

Report of the Committee on Ethics

I. INTRODUCTION

This report provides an update on ethics issues and decisions under the recently revised District of Columbia Rules of Professional Responsibility, the proposed rules of conduct issued by the Office of Government Ethics is applicable to employees of the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC), federal statutory guidelines governing post-employment restrictions on former government employees, and important developments in the FERC's rules governing *ex parte* communication.

II. RECENTLY PROPOSED STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

On July 23, 1991, the Office of Government Ethics (OGE) issued for comment a proposed rule to establish modified standards of ethical conduct for employees in the executive branch.¹ The OGE's comprehensive proposal, which would extensively revise Part 2635 of Title 5, chapter XVI, subchapter B of the Code of Federal Regulations, was intended to become final in March of 1992. However, as a result of the many comments received by OGE, this date has been indefinitely suspended, with an OGE spokesman indicating that the target date for action is now Summer, 1992. One of the most controversial portions is a provision which would effectively preclude government employees from active participation in bar associations such as the Federal Energy Bar Association (FEBA). This proposal was opposed by the FEBA in comments filed with OGE on September 17, 1992. Informal indications are that any decision on this issue may be "reserved" for future action.

The proposed regulations are predicated on the concept that a government employee has a "basic obligation of public service" that is a "public trust". The proposal then delineates the specific elements of appropriate conduct under seven discrete headings: gifts from outside sources; gifts between employees; conflicting financial interests; impartiality in performing official duties; seeking other employment (while still a federal employee); misuse of position; and outside activities.

The FEBA comments supported the OGE's efforts to establish uniform standards of conduct for federal offices and employees which will apply equally to persons serving in different agencies. The Association also supported efforts to encourage compliance, ease of administration, and foster a public perception that the government's business is being conducted in a fair and ethical manner. However, "in light of the purposes of the FEBA and the diversity of views held and represented by its members," the FEBA limited its

1. OFFICE OF GOVERNMENT ETHICS AGENCY: OFFICE OF GOVERNMENT ETHICS, 5 C.F.R. pt. 2635, "STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH", RIN 3209-AA04, 56 FR 33778 (July 23, 1991).

specific comments to Section 2635.806(h) of the proposed regulations which relate to the participation of government officials and employees in professional associations, including the FEBA.

The FEBA comments focused on the provisions of proposed Section 2635.806(h), which prohibit government lawyers from using official time to participate in the internal or business affairs of a professional association, unless the participation is specifically authorized by statute. While the proposed limitation was purportedly based on 18 U.S.C. § 208, a general prohibition against government officials and employees participating in governmental matters in which they have a personal interest, the FEBA comments pointed out that Section 208 has been construed as permitting the use of reasonable periods of official time for employee participation in the activities of professional associations. The FEBA comments also noted that the proposed rule would have the effect of precluding government attorneys and administrative law judges from holding office in bar associations, serving as a committee chairman or member, or from being an editor of the Energy Law Journal, because the day-to-day activities of the FEBA, like other bar associations, are largely conducted during normal business hours.

The FEBA comments showed that any prohibition would needlessly harm both the government service and bar associations. It would impair the ability of the government to attract outstanding legal talent by prohibiting a normal and fruitful aspect of professional growth. At the same time, FEBA argued, it would deprive the Association, and other professional organizations, of the views and insights of government lawyers engaged in energy practice. Accordingly, the FEBA suggested that OGE modify its proposal to permit and encourage participation by government lawyers in professional organizations "to the same extent as apply to lawyers in private practice."

The proposed OGE regulations also clarify the often difficult question of the nature and extent of gifts which may be made to governmental employees. The proposal provides that any payment or gift having a market value of more than \$25 is generally prohibited and such "gifts" include free transportation, lodgings and meals. However, an exception is made to allow the sponsor of a widely-attended bar association gathering on a subject of mutual concern to various sections of an industry, to provide government employees with free attendance and food. This would not include lodgings and transportation unless the employee is an active participant in the public proceeding.

Similarly, the rules would codify the manner in which government employees may seek employment in the private sector and receive inquiries by prospective employers. In addition, the rules set forth standards to ensure that government employees have no financial stake, or appearance of an interest, in any matter with which they deal; specify the limited situations in which government employees may receive outside earned income; and prohibit soliciting government employees to contribute to political or other causes. A detailed description of the OGE proposal, together with examples of situations in which they apply, is set out in a separate section of the Federal Register for July 23, 1981.

