Office of Government Ethics
93 x 25 -- 10/01/93

Letter to an Alternate Designated Agency Ethics Official dated October 1, 1993

This is in response to your letter of September 16, 1993, regarding the application of 5 C.F.R. § 2635.502. You inquire whether an employee of [your] Department who hires a lawyer to provide legal services on personal matters must recuse himself from all matters in which one of his attorney's law partners is serving as the legal representative of a client before the Department.

Section 502(a) states:

> Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

Section 502(a) only applies to particular matters involving specific parties; therefore, if a partner of an attorney of a Department employee represented clients in an agency rulemaking, that would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a).

You raise the issue central to answering your inquiry which is whether the employee would have a "covered relationship" with his attorney's partner under section 502(b). That provision identifies "covered relationships" and includes:

> (i) a person . . . with whom the employee has . . . a business, contractual or other financial relationship that involves other than a routine consumer transaction.

Whether the employee has a "covered relationship" with the partner of his attorney turns on whether the partner is a "person" as that term is used in section 502(b)(i). "Person" is a defined term in section 2635.102(k) and includes a "partnership." Officers, employees or agents of entities, including partnerships, are considered to be the same person as the entity itself. Thus, where an employee hires an attorney in that attorney's capacity as a partner of a firm, the partnership has been hired. To the extent that other partners or employees represent other clients of the firm, then such representations are by the partnership. For purposes of section 502(b)(i), the employee has a covered relationship with the law firm and with any person acting on behalf of the law firm.

The fact that an employee has a "covered relationship" with the law firm does not automatically require a recusal by the employee with respect to particular matters with specific parties where a partner of the employee's attorney is representing a client before the Department.

In order for the employee to be required to recuse himself from the matter, either he or the agency designee must conclude that a reasonable person would question the employee's impartiality with respect to the matter. Whether in a particular circumstance an employee should be recused would depend on the facts. Certainly there may be circumstances where application of the reasonable person standard would result in a determination that an employee must recuse himself from matters where his attorney's partners were representing parties. There may also be circumstances where application of the standard would result in a determination that the employee does not need to recuse himself.

The impartiality standard in section 502 was intended to accommodate variant circumstances and to provide an analytical mechanism for employees and agency ethics officials to focus on situations where the employee's impartiality could be subject to question. Ultimately, the employee and the agency ethics officials are the arbiters of whether, under the circumstances of a particular case, recusal is appropriate under the standard of section 502.

Should you have any further questions with regard to this issue, please contact our Office.

Sincerely,

Stephen D. Potts
Director