

ETHICS OPINION 2013-04

Rules: 1.7
Subject: Conflict based on Lawyer's personal interest
Summary: Lawyer working for government agency on employee furlough issues who is themselves potentially subject to furlough has a conflict which may be waived so long as Lawyer is able to provide competent and diligent representation

Lawyer is a civilian attorney working for a branch of the armed forces. Due to budget pressures, civilian employees of the Department of Defense may be subject to furlough. Furlough decisions may be subject to appeal. Lawyer will probably be asked for advice about the procedure for furloughs, the appeal process, or to represent DOD in such proceedings. Lawyer further recognizes a personal interest in the result of those matters as Lawyer is among the class of civilian employees potentially subject to furlough. There is no indication at this time that Lawyer is or certainly will be furloughed. It is simply a possibility.

Lawyer asks if Lawyer's potential personal impact from the furlough process presents a conflict of interest. Specifically, Lawyer asks if it is permissible to give advice or litigate furlough issues while potentially subject to furlough, if any conflict may be waived and if so by whom, and if Lawyer may join eventual legal actions regarding furloughs.

Resolution of this issue begins and ends with Rule 1.7. Lawyer has a concurrent conflict of interest if there is "a significant risk" that work on behalf of DOD on furlough issues would be materially limited by Lawyer's personal interests. It would be a rare individual who could so totally compartmentalize their mind as to work on rules regarding employment and furlough that could be adversely applied to them yet have no risk that personal concerns would impact their work. Therefore, the Committee and Lawyer must proceed with a belief that a conflict does exist.

Such a conflict may be waived pursuant to Rule 1.7(b), however. It is the opinion of the Committee that if Lawyer reasonably believes Lawyer can provide "competent and diligent representation" and Lawyer's client agency gives informed consent confirmed in writing (and the remaining provisions of Rule 1.7(b) are met), Lawyer can work on furlough matters. It is crucial to recognize that each particular furlough issue may have a different potential impact on Lawyer and thus a greater potential interference with Lawyer's ability to provide "competent and diligent" representation. Lawyer must evaluate each situation and make a judgement about withdrawal. It is also the opinion of the Committee that should Lawyer join an action or proceeding litigating furlough issues Lawyer's ability would be unavoidably compromised and Lawyer must withdraw.

Lastly, Lawyer is not alone is asking this question. The Committee further refers Lawyer to D.C. Ethics Opinion 365 which addresses these issues and has helped guide the Committee's discussion and decision.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota