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Why law firms need dedicated compliance officers

an interview with Jennifer Quillen and Jerry Myers

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By Ray Sheehan

History lesson: The federal anti-representation statutes

» Federal anti-representation laws are complicated, confusing, and counter-intuitive.
» The laws are seemingly redundant, but often quite different.
» These laws were created for the smaller federal government of 1800s.
» Sometimes these are seen as "gotcha" laws, made to trap unwitting, yet well-intentioned, federal employees.
» History shows us that human nature hasn't changed much in the last 150 years.

Anyone engaged in the interpretation and application of the federal bribery and conflict-of-interest statutes knows that they enter the worlds inhabited by the federal anti-representation statutes (18 U.S.C. §§ 203, 205 and 207) at their peril. Even for "ethics greybeards," understanding and applying these statutes to modern government operations, let alone explaining them to government employees, tests one's skills at the world class-level.


Sheehan

The first of the statutes, 18 U.S.C. § 205 (referred to here as the 1853 Act) generally prohibits *current* Federal employees from: (1) serving as "agent or attorney" in prosecuting or assisting in prosecuting a claim against the U.S.; receiving a share of a claim in return for assisting in such prosecution; or (2) serving as "agent or attorney" for anyone (other than the U.S.) before a federal agency or court.

The second statute, 18 U.S.C. § 203 (the 1864 Act) prohibits *current* federal employees, as well as members of Congress and federal judges from seeking or accepting compensation for: (1) representing another (other than the U.S.); or (2) performing services in support of another's representation before a federal agency or court. Lawrence "Yogi" Berra might ask, at this point, if this isn't "redundancy all over again."

And, just because breaking up is hard to do (sorry, Neil Sedaka), the final statute, 18 U.S.C. § 207 (the 1872 Act) sets out numerous restrictions on *former* federal employees, and others representing anyone other than themselves or the U.S. back before a federal agency, court, or Congress.

State ethics statutes show few, if any, parallels to these statutes. The laws do not prohibit or restrict outside employment; however, they narrow fields/issues/events in which one can engage or assist in "representation" if the matter affects the interests of the United States. Further, their wording appears dangerously similar, which may trap the unwary into assuming that the statutes might possibly share some cohesive legislative philosophy or intent. Nothing could almost be further from the truth.

A bit of history

To even hope to understand these statutes, one needs look at the environment in which they were enacted. First, the 1853 and 1864 Acts both came about largely due to actions taken by members of Congress. Then, as now, most

members were also lawyers. However, unlike the present day, Congress in the nineteenth century was a part-time job. Members used their time between sessions to practice law.

Also, Congress was for sale—really. Summing up the prevailing philosophy of the age, Simon Cameron, President Lincoln's first Secretary of War, is quoted as saying "An honest politician is one who, when bought, stays bought." Members of Congress openly offered their influence with federal officials at all levels. Yet, for Congress to pick solely upon itself is simply to identify itself, as Mark Twain later did, as a "native criminal class." Accordingly, these laws begat a great tradition—ethics legislation prompted by congressional misdeeds was extended to cover all federal personnel.

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Not that this outcome was completely undeserved mind you. The federal government was a very small entity at this time. If you were a Fed, everyone in Washington DC knew it. So, one had a much better chance than today of misusing his federal status. And there was sound reason for misusing that status. Public policy writers, such as Robert N. Roberts, Hubert Locke, and Frederick C. Moser, discuss the changing culture of federal appointees and employment with the Jacksonian Revolution and the onset of the Spoils System. Prior to the 1820s, our government was largely run by the aristocracy—fitness of character was a measure of one's potential official bearing. With the Jacksonian Revolution, appointees came to office knowing their time in office could be short and they had to take advantage of their position while they had it. Most federal employees at that time were legal clerks engaged officially in processing and reviewing claims against the government. Many were also looking to start their own practices and needed a few good clients—like, say, the ones who filed the claims that were most difficult to deny.

The 1853 Act

The story of the oldest of the statutes starts with the Mexican War and from there to (in order): A claims commission created by Congress stemming from that war; an enterprising traveling dentist or two; a clearly fraudulent property damage claim; crafty lawyers and politicians, enterprising financiers; the accidental uncovering of a scandal; the bribing of the media to not uncover it; and the always enjoyable sanctimonious political posturing and moralizing in advance of a national election. Oh, and the acquisition of Texas from Mexico.

