

Opinion No. 539

April 2002

QUESTION PRESENTED

In what circumstances may a lawyer represent defendants in criminal cases in the county in which the lawyer's spouse is an assistant district attorney?

STATEMENT OF FACTS

Spouse A and Spouse B are married to each other. Spouse B is a solo practitioner practicing criminal law in several counties and practiced criminal law in Alpha County before Spouse A and Spouse B married. Spouse A is employed as an assistant district attorney in Alpha County. Spouse B desires to practice criminal law in Alpha County in cases in which Spouse A and B do not appear against each other and in which Spouse A is not directly involved.

DISCUSSION

No provision of the Texas Disciplinary Rules of Professional Conduct specifically addresses conflicts of interest based on a spousal relationship. Although members of a law firm may be prohibited from representing a person if any member is prohibited from representing a person, the Rules contain no provision expressly prohibiting a spouse from representing a person whose interest is adverse to a client of the other spouse.

Although the committee has not previously considered whether an attorney might be prohibited from representing a person based on spousal relationship, one Texas appellate court has considered this question in a criminal proceeding. In *Haley v. Boles*, 824 S.W.2d 796 (Tex. App.--Tyler 1992, no writ), the court held that a lawyer appointed to represent an indigent criminal defendant in Shelby County was disqualified by Rule 1.06(f) because the appointed lawyer's law partner was married to the district attorney of Shelby County and therefore was disqualified by Rule 1.06(b)(2) to represent a criminal defendant in that county.

In that case, following the trial court's denial of the appointed lawyer's motion to withdraw, which alleged a conflict of interest arose by virtue of the spousal relationship between his partner and the district attorney, the appointed lawyer filed a petition for writ of mandamus to compel the trial court to allow him to withdraw. The court of appeals granted the appointed lawyer's petition for mandamus on the ground that the constitutional rights of the indigent defendant to effective *conflict-free* representation by counsel under the Fifth and 14th amendments to the U.S. Constitution had been denied.

Although the court's holding was that a writ of mandamus should be granted because the indigent defendant's constitutional rights were violated by his representation by an appointed lawyer whose law partner was married to the district attorney, the court's observations regarding disqualification of the appointed lawyer based on the spousal relationship of his partner are applicable to employed lawyers as well as appointed lawyers. In *Haley v. Boles*, the court discussed the issue, at 824 S.W.2d 796, 797-98, as follows:

The propriety of attorneys/spouses representing opposing parties in a criminal trial is one of first impression. It is clear, however, that if there be impropriety in spouses representing adversaries, the disqualification extends to the partners and associates of the spouse. [citing Rule 1.06(b)(2) and (f), and Professional Ethics Committee Opinions 419, 243, 187 and 132].

As an attorney "conflict of interest" issue, without legal precedent, we look to the [Rules]. Its Preamble provides: "7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests." There is at least the appearance of tension with respect to each of these three areas of responsibility in the case before us.

First, the *client's* interest is a serious concern. Haley is appointed counsel for an indigent criminal defendant. Christopher's right to the services of appointed counsel is one of constitutional dimensions. ... We conclude that the ... marital relationship [between the partner of the appointed attorney and the district attorney] creates the appearance of having compromised and limited the defendant's constitutional right to effective assistance of counsel. ...

As mentioned, there are other considerations that impact the representation of this indigent defendant by counsel whose partner is married to the prosecuting attorney. These relationships affect our *legal system* itself. The cornerstone of the system is effective, independent representation of the respective litigants by professional counsel. Our concern is further erosion of public confidence in our system. Here, the appearance of independence of the trial counsel is diminished. Furthermore, should the case not be tried, but dismissed or a plea bargain reached, the close personal relationship between the adversaries' lawyers creates at least an appearance that the disposition resulted from less than arm's length negotiations.

Finally, as to the spousal relationship's impact upon the *lawyer's own interests*, we note the effect of the Texas community property laws: one-half of the district attorney's salary becomes a part of the adversary/husband's community estate. [The district attorney's] prosecutorial success and continued service in that office is beneficial to [the partner of the attorney representing the criminal defendant]. ... Should Haley continue as appointed counsel, adversary representation by the husband's partner and his partner's wife could potentially create the appearance of a conflict of interest, because of its effect upon Haley's partner's personal financial interests. Likewise, it appears inappropriate that the district attorney's community estate should be enhanced by the attorney's fee awarded to the defendant's appointed counsel or his firm.

Several prior opinions of the Professional Ethics Committee were considered in answering this inquiry. Opinion 23, December 1949, held that a member of a law firm who is county attorney in the county of the firm's domicile, or his partner, may not defend a person then being prosecuted for a crime in another Texas county, but the opinion did not consider the issue of disqualification of a family member of the county attorney or the family member of a partner.

Opinion 35, March 1951, held that a judge is not disqualified from a civil suit merely because his son represents one of the litigants but recognized that he should not sit unless he is both free from bias and the appearance thereof.

Opinion 37, May 1951, held that the law partner of a county attorney may not practice criminal law in the district court of the county in which his partner is county attorney, even if the law partner restricts his criminal practice to those cases in which the county attorney takes no active part in the preparation or prosecution.

Opinion 135, September 1956, recognized that this Committee is pre-empted from resolving questions involving judicial ethics, but held that it was not a violation of the Canons applicable to lawyers for the son of a judge to try a criminal case or a civil suit on a contingent fee basis in his father's court, but that it is improper for the judge to fix the attorney fees of his son, a lawyer in the case, since the lawyer is a party for that purpose.

Opinion 183, October 1958, held that it is improper for a county attorney or district attorney to accept employment in cases in the county in which they serve and to use in such matters the office, telephone and stenographer provided and paid for by the county, but did not address the disqualification of any relative.

Opinions 318, October 1966, and 323, October 1966, held that a county attorney is prohibited by *Article 2.08 of the Texas Code of Criminal Procedure* from acting as counsel adversely to the state in any case in any court and that his disqualification to defend criminal cases extends to his partners or associates in all courts throughout the state even though the partnership or association is for the practice of civil law only.

Opinion 497, August 1994, held that a city commissioner's representation (or his law partner's representation) of a person charged with a criminal offense in the county and district courts where the city police department participates in the investigation and/or arrest of the criminal defendant would be a violation of Rule 1.06(b), "unless all parties give appropriate consent after consultation and full disclosure pursuant to Rule 1.06(c)." The Opinion concluded that the city commissioner's representation of a criminal defendant under such circumstances "creates a conflict between the client's interests and city's interests as well as the attorney's own interest" and that the city commissioner's disqualification could be removed under the provisions of Rule 1.06(c) only if "both the client and the city consent 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."

Although the Committee in Opinion 323 held that the father of a county attorney, who is not associated with his son in practice in any way, is not per se disqualified to defend a criminal case prosecuted by his son, that opinion contains the following comment:

While there is no statute or canon which expressly creates a disqualification--see Opinions 35 (March, 1951) and 135 (September, 1956)--such representation is pregnant with the appearance of impropriety and should be discouraged.

Arguably, more persuasive reasons exist for prohibiting spouses from representing persons with conflicting interests than for prohibiting a parent and a son or daughter from representing persons with conflicting interests. In the absence of an agreement between the spouses, each spouse has a community interest in the income of the other. Also, the sharing of

pecuniary benefits from separate law practices by spouses is more likely than by parent and a son or daughter. Nevertheless, the appearance of impropriety alone is not a basis for finding a lawyer's conduct is a violation of the Rules.

In this case, the issue is whether the relationship of spouses is such that a conflict of interest prohibits the proposed representation. Since all attorneys in the office of the district attorney are considered to be in the same "firm," regardless of the department or division in which they practice, the analysis is the same whether Spouse A is or is not personally involved in the prosecution of a person represented by Spouse B. n1

n1 As provided in the Terminology for the Rules, the term "Firm" includes "a lawyer or lawyers employed ... in a unit of government." Rule 1.06(f) provides that "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 is the applicable provision of the Rules on conflicts of interest and 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:

- (1) involves a substantially related matter in which the 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.

