

When Conflicts May Arise for Federal Defenders

Whether you will be reviewing cases to determine whether an applicant meets the eligibility criteria or preparing a clemency petition (or assisting in either or both), conflicts may arise in the following circumstances.

A conflict may arise if the Federal Defender's evaluation or assistance "involve[s] 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." ABA Model Rule of Professional Conduct 1.7(b). This would most likely occur if you represent or assist a co-defendant of a former client, a cooperator against a former client, or someone against whom a former client cooperated.

For example, in order to show that an applicant is eligible for clemency, you may need to argue that the applicant's sentence represents an unwarranted disparity in comparison with the sentence of a more culpable former client, or that the applicant's conduct was non-violent because the former client is responsible for any violence that occurred, or that the applicant was a low-level participant compared to the former client. If any of your arguments on behalf of a clemency applicant would require you to disparage a former client, there is a conflict.

If you represent or assist a co-defendant of a former client, ABA Model Rule 1.9(c) prohibits using confidential information obtained in the representation of the former client that would disadvantage the former client—unless that information has become generally known. A disadvantage to the former client would occur, for example, if you use information obtained in the representation of the former client to establish that the clemency applicant acted out of fear of the former client, and the former client applies for clemency, now having been disparaged by you. If it appears that you will need to disparage a former client in order to represent or assist a clemency applicant, there is a conflict.

In rare instances, a personal conflict of interest could arise. *See* ABA Model Rule 1.7(a)(2). For example, if the clemency applicant is your former client, and you discover in the course of evaluating the case that you made a mistake in the sentencing calculation or failed to raise an obvious argument, such that the client could file a habeas petition claiming ineffective assistance of counsel should commutation be denied, you should advise the client of the error. If you believe you can effectively represent or assist the client for clemency purposes, obtain written, informed consent from the client. ABA Model Rule 1.7(a)(4). If not, you should decline to represent or assist the client for clemency purposes, and inform new counsel of the error because the error itself may be a ground for sentence commutation.

Finally, if the client previously asserted ineffective assistance of counsel based on your performance or filed a bar complaint against you, you should decline to represent or assist the client in the clemency process unless you believe that you can effectively do so. If so, obtain his written, informed consent before proceeding. *See id.*

THIS DOCUMENT WAS PREPARED BY EMPLOYEES OF A FEDERAL DEFENDER OFFICE AS PART OF THEIR OFFICIAL DUTIES.