George A. Gardiner and his brother John Charles Gardiner were the Cuban-American dentists who moved to Mexico in 1840, but they were much more than that. Both were prominent Filibusters—Americans plotting to annex Cuba to the United States. In 1844, George met General Waddy Thompson in Mexico City. Thompson was then serving as Envoy Extraordinary and Minister Plenipotentiary to Mexico and was in Mexico ostensibly to demand that Mexico release those US citizens who were members of

the Texan Santa Fe Expedition. However, dispatches indicate that he might also have been there to secure Northern California for America. This meeting was fortuitous for Gardiner, who soon left for the Mexican interior where he later claimed to have been the sole proprietor of silver mines which, once war commenced, were set afire by Santa Ana's troops.

When the Mexican War ended with the signing of the Treaty of Guadalupe-Hidalgo in 1848, Mexico did not have the money to pay the claims of the American citizens whose property was taken. Accordingly, those citizens did what all good Americans would do—they got the federal government to assume their claims and take the money out of Mexico in land. Under the Treaty, a three-member Board of Commissioners was created to adjudicate the claims. Interestingly, given Congress' role as final authority on federal claims at the time, the Claims Board's decisions were to be final and conclusive—not reviewable by Congress. Further, Congress provided for no publication of the decisions. Even more curious is the fact that the Commissioners, while appointed by a Democratically-controlled Congress, were all Whigs.

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Gardiner, by 1848, was back in the United States when he again met up with Thompson and mentioned the loss of his silver mine. Thompson informed Gardiner of the Claims Board, agree to represent him, and immediately brought on then-U.S. Senator from Ohio Thomas Corwin and his nephew and law partner, Robert G. Corwin as co-counsel. Senator Corwin was a well-known and powerful political personality who was his state's favorite-son candidate for President. The Corwins, in turn, brought on as co-counsel one Major Folliot Thornton Lally who, while having no legal background of any sort, had something more valuable—status as the son-in-law of the Claims Board chairman. Not leaving anything to chance though, Robert Corwin was brother-in-law to, and lived with, another Commissioner, Caleb Smith.

The claim was asserted in late 1849. At this point, two events came together to make an intriguing matter all the more compelling. First, Gardiner needed money to go to Mexico to obtain necessary documentation to support his claim—all forgeries. To fund the trip, the Corwins purchased a quarter interest in the claim and immediately assigned it to financier William Wilson Corcoran of the Washington DC banking partnership of Corcoran & Riggs, the sole depository of federal government funds and financiers of the Mexican War. Second, almost concurrently, President Fillmore asked Senator Corwin serve as his Secretary of the Treasury. In light of a similar claim scandal that almost brought down the Taylor Administration (the Galphin Claim), the Corwins were suddenly looking for money, not to fund their client's document-hunting trips, but to quietly buy their way out of that claim and the 37 other smaller claims before the Claims Board on which they were serving as representatives.

Enter Governor John Young of New York, who arranged a sale of all Corwin interests to New York financiers George Law, Esq.

and Jacob Little. Voila! In July 1850, Corwin resigned his Senate seat and accepted nomination as Secretary of the Treasury. As for the claim, it was adjudicated favorably in the full amount claimed—almost $500,000. And, in a beautiful touch of ironic closure, the claim payments were made, pursuant to Act of Congress, at the order of the Secretary of the Treasury, Thomas Corwin. Gardiner smartly took part of his money and fled to Europe—he should have taken it all.

The newspapers had followed the Gardiner Claim closely and made no secret that it was likely fraudulent and that the Claims Board members knew it. No formal records of proceedings were kept, but a clerk was brought in to organize what documentation existed. He clearly saw the fraud and went to the media when Fillmore officials dismissed him. Eventually, he was called before President Fillmore himself and laid out his evidence. With that, President Fillmore commissioned a claims investigating team, led by Abner Doubleday, to go to Mexico and look into the mining claim. They found no more than a small hole in the ground. A hold was placed on Gardiner's remaining monies and he chose to return to the United States to clear his name. He was tried twice for fraud. The first trial ended in a hung jury; the second in a conviction and a ten-year prison sentence. Awaiting transportation to prison, Gardiner took poison and died. Everyone else did just fine.