II. *EX PARTE* COMMUNICATIONS

This has been a busy year on the *ex parte* communication front. The FERC instituted a general review of its *ex parte* regulations. During this review a number of controversial cases considered whether particular approaches to FERC or other energy agency officials violated existing rules or appropriate standards of practice.

A. *Proposed Revisions to the FERC's Ex Parte Rules*

The Administrative Procedure Act defines an *ex parte* communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given . . ."² The FERC regulations governing *ex parte* communications between the public and members of the FERC and its staff are found in separate provisions of the Commission's Rules of Practice and Procedure. Rule 2201,³ carried over from the Federal Power Commission, applies to all FERC proceedings other than oil pipeline proceedings, and Rule 1415,⁴ carried over from the Interstate Commerce Commission, applies only to oil pipeline proceedings.

Rules 2201 and 1415, however, set forth slightly different standards for determining what communications constitute prohibited *ex parte* communications. Rule 2201 prohibits any person who is a party to an on-the-record proceeding from submitting an *ex parte* communication to any member of the FERC, administrative law judge, member of a Commissioner's Staff, or any other FERC employee, regarding a contested on-the-record proceeding, and it prohibits any FERC employee from entertaining any *ex parte* communication with respect to such proceeding.⁵

The *ex parte* prohibition does not apply to communications: (1) from any local, state, or federal agency which has no official interest in or whose official duties are not affected by the outcome of the proceeding in question; (2) from a member of the public relating only to procedural matters; (3) from a party in the on-the-record proceeding, if the communication relates to matters of procedure and is directed to the Secretary, Staff Counsel, or any other FERC employee in the presence or with the approval of Staff Counsel; (4) from any person authorized by law; (5) with Staff Counsel assigned to the proceeding, or in the presence of or after coordination with Staff Counsel, with any other Commission employee other than employees involved in the decisionmaking process; (6) which the participants agree may be made on an *ex parte* basis; (7) related to routine Staff safety, construction, and operations inspections outside of the context of an on-the-record proceeding; (8) related to routine Staff field audits of the accounts, books, or records of a company subject to the FERC's accounting rules outside of the context of an on-the-record proceeding; or (9) related to Staff requests for supplemental information necessary for an understanding of factual materials pertaining to a FERC proceeding which

2. 5 U.S.C. § 551(14) (1988).

3. 18 C.F.R. § 385.2201 (1992).

4. *Id.* at § 385.1415 (1992).

5. *Id.* at § 385.2201(a) (1992).

has been made in the presence of or has been coordinated with Staff Counsel (except for communications with FERC employees participating in the decision).⁶

In contrast, Rule 1415 prohibits any person from submitting an *ex parte* communication to FERC members, administrative law judges, or any other staff members who may be expected to participate in the decisionmaking process concerning the merits of any oil pipeline proceeding pending before the FERC which must be decided on the record.⁷ Rule 1415 also prohibits members of the FERC, administrative law judges (hearing officers), or any other staff members who may be expected to participate in a decision to invite or entertain a prohibited *ex parte* communication, or to make any such communication to a person he or she may have reason to know might transmit a prohibited *ex parte* communication.⁸

Rule 1415 also expressly authorizes the following types of *ex parte* communications: (1) any oral or written communication to which all the parties agree or in which the FERC or the administrative law judge formally rules may be made on an *ex parte* basis; (2) any oral or written communication of facts or contentions of general significance to the oil pipeline industry if the communicator cannot reasonably be expected to know that the facts or contentions pertain to a substantive issue in a pending on-the-record proceeding; or (3) any communication through the news media which is intended, in the ordinary course of business, to inform the public, members of the organization involved, or subscribers to a publication, concerning on-the-record proceedings.⁹

On December 12, 1991, the FERC issued a "Notice of Intent to Establish a Negotiated Rulemaking Committee" for the purpose of establishing uniform and comprehensive proposed regulations governing *ex parte* communications between the general public and the members of the FERC and its staff.¹⁰ The FERC stated that it currently had two sets of *ex parte* regulations in effect which were carried over from the old Federal Power Commission regulations and the Interstate Commerce Commission regulations applicable to oil pipeline matters. Hence, the negotiated rulemaking committee was charged with the task of updating the existing regulations and examining the legal and policy issues involved in formulating comprehensive and uniform regulations.¹¹

In the Notice, the FERC also explained that clearer guidance is needed concerning the scope of *ex parte* communications in trial-type and adjudicatory hearings.¹² The FERC expressed particular concern about establishing standards which would govern informal consultations on environmental matters between the FERC, its environmental staff and other federal and state

6. *Id.* at § 385.2201(b) (1992).

