

L.E.O. No. 2013-03

**POTENTIAL CONFLICTS OF INTEREST FOR FEDERAL
GOVERNMENT OR MILITARY ATTORNEYS DEFENDING
AGENCIES AGAINST FURLOUGH-RELATED COMPLAINTS**

Introduction

The Office of Disciplinary Counsel has received requests for advice from federal government and military attorneys, who have been or expect to be furloughed, regarding whether a conflict of interest exists if they continue to defend their respective agency or command against other employees' furlough-related complaints. It is the opinion of the Lawyer Disciplinary Board that, while a conflict of interest does exist, the conflict of interest may be waived under certain circumstances. Specifically, the aforementioned conflict of interest may be waived if: (1) the government or military attorney, who has been or expects to be furloughed, reasonably believes the representation of his or her respective agency or command will not be adversely affected; and (2) the agency or command consents after consultation.

As a result of spending cuts to the United States federal budget referred to as "sequestration," federal government agencies and military commands will likely furlough employees, including government and military attorneys. All furloughed employees, including government and military attorneys, will have the right to challenge the furlough action by way of an appeal to the U.S. Merit Systems Protection Board.

The Office of Disciplinary Counsel has received requests for guidance from federal government and military attorneys whose agencies and commands have instructed them to inquire about potential conflicts of interest. These attorneys have questioned possible conflicts of interest, and the ability to waive the same, in the following situations: (1) the attorney has received notice that he or she is going to be furloughed; (2) the attorney has not received notice that he or she is going to be furloughed, but anticipates that he or she may receive such notice; (3) whether the attorney's status as an active or inactive member of the West Virginia State Bar changes the analysis; (4) whether the attorney's decision to challenge, or decline to challenge, a furlough notice changes the analysis. Although it is not feasible to presume all factual scenarios that may arise with respect to this issue, the Lawyer Disciplinary Board, through this L.E.O., seeks to provide guidance to federal government and military attorneys tasked with defending their respective agencies and commands against furlough-related complaints.

Discussion

Rule 1.7 of the West Virginia Rules of Professional Conduct provides as follows:

Rule 1.7. Conflict of Interest: General rules.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

“Resolving the questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.” *Id.* at cmt. *Conflict Charged by an Opposing Party.*

As an initial matter, the Lawyer Disciplinary Board notes that an attorney’s status as an active or inactive member of the West Virginia State Bar does not change the conflicts analysis, as all members of the Bar are bound by the West Virginia Rules of Professional Conduct. Moreover, under no circumstances may an attorney defend his or her agency or command against his or her own furlough-related complaint.

Assuming that the federal government agency or military command, as the client, consents to the attorney defending his or her respective agency or command against other employees’ furlough-related complaints notwithstanding the attorney’s individual interest conflict,¹ the inquiry then becomes whether the attorney reasonably believes that his or her representation will not be adversely affected under the circumstances.

¹Some of the federal government and military attorneys who have contacted the Office of Disciplinary Counsel have provided examples of waiver of conflict of interest forms. Specifically, the Office of Disciplinary Counsel has received the Secretary of the Department of Defense’s May 24, 2013 memorandum that addresses “Waiver of Potential Conflicts of Interests for Civilian Attorneys Providing Furlough-Related Legal Advice.” In the memorandum, the Secretary gives his “informed consent for any civilian attorney who is subject to being furloughed to continue to represent and provide advice” to the Department of Defense.

Employment-related complaints, including those related to furlough decisions, typically are fact-specific to the employee bringing the complaint. Whether an attorney may have a conflict of interest in defending his or her respective agency or command against other employees' furlough-related complaints while simultaneously pursuing his or her own furlough-related complaint depends upon the similarity of the allegations in the aforementioned complaints.

An attorney who is pursuing his or her own furlough-related complaint may be motivated to defend his or her respective agency or command in such a way that benefits his or her own complaint. This is certainly the case if the attorney has received notice that he or she is going to be furloughed and either has already filed a complaint or intends to do so. This is also the case, however, if the attorney has not yet received notice that he or she is going to be furloughed, but anticipates that he or she may receive such notice and that he or she intends to file a complaint upon receipt of such notice.

Even if an attorney chooses not to challenge his or her respective agency or command's decision to furlough the attorney, a conflict of interest exists, because a favorable result in one of the other employees' furlough-related complaints could have an impact on agency or command policy. Such a policy change could ultimately benefit the furloughed attorney in the absence of an appeal.

Thus, it is the decision of the government or military attorney whether he or she reasonably believes whether his or her representation of the agency or command will not be adversely affected by his or her own interests. This inquiry is necessarily fact-specific, based

on the circumstances presented in the subject complaint(s). The Lawyer Disciplinary Board finds that such a decision must be made by the individual attorney, once the client has consented after consultation. Provided the client has consented to the attorney's representation, if the attorney reasonably believes that his or her representation of the agency or command will not be adversely affected by his or her own interests, the Lawyer Disciplinary Board finds that the conflict may be waived pursuant to Rule 1.7(b) of the West Virginia Rules of Professional Conduct. If the attorney reasonably believes that his or her representation of the agency or command will be adversely affected by his or her own interests, however, the Lawyer Disciplinary Board finds that the conflict may not be waived pursuant to Rule 1.7(b) of the West Virginia Rules of Professional Conduct.

APPROVED by the Lawyer Disciplinary Board on the _____ day of _____, 2013, and **ENTERED** this _____ day of _____, 2013.

John W. Cooper, Chairperson
Lawyer Disciplinary Board