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The 1864 Act

Abdul Enterprises, Ltd. was a fictitious entity created by the Federal Bureau of Investigation (FBI) as a source of funds ostensibly supplied by two Arab sheiks looking for investment opportunities. It was the foundation for the "Abscam" scandal. The Abscam sting operation, involved a convicted conman, one Melvin Weinberg, and an FBI agent posing as representatives of the sheikhs. Abscam initially focused on stolen and forged securities and art work; however, the investigation turned toward Atlantic City and gambling casinos then being proposed and constructed. With large sums of investment funds possibly available, state and national political figures became "interested." Among the "interested," were six U.S. Congressman and U.S. Senator Harrison "Pete" Williams of New Jersey, who wanted to push forward before federal officials a titanium venture in which he had a secret interest. In May 1981, Williams, a powerful Senate committee chairman once known as "Senator for Life," was convicted of bribery, receipt of an unlawful gratuity, conspiracy to defraud the U.S., and a criminal conflict of interest under 18 U.S.C. § 203 [the 1864 Act]. The six U.S. congressmen were also found guilty of a variety of charges. So, where did this 1864 Act come from?

The 1864 Act had two Civil War catalysts. First, in 1861, for a small kickback of $50,000, U.S. Senator James Simmons of Rhode Island introduced a weapons manufacturer seeking a War Department contract (one

C.D. Schubarth) to then-Secretary of War Cameron who, not surprisingly, granted the manufacturer the contract. Consideration was given to prosecuting Simmons; however, the then-existing predecessor to section 205 was limited to claims against the U.S. It did not touch kickbacks. (Oddly, by 1873, the statute no longer covered members of Congress, though there is no record of debate on that point.)

Second, President Lincoln and Secretary of War Edwin Stanton (who replaced Cameron by 1862) were livid over the results of certain courts-martial of civilian defendants represented by sitting U.S. Representatives and Senators. In apparent knee-jerk reaction to the myriad of contracting frauds visited upon the Union forces in 1861 under Cameron's War Department, Congress in 1862 deemed civilian contractors who provided goods to the army and navy to be members of the military service with which they contracted, simply based upon the execution of a contract. As a result, they were subject to court-martial for fraud, willful neglect of duty, and violations of service regulations. This law did not sit well, either with the public, or with many members of Congress from both sides of the aisle. Hence, several Congressmen and Senators offered their services, many *pro bono*.

Senator William P. Fessenden of Maine, in support of the 1864 Act, argued that members who represented parties at courts-martial faced a clear loss of impartiality and had a conflicting interest, based on the fact that persons tried before a court-martial could, at that time, have the trial record reviewed by the whole Congress. Thus, a member of Congress who served as counsel on a court-martial could not be unbiased during the review. Senator Lafayette Foster of Connecticut, punctuating this point, added how a single senator had the power to prevent a military officer from obtaining a promotion, saying the following:

> "I have heard that on a certain occasion before a court-martial, a member of Congress, appearing as counsel, and being dissatisfied with some preliminary decisions made by the court, said in very decided language to some member of the court 'You expect soon to be promoted, and I give you to understand that your confirmation will not get through the Senate without some difficulty.'"

With Abscam, the 1864 Act was relevant because Senator Harrison, a sitting member of Congress (thus, not covered by the 1853 Act), accepted compensation (a share in the corporation) while agreeing to use his influence to push forward the titanium venture.

The 1872 Act

The criminal post-employment representation statute, 18 U.S.C. 207, specifically section 207(c), generally forbids, for one year, former senior government officials from representing others at the federal agencies where they were employed in their last year with the federal government. (The ban is now two years for Obama Administration personnel, by Executive Order.) The bar extends one year from the last day on which you served as a "senior employee" at that agency. Hence, if you worked for two different federal agencies as a "senior employee" in your last year, you would face two bars that would end at different times for different agencies in the following year.

Michael Deaver had served Ronald Reagan for more than 30 years when he left his position as Deputy Chief of Staff in May 1985 to form a successful lobbying firm that

negotiated million-dollar contracts with the governments of South Korea and Saudi Arabia. Unfortunately, he also lobbied for the Canadian government on the issue of acid rain—a touchy environmental subject with the Reagan Administration.

In 1986, accusations surfaced about Deaver violating the statute. It was the White House that revealed that Deaver had been involved in the acid rain issue before leaving for the private sector and that he was making contact again on that issue. Deaver eventually was convicted on three perjury counts. He also was charged with violating the post-employment representation law; however, the statute permits federal agencies to compartmentalize and it was unclear whether the White House properly compartmentalized. Congress was determined not to let that happen again. While congressional honoraria was the catalyst for enactment of the Ethics Reform Act of 1989, just as important was a new one-year restriction upon the ability of former senior federal personnel to represent foreign governments back to the federal government. This new restriction, quickly dubbed the "Never Again Mike Deaver Act," was only the latest addition to efforts in controlling post-employment representation that go back to 1872.