7. *Id.* at § 385.1415(a) (1992).

8. *Id.* at § 385.1415(a)(2) (1992).

9. *Id.* at § 385.1415(c)(3) (1992).

10. *Notice of Intent to Establish a Negotiated Rulemaking Committee*, IV F.E.R.C. Stats. & Regs. (Notices) ¶ 35,021 (1991), 56 Fed. Reg. 65,863 (1991) (to be codified at 18 C.F.R. ch. 1) [hereinafter *Notice*].

11. *Id.* at 35,133.

12. *Id.*

agencies that have environmental responsibilities and interests, as well as consultations between the FERC and its environmental staff and the applicants. The FERC also stated that additional guidance is necessary to ensure that, in informal rulemakings, significant off-the-record communications are reflected in the public rulemaking file so that they would be considered in the FERC's notice and comment decisional process. The negotiated rulemaking provisions found in the Negotiated Rulemaking Act of 1990 (NRA),¹³ the FERC concluded, are "well suited" for a comprehensive review of the FERC's *ex parte* regulations.¹⁴

On March 20, 1992, the FERC issued a "Notice of Determination Not to Establish a Negotiated Rulemaking Committee" which rescinded its previous decision to establish the negotiated rulemaking committee. In changing its procedural course the FERC stated that the NRA limited the use of the negotiated rulemaking procedure to rules that significantly affect "a limited number of identifiable interests."¹⁵ Since nine parties commenting on the December 12, 1991 Notice sought to add representatives to the negotiated rulemaking committee, which already had nineteen members, the FERC concluded that the committee would be too large and, therefore, inefficient and ineffective.¹⁶

Instead of using the negotiated rulemaking procedures, the FERC decided instead to convene a public conference to address the revision of the *ex parte* regulations. In the "Notice of Public Conference" issued concurrently with the notice which rescinded the negotiated rulemaking committee, the FERC stated that it sought to "draw on the experience, expertise, and knowledge of the persons and entities who practice before it."¹⁷

The Notice of Public Conference included an appendix which listed a series of issues to be addressed. The FERC sought guidance on such issues as: (1) whether *ex parte* prohibitions should apply to all FERC employees or to a more limited subset, such as decisional employees involved in the decision-making process; (2) whether clearer standards are necessary to govern contacts between the FERC and its environmental staff and applicants or other government agencies for purposes of acquiring environmental information; (3) whether there should be a clearer distinction between general background discussions, which the FERC views as permissible, and prohibited communications regarding the merits of individual proceedings; and (4) whether clearer standards are necessary to determine the extent to which FERC staff may communicate with applicants concerning compliance filings while the underlying proceedings are pending before the FERC on rehearing.

Finally, a number of commissioners indicated that they wish to explore

13. Negotiated Rulemaking Act, 5 U.S.C. §§ 581 - 590 (1990).

14. Commissioner Trabandt issued a lengthy opinion stating that he concurred with the Commission's decision to update and revise its *ex parte* regulations, particularly as they apply to adjudicatory proceedings, but objected to, as inappropriate, the use of the negotiated rulemaking process in this instance. Notice, *supra* note 10, at 35,136-49.

15. Notice, *Determination Not to Establish a Negotiated Rulemaking Committee*, IV F.E.R.C. ¶ 35,023 (1992), 57 Fed. Reg. 10,621 (1992).

16. *Id.* at 35,160.

17. *Id.*

means by which their access to industry sources in the exercise of their quasi-legislative rulemaking activities can be preserved while avoiding even the appearance of partiality between opposing parties in discrete proceedings.

B. Particular Cases Involving Ex Parte Contracts

During the past year there were at least four cases in the energy field where questions of alleged *ex parte* contacts received public attention.

