

In this hypothetical, a lawyer is employed by a branch of the military. All of the lawyers (and most other employees) employed by this military agency will be furloughed for a set number of days within the next several months, as part of spending cuts triggered by a recent act in Congress called “sequestration.” All furloughed employees will have the right to challenge the furlough action via appeals to the Merit Systems Protection Board and possibly via class action challenges to the furlough. The lawyer would like to challenge his furlough, but also anticipates being asked to represent the agency in defending furlough appeals filed by other employees. In anticipation of these issues, the Secretary of this branch of the military, in consultation with the office of general counsel, has developed a procedure for reassigning lawyers who intend to challenge their furloughs to work only on non-furlough matters and for waiving any conflicts that may exist with lawyers who do not intend to challenge their furloughs and otherwise feel able to provide diligent and competent representation to the agency on furlough-related matters.

The Secretary has directed lawyers employed by the agency to consult with their state bars for guidance regarding their ethical responsibilities if the agency lawyer is furloughed and continues to represent the agency. The Secretary has also agreed to waive the agency lawyer’s conflict of interest provided that:

- The lawyer reasonably believes that he will be able to provide competent and diligent representation to the agency;
- The representation is not prohibited by law;<sup>1</sup>
- The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding; and,
- The lawyer will cease providing legal representation and promptly notify his supervisor if, because of any material change in circumstances, he reasonably believes that he can no longer provide competent and diligent representation to the agency. A material change in circumstance would include the lawyer challenging his furlough in an administrative or judicial forum.

## QUESTIONS PRESENTED

1. Can the lawyer defend the agency against other employees’ challenges to their furloughs and also pursue his own challenge to the furlough? If this is a conflict, is the conflict cured by the lawyer waiving his right to challenge his furlough?

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<sup>1</sup> The agency has concluded that there is no violation of 18 U.S.C. § 208 (federal criminal conflict of interest statute) if an employee that is subject to the furlough provides legal advice and representation on furloughs, assists with possible litigation involving furloughs, or executes furlough decisions.

2. Can the lawyer challenge his own furlough and continue to perform other legal services for the agency, but not work on any furlough-related matters for the agency? Does it make a difference if the lawyer represents himself in the furlough challenge or hires an outside lawyer to represent him?
3. Are there any restrictions on the lawyer's ability to challenge his furlough if he first terminates his employment with the agency?

## APPLICABLE RULES

The applicable Rules of Professional Conduct are Rules 1.2(b)<sup>2</sup>, 1.6(b)(2)<sup>3</sup>, 1.7<sup>4</sup>, and 1.9(a) & (c)<sup>5</sup>.

## ANALYSIS

### *Conflicts when the agency lawyer represents the agency in furlough matters*

The most basic conflict scenario on these facts is when a lawyer appears on both sides of the same litigation, which is expressly forbidden by Rule 1.7(b)(3). Thus, a lawyer undoubtedly cannot represent both himself and his agency on opposing sides of his own challenge to the furlough, even if the government agency were willing to consent to this arrangement.

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#### <sup>2</sup> **Rule 1.2 Scope of Representation**

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(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

#### <sup>3</sup> **Rule 1.6 Confidentiality of Information**

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

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(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, ...

#### <sup>4</sup> **Rule 1.7 Conflict of Interest: General Rule**

(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 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

(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) the consent from the client is memorialized in writing.

#### <sup>5</sup> **Rule 1.9 Conflict of Interest: Former Client**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

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(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

The next question is whether there is a conflict of interest if the lawyer represents the agency in defending other furlough matters, while concurrently pursuing or intending to pursue his own challenge to his furlough. In this case, there is a conflict between the lawyer's personal interest in not being furloughed and the agency's interest in upholding the furloughs. The lawyer may benefit from a holding in another furloughed employee's matter that would undermine the agency's position in the lawyer's own furlough appeal, or that would benefit all furloughed employees, including the lawyer, even if the lawyer did not pursue his own challenge to the furlough. This conflict may be waived with the informed consent of the agency only if the lawyer waives his right to challenge his own furlough. If the lawyer intends to challenge his furlough, he is directly adverse to the agency and the conflict may not be waived because the lawyer cannot reasonably believe that he will be able to provide competent and diligent representation to the agency in light of the nature and strength of his personal interest in the matter. See Rule 1.7(b)(1). Additionally, in this hypothetical, the agency's consent and waiver of the potential conflict specifically prohibits the lawyer's continued representation of the agency in furlough-related matters should the lawyer choose to challenge his own furlough in an administrative or judicial forum.