Government officials leaving public sector jobs only to come back to work with the government as employees of non-government entities is known as "the revolving door." The "revolving door" has benefits—it heightens the level of knowledge that contractors and partners have about agency culture, the spectrum of agency programs and operations, and key personnel. Of course, there is a "down" side. Former officials can have "enhanced influence" over remaining governmental coworkers and subordinates that provides them with an unfair advantage.

As we saw, the 1853 and 1864 Acts stifled the once-lucrative practice of representation by sitting members of Congress before federal agencies and courts. As nature abhors a vacuum, it should come as no surprise that former members of Congress and former high-level government officials would fill the void in the 1860s. Congress had not legislated in this area for good reason—their personal financial futures. However, the growing series of scandals involving former Grant appointees pressured congressional action. In March 1872, Representative James Garfield of Ohio proposed the first limits on what federal personnel did after leaving government work. The catalyst for the amendment was the "Chorpenning Claim."

Major George Chorpenning, a pioneer of overland mail communication, was known as "the first man to carry the mails across the Continent." The development of overland mail service to California began soon after the 1849 Gold Rush. Mail service between California and Salt Lake City in the 1850s was irregular, due to harsh weather, treacherous terrain, and hostile Indians. Notwithstanding, Chorpenning left Somerset, Pennsylvania for California in the spring of 1850 and teamed with Captain Absalom Woodward to establish a mail business from Salt Lake City to Sacramento.

Chorpenning & Woodward, as lowest bidder, won the postal contract for Salt Lake City–California mail delivery in 1851. Chorpenning entered a second contract in 1854 (in 1851, Woodward was apparently killed by Indians) and at his own expense built stations every 20 to 40 miles along the trail, part of the route later used by Pony Express riders. The contract, however, provided the Postmaster General (PMG) with broad authority to discontinue the contract. The PMG used this authority to replace

Chorpenning with John Butterfield (Father of the Pony Express). Political considerations may have been at work, as well as a most relevant pedestrian factor: Butterfield was a close personal friend of then-President James Buchanan.

In 1857, Chorpenning had a private relief bill presented before Congress, where it was passed and was signed by President Buchanan. Oddly, the Act specifically directed how the claim should be adjusted—and adjusted in Chorpenning's favor. That said, Chorpenning was out of a contract, not to mention a place in history, and was not satisfied.

After the Civil War, Chorpenning returned to his claim by filing successive applications to PMGs Holt, Blair, Randall, and Cresswell for rehearing—all were refused. In 1870, Chorpenning went back to Congress where a new petition was referred to the Post Office and Postal Roads Committee. Committee Chairman Joe Hill, leaving town for the July 4th holiday, gave the matter to Representative John Cessna to investigate. Cessna just happened to serve Somerset, Pennsylvania. Cessna offered the House a report submitted not by the whole committee, but by just one member—him. Oh, and the "report," later-deemed "without the slightest foundation," was actually written, not by Cessna, but by Chorpenning's own attorney, George F. Earle. On the last day of the session and under a suspension of the rules, Cessna introduced a resolution paying Chorpenning's claim. It was passed by both Houses and signed by President Grant, all within 18 hours. So, on December 23, 1870, PMG Creswell awarded Chorpenning $413,010.60.

It gets worse. In fact, Earle visited the Post Office Department and was permitted unfettered freedom to sort through official documents for use before Congress. Why? Perhaps it was because Earle had been, before becoming Chorpenning's attorney, First Assistant PMG under PMG John Creswell. Perhaps it was because he was, before taking that federal post, Creswell's former law partner. Who knows? However, as newspapers got wind of this scandal, the House quickly acted to arrest payment—almost as quickly as it had initially approved the claim.

Amidst this excitement, Garfield introduced his bill. Oddly enough, as enacted, the 1872 Act was missing something fairly important to any prohibition—penalties. The House has added penalties; however, the Senate dropped all penalties following Senator John Stockton who naively was convinced that simple moral persuasion at the department or bureau level was sufficiently preventative.

As for Chorpenning, he just didn't get it—the money, that is. In 1876, the U.S. Supreme Court heard his appeal from the Court of Claims and upheld the lower court's dismissal. And with that, Chorpenning's 19-year claim saga finally came to an end.

Summary

When a federal employee or former federal employee represents the interest of a non-federal party back before the federal government, there is always a chance for a violation of these laws. The laws are counter-intuitive, largely unknown, and barely decipherable. Whenever a federal employee or former federal employee seeks to interact with the federal government on behalf of others (other than the United States) in a representational capacity, the person needs to seek ethics advice before interacting. ✳

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