

## Office of Government Ethics

85 x 14 -- 09/23/85

### Letter to a DAEO dated September 23, 1985

This is in response to your request for our opinion as to whether the [an employee] should be ordered to recuse himself from participating in [an agency] matter in which his brother's law firm represents a manufacturer that has a substantial stake in the outcome of the matter. Our view is that recusal from all [agency] matters in which the firm is involved is not absolutely necessary. However, the [agency] should examine this situation to determine whether the [employee's] participation in this matter would create an adverse appearance that would require him to recuse himself.

#### Facts

The [agency] created a Task Force to investigate the causes of injuries and deaths associated with [a certain product]. The Task Force is charged with coordinating research, information, and related tasks and working with industry representatives to encourage the development of a voluntary standard to reduce injury and death rates [associated with this product]. In addition, the [agency's] compliance staff is investigating the matter to determine whether mandatory administrative adjudicatory action may be warranted.

According to the facts you provided us in your letter, the [employee] is responsible for directing the agency's compliance and enforcement program. Although not a member of the Task Force, the [employee] supervises members of that group and the personnel conducting the separate compliance investigation. The [employee] is required to participate personally in recommending any compliance or administrative enforcement action against the industry or an individual firm pursuant to [an organic statute of the agency] and is delegated authority to issue administrative complaints to commence adjudicative proceedings. He also has authority to impose conditions on, and determine compliance with, compulsory process issued by the [agency].

One of the attorneys representing the manufacturer of approximately 70% of the product currently in the market is a partner in the law firm in which the [employee's] brother is a named partner. However, the [employee's] brother is not personally involved in the representation of

the manufacturer.

## **Discussion**

Section 208 of 18 U.S.C. precludes participation by a Government employee in matters in which he, his spouse, his minor child, or his partner has a financial interest. If the [employee] and his brother are partners in anything, such as real estate or other ventures, this statute would apply to preclude the [employee's] participation in this matter. Assuming, however, that the [employee] and his brother are not partners, section 208 does not reach the present situation.

Although there are no criminal conflict of interest statutes involved in this situation, there are standards of conduct regulations to consider. The governmentwide standards of conduct at 5 C.F.R. § 735.201a proscribe conduct "which might result in, or create the appearance of:

- (a) Using public office for private gain;
- (b) Giving preferential treatment to any person;
- (c) Impeding Government efficiency or economy;
- (d) Losing complete independence or impartiality;
- (e) Making a Government decision outside official channels; or
- (f) Affecting adversely the confidence of the public in the integrity of the Government."

The [agency] has its own regulations proscribing the appearance of a conflict of interest at [citation omitted]. That provision states:

In order to assure that the business of the [agency] is conducted effectively, objectively, and without improper influence or the appearance thereof, all [agency] employees must observe the highest standards of conduct and be guided by the Code of Ethics for

Government Service . . . [agency] employees must avoid any real or apparent conflict between their private interests and their public duties.

Although the [employee's] judgment in the matter might not actually be affected, these regulations require us to consider whether an impermissible adverse appearance would result from the [employee's] participation in a matter in which one of the affected parties is represented by a law firm in which the [employee's] brother is a senior partner and which bears his name.

In our informal advisory letter 83 x 18, this Office rendered its opinion on whether a Commissioner of a particular agency must continue to recuse himself from participation in adjudicatory proceedings in which one of the parties before the Commission was represented by a law firm with which the Commissioner's son was an associate. Our response was that recusal from all such matters was not absolutely necessary, but that each case should be examined to determine whether the Commissioner's participation would be appropriate under the circumstances. Because the Commission's proceedings in that case were adjudicatory in nature, we analogized the situation to that of a judge in order to determine whether recusal would be necessary. Although the matter in the present case is not yet at an adjudicatory stage, the [employee] has the authority to commence such an action. The need to preserve the integrity of the [employee's] investigation and any subsequent adjudication that may occur is similar to that discussed in the judicial setting. As a result, a look at the guidance given to judges should assist us in drawing conclusions about whether there is an adverse appearance in this situation that would suggest that the [employee] should recuse himself.

Disqualification of Federal judges is governed by 28 U.S.C. § 455. That provision provides that a judge should disqualify himself in certain situations, including the following: (1) in any proceeding in which his impartiality might reasonably be questioned (28 U.S.C. § 455(a)); or (2) under circumstances in which he, his spouse, or a person within the third degree of relationship to either of them is known to have an interest that could be substantially affected by the outcome of the proceeding (28 U.S.C. § 455(b)(5)(iii)).

Since the [employee's] brother is a partner in the law firm that represents [the largest manufacturer of the product], the brother has a financial interest that could be affected by the outcome of the [agency's] investigation and any proceedings emerging therefrom. Based upon 28 U.S.C. § 455, a Federal judge should disqualify himself in a proceeding

in which his brother is a partner at a firm representing a party in the proceedings. Additional support for this view appears in *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). There the court held that the trial judge should have recused himself because his impartiality might reasonably be questioned where his brother was a partner in a firm that had entered a general appearance for one of the parties.

In the present case, the [employee] is the senior official responsible for all compliance and administrative enforcement activity under the statutes administered by the [agency]. The client of the [employee's] brother's firm has approximately 70% of [this product's] market in the United States. An enforcement action could have a severe economic impact on that company as well as on the other manufacturers of [the product]. You indicate that [this] matter is a high priority project of the [agency] and that the [employee] is in a position that is subject to close scrutiny. Because of those factors, the [agency] is particularly concerned about the appearance of a conflict of interest or improper influence stemming from the fact that the [employee's] brother is a senior partner in the firm representing [this manufacturer] and as such would have an interest in the matter. These are all important considerations in determining whether the [employee's] participation in the matter creates any of the adverse appearances prohibited by the standards of conduct.

Based upon the information that you have forwarded to us, it would seem to us that the [employee] might wish to recuse himself from participation in this matter because of the degree of appearance of potential partiality. However, the final decision on whether to require recusal rests with the [agency]. If, after considering all of these factors and any others that the [agency] deems relevant, the [agency] finds that the [employee's] continued participation in the matter affecting the client of his brother's firm creates adverse appearances that could bring into question the [employee's] impartiality or the propriety of the [agency's] decisions in [this] matter, it may require the [employee] to recuse himself from participating in the matter.

We hope this opinion provides some guidance to you and the [agency]. Please do not hesitate to contact us if you have further questions.

Sincerely,

David H. Martin  
Director