

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 13-05

WHETHER AN ATTORNEY EMPLOYED BY THE FEDERAL GOVERNMENT TO DEFEND THE GOVERNMENT IN EMPLOYMENT-RELATED MATTERS MAY REPRESENT THE FEDERAL GOVERNMENT IN APPEALS FROM EMPLOYEES REGARDING SCHEDULED FURLOUGHS WHICH ALSO DIRECTLY AFFECT THE ATTORNEY

STATEMENT OF FACTS

The requesting attorney is licensed to practice law in the State of Nebraska and is employed by the United States Army as a civilian attorney. As part of the attorney's job duties, the attorney represents the Army on various aspects of employment litigation, including defending the Army in appeals, complaints, and grievances filed by Army civilian employees to the Merit Systems Protection Board ("MSPB") with respect to "adverse actions" by the Army against civilian employees.

The Department of Defense has decided to furlough many civilian employees for 11 days as a cost-saving measure. This is an "adverse action" subject to appeal by affected civilian employees to the MSPB and the requesting attorney would routinely represent the Army in such proceedings as a regular job duty. As a civilian attorney, however, the requesting attorney is also personally subject to the furlough and, thus, has a personal financial interest in the resolution of furlough-related proceedings that may conflict with the interests of the Army. The requesting attorney seeks guidance as to whether the personal financial interest that the requesting attorney has in the furlough constitutes a conflict of interest in terms of his or her representation of the Army on furlough-related matters and, if so, what effect such a conflict of interest has on his or her ability to ethically represent the Army in accordance with the Nebraska Rules of Professional Conduct.

The Army is aware of the potential conflict of interest that its civilian attorneys may experience with respect to furlough-related issues and, accordingly, the Secretary of Defense has provided a written waiver of any such conflict of interest—subject to a number of specified limitations—provided that the attorney’s state bar allows for such a waiver.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

The following rules of professional conduct are instructive with respect to the question presented:

§3-501.7: Conflict of interest; current clients.

(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 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (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, confirmed in writing.

...

Comment 20: Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0 (b). See also Rule 1.0 (n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0 (b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Comment 21: A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Comment 22: Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future

representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

§3-501.11: Special conflicts of interest for former and current government officials and employees.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rule[] 1.7 . . .

DISCUSSION

At the outset, it is important to note that the Committee has not been provided either with information concerning the specific impact that the furlough will have on the requesting attorney, or whether the requesting attorney has personally filed a grievance or appeal with respect to furlough-related matters. It is the understanding of the Committee, however, that the requesting attorney will essentially be subject to the furlough in the same manner and effect as those

individuals seeking recourse against the Army in proceedings in which the requesting attorney would be defending the Army. A furlough of 11 working days would in all likelihood result in a financial loss to the requesting attorney of possibly thousands of dollars. Accordingly, the Committee believes that there is at least a significant risk that the requesting attorney's representation of the Army in furlough-related matters would be materially limited by the personal financial interest of the lawyer in the outcome of furlough-related matters. Thus, it is the opinion of the Committee that a concurrent conflict of interest exists under Rule 3-501.7 (a) (2) and the attorney is prohibited from representing the Army absent the satisfaction of all requirements set forth in §3-501.7 (b) (1-4).

Because the proposed representation is not explicitly prohibited by law, however, and there is no indication that the representation would include the assertion of a claim by one client against another client in the same proceeding, neither §3-501.7 (b) (2) nor §3-501.7 (b) (3) would serve as an absolute prohibition against the representation. Moreover, the Secretary of Defense—on behalf of the Army—has provided written, informed consent to the attorney's representation irrespective of the potential conflict of interest thus satisfying the requirement of §3-501.7 (b) (4). Accordingly, it is the position of the committee that the requesting attorney may proceed with the proposed representation if the attorney reasonably believes that he or she will be able to provide competent and diligent representation to the client irrespective of the conflict. *See* §3-501.7 (b) (1).

Although it is the opinion of the Committee that the requesting attorney may ethically proceed with the proposed representation if the attorney reasonably believes that he or she would be able to do so in a competent and diligent manner, it is important to clarify a number of issues relevant to the analysis. First, the Committee has not been provided with any information

regarding the particular circumstances of the requesting attorney from which to conclude that the attorney could, in fact, reasonably believe that he or she would be able to perform the proposed representation in a competent and diligent manner. For instance, the Committee is not aware of the financial circumstances of the requesting attorney and the impact that the furlough is expected to have on either the attorney or his or her family. It is certainly plausible to envision a scenario under which it would not be reasonable for the attorney to conclude that he or she could competently and diligently represent the Army in light of the attorney's personal financial circumstances even though the client has otherwise provided its consent to the representation. This is an analysis that the attorney must perform prior to initiating his or her representation of the Army on furlough-related matters and must be evaluated on an objective basis.

Second, the aforementioned analysis as to whether or not the attorney reasonably believes that the representation could be conducted competently and diligently irrespective of the conflict of interest is fluid in nature and subject to changing circumstances. Thus, while the representation may initially be ethical, if circumstances change such that the attorney's belief in his or her ability to ethically represent the Army in furlough-related matters no longer remains reasonable, the attorney must immediately inform the client and cease the representation.

Finally, Comment 21 makes clear that the Army may revoke or limit its consent to the representation at any time. Accordingly, while the proposed representation may be ethical at its inception, the consent required under §3-501.7 (b) (4) may be revoked by the Army sometime thereafter and would serve to terminate the ethical nature of the representation at that point.

CONCLUSION

The requesting attorney's proposed representation of the Army in furlough-related matters likely constitutes a conflict of interest under §3-501.7 (a) (2) in light of the significant

risk that the attorney's personal financial interest in furlough-related matters will conflict with that of the client. This conflict may be waived, however, upon satisfaction of the conditions set forth in §3-501.7 (b) (1-4). Because the proposed representation is not prohibited by law; does not involve the assertion of a claim by one client against another in the same proceeding; and the client has provided written informed consent; it would be ethical for the attorney to engage in the representation provided that the attorney reasonably believes—under the particular circumstances at issue and unique to the attorney—that he or she can do so in a competent and diligent manner irrespective of the conflict of interest.