Neither spouse's representation violates paragraph (b)(1) under the facts presented. There is no indication that the interest of the criminal defendant is adverse to the interests of another client of Spouse B. Spouse A and Spouse B are not members of the same firm, as the term "firm" is defined in the Rules.

Spouse B's representation of a criminal defendant in Alpha County appears to be adversely limited by Spouse B's responsibilities to Spouse A and by Spouse B's own interests. It would be unnatural for Spouse A not to be interested in the successful practice of Spouse B and for Spouse B not to be interested in the successful practice of Spouse A. Spouse B has an interest in the success of Spouse A as an assistant district attorney in Alpha County. That interest, even in the absence of a direct pecuniary interest in the efforts of Spouse A, prohibits Spouse B from representing criminal defendants in the county in which Spouse A is an assistant district attorney unless such prohibition is removed by complying with Rule 1.06(c). Similarly, if Spouse B

represents a criminal defendant in Alpha County, Spouse A's representation of the State of Texas appears to be adversely limited by Spouse A's responsibilities to Spouse B and by Spouse A's own interests.

Therefore, Rule 1.06(b)(2) prohibits Spouse B from representing a criminal defendant in Alpha County unless (1) Spouse B reasonably believes the representation of such criminal defendant will not be materially affected by Spouse B's relationship and responsibilities to Spouse A and Spouse B's own interests, and (2) such criminal defendant consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any, as provided in Rule 1.06(c). To remove the prohibition imposed by Rule 1.06(b)(2), Spouse B is required to apply Rule 1.06(c)(2) only with respect to the consequences of the possible conflict situation for Spouse B's clients. Spouse B is *not* required to apply Rule 1.06(c)(2) with respect to the consequences of the possible conflict situation for Spouse A's client, the State of Texas.

If, however, Spouse B chooses to represent a criminal defendant in Alpha County, Spouse A's representation of the State appears to be adversely limited by Spouse A's own interests and responsibilities to Spouse B. In that event, Spouse A and all other attorneys in the district attorney's office would be prohibited from representing the State against Spouse B's client unless (1) Spouse A and the other attorneys in the office who will represent the State in the prosecution of Spouse B's client reasonably believe the representation of the State will not be materially affected by Spouse A's relationship and responsibilities to Spouse B and Spouse A's own interests, and (2) the State of Texas consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any, as provided in Rule 1.06(c). The State's consent could be conditioned on an agreement that Spouse A will not participate in any manner in the prosecution of Spouse B's client.

If the State does not consent after full disclosure, all lawyers in the Alpha County district attorney's office are prohibited from representing the State in a criminal matter in which Spouse B represents a defendant so long as Spouse A is employed in the Alpha County district attorney's office. If neither the Constitution nor any statute of the State of Texas authorizes an officer of the State to give consent on behalf of the State in such a situation, the required consent could not be obtained and all lawyers in the Alpha County district attorney's office would be prohibited from representing the State. n2

n2 The Committee is aware of no provision in the Constitution or any statute of the State of Texas that authorizes any elected or appointed officer to waive disqualification of a county or district attorney and consent to representation by a disqualified county or district attorney, or an assistant in either office. However, the Committee does not decide questions of law and expresses no opinion on the question of whether or from whom the district attorney of Alpha County might obtain a valid consent if Spouse B represents a criminal defendant in that county while Spouse A is employed as an attorney in the district attorney's office.

CONCLUSION

In each situation stated, Spouse B may not represent a criminal defendant in Alpha County unless Spouse B reasonably believes the representation of the criminal defendant will not be materially affected by Spouse's B relationship to Spouse A and the criminal defendant consents to such representation by Spouse B after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any.

If Spouse B represents a criminal defendant in Alpha County, Spouse A and each lawyer in the office of the district attorney is prohibited from representing the State in the case against Spouse B's client unless Spouse A and each lawyer in the district attorney's office reasonably believes the representation of the State will not be materially affected by Spouse A's relationship to Spouse B and the State of Texas consents to representation by an attorney in the district attorney's office after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any.

Except for compliance with the terms of any conditional consent granted by the State of Texas to the district attorney, the conclusions set forth herein are not affected by whether Spouse A personally participates in a criminal proceeding in which Spouse B represents a defendant.