



*Professional Ethics Committee*

30 Bank Street  
PO Box 350  
New Britain  
CT 06050-0350  
06051 for 30 Bank Street  
P: (860) 223-4400  
F: (860) 223-4488

Approved May 15, 2013

**Informal Opinion 2013-06**  
**Consent to Personal Interest Conflict of Interest**

The inquiring lawyer (“the Lawyer”) is an attorney licensed in Connecticut who is a civilian attorney in a department of the Federal government (“Department”) and one of many attorneys in the Federal government who may be called upon to provide advice to management and/or to litigate cases involving upcoming furloughs of government employees. The Lawyer’s inquiry presents questions concerning conflicts of interest and advance consent. Our conclusion is that the potential personal interest conflict is curable with consent, so long as the conditions of Rule 1.7(b) are satisfied.

The underlying facts are as follows: The Lawyer serves as first level supervisor for a small group of senior attorneys, and as second level supervisor for larger number of other civilian attorneys. Attorneys employed by the Federal government are required to be an active member of good standing of at least one state bar, but there is no requirement that they be licensed in the particular state in which they might be stationed at any given time. Consequently, the attorneys working under the Lawyer’s supervision are licensed by a variety of state bars.

The Department (as well as many other Federal agencies) is proposing to furlough almost all of its employees. The administrative furlough is necessitated by the budgetary challenges facing the Department for the remainder of fiscal year 2013, including what is commonly referred to as the Sequestration. The furlough will be on discontinuous (intermittent) days. Full-time employees will be furloughed no more than 14 workdays. Due to the uncertain and potentially fluctuating amount of funding which may be available to the Department, the number of hours per pay period required for the furlough may vary.

The only employees in the Department who are not being furloughed are employees: (1) currently in a non-pay status, (2) under an Intergovernmental Personnel Act mobility assignment that does not cause an expenditure of funds of the agency, (3) on an assignment not otherwise causing an expenditure of funds to the agency, or (4) in a position whose duties have been determined to be of crucial importance to the agency’s mission and responsibilities and cannot be curtailed (e.g., civilians deployed to combat zones). This represents a very small percentage of the civilian employee workforce.

Employees will receive notices proposing the furlough, and will have the opportunity to reply to the proposed furlough before a final decision is issued. The final decision will trigger various rights, including rights to appeal to the Merit Systems Protection Board or the Equal Employment Opportunity Commission or rights to grieve and request arbitration under any

applicable negotiated Labor Management Agreement.

During this process, the Department will need and require attorneys to provide advice to management and to represent the Department in any appeals or grievances. However, these attorneys will also be subject to the same furlough process and have the same appeal rights as every other employee of the Department. The inquiring Lawyer indicates that he does not intend to pursue any appeal of his own furlough.

The Department's General Counsel has notified all civilian attorneys working for the Department about the potential conflict of interest. In addition, the Secretary of the Department has executed a consent "for any civilian attorney who is subject to being furloughed to continue to represent and provide advice to the [Department and related agencies]." This advance consent is contingent on the attorney confirming in writing to his or her supervisor that:

- The attorney, notwithstanding the fact that he or she may be furloughed, reasonably believes that he or she will be able to provide competent and diligent representation to the Department;
- The representation is not prohibited by law;
- The representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same proceeding; and,
- The attorney will cease providing legal representation and promptly notify his or her supervisor if, because of any material change in circumstances, he or she reasonably believes that he or she can no longer provide competent and diligent representation to the Department.

The waiver expressly provides that "a material change [in circumstances] would include the attorney challenging his or her furlough in an administrative or judicial forum."

Attorneys are to notify their supervisors if they believe they have a potential conflict of interest based on the rules of their particular State bar. Before any attorney who notifies his or her supervisor of a potential conflict of interest will be assigned furlough-related work, the attorney will need to provide written confirmation to the supervisor that he or she has satisfied the conditions set forth in the Secretary's waiver. Moreover, before the supervisor actually assigns any such work to any attorney, the supervisor is required to discuss with the attorney the steps he or she took to ascertain whether there was a conflict and, if so, whether the Secretary's waiver would satisfy the attorney's State bar rules of professional conduct. Only "cleared" attorneys within Department will be able to access furlough-related case files, associated information received from clients and any advice provided by other "cleared" attorneys.

The Lawyer asks two questions:

1. Whether the Department's written consent resolves any potential conflict; and
2. Whether the procedures described above satisfy his supervisory obligations under Rule 5.1 of the Rules of Professional Conduct.

Conflicts of interest are analyzed under Rule 1.7(a) (Conflict Of Interest: Current Clients), which provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

On the facts presented, there is no concurrent conflict of interest under subsection (a)(1) for the Lawyer in advising or representing the Department in connection with furlough-related matters. There is no adversity between clients because there is only one client: the Department. For the same reason there is no "significant risk" of any material limitation due to "responsibilities to another client [or] former client," within the meaning of subsection (a)(2). Nor do the facts suggest any conflict with responsibilities owed to a third person.

