



ETHICS ADVISORY OPINION

13-06

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

The Ethics Advisory Committee has received several inquiries from federal and military lawyers licensed in SC who expect to be furloughed or have been furloughed. They have inquired about the ethical propriety of advising and representing and defending their client, the US Government, against other employees' furlough-related complaints. The Committee understands that the highest-ranking person within their chain of command (the Secretary of Defense, Secretary of the Navy, Commandant of the Marine Corps, etc.) has consented to the waiver or conflict. The inquirers noted that the departments of the Federal Government have requested that all affected lawyers inquire as to the requirements of the jurisdictions in which they are licensed.

Questions Presented:

1. May an attorney employed by a federal agency defend the agency from furlough-related complaints brought by other agency employees when the attorney was also furloughed, but does not intend to pursue her own complaint? (Provided that the person at the top of the command chain issues a letter acknowledging and waiving conflict).
2. May the attorney represent the agency if the attorney does intend to pursue her own complaint?

Summary:

A government attorney may defend her agency or command from furlough related complaints, provided that she reasonably believes she will be able to provide competent and diligent representation to her employer-client as required under Rule 1.7(b)(1). However, it will likely be unreasonable for the attorney to believe that she can provide competent and diligent representation to the agency in furlough-related matters while actively challenging the agency in her own furlough-related complaint.

Opinion:

There exists a concurrent conflict of interest under Rule 1.7(a)(2) given the attorney's personal interest as an employee subject to the sequestration furlough, and the significant risk that, as such, her professional judgment on behalf of the agency would be adversely affected by her personal and financial interests in avoiding the sequestration. This conflict can be waived provided that the requirements of Rule 1.7(b) are satisfied. Given the facts provided, subsection (2), (3) and (4) appear to be met, leaving the analysis to turn on subsection (1). This subsection provides that "a lawyer may represent a client if ... the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." When addressing the same issue regarding furlough-related work, the Philadelphia Bar Association analyzed the "reasonably believes" provision of 1.7(b)(1) in the following manner:

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(k)], '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).

From the facts presented, this Committee sees nothing that would prohibit the attorney from reasonably believing that she will be able to provide competent and diligent representation to the agency in advising them in furlough-related matters.

Whether it is reasonable, however, for an attorney to represent the agency in these matters, while also pursuing her own complaint, is a fact specific inquiry that "will depend on the similarity between the allegations in the attorney's complaint and the complaint she is defending, and on whether the outcome of the complaint the lawyer is defending will have a persuasive or binding effect on her own complaint." (District of Columbia, Legal Ethics Committee, Opinion 365 (April 2013). When analyzing this same issue, the New York State Bar Association stated that:

Where a lawyer does file his or her own appeal against the sequestration furlough, ... we doubt that the lawyer could reasonably reach the conclusion that he or she could competently and diligently defend the agency against a similar appeal by another employee, at least where, as is likely to be the case, the issues in the lawyer's own case and those of the defense are the same.

New York State Bar Association, Committee on Professional Ethics, Opinion 968 (June, 10, 2013).

Given that it is much more likely that the attorney will be faced with defending similar allegations that she lodges against the agency in her own complaint, we caution the attorney against representing the agency in furlough-related matters if she intends to file her own complaint against the agency.