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New York State Bar Association
Committee on Professional Ethics

Opinion 968 (6/10/13)

Topic: Conflicts of interest for government lawyer; government lawyer pursuing personal claims against employer; government lawyer representing agency against claim that could also be asserted by the lawyer

Digest: A federal government lawyer subject to a mandatory furlough may bring a challenge to the furlough in an administrative tribunal if consistent with the lawyer's other ethical obligations. If the inquiring lawyer does so, however, the lawyer may not represent the agency in opposition to challenges to the furlough by other employees, unless permitted by a rule of necessity applicable if no other lawyer can defend the agency. If the inquiring lawyer does not pursue such a challenge, the lawyer may represent the agency in opposition to such challenges by others if the agency gives informed consent and the other requisites for conflict waiver are met. Other lawyers in the office may also defend the agency against such challenges if there is appropriate waiver of the conflict and those other lawyers do not pursue their own challenges.

Rules: 1.0(h); 1.1(c); 1.7; 1.10(a), (d); 1.11(d); 8.5

QUESTIONS

1. May a lawyer who is employed by a Federal government agency and is subject to employment furloughs of up to 22 days resulting from "sequestration":

   a. exercise the lawyer's statutory right to challenge his or her own sequestration furlough before the Merit Systems Protection Board, an administrative tribunal established to hear appeals by Federal government employees from "adverse employment actions"; or
   b. represent the agency before the MSPB in actions brought by other agency employees, or otherwise advise the agency regarding implementation of the furlough?

OPINION

2. The Committee has received several inquiries from civilian lawyers who are admitted in New York and are employed by Federal government agencies concerning possible conflicts arising out of potential employment furloughs resulting from the ongoing Federal government "sequestration." As a result of the sequestration (a Congressionally-mandated across-the-board budget cut), many Federal employees – including attorneys – may be subjected to employment

furloughs of up to 22 days. Federal employees – again, including attorneys – have the statutory

right to challenge such furloughs before the Merit Systems Protection Board ("MSPB").

3. The inquirers have raised questions concerning (i) whether the inquirers may pursue their own challenge before the MSPB against their employer, and (ii) whether the fact that the inquirers are themselves subject to sequestration furloughs would present a conflict of interest if the lawyers are asked to represent their agency in appeals of the furlough brought by other agency employees, or asked to advise the agency in implementation of the furlough. We understand that the challenges to the furlough will raise issues common to all or many persons affected by it, such as the adequacy of notice under governing statutes and rules, and whether the furlough otherwise meets statutory and constitutional requirements for such job actions.

Choice of Ethics Rules

4. We address first whether New York's Rules of Professional Conduct apply at all. Each of the inquirers is admitted in New York but practices in the District of Columbia or Virginia. Each assumes that New York's ethics rules apply.

5. Rule 8.5(b) of the New York Rules of Professional Conduct is a choice-of-law rule for legal ethics. It provides that "[f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice …, the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For other conduct, the rules to be applied are New York's rules if the lawyer is admitted only in New York. Rule 8.5(b)(2)(i). If the lawyer is licensed to practice in New York and some other jurisdiction, the rules to be applied are those of the "admitting jurisdiction in which the lawyer principally practices," unless "the particular conduct clearly has its predominant effect in another" admitting jurisdiction, in which case the rules of that jurisdiction apply. Rule 8.5(b)(2)(ii).

6. As the inquirers are asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule.[1] (The proposal would have adopted the usage in the ABA Model Rules of Professional Conduct.) Thus, while there may be policy reasons for treating administrative tribunals as courts, *see* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* ("*Simon's*") 1626 (2013 ed.) (noting desirability of a uniform rule for practice before a particular administrative tribunal), we do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals

[1] NYSBA Proposed Rules of Professional Conduct 240 (Feb. 1, 2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports.

such as the MSPB.[2]

7. The rules to be applied, therefore, are not necessarily those of the jurisdiction in which the MSPB sits. Rule 8.5(b)(2) provides that if the lawyer is admitted in multiple jurisdictions including New York, then the conduct will be subject to the rules of either New York or one of the other admitting jurisdictions (depending on where the lawyer principally practices and possibly on the predominant effect of the conduct). If the lawyer is admitted only in New York, then New York's rules will apply.[3] We are informed that at least one of the inquirers is admitted to practice only in New York.[4] We therefore will proceed to analyze the questions under New York's Rules of Professional Conduct.

