

June 26, 1995

MEMORANDUM

To: T. Jeremy Gunn
From: Dennis J. Quinn
cc: David G. Marwell

Subject: Legal Opinion on Pro Bono Work

This is in response to your request for a legal opinion concerning your continued service as unpaid General Counsel for the National Coalition for Public Education and Religious Liberty (National PEARL).

There is no statute or regulation that strictly prohibits you from providing legal advice to this organization, as long as you are not compensated for it and do so on your own time.¹ But serving as the General Counsel does present a problem, particularly if you are named as such on the association's letterhead and other official documents.

Regulations promulgated by the Office of Government Ethics place restrictions on the professional activities of covered noncareer employees.² The regulations state, in part, that a covered noncareer employee shall not:

(2) Permit his name to be used by any firm, partnership, association, corporation or other entity which provides professional services involving a fiduciary relationship.³

The regulation defines "profession which involves a fiduciary relationship" as

¹ The Ethics In Government Act, 18 U.S.C. §205(a), prohibits an employee of the United States from acting as an attorney for anyone before any court or agency in connection with any matter in which the United States is a party or has a substantial interest. You have already indicated that you will not appear as counsel of record or allow your name to be used on any pleading filed in any court on behalf of National PEARL.

² The analysis used for determining who is a covered noncareer employee is the same used to determine who is required to file a Public Financial Disclosure Report. For the same reasons you are required to file such a report, you are considered a covered noncareer employee.

³ 5 C.F.R. § 2636.305(a)(2)

a profession in which the nature of the services provided causes the recipient of the services provided to place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge of the practitioner. Such professions are *not limited* to those whose practitioners are legally defined as fiduciaries (emphasis added)⁴

I discussed this at length with Cheryl Kane-Piasecki, our desk officer at OGE. She in turn discussed it with Steve McCleary from the OGE General Counsel's Office. Together, we analyzed Section 2636.305 and how it relates to your situation. After several telephone conversations we reached the following conclusions:

First, we agreed that this regulation was probably not drafted with your situation in mind. The intent of this section was to prevent law firms from keeping the names of former partners on the letterhead while the partners are in government service. Nevertheless, it has been interpreted rather broadly in recent years to include situations analogous to your own.

Second, we agreed that while National PEARL may not provide professional services involving a fiduciary relationship in the traditional sense, the fact that it litigates cases on behalf of other groups and individuals, would place it within the broad definition cited above.

Thus, the three of us are in agreement that your situation falls within the restrictions of 5 C.F.R. § 2636.305(a)(2). In addition, absent any additional statutory restriction, Cheryl and I agreed there is an appearance of impropriety when a full-time employee of the United States serves as the General Counsel of an organization which may at some point, be in litigation against the United States.

Accordingly, it is my opinion that you may not continue to serve as General Counsel of National PEARL. Specifically, the organization should not list you as such on any of its official documents or letterhead. You may, however, continue to provide general legal advice under the restrictions described above.

If you would like me to request an Informal Advisory Letter from the Office of Government Ethics please advise.

⁴ 5 C.F.R. §2636.305(b)(2)