

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

30647

FILE: B-217096

DATE: March 11, 1985

MATTER OF: Retired Marine Corps Officers

DIGEST:

Retired Marine Corps officers who are attorneys either employed by or "of counsel" to a law firm incorporated in Virginia as a professional corporation may not serve as legal counsel for the Office of the Saudi Military Attache, an instrumentality of a foreign government, without obtaining the consent of Congress as required for officers of the United States by Article I, section 9, clause 8 of the U.S. Constitution and 37 U.S.C. § 908. Under Virginia law an attorney's professional relationship with his clients remains unchanged notwithstanding the existence of a professional corporation; thus, the fact that they are employees of the professional corporation does not exempt Virginia attorneys from obtaining the required consent.

The question presented is whether the existence of a professional corporation would affect the applicability of Article I, section 9, clause 8 of the United States Constitution to retired officers of the U.S. Marine Corps who as employees of a professional corporation, incorporated in the Commonwealth of Virginia, will serve as legal counsel to the Office of the Saudi Armed Forces Attache.^{1/} We conclude that the constitutional prohibition on the acceptance of any emolument from a foreign government without the consent of Congress by one who holds an office of the United States remains applicable. Accordingly, the individuals concerned should obtain the consent of Congress as required by the Constitution prior to their legal representation of the Office of the Saudi Armed Forces Attache. This may be

^{1/} The request for a decision is presented at the direction of the Commandant of the Marine Corps by Brigadier General H.E. Davison, Deputy Fiscal Director of the Marine Corps.

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accomplished by obtaining the approval of the Secretary of the Navy and the Secretary of State as provided in 37 U.S.C. § 908.

Background

By letter dated November 7, 1984, to the Commandant of the Marine Corps, Colonel Matthew A. Clary, Jr., USMC, Retired, the President of the law firm of Clary & Pijor, P.C., advises that the Office of the Saudi Armed Forces Attache contemplates retaining the law firm of Clary & Pijor, P.C. to represent it and designated Saudi nationals in legal proceedings in courts or before administrative agencies in the United States. The law firm also would counsel and advise the Attache on United States legal matters pertaining to the Office of the Saudi Armed Forces Attache or to Saudi nationals under the control of that Office. He advises that Clary & Pijor, P.C., with principal offices in Virginia, was established in 1976 as a Virginia professional corporation. The firm employs seventeen persons, seven of whom are attorneys. Four other attorneys are associated with the firm on an "of counsel" basis. Two of the employee attorneys, including Mr. Clary, and one of the attorneys who is "of counsel" to the firm are retired regular officers of the Marine Corps. Legal services would be performed for the Saudi Attache's Office by whichever of the firm's attorneys, including the retired Marine officers, is or are deemed best or appropriately qualified to handle the particular matter.

While it is undisputed that the Office of the Saudi Armed Forces Attache is an instrumentality of the Saudi Arabian government, Mr. Clary argues that Article I, section 9, clause 8 of the Constitution is not applicable to either himself or the other two attorneys associated with the firm in connection with the firm's proposed representation of that Office. He states that the Attache's Office would be the client of the professional corporation and would not be the client of any individual attorney employed by the corporation. He further states that the Attache's Office would be billed by the corporation for all services performed which billing would be due the corporation itself and not to any of its personnel individually. He elaborates on this point by stating that the compensation of the corporation's employees, including its attorneys, is normally

established annually by the corporation's board of directors^{2/} and that no attorney will be entitled to or receive any compensation on the basis of collection by the firm from any particular client or for any particular service. He emphasizes that under the laws of the Commonwealth of Virginia the professional corporation is a separate legal entity from its employees. Thus, Mr. Clary concludes that the proposed situation under consideration is no different from that of retired officers working for U.S. corporations in the aircraft, automotive, and consultant businesses which do business under contract for foreign governments.

He also argues that, in any event, his view is supported by the case of Lieutenant Colonel Marvin S. Shaffer, 62 Comp. Gen. 432 (1983), in which we held that the constitutional prohibition does not apply to a retired officer employed by American Motors Corporation, the controlling interest in which is held by a French company owned by the French government.

Analysis

Article I, section 9, clause 8 of the Constitution prohibits any person "holding any Office of Profit or Trust" under the United States from accepting "any present, Emolument, Office, or Title, of any kind whatever" from a foreign government without the consent of Congress. The history of this constitutional provision indicates that the evil intended to be avoided by it is the exercise of undue influence by a foreign government upon officers of the United States. See 24 Op. Att'y Gen. 116 (1906). It is well established that this prohibition applies to retired members of the uniformed services. 58 Comp. Gen. 487 (1979); 53 Comp. Gen. 753 (1974); and 37 U.S.C. § 908 (1982). And, we have held that the term emolument as used in this provision includes the salary, fees or compensation received for services. 44 Comp. Gen. 130 (1964); 37 Comp. Gen. 138 (1957). We also have held that in view of the wording of the provision in prohibiting the acceptance of emoluments, etc., "of any kind whatever", it is to be given the broadest possible scope and application. 58 Comp. Gen. 487, 493 (1979). Therefore, it seems clear that a retired officer practicing law as a sole practitioner would be subject to the constitutional prohibition if he wished to provide services to, and receive compensation from, the Saudi Defense Attache's Office.