MSPB Appeal Filed by Government Lawyer

8. One of the inquiries asks whether a government lawyer who is subject to a sequestration furlough as a government employee may file an MSPB appeal on his or her own behalf against the lawyer's employer. Rule 1.1(c)(2) provides that a lawyer "shall not intentionally … prejudice or damage the client during the course of the representation except as permitted or required by these Rules." We assume for purposes of this opinion that the inquirer's client is the

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[2] We do not need to address in this opinion the question of what would happen if the rules of an administrative tribunal presented ethical requirements that conflicted with New York's rules, because the MSPB rules do not appear to impose such conflicting obligations. The MSPB permits parties to be represented by anyone of their choosing subject to relatively general rules permitting another party to challenge an adverse representative on grounds of "conflict of interest" and permitting a judge to limit a representative's participation for conduct prejudicial to the administration of justice. 5 C.F.R. §§ 1201.31(b), 1201.43(d) (2012); *see also* Standards of Ethical Conduct for Employees of the Executive Branch, *id.* Part 2635 (2013) (general conflict of interest and other standards).

[3] This conclusion would also apply to representing the agency in connection with implementation of the furlough, which would not be conduct in connection with a proceeding in a court. We note that decisions by the MSPB are appealable to the U.S. Court of Appeals for the Federal Circuit, which is of course a "court" within the meaning of Rule 8.5(b)(1). So, if an MSPB decision were appealed to the Court of Appeals, conduct in connection with that appeal would be subject to "the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1).

[4] We express no view on whether the inquirers' practice is permitted under the rules governing unauthorized practice in Virginia and the District of Columbia. *Cf. Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379, 401 (1963) (allowing petitioner to practice federal patent law in a state in which he was not admitted to practice law because the Patent and Trademark Office had issued rules on practice before it and "[t]he rights conferred by the issuance of letters patent are federal rights").

agency that employs him or her.[5]

9. Professor Simon opines that the phrase "during the course of the representation" includes both a temporal aspect – making clear that the duty applies only to current clients – and also a substantive limitation – "that the duty not to prejudice or damage a client applies only in ways related to the 'representation'" and does not apply to lawyer conduct "*outside* the scope of the representation." Simon's, *supra*, at 73 (emphasis in original); *accord* Nassau County 05-1 (lawyer may give testimony against current client in matter unrelated to legal services being rendered). Even if this interpretation is accepted, it is unclear whether the action contemplated here – a claim by in-house counsel relating to the terms of his or her employment as counsel – is outside the scope of the representation of the agency, which presumably extends to all the work the lawyer does while employed by the agency.

10. While Rule 1.1(c)(2) is relatively unusual – it is not part of the ABA Model Rules of Professional Conduct – it captures part of the common law duty of loyalty. It is helpful to consider the courts' consideration of that common law right in delineating the scope of the Rule. Courts have generally allowed an in-house or government lawyer to assert his or her own statutory or contractual rights against the lawyer's employer where doing so would not violate a specific ethical duty.

11. In *Santa Clara County Counsel Attorneys Assn.* v. *Woodside*, 7 Cal. 4th 525, 869 P.2d 1142 (Cal. 1994), an association of attorneys in the office of the Santa Clara County Counsel's office sought a declaration from the Supreme Court of California that attorneys in the association

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[5] We recognize that identification of a government lawyer's client is not always straightforward. *See* Rule 1.13, Cmt. [9] ("Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context."); Restatement (Third) of the Law Governing Lawyers §97, Cmt. c (2000) ("No universal definition of the client of a governmental lawyer is possible."); Roger Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal Ethics 291, 296 (1991) (noting possibilities that government lawyer's client could be the public, the government as a whole, the branch of government in which the lawyer is employed, the particular agency or department in which the lawyer works, and the responsible officers who make decisions for the agency). We do not strive to address or resolve such issues in this opinion. *See* Rule 1.13, Cmt. [9] ("Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules."); N.Y. City 2004-03 ("Ultimately, the question of who is the government lawyer's client is a question of law and not of ethics, and one to which the government lawyer must give careful consideration in each case."). A prevailing approach, however, and the one we follow here, is that (apart from cases like Attorneys Generals' Offices or prosecution agencies), the employing agency is treated as the presumptive client. *See*, *e.g.*, N.Y. City 2004-03 (assuming generally "that the government agency is for practical purposes the 'client agency'"); Restatement §97, Cmt. c ("For many purposes, the preferable approach on the question presented is to regard the respective agencies as the clients …"); Cramton, *supra*, at 298 ("For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed.").

