

LAW

## Court To Investigate Whether Michael Flynn's First Lawyers Did A Bad Job

*Flynn's case, already of significant interest to conservatives, will now likely have the full attention of the D.C. legal profession and ethics experts nationwide.*

Prosecutors in the federal case against Lt. Gen. Michael Flynn over the weekend asked the court to authorize Flynn's former attorneys to provide information and documents about their representation of Flynn to the government. Flynn has moved to withdraw his guilty plea in federal court on the grounds that his original counsel, the prominent D.C. law firm Covington and Burling, had a conflict of interest and did not provide him with effective assistance of counsel. The prosecutors also asked for more time to respond to Flynn's motion to withdraw his guilty plea in order to consult with the Covington attorneys.

In this case, Flynn initially retained Covington and Burling to help him make disclosures under the Foreign Agents Registration Act (FARA) for work through his consulting firm prior to Donald Trump's inauguration. Later, the government launched a criminal investigation into whether those FARA filings were false and whether Flynn had made false statements about an unrelated telephone call with the Russian ambassador while Trump was the president-elect. Covington represented Flynn in this criminal investigation and his subsequent guilty plea, which almost certainly constituted a conflict of interest, as I've previously [explained](#).

The prosecutors' motion seeking access to Flynn's records will signal whether they believe a conflict of interest existed between the attorney providing counsel or the Covington attorney providing the motion describes in detail Flynn's statements and the motion asks the court to give the prosecutors time to evaluate Flynn's claims.

In a late filing Sunday, the defense advised the court of the government's request to delay its filing a



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brief the sensitive issue of access to former counsel, while also noting that the parties could work out the issue between themselves, thus not requiring a ruling from the court.

On Monday, Judge Emmett Sullivan granted the prosecutors' request for additional time, and postponed the scheduled sentencing date until after the ineffective assistance of counsel claim is resolved. He directed the parties to confer to see if they can reach agreement on the ground rules for granting the government access to Flynn's former attorneys at Covington. Absent agreement, he directed the parties to brief their positions by March 2, 2020, so he can decide the matter.

## What Happens When Counsel Is 'Ineffective'

A request from prosecutors for access to former defense counsel is highly unusual except in cases wherein the defendant claims his former counsel was "ineffective." The constitutional right to counsel includes the principle that the lawyer must be "effective," meaning he provides representation at a skill level expected of a competent lawyer. Typically, to win a motion claiming the prior lawyer rendered ineffective assistance, a defendant must show both that the lawyer's representation fell below that standard and that the client was prejudiced by the ineffectiveness.

When a criminal defendant claims a prior lawyer provided "ineffective assistance of counsel," the courts deem that claim to be a waiver of the attorney-client privilege. That means that otherwise-privileged communications between the attorney and client can be disclosed in order to adjudicate the ineffective-assistance claim. But that does not open the door for access to all communications between the defendant and former counsel or to all the information that former counsel obtained during the representation.

Under ethical rules, lawyers may only disclose client information relating to the representation under certain exceptions.

One of those rules says lawyers may disclose information against claims by clients about the lawyer's performance.

But this exception only permits disclosure to resolve the specific ineffective assistance claim. Authorities have cautioned that a claim of ineffective assistance does not provide carte blanche for defense counsel to provide case to prosecutors.



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## How Attorney-Client Privilege Works in the Flynn Case

In that regard, the prosecutors' motion in Flynn's case is too aggressive. It asks the judge to permit the Covington lawyers to broadly cooperate with the government in addressing the conflict of interest issue. It does not narrow the request to information "reasonably" necessary or limit it to "specific allegations" Flynn raised in his claim of ineffective assistance. Both of those limiting safeguards are reflected in the D.C. ethics opinion on this issue. Flynn's defense counsel can and presumably will insist on these limitations.

The government's motion also leaves open the possibility that prosecutors could later use information they learn from the Covington lawyers to prosecute Flynn for perjury if he testifies in a hearing on the ineffectiveness of counsel issue, a request Flynn's counsel should strenuously oppose. These issues were addressed in a way that favors Flynn's position during a 2017 case named *Straker* in the D.C. federal court before Judge Bates, a highly respected jurist whose reasoning in that case was very sound.

Based on the existing law and ethics rules, Judge Sullivan will probably allow Flynn's former attorneys at Covington to provide relevant information to the government. He will probably also permit the Covington lawyers to provide information to the government without Flynn or his new counsel being present during those discussions, unless the prosecutors agree to that procedure.

Neither of these rulings would force the Covington lawyers to work with the prosecutors. They would simply confirm that it would not be a violation of the attorney-client privilege and legal ethics if they choose to do so.

### Likely Outcomes

Flynn's lawyers have suggested in their motion that the government should agree that the Covington lawyers represent Flynn and join the defense team. Although that would be quite unusual, if the government reviews the facts with the Covington lawyers and agrees that the conflict of interest that prevented effective assistance of counsel (and should) agree to join the defense team, the judge will certainly grant Flynn's motion to withdraw the Covington lawyers from the case.



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If the defense and prosecution cannot agree to resolve a dispute between Flynn's counsel and the government about Flynn's ineffective assistance claim, at which both Covington attorneys and prosecutors are likely to testify. The longtime prosecutor in the case, Brandon Van Grack, did not sign either motion and will be a witness for the government if there is a hearing regarding ineffective counsel.

Van Grack was the lead government lawyer during the plea negotiations with Covington, so his firsthand information about the plea discussions will be an important element in resolving the question of whether Flynn received effective counsel. Presumably, he will also be excluded from the discussions between prosecutors and the Covington lawyers, another point Flynn's defense lawyers should negotiate with the prosecutors or raise with the judge.

It has been decades since lawyers in such a high-profile case and at a leading D.C. law firm have been so publicly accused of malpractice or ineffectiveness of counsel. Flynn's case, already of significant interest to conservatives, will now likely have the full attention of the D.C. legal profession and ethics experts nationwide.

*Leslie McAdoo Gordon is the principal of McAdoo Gordon & Associates, P.C., founded in 2003. She graduated cum laude from the Georgetown University Law Center in 1996, and is licensed to practice law in Maryland, Virginia, the District of Columbia, and numerous federal trial and appellate courts, including the U.S. Supreme Court. Prior to entering the field of law, Leslie McAdoo Gordon served as a Special Agent for the Department of Defense, Defense Investigative Service (now the Defense Counterintelligence and Security Agency).*

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