

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 666**

**December 2016**

**QUESTIONS PRESENTED**

Does a conflict of interest exist where attorneys, who are married to each other, either represent, or are members of firms who represent, opposing parties to the same civil matter? If so, can the conflict be cured?

**STATEMENT OF FACTS**

Alpha Firm and Beta Firm have been retained by opposing parties in a civil matter, such as a transaction or a lawsuit. Spouse A is employed by Alpha Firm and Spouse B is employed by Beta Firm. Each spouse knows that his or her respective firm represents a client in a matter directly adverse to a client of the other spouse's firm. In one scenario, Spouse A is not directly involved with the matter, but Spouse B is directly involved. In another scenario, neither Spouse A nor Spouse B is directly involved with the matter.

**DISCUSSION**

The Texas Disciplinary Rules of Professional Conduct do not specifically address conflicts of interest based on spousal relationships. Instead, the issue is governed by Rule 1.06(b)(2), which addresses conflicts of interest arising from a lawyer's personal interests. Rule 1.06 provides, in part:

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
  - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
  - (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
- (c) A lawyer may represent a client in the circumstances described in (b) if:
  - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
  - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible

adverse consequences of the common representation and the advantages involved, if any.

A lawyer does not necessarily or automatically have a conflict of interest merely because the lawyer's law firm represents a party adverse to a party represented by the law firm of the lawyer's spouse. Such a lawyer will have a conflict of interest, however, if the lawyer's representation "reasonably appears to be or become adversely limited" by the lawyer's relationship with his or her spouse. In most cases this will be a question of fact.

A Rule 1.06(b)(2) conflict of interest will usually exist when both spouses are personally involved in representing opposing parties in the same matter, or when either spouse, for whatever reason, has a material personal interest in the outcome of the matter. In other circumstances, resolution of the issue requires consideration of all the circumstances, including, without limitation, (1) the nature of the matter and the issues involved; (2) whether either spouse will be directly involved in the representation, and if so the nature and extent of such involvement; (3) whether and to what extent the outcome of the representation may have a financial effect on either spouse; (4) the positions of the spouses within their firms; and (5) whether the lawyers handling the representation have a close working relationship with the lawyer-spouse in the same firm. It should be noted that, under the facts considered in this opinion, each spouse knows that his or her firm is representing a client in a matter directly adverse to a client of the other spouse's firm.

If, under the circumstances, it reasonably appears that the lawyer's representation will not be adversely limited by the lawyer's interests arising from the marital relationship, the lawyer is free to undertake or continue with the representation. Even in that event, it may be wise (although not required) for the lawyer to disclose the spousal relationship to the client, notwithstanding the absence of a conflict of interest.

If, under the circumstances, it reasonably appears that the lawyer's representation will be adversely limited by the lawyer's interests arising from the marital relationship, the lawyer must either (1) decline or seek to withdraw from the representation, or, if appropriate, (2) seek to undertake or continue the representation by obtaining client consent in accordance with Rule 1.06(c).

Obtaining consent under Rule 1.06(c) is a two-step process. First, before seeking client consent a lawyer must reasonably believe that the representation of the client will not be materially affected by the lawyer's relationship with the spouse. Rule 1.06(c)(1). A "reasonable belief," when used in relation to conduct of a lawyer, denotes both "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Terminology Section of the Texas Disciplinary Rules of Professional Conduct. "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent." Comment 7 to Rule 1.06.

If the lawyer reasonably believes that, under the circumstances, the representation will not be materially affected by the lawyer's relationship with the spouse, the lawyer may then seek the client's consent. In order to obtain effective client consent, the lawyer must first fully disclose the existence, nature, implications, and possible adverse consequences arising from the marital relationship and the advantages involved, if any. Although the Rules do not require written consent, the lawyer would be prudent to obtain written consent. If the client provides informed consent, the lawyer may accept or continue with the representation. If the client does not consent, the lawyer and the lawyer's firm must decline the representation or withdraw.

In many United States jurisdictions, a conflict arising from a lawyer's marriage to another lawyer at an opposing law firm is not necessarily imputed to all other lawyers in the firm. In particular, many jurisdictions have adopted a version of ABA MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(1), under which "personal interest" conflicts of one lawyer are not imputed to other lawyers in the firm so long as they do not "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

Although there is significant merit to the ABA's approach regarding imputation of "personal interest" conflicts, no such exception exists under the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(f) provides:

"If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."

Rule 1.06(f) requires imputation of personal interest conflicts under Rule 1.06(b)(2). Consequently, if a lawyer would be prohibited from undertaking representation on a matter because the representation "reasonably appears to be or become adversely limited" by the lawyer's relationship with the lawyer's spouse, no other lawyer in the firm may undertake the representation without obtaining the client's informed consent under Rule 1.06(c). The Committee appreciates that the firm-wide imputation of spousal conflicts may in some cases lead to harsh results but those results are dictated by the current provisions of Rule 1.06(f).

The foregoing analysis applies independently to each lawyer spouse and his or her firm. A determination of whether a conflict exists by one spouse and his or her firm will not necessarily call for the same determination by the other spouse and his or her firm. Similarly, if a conflict exists and consent is appropriate, one client may give informed consent under Rule 1.06(c) independently of whether the other client does so.

Finally, the Committee notes that in one situation a lawyer's marriage to opposing counsel may require withdrawal regardless of client consent under Rule 1.06(c). In *Haley v. Boles*, 824 S.W.2d 796 (Tex. App.—Tyler 1992, orig. proceeding, no writ), the court held that the trial court abused its discretion in denying a motion to withdraw filed by counsel appointed to represent an indigent criminal defendant when the appointed counsel's law partner was married to the district attorney. The court observed that constitutional concerns would require withdrawal even if the

indigent defendant had consented to the conflict under Rule 1.06(c). *Id.* The court expressly limited its holding to situations involving indigent criminal defendants represented by court-appointed attorneys because, as the court explained, the indigent defendant does not have the full ability to evaluate and consent to the representation. *Id.*

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a marriage between lawyers affiliated with opposing firms engaged on the same adverse matter may give rise to a conflict of interest. Whether a conflict exists will depend on the circumstances. If the circumstances are such that it reasonably appears a lawyer's spousal relationship will adversely limit the lawyer's representation, neither the lawyer nor any other lawyer in his or her law firm may undertake or continue the representation without obtaining the client's informed consent under Rule 1.06(c).

To obtain effective consent under Rule 1.06(c), the lawyer must first reasonably believe the representation can be undertaken or continued with no material adverse effects on the client. Whether such a belief is reasonable depends on the circumstances. Assuming the lawyer can form such a reasonable belief, the lawyer may then seek the client's consent by making full disclosure of the existence, nature, implications, and possible adverse consequences of the representation under the circumstances and the advantages involved, if any. The lawyer may undertake or continue the representation only when the client has provided such informed consent.