would not violate their ethical obligations by bringing a lawsuit against the county counsel's office seeking to enforce statutory collective bargaining rights. Relying on ABA informal opinions concerning the right of in-house lawyers to participate in unions and union job actions, the court recognized a need for a "realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee." *Id.* at 551, 869 P.2d at 1157. Accordingly, the court found that:

> "[I]n determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, we look not to whether the action creates antagonism between the attorney/employee and the client/employer, since such antagonism in the labor relations context is unfortunately commonplace; rather, we seek to ascertain whether an attorney has permitted that antagonism to overstep the boundaries of the employer/employee bargaining relationship and has actually compromised client representation."

Id. at 552, 869 P.2d at 1157. The court distinguished cases in which lawyers had been barred from pursuing claims where prosecution of the lawsuit would make use of confidential information, *Balla* v. *Gambro*, 145 Ill. 2d 492, 584 N.E.2d 104 (1991), or where the lawyer's claims impaired the lawyer's ability to defend the client in closely related claims that were assigned to the lawyer, *Jones* v. *Flagship Int'l*, 793 F.2d 714 (5th Cir. 1987). Under this analysis, the California court held, "The only realistic accommodation between the enforcement of statutory guaranties under [California labor law] and the enforcement of the Attorneys' professional obligations … is to permit [the Attorneys' lawsuit], as would be permitted to other public employees, while at the same time holding the Attorneys to a professional standard that ensures that their *actual* representation of their client/employer is not compromised." *Id.* at 553, 869 P.2d at 1157 (emphasis in original).

12. A similar result was reached in a Minnesota case brought by a lawyer alleging retaliatory discharge. *Nordling* v. *Northern State Power Co.*, 478 N.W.2d 498 (Minn. 1991). While by the time the suit was brought the lawyer was no longer employed by the client, the court's analysis addressed the effect of permitting the suit on the client's usual right to fire a lawyer at any time – an aspect of the current-client relationship. The Minnesota Supreme Court held, "It seems to us … that in-house counsel should not be precluded from maintaining an action for breach of a contractual provision in an employee handbook, provided, however, that the essentials of the attorney-client relationship are not compromised." *Id.* at 502. The court analyzed the particular claim at issue and concluded that it did not "appear to implicate company confidences or secrets" and, while there was a loss of trust between the lawyer and his direct superior, "this is not a loss of trust that necessarily impairs Nordling's attorney-client relationships with the constituencies of the corporate organization." *Id.* at 502-3; *see also Verney* v. *Pennsylvania Turnpike Comm'n*, 903 F. Supp. 826, 832 (M.D. Pa. 1995) (upholding attorney's right to bring retaliatory discharge claim for filing gender discrimination lawsuit where action did not "'so interfere[] with [Plaintiff's] performance of [her] job that it renders [her] ineffective in the position for which [she] was employed'") (citation omitted); *Parker* v. *M&T Chemicals, Inc.*, 566 A.2d 215, 236 N.J. Super. 451 (App. Div. 1989) (upholding in-house attorney's right to sue former employer for damages under the New Jersey Whistleblowers Act where lawyer complained that he was mistreated and constructively discharged for refusing to join illegal scheme).

13. Ethics committees in this State have considered analogous questions and reached similar conclusions. In N.Y. State 578 (1986), this Committee concluded that lawyers may join a union as long as they comply with all disciplinary rules. "If a conflict arises between union membership and a lawyer's ethical obligations under the Code, the lawyer must withdraw from the union or from the representation, or, if it is obvious that he or she can adequately represent the client … must obtain the informed consent of the client to continue the representation."[6] This Committee relied on the ABA ethics opinions upon which the California Supreme Court later relied in concluding that, by analogy, lawyers could sue their current employer as long as the "*actual* representation of their client/employer was not compromised." *Accord* N.Y. City 79-55 (1980) (if at any time membership of a lawyer in a union affects or reasonably may affect his or her professional judgment, the lawyer must choose between continuing the union membership and continuing to represent the client affected, unless the informed consent of the client is obtained): N.Y. City 82-75 (1983) (ethical obligations of attorneys employed by Legal Aid Society when their union calls a strike).