*Conflicts when the lawyer represents the agency only in unrelated matters*

As provided by Rule 1.2(b), a lawyer may limit the scope of representation with informed consent from the client. Therefore, a lawyer in this situation may attempt to manage the conflict of interest by limiting his representation to exclude any furlough matters. This limitation alone, however, is not sufficient to avoid the conflict of interest. Even though the lawyer would be adverse to the agency only on a matter unrelated to his representation of the agency, comment 6 to Rule 1.7 makes clear that a lawyer cannot be adverse to a current client even on an unrelated matter unless the client consents as permitted by Rule 1.7(b)<sup>6</sup>. In this case, the agency/client, through its general counsel, has indicated its willingness to waive this conflict and permit lawyers to work on matters unrelated to the furlough<sup>7</sup> while challenging their own furloughs. Accordingly, the Committee opines that the conflict may be waived with the informed consent of the agency because it is reasonable to believe that the lawyer will be able to provide diligent and competent representation to the agency on these unrelated matters and all other requirements of Rule 1.7(b) are satisfied.

*Would the conflicts analysis be different if the lawyer were represented by private counsel not employed by the agency?*

No, the agency lawyer's retention of private counsel to pursue his challenge to the furlough does not change the conflicts analysis explained above. Assuming private counsel were retained, the Committee believes that the lawyer still could not reasonably believe that he could diligently and competently represent the agency on furlough related matters while pursuing a challenge to his furlough. Also, the risk that the representation of the agency would be materially limited by the lawyer's personal interests is not removed merely because the lawyer is represented by counsel instead of representing himself. Either way, the Committee's guidance remains the same.

*Conflict if the lawyer's employment with the agency is terminated*

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<sup>6</sup> "As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."

<sup>7</sup> Matters that the lawyer might handle on behalf of the agency that are unrelated to the furloughs could include contracts, procurement issues, personnel issues (unrelated to the furloughs), etc.

Assuming the lawyer's employment with the agency is terminated, you ask what ethical constraints might apply if the lawyer pursues a furlough challenge against his former client. The Committee believes that while Rules 1.6 and 1.9 impose ethical obligations that a lawyer owes a former client, those obligations do not preclude the lawyer from exercising the personal rights given him as a federal employee to challenge his furlough in any administrative or judicial proceeding. To the extent that Rule 1.9(a) might be read to do so, this Committee rejects that interpretation of the rule as manifestly unfair, as well as illogical. If the agency has consented to allow the lawyer to challenge his furlough while employed by the agency, under the terms and conditions set out in its waiver, it is manifestly unfair and illogical that the lawyer would be ethically precluded from pursuing his furlough challenge *after* the representation of the client has ended, solely on the basis that the agency will not consent. As the Supreme Court of Virginia observed in *Barrett v. Virginia State Bar*, 272 Va. 260, 634 S.E.2d 341 (2006), "[r]ules of statutory construction provide that language should not be given a literal interpretation if doing so would result in a manifest absurdity." 272 Va. at 267. This Committee adopts a similar view with its construction of Rule 1.9(a). Such an interpretation also appears at odds with Rule 1.6(b)(2) which permits a lawyer to disclose confidential information if reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. . . ." Also, Rule 1.9(c) permits the lawyer to use or reveal information relating to the representation of a former client to the extent that Rule 1.6 would permit with respect to a client.<sup>8</sup>

Finally, as the Scope to the Preamble to the Virginia Rules of Professional Conduct states: "the Rules of Professional Conduct are rules of reason." The Preamble also states that:

In the nature of law practice, however, conflicting responsibilities are encountered. . . Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Based on these considerations, the Committee believes that the lawyer is not precluded by the Rules of Professional Conduct from challenging his furlough after termination of his employment by the agency.

This opinion is advisory only and is not binding on any court or tribunal.

Committee Opinion  
July 24, 2013

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<sup>8</sup> In addition to the Rules of Professional Conduct, other sources of law, including regulations, may affect a lawyer's ability to disclose information learned in the course of his employment.