

Office of Government Ethics

80 x 6 -- 08/01/80

Letter to a Designated Agency Ethics Official dated August 1, 1980

You have asked for a written opinion concerning the following facts:

A former senior lawyer of [your] Department is presently working for a private law firm and wishes to represent a private client who is suing [the Department]. This attorney is a Senior Employee for purposes of 18 U.S.C. § 207(d)(1)(C) and wants to represent the plaintiff in court within one year of his leaving [the Department]. The civil suit in question names the Department as defendant and involves the interpretation of a [Department] regulation.¹ Assuming that this lawyer would try to avoid communicating directly with or making an appearance before [the Department] in connection with this case, would his advocacy for the plaintiff in court still be prohibited by 18 U.S.C. § 207(c)?

The answer is yes, during the one year time ban of § 207(c). The critical issue is whether arguing to a judge (or jury) in court on behalf of the private plaintiff with the Department as the adverse party (defendant) constitutes an ". . . oral . . . communication" to the Department "with the intent to influence" it. Under the regulations promulgated pursuant to 18 U.S.C. § 207(c), 5 C.F.R. § 737.11(e) and (f), any communications made by this attorney in court on behalf of his private client would, even though addressed to the court, have the additional unavoidable intent of attempting to influence and to persuade the defendant in the lawsuit. The role of the plaintiff's lawyer is in large part to have the defendant [Department] change its position as a result of what plaintiff argues in court. Equally as important, it is unrealistic to assume that plaintiff's lawyer will be able to avoid direct contact with [the Department's] lawyer during the trial, despite his best intentions to do so. For example, the judge might order that settlement negotiations be undertaken or that the parties work out certain stipulations between themselves. In either case, plaintiff's attorney would be forced to have direct oral communications with [the Department's] lawyer with the intent to influence that [Department] lawyer of the wisdom of plaintiff's position.

The legislative history of 18 U.S.C. § 207(c), while not dealing specifically with appearances in court, supports the conclusion that this new subsection (c) is directed at representational contacts in matters in which the former high ranking Government employee's Department has a direct and substantial interest.

The conference also adopted the House language, contained in subsection (c)(3), to prohibit contact by a former official with his former agency, either on matters pending before that agency or on matters in which the former agency has a direct and substantial interest. Thus contact is proscribed, even though the matter is pending elsewhere and not before the agency itself, provided that the agency has a "direct and substantial interest" therein.

S. Rep. No. 127, 95th Cong.,
2nd Sess. 75 (1978).

Thus a matter "pending elsewhere" in which [the Department] has a direct and substantial interest must include instances where the Department is a named defendant in a court of law.

Therefore, the one year prohibition of 18 U.S.C. § 207(c) would attach to prevent the planned representation of the plaintiff in this civil lawsuit by the former Senior Employee of [the Department]. Cf. Example 2 of 5 C.F.R. § 737.11(f), (February 1, 1980).

Sincerely,

David R. Scott
Chief Counsel

1 You have told me that due to several factual circumstances the

subject of this suit is not the type of particular matter involving specific parties which would trigger any 18 U.S.C. § 207(a) or (b) prohibitions.