1. The *Iroquois/Tennessee* Case

This case involves meetings between Commission staff and applicant representatives in the *Iroquois/Tennessee* proceedings over proposals to construct a major new pipeline from Canada to New York and New England. These meetings led to differing appraisals of the propriety of the meeting by the Court of Appeals for the District of Columbia and the United States Comptroller General. The principal meeting took place on March 15, 1990, at the request of the Commission Staff, to explore the ramifications of amendments to the *Iroquois* and *Tennessee* applications. These amendments raised questions about the ability of the Commission to complete processing of the applications by the June 1990 target date for commencement of construction. At approximately the same time representatives of the applicants also had brief meetings with several Commissioners about the status of the proceedings.

Various opponents of the *Iroquois* project filed complaints with the FERC alleging that the meetings involved violations of the Commission's *ex parte* rules. An investigation of the charges was conducted by the Commission's General Counsel who reached the conclusion that no violation had occurred. The Commission in its opinion on *Iroquois* agreed with the General Counsel's report.¹⁸ On appeal, in *Louisiana Ass'n of Independent Producers v. FERC*,¹⁹ the Court concluded that while there were meetings between agency officials and industry officials, "the record supports the Commission's conclusion that there was nothing improper about those meetings. Because we find no evidence in this record indicating that judicial review has been frustrated or that any serious questions of fairness have been presented, we sustain the Commission's finding that 'the integrity of the decision-making process has been fully maintained'."²⁰

Prior to the Court's order, the Comptroller General, at the request of the Subcommittee on Energy, Environment and Natural Resources of the House Committee on Government Operations, conducted its own study of the meetings between *Iroquois* and various Commission officials. In a January 14, 1992 letter to the Subcommittee, the Comptroller General concluded that "FERC officials engaged in prohibited *ex parte* communications during the March 15, 1990 meeting." The meetings became the subject of hearings before the Subcommittee and led to correspondence between the individual commissioners and Subcommittee staff.

18. See *Iroquois Gas System et al.*, 52 F.E.R.C. ¶ 61,091, at 61,428 (1990).

19. 958 F.2d 1101 (D.C. Cir. 1992).

20. *Id.* at 1113.

It appears that the continuing uncertainty, both as to the nature of *ex parte* contacts and whether the language of the existing *ex parte* rules adequately inform parties of the limits under which they must operate, is a major impetus for the Commission's review of its *ex parte* rules.

2. The *Transco* Case

In the *Transcontinental Gas Pipe Line Corp.*²¹ proceeding, a majority of the Commission, with Chairman Allday and Commissioner Terzic dissenting in part, concluded that when pipeline counsel asked the Commission's General Counsel for oral argument prior to Commission action on rehearing, the request should have been treated as an *ex parte* communication and made public by the recipients.²² The majority, citing the *Iroquois* opinion, concluded that "this is the kind of doubtful situation that should be treated as involving comments related to the merits in order to protect the integrity of the decision-making process."²³ The dissenters, on the other hand, concluded that the request for oral argument was procedural in nature and not directed to the merits of the proceedings.²⁴

3. The *Transcanada* Case

Also of interest is a case before Canada's National Energy Board in which Transcanada Pipeline requested authority to construct facilities which would have been utilized, *inter alia*, to transport gas to the United States. In that case the NEB rejected the Transcanada application. Immediately after this action the FERC gave the requisite authorization for construction of necessary border facilities to import gas into the United States, conditioned upon the approval of Transcanada's Canadian construction application. Subsequently, various parties sponsoring the Transcanada line, including a former chairman of the NEB employed as a consultant for Transcanada, met privately with the current Chairman and Vice-Chairman of the NEB to request that they initiate a review of the NEB's negative decision.

In *CNG Transmission Corp. v. National Energy Bd.*, the Trial Division of the Federal Court of Canada concluded that the meeting violated the NEB's established procedures which require that communications with the Board must be initiated through the Secretary. In addition, the communication was found to be unfair to the other participants because it was not limited to purely procedural matters. As a consequence, the NEB's action to rehear its earlier order was quashed. Moreover, the Chairman and Vice Chairman were prohibited from participating in any further review of the decision. Although the other members of the NEB had been informed of the meeting, the Court determined that extending disqualification to the entire NEB, as CNG had requested, would be inappropriate.