14. Similarly, in N.Y. City 1994-1, the ethics committee of the Association of the Bar of the City of New York concluded that a lawyer might sue his former employer for racially discriminatory discharge, as long as care was exercised to avoid disclosing confidential information of the former client. The Committee relied on, *inter alia*, the wrongful discharge cases discussed above.[7]

15. Based on the foregoing, we conclude that a lawyer who is subject to a sequestration furlough would not violate Rule 1.1(c)(2) merely by exercising his or her statutory right to file an appeal of that furlough on the lawyer's own behalf, but should consider whether doing so would affect his or her representation of the employer-client in violation of any other ethical rules. However, it does not appear likely that the challenges to the furlough would, for example, implicate confidential information, because those challenges would likely be based on considerations of notice and due process common to many employees.

Representation of Agency in MSPB Appeals

16. We turn next to the question of whether a lawyer who is subject to a sequestration furlough may represent the lawyer's employer-client either in connection with MSPB appeals

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[6] The provisions of the former Code of Professional Responsibility referred to in the Committee's opinion were identical or similar to provisions of the current Rules of Professional Conduct. The text of Rule 1.1(c)(2) closely followed that of DR 7-101(A)(3). *See* Simon's, *supra*, at 73.

[7] N.Y. City 1994-1 (citing *Parker* and *Nordling*). The committee raised a question whether a claim based on the common law, as opposed to statute or an employee handbook, would be permitted, citing the cases, among others, that the California Supreme Court had characterized as ones in which the attorney's suit would violate a separate ethics prohibition. We do not consider such issues here, because we understand that the furlough challenge would be based on statutory and constitutional claims.

filed by other government employees within the lawyer's agency or in implementation of the furlough generally. Rule 1.7(a)(2) prohibits a lawyer from representing a client where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." As Professor Simon wrote, a "significant" risk is "more than a possibility but less than a certainty." Simon's, *supra*, at 306.

17. Here, the risk is that a lawyer's personal interest as an employee subject to a sequestration furlough would alter the lawyer's professional judgment on behalf of the employer-client when asked to defend the same sequestration furlough or to implement the furlough. This is readily seen with respect to defending a challenge to the furlough: A good outcome for the employer client – that is, upholding the sequestration furlough, particularly as applied to employees at the lawyer's agency – would tend to harm the interests of the lawyer in the lawyer's capacity as an employee of the same agency. Conversely, a bad outcome for the employer-client – overturning the furlough – would tend to benefit the lawyer's personal and financial interests as an employee of the agency. We suspect that the same would be true for at least some of the advice that the lawyer may be asked to provide in connection with implementation of the furlough. The potential furlough could affect a substantial portion of the lawyer's annual income – up to 22 days, or approximately 8.5% of an employee's annual salary. Given this, we conclude that, in the usual case, there is a "significant risk" that a government lawyer's professional judgment on behalf of the lawyer's agency would be adversely affected by the lawyer's personal and financial interests in avoiding sequestration cuts as an employee of the same agency. *Cf.* N.Y. State 578 (1986) (State-employee lawyer who is covered by collective bargaining agreement has a conflict in representing the State in disciplinary proceedings against State employees under the agreement).[8]

18. This conflict is imputed to other lawyers in the same law office. Under Rule 1.10(a), "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

19. A "firm" is defined to include "a government law office." Rule 1.0(h). Despite that definition, there may possibly be circumstances in which a government law office is not subject to particular rules that apply to firms generally. Comment [3] to Rule 1.0 notes, "Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law." But in the context of this inquiry and the imputation rule, we are not aware of any governing law or other circumstances that would warrant reading "firm" any more narrowly than its definition. *Cf.* N.Y. State 900 ¶ 21 (2011) (a County Attorney's office is a "firm" under imputation rule). Our conclusion is reinforced by the Rule's

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[8] This conclusion may vary with the facts of individual cases, however. Some employees may not view the furlough as a negative development, where, for example, they can replace the lost income from other sources or would welcome the opportunity to devote time to other activities. One inquirer, for example, states that he is indifferent to whether he is furloughed, because he would devote the time to paid service in the military reserve.

history. Some jurisdictions have adopted versions or interpretations of imputation rules that do not apply to government law offices.[9] The New York State Bar Association endorsed that approach by proposing an amendment that would have made imputation under Rule 1.10(a) inapplicable to government law offices. NYSBA Proposed Rules of Professional Conduct 68 (Feb. 1, 2008) (proposing version of Rule 1.10(e) providing that "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11"). That proposal, however, was not adopted by the courts.

