

ETHICS OPINION

100623

Three conflicts in a small Montana town

FACTS:

1. A small city's prosecutor is married to one of the city's police officers. The prosecutor handles the cases charged by the officer.
2. A county attorney is married to the jurisdiction's detention center administrator and prosecutes cases brought by the county sheriff, which employs the administrator.
3. A small city's local law firm handles the city's civil issues. The firm also provides criminal defense representation in criminal matters prosecuted by the city. The prosecuting city attorney and the city civil attorney are in two separate law firms, in two separate buildings and nothing is shared between them.

QUESTION PRESENTED:

Are there conflicts present in these scenarios and if so, can the conflicts be waived under Rule 1.7 of the Montana Rules of Professional Conduct?

SHORT ANSWERS:

In both fact scenarios 1 and 2 the potential for cross examining one's spouse creates a personal interest conflict, but presumably the governmental entity is aware of the potential conflict and it can give informed consent, confirmed in writing, to waive the conflict.

In fact scenario 3 there is enough of a separation to prevent a conflict.

DISCUSSION:

There are no special rules for lawyers in small jurisdictions with family in law-related fields. However, Montana's Rules of Professional Conduct suffice to address the challenges and constraints presented by these questions. Rule 1.7 of Montana's Rules provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client

against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Factual scenarios 1 and 2 are similar enough to warrant the same analysis: both create the inquiry as to whether a “significant risk” exists that the representation of the clients will be “materially limited” by the lawyers’ “personal interests.” The representation is forbidden unless the lawyers “reasonably believe” that they are able to provide “competent and diligent” representation and the clients give informed consent, confirmed in writing.

In our Opinion 950721, the State Bar Ethics Committee agreed that a law firm can provide criminal defense representation when a spouse of an attorney in the firm is employed as a deputy sheriff in the same jurisdiction if the lawyer reasonably believes that the client would not be adversely affected and the client consents after full disclosure. We reach the same conclusion with the facts presented in scenarios 1 and 2.

If a lawyer who has conflicting personal interests reasonably concludes that she will nonetheless be able to provide effective representation, the lawyer may serve as counsel after obtaining the client's informed consent. However, if the lawyer's personal interests are likely to prevent her from providing adequate representation, client consent will not cure the conflict. Presumably in scenarios 1 and 2 the entities represented by the attorneys are aware that the attorneys are married to the jurisdiction's deputy and detention center administrator. In both situations the entities may provide informed consent confirmed in writing and are probably very aware, as many in small jurisdictions are, of the potential for conflicts. While we discuss them together here, the analysis there must be an evaluation of all the particular circumstances on a case-by-case basis. MRPC 1.7(b)(1).

Lawyers are required to evaluate the existence of conflicts of interest throughout the representation, not just at the outset. If the spouse becomes a witness in the matter, for example, requiring cross-examination by the lawyer, the threshold in MRPC 1.7(b)(1) could not be met and the lawyer would be required to withdraw. If the lawyer is disqualified under MRPC 1.7(b), all members of the lawyer's firm would be imputedly disqualified under MRPC 1.10(a). The lawyer must remain alert for developing conflicts. What constitutes adequate disclosure is fact specific and could only be evaluated on a case-by-case basis, so any effort to satisfy the disclosure obligations imposed by ethics rules by use of a form is almost certain to prove unsatisfactory. It is the counseling and discussion with the client underlying the execution of any such form that would serve as the touchstone for determining whether the necessary disclosure has been adequately made. While a form should certainly reflect that both advantages and disadvantages have been covered, assuming one is used, it cannot serve as a panacea to obviate the necessity for compliance with the Rules in fact.

Scenario 3 is a step away in the analysis: A small city's local law firm handles the city's civil issues. The firm also provides criminal defense representation in criminal matters prosecuted by the city. The prosecuting city attorney and the city civil attorney are in two separate law firms, in two separate buildings and nothing is shared between them.

There is no imputation of conflict necessary under Rule 1.10¹. As presented, the facts suggest that there is no overlap between the functions of the two firms and responsibilities for the city. The civil and criminal responsibilities are entirely separate. The key to conflict analysis is the misuse/abuse of confidential information. In the event a scenario developed where confidential information could be misused, the analysis employed for scenarios 1 and 2 should be applied. But in the facts presented, there is sufficient distance between the sets of responsibilities and offices to suggest no general conflict looms.

THIS OPINION IS ADVISORY ONLY

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RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(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 1.7 or 1.9 unless 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.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

- (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.