21. 58 F.E.R.C. ¶ 61,023 (1992).

22. *Id.* at 61,054.

23. 52 F.E.R.C. at ¶ 61,433 (1992).

24. *Id.*

4. The *Arcadian* Proceeding

This proceeding involved a question over the nature of participation by the DOE in a Commission complaint proceeding, *Arcadian Corp. v. Southern Natural Gas Co.*²⁵ The Commission denied Arcadian's complaint, and almost five months after rehearing had been sought by Arcadian, the Deputy Secretary of the DOE, who had not intervened or otherwise participated in the proceedings, sent a letter to the Commissioners supporting, on policy grounds, Arcadian's request for relief. On November 21, 1991, the FERC Secretary issued a Notice stating that a copy of the November 7, 1991 letter had been distributed to the Public Reference Room and made available on the Records Information Management System and that comments on the Deputy Secretary's letter could be filed by interested parties by December 3, 1992.

A number of comments were filed which, in addition to addressing the merits of the controversy, argued that the letter, which had not been served on the parties to the Commission proceedings, was in violation of the Commission's *ex parte* rules. Commenters also argued that the letter was an untimely response to the request for rehearing and should be disregarded by the Commission in reaching its decision. The Commission set the case for oral argument (in which the DOE did not participate), but did not directly address the question of the status of the Deputy Secretary's letter. A decision in the case has not yet been issued.

III. UPDATE ON D.C. BAR ETHICS RULES

As reported last year,²⁶ the District of Columbia Court of Appeals adopted new rules of professional conduct effective January 1, 1991. Eight opinions were issued in 1991 by the District of Columbia Bar Legal Ethics Committee interpreting the new rules.

A. *Corporate Counsel Representation of Corporation Against Shareholder*

Opinion No. 216, issued January 15, 1991,²⁷ dealt with the question of whether a corporate counsel could represent a closely held corporation in an action against a shareholder of the corporation. The matter involved an action for wrongful termination of a banking relationship against a bank that obtained a judgment against, and then obtained the ownership interest of the president of the corporation, who had been a 50 percent shareholder.

The Committee observed that Rule 1.13 of the District of Columbia Rules of Professional Conduct "embodies the well-established principle that a lawyer retained by a corporation, or by any other organization recognized as a separate legal entity, represents the entity."²⁸ The Committee also observed that there was a difficulty presented because the president (who had not been replaced as president because of a deadlock between the two shareholders)

25. 54 F.E.R.C. ¶ 61,207 (1991).

26. Report of the Committee on Ethics, 12 ENERGY L.J. 421, 428-31 (1991).

27. Corporate Counsel, 7 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 67 (Mar. 27, 1991).

28. *Id.*

may have had reason to disregard the corporation's interest in determining the corporation's course of action in its dispute with the bank.

The opinion concluded that if the lawyer should become convinced that the president's actions are clearly in violation of the president's fiduciary duties to the corporation, the lawyer may be required to seek guidance from the court as to who is in control of the corporation.

B. Representation of Multiple Members of a Group of Claimants Against Other Claimants to a Limited Fund

The issue of when a lawyer may engage in representation of multiple members of a group of claimants against other claimants to a limited fund was addressed in Opinion No. 217, on January 15, 1991. The inquiry presented was whether a law firm could properly represent three clients as a claimant group before the Copyright Royalty Tribunal. The allocation of any resulting award among the three would be determined by agreement.

The Committee observed that Rule 1.7(a) has a narrow reach. The Rule provides that "[a] lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse to a position taken or to be taken in the same matter by another client represented with respect to that same position by the same lawyer." However, the Committee explained that Rule 1.7(a) bars representation "only with respect to a particular 'position' in a matter in which the firm represents a second client who actually takes or will take an adverse 'position' on the same issue."²⁹ Thus, the Committee concluded that Rule 1.7(a) would not preclude the joint representation contemplated before the Copyright Royalty Tribunal or in negotiations with other participants because there was no adverse "position" in the "matter."

