

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2013-3
(April 2013)

The inquirer, a licensed Pennsylvania attorney, is a member of and employed by one of the branches of the military ("Department"). Not only are there several other attorneys in the inquirer's office, but there are other commands which report to the inquirer's Department.

All of the attorneys in these commands along with the inquirer will be furloughed in the upcoming months due to the budgetary cutbacks that recently took effect, commonly referred to as the Sequestration. The terms of the furlough will significantly reduce the time they work. As a result, the affected employees' pay, leave time and retirement contributions will be significantly decreased by the same factor that their work hours and income will be reduced.

Each furloughed attorney has the right to appeal their furlough to the Merit Systems Protection Board, and it is anticipated that many will do so. The Committee is unsure as to the grounds which will be raised in the anticipated appeals. For the purposes of this Opinion, the Committee assumes that the basis for the anticipated appeals is one that is equally available to all furloughed persons, and therefore that it could also be raised by the inquirer, should she wish to appeal her own furlough.

The inquirer advises the Department on various legal issues, and it is likely that she will be asked to represent the Department in any furlough appeals filed.

The inquirer has requested guidance on the issue of whether representing the Department on a matter contrary to her personal interests creates an ethical conflict, and if so whether such a conflict of interest would be waivable.¹ Other Pennsylvania attorneys similarly situated are also requesting guidance on this issue.

Being a Pennsylvania admitted attorney, the inquirer is a Pennsylvania attorney subject to the Pennsylvania Rules of Professional Conduct (the "Rules"). (Like many attorneys practicing at widespread locations for the federal government, the inquirer is licensed in a state other than the one in which she practices. In such cases, an attorney's ethical obligations are governed his or her state of licensure.)

¹ Additionally, the inquirer sought clarification as to whether an attorney who is conflicted out of representing the Department as an "advocate" may nonetheless continue to act on the Department's behalf in an advisory capacity. This distinction, however, is immaterial because there is no difference between "advocates" and "advisors" from an ethics standpoint. Both advocates and advisors represent the interests of their clients within the meaning of the applicable ethical rules.



First, it is obvious that Rule 1.7(b)(3) creates an absolute bar from the inquirer representing the Department in an appeal that she institutes on her own behalf. Rule 1.7(b)(3) specifically prohibits the assertion of a claim by one client against another client represented by the same lawyer in the same litigation or other proceeding before a tribunal.

The more significant issue is whether the inquirer may ethically represent the Department in responding to appeals filed by others in her office or one of its reporting commands. Rule 1.7(a)(2) provides in pertinent part that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest... [which] exists if...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.**” [emphasis added]

By virtue of the inquirer’s own upcoming furlough, she is in a situation where she has a personal interest contrary to that of her client, the Department, as she presumably does not wish to be furloughed. The inquirer’s personal interest in not being furloughed is in direct conflict with the Department’s interest in upholding the furloughs. Thus, someone in the inquirer’s position may hope that the other furloughed attorneys prevail in their appeals, thereby setting a legal precedent that is favorable to her personally should she later decide to appeal her furlough, or even requiring that result by collateral estoppel. Moreover, her competing personal interest would persist even if she were to renounce her right to appeal, since a result favorable to the other furloughed persons could cause the Department to change its policy regarding the furloughs of attorneys to her benefit, even absent an appeal by her. For that reason, under the facts the inquirer presents, there is clearly a conflict of interest.

That conflict, however, may be waived provided that the requirements of Pennsylvania Rule of Professional Conduct 1.7(b) are satisfied. Rule 1.7(b) provides:

“Notwithstanding the existence of a concurrent conflict of interest under [Pennsylvania Rule of Professional Conduct 1.7(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.

Subparagraphs (2) and (3) are satisfied in this case. The result here turns on application of subparagraphs (1) and (4).



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.

If the inquirer concludes that she can set aside her own personal interests, she must still obtain, under Rule 1.7(b)(4), the informed consent of the Department to her continued representation. Comment 18 to Rule 1.7 offers additional guidance on the concept of informed consent, and provides in pertinent part that "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client..." Here, the Department, part of a large military organization with ample resources, would be considered a highly sophisticated client with the ability to understand the circumstances and the nature of the rights that it would waive if it were to grant consent. The Rules specifically contemplate that the degree of sophistication of the party from whom informed consent is requested is a factor. See Rule 1.0, Comment 6 ("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.") Also given the high visibility and importance of the handling of the Sequester and the furloughs, it is highly likely that the Department will devote the resources necessary to ensure it understands the requested waiver and considers it carefully. The inquirer is encouraged to make sure that the individual consenting on behalf of the Department is authorized to enter into such an agreement on the Department's behalf, and considers the request carefully, with its own separate counsel, if possible.

Finally, the Committee cautions that in addition to being guided by this opinion, as a federal and military employee, the inquirer should also request guidance from the



applicable Office of Ethics that serves the Department. However, the Committee also cautions the inquirer that no matter what she may be advised by any ethics body from which she seeks advice, as a Pennsylvania licensed lawyer, she must meet the requirements of the Pennsylvania Rules of Professional Conduct.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.