20. As applied to this inquiry, Rule 1.10 imputes a personal-interest conflict of a lawyer in the government law office to any other lawyer in that office who knows of the conflict. More particularly, it means that if any lawyer in the relevant government law office is subject to the furlough, all lawyers in that law office who know that fact would have a conflict in defending the agency against a challenge to the furlough by any employee of the agency.

21. The existence of a conflict under Rule 1.7(a), however, does not end the inquiry. Under Rule 1.7(b), a lawyer who has a conflict under Rule 1.7(a) may nevertheless represent a client in the matter when certain criteria are met, namely that:

> "(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."

22. We have held that a public agency can give informed consent, N.Y. State 629 (1992), and we will assume that there are no laws prohibiting the representation. The remaining questions are whether a lawyer subject to the furlough can reasonably conclude that he or she will be able to provide "competent and diligent representation" to the employer's agency, and whether the representation would "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." Rule 1.7(b)(1), (3).

23. On the first question, we believe that a lawyer who has not challenged the furlough could well reach a reasonable conclusion that he or she could set aside the effect on himself or herself, and competently and diligently represent the agency in defending a challenge or advising on implementation of the furlough. This is particularly the case because of the nature of the issues likely to arise in the challenge cases, which go to statutory and constitutional issues and not questions of deeply personal choice or belief.

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[9] *E.g.*, ABA Model Rule 1.10(d); ABA Model Rule 1.11, Cmt. [2]; *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987); *State v. Fitzpatrick*, 464 So. 2d 1185 (Fla. 1985); *Anderson v. Commissioner of Correction*, 15 A.3d 658 (Conn. App. Ct. 2011); ABA Formal 342 (1975) (construing broad imputation rule of DR 5-105 as not applicable to government law offices and citing policy reasons in support).

24. Where a lawyer does file his or her own appeal against the sequestration furlough, however, 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. It is not just that the lawyer could profit personally from losing the argument. As a matter of common experience, a litigant frequently has or acquires a deeply held belief in the justness of his or her cause, and the merits of the arguments advanced in support, so as to make it difficult to pursue the contrary position wholeheartedly. A recent opinion by the ethics committee of the District of Columbia Bar reaches the same conclusion under the identical language of D.C. Bar Rule 1.7(c)(2):

> "In our view, the reasonable belief requirement of Rule 1.7(c)(2) is a difficult obstacle to surmount if the lawyer is asked to defend the agency against a furlough complaint with allegations that are substantially similar to the allegations she has raised in her own furlough complaint against the agency. The level of difficulty increases with the similarity of the allegations in the complaints."

District of Columbia Opinion 365 (2013).[10]

25. We do not believe that this condition of nonconsentability extends to all lawyers in the agency, however. Rule 1.10(d) contains a specific provision for consent to imputed disqualification: "A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." Thus, if the lawyer pursuing the appeal is Lawyer A and the lawyer to whom the conflict would be imputed is Lawyer B, the conflict imputed to Lawyer B can be waived under the conditions in Rule 1.7. Under our analysis above, Lawyer B (if not pursuing his or her own appeal) may reasonably conclude that he or she "will be able to provide competent and diligent representation to each affected client" within the meaning of Rule 1.7(b)(1), so that the conflict imputed to Lawyer B can be waived by the client agency. In other words, in deciding whether an imputed conflict (in the language of Rule 1.10(d), the "disqualification prescribed by this Rule") can be waived, it is necessary to apply the standards set forth in Rule 1.7(b) to the lawyer to whom the conflict is imputed.

