . . .

Shall be fined not more than \$10,000, or imprisoned not more than two years or both.

To trigger the prohibitions of this statute, one must have (1) a former executive branch employee; (2) a particular matter involving a specific party or parties; (3) an interest by the United States in the matter; (4) the former employee's personal and substantial participation in the matter while serving the Government; and (5) the former employee now wishing to act as agent or attorney for anyone other than the United States in the matter.

You are a former executive branch employee; the litigation initiated by the [agency] is a particular matter involving specific parties; and, the United States through [the agency] has an interest in the litigation. The real issues involved in your question then are whether your participation in the criminal prosecution of these individuals for the same conduct leading to this civil litigation constitutes participation in the same particular matter and, if so, would you be acting as agent or attorney for anyone other than the United States if your firm were hired to conduct this litigation on behalf of [the agency].

We believe that the civil suits instituted by [the agency] against these individuals are part of the same particular matter involving specific parties as their criminal prosecution for the same actions. The individuals involved in the civil actions are for the most part those involved in the criminal action. Those defendants added in the civil actions are related parties because the conduct giving rise to their being sued in the civil actions occurred in conjunction with the conduct of those prosecuted criminally. The information necessary to each action is substantially the same. And, clearly there is a continuing Federal interest. See 5 C.F.R. § 737.5(c)(4). Further, we believe that the hiring of outside counsel by [the agency] to conduct this civil litigation is part of the same overall matter and cannot be separated.

Therefore, it is our opinion that 18 U.S.C. § 207(a) would prohibit you from representing your firm in any negotiations with the [agency] concerning the business arrangement (contract) between your firm and the [agency]. In that instance you would be acting as an agent or attorney for your firm (a business entity) on a part of a particular matter involving a specific party or parties in which you had personally and substantially

participated while an executive branch employee. You would not be prohibited by section 207(a) from carrying out the actual work of pursuing the litigation once the firm was hired by the [agency] as long as you were never involved in representing the firm on the substance of the business arrangement with [the agency].

In order to make this distinction more easily understood, we believe the following guidance will be helpful to both you and the [agency].

You may not, pursuant to our interpretation, represent your firm on such matters as contract negotiations, fee renegotiations, and requests for additional personnel (and thus money for the firm), or on matters involving any questions of the competence of the services provided by the firm. If you did so, you would be acting as an agent of the firm in matters where there is controversy arising out of the business relationship between [the agency] and the firm.

On the other hand, once your firm is hired, you may in the normal course of providing the litigation services required under the contract, contact [the agency] for the files, discuss briefs previously filed by [the agency], and discuss future strategy. In these instances, there is no element of intent to influence or controversy concerning the business relationship on your part. It is simply the flow of information necessary to carry out the contract. See 5 C.F.R. § 737.5(b)(4) and (5).

With regard to matters involving a third party or parties such as negotiations with the defendants or matters before the Court, you would be acting as an attorney for the Government and would not be prohibited by 18 U.S.C. § 207(a) from doing so.

We have asked representatives of [the agency] whether they believe that, as a practical matter, this would be a workable arrangement. They have indicated that they feel that it would, based on the fact that all fee and professional services negotiations and complaints could be directed to the firm's managing committee and that the terms of the employment contract itself, other than fees, would be so broad that the only other potential dispute would be the failure of the firm's attorneys handling the matter to meet the normal professional standards required of attorneys. These complaints could also be directed to the firm's managing committee rather than to you.

It is our understanding that you have asked [the agency] to direct any further inquiries pertaining to the business arrangement to a partner other than yourself. And, it is our further understanding from both you and the [agency] that matters on which you have been contacted by the [agency] have been informational only. You have, at [the agency's] request, asked the firm's managing committee about a discount and related that information to [the agency]. You also sent a list of attorneys and paralegals with their billing rates in response to a request from [the agency] (who had already outlined the number of people it felt the matter would take). The simple transfer of information at the request of [the agency] does not rise to the level of acting as an agent with the intent to influence and would not, therefore, be a violation of the statute. If you have at any time negotiated with [the agency] on behalf of the firm in the matter of its being hired to carry out this litigation, you may very well have already violated section 207(a). If either you or the [agency] are concerned about any aspect of your prior dealings with them, we would suggest that they be brought to our attention immediately.

If you have any questions concerning this letter or if at any time in the future you have a question concerning a specific communication you wish to make with [the agency] should the contract ensue, please feel free to contact this Office.

Sincerely,

David R. Scott
Acting Director