^{2/} The board of directors is composed of six of the seven attorney stockholders.

The question for resolution in this case, then, is whether Colonel Clary and the other retired officers associated with Clary & Pijor are relieved from the constitutional restriction by practicing law as a professional corporation.

As indicated above, we did hold that a retired officer who was employed by American Motors Corporation did not violate the constitutional restriction by that employment notwithstanding that a controlling interest in American Motors was held by a French automotive firm 92 percent of which was in turn owned by the French government. In that case we noted that, as a general rule, a corporation is a legal entity separate and distinct from its shareholders. We did note that where equity dictates, the corporate entity will be disregarded, for example, where there is such interest and ownership that the separate personalities of the corporation and its shareholders no longer exist. In that case, however, we found no indication that American Motors, a domestic corporation, and the French company were not separate entities, and we found that the power to control and direct the retired officer's employment was with the domestic corporation. Thus, we did not deem it necessary for him to seek the approval required by the Constitution, although we did caution that in cases where doubt exists as to an employment situation the individual involved should seek the required approval. Lieutenant Colonel Marvin S. Shaffer, 62 Comp. Gen. 432, supra.

In another case a retired officer was nominally employed and paid by a domestic corporation but the facts of the case showed that the domestic corporation was in effect merely an employment agency and that actually there existed an employee-employer relationship between the officer and an instrumentality of a foreign government for which the domestic corporation procured personnel. In that case we looked through the ostensible relationship with the domestic corporation and held that the officer's acceptance of salary incident to that employment was prohibited by the Constitution in the absence of the consent of Congress. 53 Comp. Gen. 753 (1974).

While neither of these cases involved attorneys or a professional corporation, they do show that we base our determinations on the actual relationship involved and not merely on form.

Until relatively recently lawyers in private practice did so as sole practitioners or in partnerships because, in view of the personal nature of the attorney-client relationship, a corporation could not be licensed to practice law. However, most states have now enacted statutes to authorize professional service corporations primarily to extend certain Federal tax benefits to professionals by enabling them to organize and carry on their professions by means of a legal entity possessing corporate characteristics. The corporate entity method of doing business brings the corporation itself within the disciplinary jurisdiction of the courts, but does not relieve the individual practitioner through whom the corporation practices from his obligation to abide by all the rules and canons of professional ethics. Annot., 4 A.L.R.3d 384-385, 390; 7 Am. Jur. 2d Attorneys at Law § 111.

Under the laws of the Commonwealth of Virginia, which apply to Clary and Pijor, P.C., every attorney-at-law is liable to his client for any damage sustained by him due to the attorney's neglect of his duty. Va. Code § 54-46 (1950), as amended; Ortiz v. Barrett, 278 S.E.2d 833 (Virginia 1981). Furthermore, under the Code of Professional Responsibility, promulgated by the Supreme Court of Virginia, an attorney has the responsibility to represent a client zealously within the bounds of the law, and with limited exceptions, should preserve the confidence and secrets of a client. Va. Code Vol. 11, DR 4-101, DR 7-101, and DR 7-102. Thus, professional corporations differ significantly from ordinary business corporations.

The following provision of the Virginia professional corporation statute makes it clear that an attorney's association with a professional corporation does not affect his professional relationship with his client:

"The provisions of this chapter shall not be construed to alter or affect the professional relationship between a person furnishing professional services and a person receiving such service either with respect to liability arising out of such professional service or the confidential relationship between the person rendering the professional service and the person receiving such professional service, if any, and all such confidential relationships enjoyed under the laws of this

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Commonwealth, whether now in existence, or hereafter enacted, shall remain inviolate. * * * Va. Code § 13.1-547.

Thus, it appears that the attorneys who are either employees or "of counsel" to the professional corporation of Clary and Pijor, have the same professional relationship with their clients as attorneys who are not associated with a professional corporation.

While the attorneys performing services for the Saudi Arabian Government would not be paid directly for their services as they would be if they were individual practitioners, the Saudi Arabian Government would pay the professional corporation for the services performed by the retired military officers and they in turn would benefit from these payments through the receipt of salary and other compensation and benefits from the professional corporation. In the circumstances it cannot be said that the retired military officers would not receive "any present, Emolument, Office, or Title, of any kind whatever" from the Saudi Arabian Government. It is, therefore, our view that the existence of the professional corporation does not exempt the retired military officers concerned from application of Article I, section 9, clause 8 of the United States Constitution. Accordingly, it appears that their representation of the Office of the Saudi Military Attache and receipt of compensation as a result thereof without the required consent would require the withholding of their retired pay. See Major Marvin L. Friedman, 61 Comp. Gen. 306 (1982).

Congress has given its consent to retired members of the uniformed services accepting civil employment by foreign governments and compensation for that employment provided the retired members receive the approval of both the Secretary of State and the Secretary of the service concerned. See 37 U.S.C. § 908, and implementing regulations in 22 C.F.R. Part 3a (1984). Mr. Clary and the other attorneys involved who are retired military officers should obtain the required approval prior to their legal representation of the Office of the Saudi Military Attache.

Milton J. Fowler
for Comptroller General
of the United States