

Ethics Opinion 2024-01

Question Presented: May a lawyer serve as a criminal prosecutor for a state's attorney's office regarding cases adverse to criminal defendants represented by attorneys in a firm in which the lawyer's spouse also practices (and vice versa)?

Short Answer: Yes, so long as the lawyers who are spouses do not actually represent the state's attorney's office and a criminal defendant in the same case and take other protective action.

Rules Implicated: 1.7, 1.10, 1.11.

FACTS

County State's Attorney's Office ("SAO") has employed Lawyer for a time regarding civil matters. SAO now wants Lawyer to start working on criminal cases. Lawyer is married to Spouse, who is an attorney in a firm that regularly represents criminal defendants being prosecuted by the SAO. Spouse also represents some of the criminal defendants in those cases.

SAO inquires whether this general arrangement will violate any conflicts of interest rules. Assuming it does not, SAO also inquires whether Lawyer and Spouse can engage in this representation regarding the same criminal defendant (i.e., Lawyer represents the SAO and Spouse represents a criminal defendant in the same case) so long as the concurrent representation is limited to occasions where the criminal defendant is appearing at "non-substantive" hearings, such as arraignments, status hearings, and non-evidentiary motion hearings.

ANALYSIS

The general rule under Rule 1.7 (which also applies to Lawyer working for the SAO under Rule 1.11(d)(1)) is that lawyers who are spouses cannot represent clients with adverse interests in the same case. Rule 1.7 references conflicts arising from "personal interests" of the lawyer, and Comment [11] of the rule clarifies that a "personal interest" includes situations where adverse parties would be represented by attorneys who are siblings, parent/child, or spouses.

Accordingly, Lawyer and Spouse cannot represent their respective clients' interests in the same matter. This includes non-substantive matters, such as occasions where a court might hold a series of arraignments or other non-evidentiary hearings on multiple criminal matters on a rolling basis.

The conflict is *potentially* waivable, so long as both the SAO and the criminal defendant provide the waiver contemplated by Rule 1.7(b)(4) with the required informed consent. However, obtaining a waiver is not the end of the analysis. Under Rule 1.7(b)(1), the Lawyer and Spouse, must also be satisfied that the SAO's and criminal defendant's interests will be competently and diligently (and, by implication—zealously) represented notwithstanding the close personal relationship of the two advocates. The Committee does not opine this is per se impossible, but notes it is uniquely problematic in this particular situation.

This conflict does not *per se* extend to other members of the SAO or Spouse's law firm. Rule 1.10 clarifies that, although Rule 1.7 conflicts are ordinarily imputed to all members of the firms involved, they are not imputed if "the prohibition is based on a personal interest of the prohibited

lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

Here, the primary source of “material limitation” would be access to confidential information. The SAO and Spouse’s law office should both ensure that Lawyer and Spouse, respectively, do not have access to any files in which the other attorney is involved, and are not included in any discussion regarding those cases.

Although this addresses most concerns, the SAO and Spouse’s law office must also be satisfied that denying Lawyer and Spouse access and involvement on these cases does not hamper the SAO’s and Spouse’s office’s overall ability to effectively represent their clients’ interests, given the loss of Lawyer’s and Spouse’s input and availability in certain cases. For example, on occasions where the court holds a rolling-calendar of non-substantive matters on its criminal docket, the SAO will need to ensure there is an attorney other than Lawyer who can step in to represent the SAO on matters where Spouse is representing the criminal defendant.

The Committee cannot opine on whether there are any constitutional, substantive, or procedural criminal law principles that would require Spouse or Spouse’s firm to advise its clients who are criminal defendants of the fact that Spouse is married to an attorney who works for the SAO, but simply notes this is something Spouse and Spouse’s firm should independently consider.