

**OFFICE OF GOVERNMENT ETHICS**

**01 x 1**

**Letter to a Former Employee  
dated March 14, 2001**

This is in response to your letter to the Office of Government Ethics (OGE) dated February 1, 2001. In your letter, you question the advice given to you by an ethics official at your agency in response to your asking whether you, an employee of [a] Department, may act as a compensated agent for private clients in prosecuting patent applications before the Patent and Trademark Office of the Department of Commerce. The ethics official advised that your proposed conduct would violate 18 U.S.C. § 203 and 18 U.S.C. § 205. After confirming that advice in response to your objections, the ethics official told you that you could obtain an opinion from this Office if you desired. Normally, OGE does not serve as an appellate forum because we rely on ethics officials at agencies to give advice and we consult with these officials when they have questions regarding advice. Nevertheless, since the ethics official at your agency has stated that you may seek an opinion from this Office, we are providing the following general information in response to the issue you pose.

By its terms, 18 U.S.C. § 203(a) prohibits Federal employees from receiving compensation for representational services, other than in the proper discharge of official duties--

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission . . . .

By its terms, 18 U.S.C. § 205(a)(2) bars the same activity even if no compensation is received. Here, you are a Federal employee.<sup>1</sup>

---

<sup>1</sup> Sections 203 and 205 apply to certain employees called "special Government employees" (SGE) only in relation to particular matters involving a specific party or parties in which the employee participated as a Government employee and, if the employee has served in the department for more than 60 days, to particular matters involving a specific party or parties pending before the department at which he is employed. See 18 U.S.C. §§ 203(c), 205(c) (2000). Although it is not clear in this respect, your letter seems to indicate that you are a regular Government employee rather than  
(continued...)

Further, you propose to provide representational services as an agent of private clients to the United States Department of Commerce, a Federal department. These services will relate to applications, which are specified as particular matters in the statutory sections. With respect to subsection 203(a), your letter indicates that you will receive compensation for your services. Thus, the only element of subsections 203(a) and 205(a)(2) that you seem to be claiming is not met in your case is whether a patent application is a matter "in which the United States is a party or has a direct and substantial interest."

The United States Court of Appeals for the Seventh Circuit has held that the United States does have a direct and substantial interest in the prosecution of a patent application before the Patent and Trademark Office. See *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 591 (7th Cir. 1971), cert. denied, 405 U.S. 1066 (1972). Discussing reissue patent applications, the court stated, "It is also clear that the potential impact on the public of the reissue applications placed them in the category of matters in which the United States has a direct and substantial interest." *Id.* The Seventh Circuit relied on the legislative history at S. Rep. No. 87-2213, at 5, 12 (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3854, 3861, and the opinion of the United States Supreme Court in *United States v. American Bell Tel. Co.*, 128 U.S. 315, 370 (1888). See *id.* at 591 n.32. While the *Kearney* case involved another conflict-of-interest statute (18 U.S.C. § 207), the court was construing the same "United States is a party or has a direct and substantial interest" language that is found in sections 203 and 205. Accordingly, we see no persuasive reason to suggest that the United States lacks a direct and substantial interest in the prosecution of a patent application before the Patent and Trademark Office for purposes of sections 203 and 205 as well.

You assert that sections 203 and 205 do not apply to your proposed conduct, based upon your reading of *Van Ee v. EPA*, 202 F.3d 296 (D.C. Cir. 2000). The court in *Van Ee* held "that § 205 is inapplicable to [the defendant's] uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans . . . ." *Van Ee*, 202 F.3d at 298-99. Your proposed conduct is clearly distinguishable from the special situation involved in *Van Ee*: you

---

<sup>1</sup>(...continued)  
an SGE. We are assuming for purposes of this letter that you are not an SGE, and we do not address hereinafter subsections 203(c) and 205(c). Should you be unsure whether you are a special Government employee, please consult 18 U.S.C. § 202(a) (defining "special Government employee") and the ethics official at your agency.

are not proposing to make uncompensated communications on behalf of public interest groups as part of public comment on proposed environmental impact statements related to land-use plans.

In sum, your proposed conduct falls squarely within the terms of 18 U.S.C. §§ 203 and 205. Accordingly, you are not permitted to act as a compensated agent for private clients in prosecuting patent applications before the Patent and Trademark Office. We concur with the advice given to you by the ethics official at your agency.

Sincerely,

Marilyn L. Glynn  
General Counsel