

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 667**

**December 2016**

**QUESTION PRESENTED**

May the prosecuting attorney or another attorney in the prosecuting attorney's office represent the government in a criminal case against a defendant in which the prosecuting attorney's spouse acts as the defendant's bail bondsman?

**STATEMENT OF FACTS**

Spouse Bondsman, a bail bondsman, and Spouse Attorney, the county attorney, are married to each other. Spouse Bondsman is the criminal bail bondsman for a criminal defendant charged with a misdemeanor in a county court in Alpha County. Spouse Attorney is employed as the county attorney in the county attorney's office for Alpha County. Spouse Attorney and other attorneys in the county attorney's office prosecute the misdemeanor cases in Alpha County.

**DISCUSSION**

No provision of the Texas Disciplinary Rules of Professional Conduct specifically addresses conflicts of interest based on a spousal relationship. Consequently, the general conflict rule, Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, governs. Professional Ethics Committee Opinions 666 (December 2016) and 539 (February 2002) addressed conflicts of interest based on spousal relationships in situations in which both spouses are lawyers. In contrast, this opinion addresses conflicts of interests based on spousal relationships in which only one of the spouses is a lawyer.

Rule 1.06 provides in pertinent part as follows:

“(b) . . . except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

. . . .

(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.

....

- (f) 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 the conduct."

The starting point in any conflict of interest analysis under Rule 1.06 is whether a conflict of interest exists. Whether a conflict of interest exists requires an analysis of the facts of each case. Attorneys must determine whether conflicts of interest exist at the outset of the representation and be mindful of conflicts that may arise during the course of the representation.

Rule 1.06(f) provides that if one lawyer in a firm is prohibited by Rule 1.06 from a particular representation, all lawyers who are members of or associated with that lawyer's firm are also prohibited from the representation. "Firm" is defined in the Terminology section of the Rules to include those lawyers "in a unit of government." As a result, from the standpoint of a conflict of interest analysis, every lawyer in the county attorney's office must determine whether a conflict of interest exists if Spouse Attorney were the lawyer prosecuting the misdemeanor case. Thus, the conflict of interest analysis in this opinion will consider whether Spouse Attorney would have a conflict of interest in representing the government in misdemeanor case in which her spouse is the bail bondsman. If Spouse Attorney has a conflict of interest, then every lawyer in her office also has a conflict of interest.

Under Rule 1.06, the concern is whether Spouse Attorney's representation in this misdemeanor case reasonably appears to be (or becomes) adversely limited by Spouse Attorney's responsibilities to a third person (Spouse Bondsman) or by her own interests. Rule 1.06(b)(2).

It would not be surprising for Spouse Attorney to be interested in the success of the business of Spouse Bondsman. *See e.g.* Opinion 539 (February 2002). Nor would it be surprising for Spouse Attorney to be interested in how a non-appearance by the defendant would affect Spouse Bondsman's business, including the resulting legal consequences to Spouse Bondsman and the financial consequences to both Spouse Bondsman and Spouse Attorney.

If Spouse Attorney knew that her spouse was going to be the bail bondsman from the inception of the matter, it might influence Spouse Attorney's recommendation on the amount of

the initial bond or subsequent increases or decreases in the amount of the bond. If Spouse Attorney learned that the defendant was not going to make a required appearance in court, the impact of that failure on Spouse Bondsman could impact Spouse Attorney's decisions about how to prosecute the case including considerations regarding whether it would be appropriate to dismiss the pending charges, which could relieve Spouse Bondsman of potential liability on the bond. Tex. Occ. Code Ann. § 1704.208; *Apodaca Bail Bonds v. State*, 720 S.W.2d 279 (Tex. App.--El Paso 1986, writ dismissed).

Spouse Attorney might also be influenced by the possibility of Spouse Bondsman, as surety, being named as a defendant if a bond forfeiture action arose. Under current Texas statutes, when a criminal defendant is bound by bail and fails to appear, a judicial declaration of forfeiture must be taken against the defendant and the sureties on the bond, which in this case would include Spouse Bondsman. Tex. Code Crim. Proc. Ann. arts. 22.01, 22.02. Thereafter, the clerk files suit, naming the State of Texas as plaintiff and the principal and any sureties as defendants, and issues citation "notifying the sureties of the defendant, if any, that the bond has been forfeited, and requiring them to appear and show cause why the judgment of forfeiture should not be made final." Tex. Code Crim. Proc. Ann. arts. 22.10, 22.03(a). The case proceeds under the rules governing other civil suits to trial or settlement. Tex. Code Crim. Proc. Ann. arts. 22.10, 22.125. Because Texas is a community property state, a judgment against Spouse Bondsman may result in financial loss to Spouse Attorney. *See also* Tex. Occ. Code Ann. § 1704.155(6) (requiring a bail bond surety applicant's spouse to sign a sworn statement agreeing to transfer to the bail bond board any right, title or interest that the spouse may have in non-exempt real property that the bail bond surety applicant intends to execute in trust to a county bail bond board pursuant to section 1704.154(b)(3)).

These are examples of possible limitations on Spouse Attorney's representation of the government in the misdemeanor case that could arise based on Spouse Attorney's own interests and her responsibilities to Spouse Bondsman, depending on the facts actually present. Whether these issues or others create a conflict of interest will depend on the specific facts present in each particular case. *See* Comment 4 to Rule 1.06.

If Spouse Attorney's representation reasonably appears to be adversely limited by her responsibilities to Spouse Bondsman or by Spouse Attorney's own interests at the outset of the case or at some later time during the prosecution, then Spouse Attorney would be prohibited from prosecuting the misdemeanor case from that point forward unless the representation is properly consented to under the provisions of Rule 1.06(c).

In that situation, two parts of Rule 1.06(c) must be met for the representation to continue. First, Spouse Attorney must reasonably believe that the representation of the government will not be materially affected. "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Terminology section of the Rules. Comment 7 to Rule 1.06 adds that "when 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." Whether a request for consent is appropriate

will be determined based on the specific facts present in each case. If the lawyer reasonably believes that the representation of government will not be materially affected by consenting to the conflict, then the lawyer may attempt to obtain the necessary consent to continue the representation as provided in Rule 1.06(c)(2).

If it would be appropriate to request client consent under Rule 1.06(c)(1), Spouse Attorney must obtain the consent of the government after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any. Rule 1.06(c)(2). The determination of whether consent can be given at all and, if it can, the appropriate person or entity to give that consent is beyond the purview of the Committee. *See* Opinion 540 (February 2002).

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a prosecuting attorney may not represent the government in a criminal case against a defendant in which the spouse of the prosecuting attorney acts as the defendant's bail bondsman without properly obtaining the government's consent to the representation in accordance with the provisions of the Rules, unless, under the specific facts present in the particular case, the attorney's representation of the government does not reasonably appear to be adversely limited by the attorney's responsibilities to the bail bondsman or by the attorney's own interests. If the prosecuting attorney cannot represent the government in the case, no attorney in prosecuting attorney's office can represent the government.