It is possible, however, that the lawyer may have a "personal interest" conflict. Though the Lawyer does not intend to appeal his own furlough, presumably he does not wish to be furloughed. In addition, the Lawyer may have an interest in the appeals of other furloughed attorneys because one or more appeal might be successful on grounds that establish a precedent that would benefit the Lawyer even if he has waived his right to appeal. And if the furloughs were subject to challenge by way of class action, the Lawyer might be deemed a part of the class.

Any such "personal interest" conflict may, however, be waived if the requirements of Rule 1.7(b) are satisfied. That subsection provides as follows:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Subsections (2) and (3) appear to be satisfied in this case, leaving the analysis to turn on Subsections (1) and (4). Addressing a similar question about sequester furlough-related work, the Philadelphia Bar Association analyzed the "reasonably believes" provisions of Subsection (1) this way:

To proceed with the representation, Rule 1.7(b)(1) requires the inquirer to make a determination of whether she reasonably believes that she can provide competent and diligent representation to the Department in spite of her personal interest in an outcome contrary to the Department's interest. Thus, the inquirer is faced with a critical self-analysis. If the inquirer still believes she can provide competent and diligent representation to her client, then the conflict is waivable. The Committee points out that this is initially a personal analysis that must be done by the inquirer herself. But her determination must also be a reasonable one. Under Rule 1.0(i), "Reasonable belief" or

“Reasonably believes” when used in reference to a lawyer denotes that “the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” Her conclusion on this issue is potentially subject to challenge. The Committee sees no facts here which would prohibit the inquirer from determining that notwithstanding her personal interest she could still provide competent and diligent representation, should she personally conclude that is possible. That could turn on factors unique to the inquirer that renders her more or less able than others to set aside her own personal interests, factors about which the Committee has no knowledge. However, the Committee sees no reason to believe that the inquirer cannot make a responsible judgment as to that matter.

The Philadelphia Bar Association, Professional Guidance Committee, Opinion 2013-3 (April 2013).

Likewise, on the facts presented here, we see no facts that would prevent the Lawyer from “reasonably believ[ing] that [he] will be able to provide competent and diligent representation” to the Department in furlough-related matters. *See* Connecticut Rule of Profession Conduct, Rule 1.0(j) (definition of “Reasonable belief” and “reasonably believes”).

As for the fourth requirement of Rule 1.7(b) – the client’s informed consent – the Department has already provided informed consent to the potential conflict. As a large Department in the Federal government, with ample legal resources, the Department may properly be considered a sophisticated client, capable of understanding the risks of providing consent and competent to provide an effective waiver. *See* Rule 1.0, Official Commentary (“In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.”).

Our analysis would be different if the Lawyer intended to pursue an appeal of, or otherwise challenge, his own furlough. In that case, the direct conflict between the Lawyer’s interests and the Department’s interests might well make it objectively unreasonable for the Lawyer to believe that he could provide “competent and diligent representation” for the Department in furlough-related matters while actively challenging the Department in his own furlough matter. This is a fact specific inquiry.

As noted above, the Department’s written consent expressly provides that “a material change [in circumstances] would include the attorney challenging his or her furlough in an administrative or judicial forum.” From this we infer that the Department’s consent would no longer be valid if the Lawyer, or any similarly situated Department lawyer, challenged his own furlough. In that circumstance, the Lawyer could, however, continue to represent the Department in furlough-related matters if he: (1) reasonably believes that he could provide diligent and competent representation notwithstanding the conflict; (2) he discloses the change of circumstance to his client (the Department); and (3) he obtains a new informed consent, confirmed in writing. *See* Rule 1.0(c) (definition of “Confirmed in writing”) and (f) (definition

of “Informed consent”).

The Lawyer also asks whether the procedures described above satisfy his supervisory obligations under Rule 5.1 of the Rules of Professional Conduct. Rule 5.1 requires that lawyers who have “managerial authority” to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm or agency conforms to the Rules of Professional Conduct.”

The procedures the Lawyer describes include the requirement that Department attorneys notify their supervisors if they believe they have a potential conflict of interest, and before any furlough-related work is assigned to any attorney, the supervisor is required to discuss with the attorney the steps he or she took to ascertain whether the attorney had a conflict and, if so, whether the Secretary's waiver satisfies the professional conduct rules of the attorney's licensing state. Only “cleared” attorneys within the Department will be able to access furlough-related case files, associated information received from clients and any advice provided by other “cleared” attorneys.

We assume, for the purpose of this opinion, that the Department is a “firm” within the meaning of Rule 1.10(a). A Department attorney's personal interest conflicts will not be imputed to other attorneys in the Department so long as the personal interest conflict “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” *See* Rule 1.10(a)(1). Given that any disqualified lawyer will do no furlough-related work and a clearance protocol is in place to ensure that his or her conflict will not materially limit the representation by others who will work on the matter (see Rule 1.10 Commentary, Principles of Disqualification), that lawyer's conflict will not be imputed to other attorneys in the Department. Accordingly, the foregoing procedures, which also include the screening of disqualified attorneys from access to furlough-related case files and information, appear to be sufficient to meet the Lawyer's supervisory obligations under Rule 5.1.

THE COMMITTEE ON PROFESSIONAL ETHICS

By

  
\_\_\_\_\_  
John R. Logan, Chair