26. In many kinds of cases, a conclusion that Lawyer A has a nonconsentable conflict will likewise apply to Lawyer B. For example, in a private law firm setting, if Lawyer A's nonconsentable conflict arises from the fact that Lawyer A cannot give enough information to one of Lawyer A's clients in order to obtain informed consent to take on representation of another client (*e.g.*, because the matter to be handled for the new client involves a still-secret

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[10] Whether the lawyer could represent the agency in advising on implementation of the furlough would depend, as the D.C. Bar opinion concluded, on how close the questions on which advice is sought are to the lawyer's claims in the challenge to the furlough. The Philadelphia Bar Association ethics committee concluded that the conflict presented by the furlough is waivable, even if the lawyer might later file an appeal of his or her own, but did not expressly discuss the question of a lawyer defending the agency while at the same time pursuing an appeal. Phila. 2013-3.

hostile action to be taken against the other client), that condition would affect all lawyers in Lawyer A's firm. But where the nonconsentable nature of Lawyer A's conflict is personal to Lawyer A, the circumstances may well allow the client to consent to representation by Lawyer B.

27. To be clear, this is not to suggest that the conflict is not imputed in the first place. Nothing about Rule 1.10(d), which deals only with consent to waive an imputed conflict, alters the basic rule that all conflicts under Rules 1.7, 1.8 and 1.9 – whether derived from representation of another client or from personal circumstances of one lawyer in the law firm – are imputed to all lawyers in the firm under the standards set forth in Rule 1.10(a).

28. There is one form of nonconsentable conflict that presents a different problem, and that is the situation presented by Rule 1.7(b)(3), which bars a lawyer from representing clients on both sides of the same litigation or other proceeding before a tribunal. Lawyer A cannot appear on both sides of a litigation, but can Lawyer A appear adverse to Lawyer B from the same law firm in that litigation? We think that such a situation would be governed by different considerations because litigation involves the interests not just of the affected client or clients but also of the public and the judiciary. For example, where a matter is in litigation, the appearance of lawyers from the same firm may deprive the judiciary and the public of the confidence that the adversary system, on which the development of the law depends, will function as it should. But we do not address that question with finality here, as the issue is not presented.[11]

29. Finally, we note that other provisions of the New York Rules of Professional Conduct, and our previous opinions, provide for a "rule of necessity," which allows lawyers – in particular, government lawyers – to engage in an otherwise impermissible representation in cases where there is no one else who can act. *See, e.g.*, Rule 1.11(d)(1) (permitting a government attorney to participate in a matter in which the lawyer "participated personally and substantially while in private practice or nongovernmental employment" in cases where "under applicable law no one is, or by lawful designation may be, authorized to act in the lawyer's stead in the matter"); N.Y. State 638 (1992) ("The rule of necessity thus recognizes that, as a matter of ethics, Lawyer should not be disciplined for undertaking a prosecution that the law requires and a court directs Lawyer to undertake, even if Lawyer personally and substantially participated in the matter while in private practice."); *cf*. N.Y. State 675 (1995) ("[I]n recognizing that a prosecuting attorney seeking reelection is not bound by the same limitations on his conduct as otherwise attach when he is not a candidate for reelection, we do so not for ethical reasons but under a notion of necessity in deference to the realities of the political elective process."). Ordinarily, if outside counsel, or counsel from another agency, could lawfully represent the agency, that would obviate the need to invoke any rule of necessity. N.Y. State 638 ("The disqualification created

[11] None of the inquirers proposes to represent the agency adverse to a lawyer from the same government agency. Rule 1.7(b)(3) by its terms only applies when lawyers are *representing clients* on both sides of the case. Here, the appealing lawyer would be the client, or would be proceeding *pro se*, and would not be representing a client (other than him- or herself). Even so, however, other lawyers in the office could have a personal conflict of interest that would prevent them from competently and diligently representing the agency (even with consent) against a colleague working in the same office.

by DR 9-101(B)(3)(a) [now Rule 1.11(d)(1)] depends on the availability as a matter of law of a special prosecutor."). We have insufficient facts to determine whether a rule of necessity would apply to the inquiries before us.

CONCLUSION

30. For the reasons stated, and subject to the qualifications set forth above, a lawyer who is employed by a government agency and is subject to employment furloughs resulting from "sequestration" may exercise his or her statutory right to appeal the sequestration furlough before the MSPB, so long as the dispute does not impermissibly affect his or her representation of the employing agency. A government lawyer who is subject to a sequestration furlough, or knows that another lawyer in the same government law office is subject to such a furlough, may only represent the employee's agency before the MSPB in actions brought by other agency employees if (i) the agency gives informed consent, confirmed in writing, prior to the lawyer engaging in such representation and (ii) the lawyer does not file his or her own appeal with the MSPB.

(16-13)