-- *N.J.L.J.* --
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ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
Appointed by the Supreme Court of New Jersey

OPINION 726

Conflict of Interest – Government Lawyers

The Advisory Committee on Professional Ethics received several inquiries from New Jersey licensed lawyers employed by the United States government. Inquirers' job duties include advising their government employer on legal issues, including employment matters. Inquirers also represent the government before tribunals such as the Merit Systems Protection Board on employment issues.

The federal government budget has recently suffered automatic cuts requiring federal agencies to reduce costs of operation pursuant to the so-called "sequestration." Inquirers state that their employer is planning to impose a furlough of all civilian employees for one day a week, resulting in an economic loss of about 20% of pay per week for a period of time. Inquirers are civilian employees, likely to be furloughed. Inquirers will be asked legal questions about the implementation of the furlough program in their organization and anticipate defending the government in individual employees' appeals of their furlough before the Merit Systems Protection Board.

Inquirers ask whether they have a nonwaivable conflict of interest under *Rule of Professional Conduct* 1.7(a)(2) since the economic loss they personally face will

materially limit their representation of the government on furlough matters. This *Rule* provides:

> (a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (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.

Pursuant to *Rule of Professional Conduct* 1.7(b)(1), a public entity cannot consent to representation by a lawyer who has a concurrent conflict of interest.

Conflicts of interest of full-time government lawyers, especially those concerning adverse but shared economic interests, must be analyzed differently from conflicts that arise in the private sector. Absent unusual circumstances, economic issues that affect government lawyers and employees as a class should not render the lawyer unable to provide legal advice and representation to the government employer about that issue. Disqualifying every lawyer in the class due to this adverse but shared economic interest deprives the government of the expertise of its own lawyers and affects its ability to operate efficiently. Public policy supports a more flexible conflicts analysis that acknowledges the legitimate needs of governmental entities and the integrity of full-time government lawyers.

The New Jersey Supreme Court recognized that certain actions taken in the private sector may give rise to a conflict while the same actions taken in the public sector do not. In *Gormley v. Lan*, 88 *N.J.* 26 (1981), a legislator argued that the Attorney General had taken a position in the matter that created a conflict of interest. The Court responded:

> Absent unusual circumstances, the adoption of any such position by the Attorney General should not have the effect of barring him from the role of counsel to the various departments and agencies of State government, *see N.J.S.A.* 52:17A-4(e), even though his publicly-stated position may cast some doubt on his ability to render independent advice on the matter. The office of Attorney General is a complex one that encompasses many functions. We should not limit those functions, the product of centuries of experience, constitutional intendment, and legislative will, by imposing strictures that may be entirely appropriate where private counsel is involved. When it comes to the Attorney General, barring unusual circumstances, the faithful discharge of his duties will depend not on finely-tuned rules concerning conflicts of interest but rather on the integrity of the occupant of the office. The wide scope of functions invested in that office and thought to be advantageous to the public necessarily entails some risk of conflict. Absent unusual circumstances, however, this Court should not attempt to eliminate that conflict at the cost of diminishing the public advantage thought to inhere in the broad range of functions committed to that office.
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> [*Id.* at 43-44.]

This flexible approach to conflicts in the public sector is also supported by cases such as *State v. Bell*, 90 *N.J.* 163 (1982), and *State v. Muniz*, 260 *N.J. Super.* 309 (App. Div. 1992). In *Bell*, two public defenders from the same office represented codefendants in a criminal proceeding. The Supreme Court implicitly recognized that while two private criminal defense lawyers in the same firm would not be permitted to represent co-defendants, the unique setting of the public sector supported a different result. In *Muniz*, a public defender represented a murder suspect while a different public defender from the same office had represented the murder victim on unrelated charges prior to his death. Two private lawyers from the same firm would not have been permitted to undertake the representation but the Court decided that the conflict was not disqualifying. *Cf.* ACPE Opinion 525, 113 *N.J.L.J.* 365 (April 5, 1984) (to permit mobility of young lawyers who worked at firms that handled toxic tort (asbestos) litigation, "public policy considerations dictate different rules here which will not serve to dilute the application of the Code of

Professional Responsibility"); ACPE Opinion 660, 130 *N.J.L.J.* 659 (February 24, 1992) (permitting a law firm to screen a former government lawyer who handled related cases, in furtherance of the public policy of "fostering recruitment of competent attorneys who should not be denied private employment after their government service" unless confidential information may be improperly disclosed).

Lawyers in the New Jersey Attorney General's Office handle cases regarding adverse but shared economic effects on a regular basis without any charge of conflict of interest requiring the State to hire outside counsel. An Assistant Attorney General in the Division of Law recently represented the Civil Service Commission defending rules governing furloughs imposed on State employees, including lawyers in the Division of Law -- and on the very lawyer who argued the case. *In re Emergency Temporary Layoff Rule*, 2009 *N.J. Super. Unpub. LEXIS 1549* (App. Div. 2009). Deputy Attorneys General in the Division of Law successfully defended a statute that imposed a $100 fee on all lawyers, including public sector lawyers, to raise revenue to retire the debt of a State-run automobile insurance high-risk pool. *New Jersey State Bar Ass'n v. Berman*, 259 *N.J. Super*. 137 (App. Div. 1992). Full-time government lawyers routinely provide legal advice and representation on matters that adversely affect the economic interests of government workers, lawyers, or other broad classes that include themselves. Research has not disclosed any precedent for mass disqualification of government lawyers due to an adverse but shared economic interest.

The Committee here is considering only the conflict that arises due to personal interests that are economic and shared by a class of government workers. It finds that, in

accordance with sound public policy, mass disqualification of all government lawyers in that class is not warranted by the *Rules of Professional Conduct*.

In contrast, a personal interest that affects the government lawyer in some unique way requires a different treatment. A government lawyer should not advise or represent an agency in a case that concerns a family member, family business, personal investments or property, or the like. When personal interests are unique to the government lawyer and are not shared by that lawyer in a class with other government lawyers or workers, the lawyer should be disqualified from the matter.

Hence, the adverse economic consequences of the furlough on a federal government lawyer conceivably could create a personal interest that affects the lawyer's objectivity and independence of judgment in providing legal advice and representation to the government agency in connection with the furlough program. *RPC* 1.7(a)(2). But when the effects of the furlough are shared by all the government lawyers in the agency, public policy dictates that the conflict does not disqualify lawyers from fulfilling their public duties.

If, however, the federal government lawyer has filed an appeal of his or her own furlough, then that lawyer is disqualified from providing representation and legal advice to the government on the furlough program. The filing of his or her own appeal introduces a new factor into the equation; the lawyer now has a unique interest because he or she has individually challenged the agency on the permissibility of imposing furloughs. This action disqualifies the lawyer from providing legal advice to the agency regarding the furlough program and representing the agency in similar appeals involving other employees.