

Office of Government Ethics

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Memorandum dated November 3, 1999,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
Regarding Contingency Fees and 18 U.S.C. § 203

On several occasions recently, the Office of Government Ethics (OGE) has been asked about the extent to which a prospective Government employee may retain, or otherwise maintain control over, an interest in a pending contingency fee case. The limitation at issue derives from 18 U.S.C. § 203, which prescribes criminal penalties for anyone who directly or indirectly "demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another," to the executive branch or a court in connection with any particular matter in which the United States is a party or has a direct and substantial interest,¹ if any part of the representation occurs while that person is a Government employee. Since a pending contingency fee case in which the United States is a party or has a direct and substantial interest will ordinarily involve continuing representational activity described in 18 U.S.C. § 203 by someone during the prospective employee's Government service, appropriate steps must be taken to avoid this proscription on sharing in the compensation therefrom.²

While typically involving an attorney, the statutory bar and its resolution apply equally to non-attorneys who provide representational services, such as consultants and experts in engineering, accounting, and similar professional fields. The

¹ An issue of supplementation of salary under 18 U.S.C. § 209 must also be considered, even where the United States is not a party and does not have a direct and substantial interest. That is a separate matter to be resolved in each case, but is not the subject of this memorandum.

²Of course, 18 U.S.C. § 205 separately bars a Government employee's personal representation under these circumstances, whether or not compensated, unless an exception applies.

most common resolutions have been for the prospective employee to agree before entering Government service to completely relinquish any rights to the contingency fee or, alternatively, to obtain before entering Government service an advance payment (or legal obligation for a fixed amount, that is not contingent on the outcome of the matter) for any such fee from the other persons involved in continuing representation in the matter.³ Sometimes, however, a prospective employee may be unable to obtain an advance cash payment or obligation to liquidate the potential fee for himself, especially since a determination of its value as a sum certain may be difficult. Some prospective employees have, therefore, proposed assigning to another person their rights to any fee that may eventually arise.

After consulting informally with the Office of Legal Counsel at the Department of Justice, we have concluded that such an assignment, under appropriate conditions and safeguards, may be made without violating 18 U.S.C. § 203. We recommend that you consult with OGE concerning a prospective employee who may be contemplating an assignment of a contingency fee. Such an assignment:

- (1) must be executed and effective prior to entering Government service;
- (2) must be complete, unconditional, and irrevocable;

³ Additionally, the Office of Legal Counsel at the Department of Justice has advised that 18 U.S.C. § 203 permits a prospective employee to recover certain expenses from a contingency payment. To the extent that a contingency payment will only reimburse for legitimate litigation expenses that have been properly advanced on behalf of a client and would be billed separately from a fee for professional services, it is not considered compensation for representational services under 18 U.S.C. § 203, and therefore may be accepted by the prospective employee, even after entering Government service. This might include payments made in advance by an attorney to cover court costs, medical examination costs, telephone and facsimile charges, and deposition reporting costs. If a prospective employee is contemplating recovery of such expenses, we recommend that an ethics official discuss the specifics with OGE.

(3) must not be made to the employee's spouse, minor child, legal dependent, or household member; and

(4) must not permit the employee's involvement, after entering Government service, in determining the amount of the fee.

The imposition of these conditions on a contingency fee assignment will ensure that the employee is not considered to have directly or indirectly received compensation barred under 18 U.S.C. § 203 or to have engaged in a sham transaction. By unconditionally giving away his rights to the potential fee before entering Government service, he will have relinquished all dominion, control, and benefit in connection therewith. The assignment itself will not, under these circumstances, be viewed as receipt for purposes of 18 U.S.C. § 203, so long as it involves a preexisting contingency fee arrangement that must be resolved before entering Government service.

As a separate matter, the prospective employee should be advised to consult the rules of his local bar or other professional licensing authority before making an assignment of a contingency fee, to ensure that it is permissible under professional and legal standards applicable to him.