

Office of Government Ethics
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Letter to a Designated Agency Ethics Official
dated April 1, 1988

This is in response to your letter of March 14, 1988, requesting advice on the applicability of 18 U.S.C. § 207 to a former [agency] employee. Your letter indicates that [the former employee] served in the [agency's] Office of General Counsel for more than 25 years, as an attorney and the General Counsel, until he retired in 1983. He was temporarily re-employed through January 6, 1984. During the period August 1984 through November 1987, [the individual] was retained under contracts with the [agency] for the sole purpose of completing [the agency's] representation in the case of [citation deleted] (hereinafter [the case]).

Based on information in your letter, as well as a telephone conversation between [a staff attorney] of this Office and [an individual from the agency], we understand the facts to be as follows. [The former employee] has not served in a Senior Employee position, as that term is used in 18 U.S.C. § 207, so the Senior Employee restrictions of 18 U.S.C. § 207(b)(ii) and § 207(c) are not at issue. [The individual] is barred for a lifetime by 18 U.S.C. § 207(a) from switching sides in [the case] (which is unlikely, because the case has now been concluded), since he personally represented the [agency] in that case prior to his retirement. The only other prohibition of 18 U.S.C. § 207 is subsection (b)(i), which restricts former Government employees for a period of two years concerning matters under their official responsibility during the last year of such responsibility. Because [the individual] has had no matter other than [the case] under his official responsibility since January 1984, that subsection no longer applies.

You have opined that [the individual's] restrictions under 18 U.S.C. § 207 hinge on the narrow issue of whether he should be considered a Government employee during the period of his service under contracts from 1984 to 1987. In view of the observations contained in the preceding paragraph, his status while performing under the contracts appears to be irrelevant.

However, to the extent that he may have participated

personally and substantially in, or had official responsibility for, particular matters involving specific parties other than [the case] during the time he served under contracts with the [agency], it appears that he would not be barred by 18 U.S.C. § 207. This is based on the information you have provided, which indicates that [the individual] was an independent contractor, having been hired to personally handle [the case]; to use his judgment to analyze, evaluate, negotiate, make recommendations and settle or try the case; and to submit a final report to the [agency], summarizing his work.

We note, however, that the question of whether a person will be regarded as an employee or an independent contractor is one of degree, based on the nature of the work and amount of supervision. If there are additional factors which indicate that [the individual's] independence was significantly circumscribed or that he was closely supervised, or if there are circumstances of his performance which make him an employee de facto, then his service under the contracts would be subject to the proscriptions of 18 U.S.C. § 207(a) and § 207(b)(i). See the enclosed opinion of the Office of Legal Counsel, Department of Justice, at 1 Op. Off. of Legal Counsel 20 (1977).

Sincerely,

Frank Q. Nebeker
Director