THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS

Proposed Opinion PO 2026-3

Posted for Public Comment October 21, 2026

QUESTIONS PRESENTED

1. May a lawyer represent a defendant in a criminal case when the lawyer's spouse is an assistant prosecutor in the district or county attorney's office?

2. If so, what are the implications for the other lawyers in the prosecutor's office?

3. Would the result be the same if the criminal defense lawyer's spouse were the district or county attorney?

STATEMENT OF FACTS

A lawyer ("Defense Lawyer Spouse") represents defendants in criminal cases in the same county where the lawyer's spouse ("Prosecutor Spouse") serves as an assistant prosecutor. Although Prosecutor Spouse is screened from participating in Defense Lawyer Spouse's cases, other lawyers in Prosecutor Spouse's office are not screened.

In another scenario, Prosecutor Spouse serves as the district or county attorney rather than as an assistant prosecutor.

DISCUSSION

In Professional Ethics Committee Opinion 539 (April 2002), the Committee addressed the circumstances under which a lawyer may represent defendants in criminal cases in the county where the lawyer's spouse serves as an assistant district attorney. The Opinion assumed that the spouses would not be involved in the same cases. It concluded that both spouses had conflicts of interest under Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct. The Opinion also concluded that the prosecutor spouse's conflict would be imputed to all other lawyers in the district attorney's office.

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As discussed below, the October 2024 amendments to the Texas Disciplinary Rules of Professional Conduct require a new analysis of the issues addressed in Opinion 539.

Conflicts of interest under Rule 1.06(b)(2)

Rule 1.06(b)(2) prohibits representation that "reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests." In assessing conflicts between a client's interests and the lawyer's own interests, Comment 4 to Rule 1.06 explains: "The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

A conflict of interest may arise under the Rule when lawyer-spouses or their firms are on opposing sides in the same matter. *See* Opinion 666 (December 2016) ("Such a lawyer will have a conflict of interest . . . if the lawyer's representation 'reasonably appears to be or become adversely limited' by the lawyer's relationship with his or her spouse"). Although this is ordinarily 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." *Id*.

If a Rule 1.06(b)(2) conflict of interest exists, a lawyer may represent the client only if:

> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
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> (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.

Rule 1.06(c).

In the Committee's view, a lawyer may not personally represent a criminal defendant if the lawyer's spouse is personally involved in prosecuting the defendant

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in the same matter, and vice versa. The lawyers may not avoid the conflict by obtaining informed client consent, because no disinterested lawyer could reasonably conclude that the conflict would not materially affect the representation. *See* Comment 7 to Rule 1.06 ("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.").

Imputation of "personal interest" conflicts of interest under Rule 1.10

Effective October 1, 2024, the Texas Supreme Court approved amended Rule 1.10, "Imputation of Conflicts of Interest: General Rule." Regarding "personal interest" conflicts, Rule 1.10(a)(1) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.06 or 1.09, unless:
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> > (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

The term "personal interest" is not defined in the Rules. In the Committee's view, the personal interest exception to imputation includes conflicts of interest under Rule 1.06(b)(2) that arise from familial or other close personal relationships, personal financial interests, and personal beliefs, rather than conflicts arising from a lawyer's responsibilities to current clients, former clients, or third parties. *See generally,* Comments 10 and 11 of ABA Model Rule 1.7 (discussing personal interest conflicts under a rule similar to Texas Rule 1.06(b)(2)). The Committee concludes that a conflict of interest based solely on a spousal relationship is a "personal interest" conflict of interest.

