

## Office of Government Ethics

88 x 3 -- 03/02/88

### Letter to an Agency Employee dated March 2, 1988

This responds to your letter to the former director of the Office of Government Ethics, which we received on January 21, 1988.

According to your letter, you are a full-time employee of [a Department of the Federal Government]. You are an attorney. You and another attorney, who is neither a Federal employee nor related to you, have a law firm. You have received authorization of your outside employment. Your wife, who is not a Federal employee, is employed at the law firm as a secretary and paralegal.

You have asked three questions: (1) whether you can recover costs incurred in providing representational services for Federal employees in personnel/EEO proceedings; (2) whether your wife can recover costs and fees for the administrative and paralegal services that she provides for these cases; and (3) whether the other attorney can recover costs and fees for services provided in these matters.

With limited exceptions, the criminal conflict-of-interest statute at 18 U.S.C. § 205 prohibits any Federal executive branch employee from representing another person before a Federal or District of Columbia agency or court on any particular matter in which the United States is a party or has a direct and substantial interest. In the third paragraph of section 205, however, there is the following exception (emphasis supplied):

Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

Regarding the language in this exception that we have underlined, our Informal Advisory Opinion 82 x 19 states:

It should be noted . . . that a federal [employee] does not have the power to decide for himself whether he may represent another person in a personnel administration matter. His superior or superiors must decide that such representation is "not inconsistent with the faithful performance of his duties."

In order to comply with section 205, you should have each instance of proposed representation evaluated by your superiors, so that they can determine on a case-by-case basis whether representation by you in a given set of personnel administration proceedings is "not inconsistent with the faithful performance of [your] duties." While you have stated that you obtained outside activity authorization, a blanket approval of the outside practice of law, even if confined to personnel matters, is insufficient to ensure compliance with section 205. In any given personnel matter, the facts, parties, or particular issues may mean that the rendering of representational services by you would violate section 205. You should also be aware that, according to prior opinions of this Office and the Department of Justice, "Congress intended to permit representation of federal employees only in matters directly connected to their treatment as employees by their federal employ[ers]." (See Informal Advisory Opinion 85 x 1, for a fuller discussion.)

You must also be concerned with 18 U.S.C. § 203, which prohibits a Federal employee from directly or indirectly receiving any compensation based on the employee's or anyone else's representational services in relation to any proceeding before any Federal or D.C. department or agency or before any of certain Federal military groups and individuals. Under section 203, you cannot recover fees for any representation before an agency in personnel administration proceedings even though you are allowed to provide the services under the section 205 exception. You may, however, recover your costs connected with these proceedings, which you should be careful to document as costs in written records.

Further under section 203, you may not share in any money derived from fees for the representational services of the other attorney or your wife in the personnel matters or in any other matters before the entities listed in the first sentence of this paragraph. Representational service is [seeking on behalf of another, a] discretionary action [from the Government]. It includes any of a broad spectrum of activities beyond formal

representation in courtroom or in agency proceedings by an attorney. For example, if during the course of a telephone conversation with someone from an agency your wife is making arguments in support of a client's claim, she is engaging in representation. If, however, she merely verifies information during the call, she is not engaging in representation. As discussed in our Informal Advisory Opinion 84 x 3,

[Y]our firm must maintain a bookkeeping arrangement which segregates funds [others] receive for such representations from those in which you are eligible to share. They may not make up any resulting disparity so that you do not suffer any economic loss.

Thus, under section 203 you are barred from receiving any partnership share, any bonuses, or any other form of payment derived from compensation for the representational services of others in such proceedings. However, the other attorney in your firm, who is not a Federal employee, can recover his own costs and fees.

You are urged to consult with your state and local bar associations regarding any screening and fee segregation procedures they may impose. For your information, we enclose Informal Advisory Opinions 82 x 19, 84 x 3, and 85 x 1.

Sincerely,

Frank Q. Nebeker  
Director