

Office of Government Ethics
94 x 7 -- 02/07/94

Letter to a Government Attorney dated February 7, 1994

This is in response to your letter concerning the application of 18 U.S.C. § 205 to your proposed representation of a woman in a Federal court action arising under [an Act]. Although your request for guidance does not meet the criteria for a formal opinion, 5 C.F.R. § 2638.303, we are providing the guidance below to help you in considering your situation. See 5 C.F.R. § 2638.305(a)(2). Please note that the advice provided in this letter is general in nature and is not meant to address a particular fact situation. If you require assistance in applying these rules to a particular set of circumstances, you should contact the Designated Agency Ethics Official (DAEO) of [your] Department.

According to your letter, you are a licensed attorney working for [a] Regional Office [of a Department], in its litigation section. Both the plaintiff and the defendant (a private law school) in the Federal court action are private parties; there are no other parties to the action. Your question is whether the United States would be considered to have a "direct and substantial interest" in this action for the purposes of 18 U.S.C. § 205. If so, then your representation would be prohibited by that section. If the United States does not have a direct and substantial interest, then your representation would not be prohibited by section 205. Although we are unable to definitively resolve this question, we can provide you with a discussion of the relevant issues to be considered, as well as restrictions that may apply other than that found in 18 U.S.C. § 205. We have not discussed this response with the Department of Justice.

As you know, 18 U.S.C. § 205 prohibits a Government employee from acting as agent or attorney for anyone (other than the United States) before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any particular matter in which the United States is a party or has a direct and substantial interest. The statute thus prohibits a Government employee from acting as an agent or attorney for a private party in a matter where the Government, the employee's primary employer, has an interest. In this instance, you seek to represent a party other than the United States in connection with a matter before a Federal court. According to your letter, the United States is not a named party in the matter. We therefore turn to a discussion of the phrase "direct and substantial interest."

As an initial matter, we note that while the proposed representation

involves a Federal statute and a Federal forum, that in and of itself does not create a direct and substantial interest on the part of the United States for purposes of section 205. 14 Op. O.L.C. 139 (June 7, 1990) (sections 203 and 205 do not bar a current executive branch employee from serving as a bankruptcy trustee, if the United States is not a party and lacks a direct and substantial interest). There is, however, no statutory definition of the phrase "direct or substantial interest" as used in 18 U.S.C. § 205. The phrase does appear in other criminal conflict of interest statutes, notably 18 U.S.C. §§ 203 and 207. OGE regulations interpreting section 207 provide helpful guidance on the scope of the phrase by describing its application in the context of that statute. These regulations make it clear that the United States may have a direct and substantial interest in a private action where the Government is not a party. See 5 C.F.R. § 2637.201(c)(5), example 1.¹ In the cited example, the United States, to avoid inconsistent results and any appearance of impropriety due to a former employee's representation in the matter, had a direct and substantial interest in a private antitrust action against the same defendant. Once the Government's antitrust investigation or case was closed, the United States would cease to have a direct and substantial interest in the matter. *Id.*

Additional guidance may be found in regulations that implement former 18 U.S.C. § 207(c). That section barred certain former senior employees from attempting to influence their former agencies for one year after they left the Government on matters in which their former agencies were a party or had a direct and substantial interest.² An example in the regulation states that the employee may seek a determination from his former agency as to whether the agency asserts a direct and substantial interest in a proceeding. 5 C.F.R. § 2637.204(f), example 2 (interest of regulatory agency in a criminal proceeding). The example also makes it clear that if the contacted agency does not assert such an interest, then the former employee may engage in the affected conduct (in that example, communication with his or her former agency).

Before applying the above principles to the application of 18 U.S.C. § 205 to a proposed representation, one should bear in mind the differences between section 205 and former section 207(c). The restriction in former 18 U.S.C. § 207(c) applied to matters where the former senior Government employee's former agency was a party or had a direct and substantial interest. Thus, the former agency was the one that was approached for an assertion of a direct and substantial interest. In section 205, the requirement is much broader; instead of referring to one agency, the statute bars acting as agent or attorney in any matter in which the United States is a party or has a direct and substantial interest. This may require that a number of different agencies or offices be consulted to

ensure that the Government does not assert such an interest.