The Committee also found Rule 1.7(b) to be applicable. This rule permits joint representation if all potentially affected clients consent after full disclosure where the lawyer would be representing a client with respect to a matter if:

- (1) A position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter;
- (2) Such representation will be or is likely to be adversely affected by representation of another client;
- (3) Representation of another client will be or is likely to be adversely affected by such representation; or
- (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibility to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

The Committee explained that the consent must be uncoerced and based on full and informed disclosure.

The Ethics Committee explained that under Rule 2.2, the lawyer could not serve as an advocate for any of the three clients in negotiations with the others to establish the allocation of any award among them. Nevertheless, the

29. Opinion 217, DAILY WASHINGTON LAW REPORTER, May 24, 1991, at 1104.

Committee observed that the lawyer might be able to act as an intermediary among the clients. It warned that it is essential that each client understand the lawyer's role as an intermediary, and commented that "[b]ecause the risks are great for the lawyer as well as the clients, a written explanation of the implications of common representation should be provided whenever feasible."

Finally, the Committee discussed a question raised as to the effect of confidentiality agreements governing prior settlements. It commented that the lawyer's contractual obligations under those agreements are independent of the ethical obligations under the Rules of Professional Conduct. Because the relevant rule (Rule 1.6) permits a lawyer to use or reveal confidential information or secrets with client consent, the Committee did not express an opinion on the issue.

C. Arbitration of Fee Disputes

Legal Ethics Committee Opinion No. 218, adopted June 18, 1991, concluded that a retainer agreement providing for mandatory arbitration of fee disputes before the District of Columbia Bar Attorney-Client Arbitration Board (ACAB) is not unethical. However, the client must be advised in writing about the availability of counseling by the ACAB staff and must consent in writing. An earlier decision, Opinion No. 211, found that a retainer agreement providing for mandatory arbitration of all disputes was improper unless the client is counseled by another attorney prior to entering into the retainer agreement. The Opinion reserved the question of whether arbitration limited to fee disputes only were permissible.

The Committee ruled in Opinion No. 218, that a lawyer relying on a fee only arbitration agreement may not ethically use the existence of an arbitration award in an attempt to preclude a subsequent malpractice award unless the lawyer had complied with the dictates of Opinion No. 211.

D. Revealing Fraud

The ethical constraints against disclosure of client confidences are not contravened in circumstances where a client has refused to rectify a fraud when called upon to do so in accordance with regulations of a federal tribunal. In Opinion No. 219, issued July 17, 1991, the Legal Ethics Committee stated its belief that the lawyer is required to notify the client and provide the client with a reasonable opportunity to investigate and pursue any good faith challenge to the regulations before the lawyer makes any disclosure of a client confidence.

E. Threats to File Disciplinary Charges

In Opinion No. 220, issued September 17, 1991, the Legal Ethics Committee ruled that threats to file disciplinary charges against either attorneys or non-attorneys SOLELY to gain advantage in a civil matter, would constitute a violation of Rule 8.4(f) of the Rules of Professional Conduct. The Committee observed that neither the history nor the published comments to Rule 8.4 address the reasons for modifying the prior rule, which was limited to the

filing of or threat of filing criminal charges. It stated that the question of the purpose for filing or threatening to file disciplinary charges would be a factual question. The Committee added that Rule 8.3(a), which establishes an affirmative obligation upon a lawyer to inform the appropriate professional authority of misconduct or questions of honesty, trustworthiness or fitness would be relevant. The Committee further added (emphasis supplied): "it is unlikely that a THREAT to file a disciplinary complaint could be viewed as a good faith effort to comply with Rule 8.3 since the obligation under that Rule is to report — and not to threaten to report — the relevant information."

F. Other Opinions

The other opinions issued in 1991 dealt with an employment agreement between a law firm and a departing attorney, employment discrimination outside of the District of Columbia, and whether attorneys for a legal services support center may reveal client confidential material to representatives of a funding agency.

Opinion No. 221, issued October 15, 1991, ruled that an employment agreement allocating contingent fees on a percentage basis between a firm and a departing client may be determined according to the amount of time the case was with the firm and the amount of time it was with the departing lawyer who takes the client. The agreement may not include a provision restricting the attorney's right to send an announcement to clients notifying them of his or her departure from the firm.