First scenario: Prosecutor Spouse is an assistant prosecutor

In the first fact scenario, Defense Lawyer Spouse is married to an assistant prosecutor in the district or county attorney's office. The scenario assumes that Prosecutor Spouse will not personally participate in prosecuting Defense Lawyer Spouse's clients. The question is whether the Prosecutor Spouse's "personal interest"

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conflict is imputed to other lawyers in the district attorney's office—a "firm" under the Rules' Terminology section—who may prosecute those clients. Amended Rule 1.10(a)(1) provides the answer: the Prosecutor Spouse's personal interest conflict is not imputed to other lawyers in the district attorney's office if the conflict "does not present a significant risk of materially limiting the representation of the client [i.e., the State] by the remaining lawyers in the firm [i.e., the prosecutor's office]." To help ensure that the other lawyers in the office are not materially limited by Prosecutor Spouse's personal interest conflict, the district attorney should restrict Prosecutor Spouse's access to files involving Defense Lawyer Spouse's clients and instruct all lawyers in the office not to discuss those matters with Prosecutor Spouse.

Although amended Rule 1.10 may allow the other lawyers in the district attorney's office to avoid imputation of the Prosecutor Spouse's conflict, it does not alter the analysis of Defense Lawyer Spouse's conflict. Defense Lawyer Spouse's conflict is direct, not imputed, because he represents the defendant personally. As Opinion 539 concluded, Defense Lawyer Spouse may not represent a criminal defendant in the same county where his or her spouse is an assistant prosecutor unless (1) Defense Lawyer Spouse reasonably believes the representation of the client will not be materially affected by the spousal relationship, and (2) the client 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." *See* Rule 1.06(c). Accordingly, Defense Lawyer Spouse may not represent criminal defendants in the same county where his or her spouse is an assistant prosecutor without complying with Rule 1.06(c), even if Prosecutor Spouse is formally screened from prosecuting Defense Lawyer Spouse's clients.

Second scenario: Prosecutor Spouse is the district or county attorney

The Committee concludes that if the Prosecutor Spouse is the district or county attorney, rather than an assistant prosecutor, the Prosecutor Spouse's personal interest conflict *will* be imputed to all other lawyers in the district or county attorney's office. In the Committee's opinion, in this scenario the Prosecutor Spouse is not merely a co-worker but also appoints, employs, supervises, and reviews the performance of assistant prosecutors. If the district or county attorney is married to a lawyer representing a criminal defendant, the remaining prosecutors in the office face a much greater risk of being materially limited in their representation of the client (the State). *See* Comment 2 to Rule 1.10 (a lawyer's personal interest conflict will be imputed to others in the firm if "others in the firm would be materially limited in their representation because of loyalty to that lawyer").

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As a result, in the second scenario all other lawyers in the county or district attorney's office would be prohibited from representing the State against the Defense Lawyer Spouse's clients unless (1) the lawyers in the office representing the State reasonably believe that the representation of the State will not be materially affected by the relationship, and (2) the State of Texas consents to the 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).

This Opinion addresses the duties and responsibilities of Texas lawyers under the Rules. Whether and when a trial court has the authority to disqualify members of the district or county attorney's office, and which conflicts of interest might violate a defendant's due process rights, are substantive legal questions outside the Committee's purview.

CONCLUSION

A lawyer may not personally represent a criminal defendant if the lawyer's spouse is personally involved in prosecuting the defendant in the same matter. A lawyer may not represent a criminal defendant in the county where the lawyer's spouse is employed as an assistant prosecutor unless the lawyer reasonably believes that the client's representation will not be materially affected by the marital relationship and the client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation, and of any advantages involved.

When a criminal defense lawyer's spouse is employed as an assistant prosecutor, that assistant prosecutor may not personally represent the State in prosecuting a defendant represented by the criminal defense lawyer. Other prosecutors in the office may prosecute the defendant if the spousal relationship does not pose a significant risk of materially limiting the State's representation by the remaining prosecutors in the office. Screening should be considered to help ensure that the other lawyers in the office are not materially limited by Prosecutor Spouse's personal interest conflict.

When a criminal defense lawyer's spouse is the district or county attorney, no lawyer in the office of the district or county attorney may represent the State in the case against the criminal defense lawyer's client unless the prosecuting lawyer

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reasonably believes that the representation of the State will not be materially affected by the marital relationship and the State of Texas gives informed consent to representation, after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any.

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