In addition, the area of prohibited conduct is much broader under section 205 than under former section 207(c). Former section 207(c) only concerned communications or appearances made to or before a former senior employee's former agency with the intent to influence the agency. Section 205 is a prohibition on acting as an agent or attorney for anyone other than the United States where the United States is a party or has a direct and substantial interest. This is important to note because, if a direct and substantial interest on the part of the United States does arise as a matter proceeds, then the statutory bar is established at that time. See 5 C.F.R. § 2637.204(f), example 3 (private action where former agency originally expressed no interest, when important issue of statutory construction arose and former agency filed an amicus brief with the court, the former employee was barred from communicating with former agency by section 207(c)).

When the above analysis is considered, it becomes clear that a Government employee seeking to represent a private party in a Federal court action must take great care to ensure that he or she does not violate 18 U.S.C. § 205 even where the United States is not a named party. Determining whether or not the United States, although not a party to a matter, has a direct and substantial interest in it may not be easy. You have indicated that the action that your potential client wishes to pursue arises under [an Act] which prohibits discrimination against persons with disabilities by recipients of Federal financial assistance. Given that, you might start by focusing on the agency or agencies that are involved in funding programs at or providing assistance to the private law school in question. That agency's (or those agencies') regulations and policies may be implicated in your proposed client's action and may give that agency (or agencies) an interest in the matter. If there are particular issues or facts arising in your proposed client's action that may impact other Federal agencies or programs, you might consider the interests of those entities as well. Will any of these agencies be required to provide documents or testimony? Do any have a history of intervening in cases similar to the one which you are considering? The answers to these questions and other similar questions will assist in coming to some conclusion about the presence of a direct and substantial Governmental interest. We would suggest that if, after you have made this initial analysis, you believe that the Government has no interest in the matter, you discuss your conclusion with your DAEO. In that way, you will have certainly made a good faith attempt at determining whether the Government has an interest if you decide to proceed.

You should also be aware that there are other statutes besides 18 U.S.C. § 205 that affect a Government employee's ability to engage in outside employment. Your letter does not state whether your representation in this case would be compensated. While the statute barring the receipt of compensation for representational services, 18 U.S.C. § 203, does not apply if the United States is not a party or does not have a direct and substantial interest, there are also statutory restrictions that bar "covered noncareer employees" from receiving compensation for practicing

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profession, such as law, that involves a fiduciary relationship. 5 U.S.C. appendix (Ethics in Government Act of 1978), § 502. The term "covered noncareer employee" is defined at 5 C.F.R. § 2636.303(a). As an outside activity, your proposed representation must also be considered in light of the regulations governing such activities. These regulations apply whether or not you would receive compensation for the proposed representation. These regulations are found in subpart H of 5 C.F.R. part 2635 (the Standards of Ethical Conduct for Employees of the Executive

Branch) and in any agency supplemental regulations thereto or other agency requirements regarding outside activities that remain in effect pending issuance of such supplemental regulations. We note that many agencies require prior approval for outside employment or activities.

As we stated earlier, we recommend that you contact the DAEO at [your Department] to further discuss the application of 18 U.S.C. § 205 and other restrictions to your proposed representation.

We hope that this information is helpful to you. If you pursue this matter with your agency, you should share this letter with your agency at that time.

Sincerely,

Stephen D. Potts
Director

1The regulations found at 5 C.F.R. part 2637 implement 18 U.S.C. § 207 as it read prior to January 1, 1991. Section 207 was amended by title I of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, as amended. The regulations and examples contained in 5 C.F.R. part 2637, however, remain useful for interpreting the phrase "direct and substantial interest," as used in the current versions of 18 U.S.C. §§ 203, 205 and 207.

2The Ethics Reform Act of 1989 also amended section 207(c); the restriction is substantially similar but no longer contains the phrase "direct and substantial interest."