In Opinion No. 222, issued November 19, 1991, the Committee dealt with an inquiry from a member of the D.C. Bar who serves on the board of elders of his church (in Virginia) and the board of directors of an international religious human rights organization (in Maryland), but the attorney does not provide legal counsel or services to either. Both organizations are opposed as a matter of principle to homosexuality and to those who condone or practice it. Unlike the District of Columbia, neither Virginia nor Maryland, nor federal law, expressly forbids discrimination in employment based on sexual orientation. The Legal Ethics Committee ruled that the inquirer's participation and concurrence in hiring decisions by those boards of directors would not subject him to discipline. The Committee added, however, "that if Maryland or Virginia law, or the federal law, should be changed to include 'sexual orientation' as a forbidden ground for employment discrimination," the lawyer would be subject to disciplinary action.

Opinion No. 223 ruled that attorneys for a legal services support center must refuse to allow representatives of a funding agency to see materials that include confidences and secrets of clients assisted by the support center. The Legal Ethics Committee found that editing of client names would be insufficient to preserve confidentiality when unedited information would link the confidence or secret to the client.

G. *ABA Refuses to Adopt Recommended Rule Permitting Lawyers to Practice with Non-Lawyers*

The American Bar Association considered whether lawyers should be permitted to practice with non-lawyers but declined to follow the lead of the D.C. Bar. Rule 5.4 of the D.C. Rules of Professional Conduct permits non-lawyers to hold a financial interest or exercise managerial authority in a law firm if certain conditions are met. The ABA's Standing Committee on Ethics and Professional Responsibility proposed a rule similar to the D.C. rule. It was opposed by the Section of Litigation which offered a prohibitory approach. The Litigation Section's recommendation was passed by a 197-186 vote at the House of Delegates meeting on August 12-13, 1991.³⁰

IV. MISCELLANEOUS AGENCY AND COURT OPINIONS

The FERC recently reached a settlement with a Commission employee who violated the Commission's conflict of interest regulations.³¹ In this case, an employee of the FERC's Atlanta regional office entered into a settlement agreement with the FERC stipulating that he was in violation of Sections 3c.5 and 3c.6 of the Commission's Rules of Practice and Procedure.³²

The employee conceded to "performing numerous activities for the developers of the City Mills, Milstead and Henrietta projects while still employed by the Commission."³³ These activities included: drafting exemption applications and other pleadings that developers filed with the Commission, conducting an official inspection of a project for which he had drafted an application for the developer, providing a construction schedule for a project regulated by the Commission, and arranging for the employment of his brother on the construction project.³⁴

Under the settlement agreement, the employee may not practice before the FERC for a period of 5 years, although at the end of three years he may

30. Corporate Counsel, 7 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 256 (Aug. 28, 1991).

31. 53 F.E.R.C. ¶ 61,006 (1990).

32. See also 18 C.F.R. § 385.602(g)(1) (1990).

FERC's Conflict of Interest Regulations: Section 3c.5(d) states that, while employed at the Commission:

An employee is prohibited, except as permitted in the proper discharge of his official duties or by express statutory exemption, from acting with or without compensation as agent or attorney before a court or government agency in a matter in which the United States is a party or has a direct and substantial interest.

Section 3c.6(i)(2) provides that:

(2) Employees shall avoid any action, whether or not specifically prohibited by §§ 3c.5 and 3c.6 which might result in or create the appearance of:

- (i) Using public office for private gain; or
- (ii) Giving preferential treatment to any person; or
- (iii) Losing complete independence or impartiality of action; or
- (iv) Making a government decision outside official channels; or
- (v) Impeding government efficiency or economy; or
- (vi) Affecting adversely the confidence of the public in the integrity of the government and the Federal Power Commission.

33. *Id.* at 61,036.

34. *Id.* at 61,036.

petition the FERC for reinstatement. Should the FERC reinstate him, the remaining two years of the term would be suspended. Should the FERC, "after an appropriate hearing," find him in violation of the "terms of the prohibition while it is in effect, or to have violated any statute or regulation under the Commission's jurisdiction during the full five year period of the Agreement", he would be permanently disbarred from practicing before the Commission.³⁵

Richard A. Solomon, Chairman
Douglas M. Canter, Vice Chairman

Scott P. Anger
James N. Horwood

Mark C. Darrell
Sheila R. Tweed

35. *Id.*