



Ohio Board of Professional Conduct

OPINION 2022-06

Issued June 10, 2022

Withdraws Adv. Op. 1993-7

Conflicts Arising out of Personal Relationships with Opposing Counsel¹

SYLLABUS: Spouses may not represent opposing parties without informed, written consent of the affected clients. When a prosecutor-spouse and criminal defense lawyer-spouse are practicing in the same jurisdiction, the best practice is for the prosecutor's office to assign another prosecuting attorney to the case and screen the prosecutor-spouse from any matter involving his or her spouse.

Other lawyers in the lawyer-spouse's law firm may represent criminal defendants without disclosure and consent, so long as the lawyer does not have a close personal relationship with the specific prosecutor assigned to the case. The lawyer-spouse may represent criminal defendants without disclosure and consent so long as the lawyer-spouse does not have a close personal relationship with the specific prosecutor assigned to the case. If a lawyer shares a close personal relationship with the prosecutor assigned, the lawyer must obtain informed written consent from the client.

Domestic partners, individuals in an intimate relationship, close friends, and roommates have the same duties as those in spousal relationships in evaluating potential conflicts of interest. Lawyers who are domestic partners or in intimate relationships are advised to adhere to the client consent and disclosure obligations applicable to married lawyers. Lawyers in other relationships should consider the characteristics present in the relationship and exercise professional judgment regarding client disclosure and consent.

At a minimum, a lawyer seeking client consent to a conflict should disclose any shared financial or personal interests, explain the fact that there is a presumption of confidences and loyalty between those in a personal relationship, and explain the risks of breach of the duty to loyalty and confidentiality based on that relationship. A written

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disclosure should contain the above information, the precise nature of the relationship giving rise to the to the conflict, and alternatives to the representation.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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QUESTIONS PRESENTED:

- 1) May a prosecutor and a criminal defense lawyer who are spouses represent opposing parties in the same matter or in substantially related matters?
- 2) May other lawyers in the criminal defense lawyer's firm represent defendants who are prosecuted by a firm member's spouse or other lawyers in the prosecutor's office?
- 3) May a lawyer married to a prosecutor represent criminal defendants prosecuted by other lawyers in the same prosecutor's office?
- 4) Do domestic partners, individuals living together in an intimate relationship, close friends, or roommates share the same duties as those in spousal relationships?
- 5) If disclosure is required when opposing parties are living together, must the lawyer disclose the "spousal relationship" or is a more general disclosure of "household member" sufficient?
- 6) What implications must be discussed with the client?
- 7) What information should be contained in any written waiver signed by a client?

APPLICABLE RULES: Prof.Cond.R. 1.7, 1.9, 1.10, 1.11.

OPINION: The requesting lawyer is the county public defender in a county that handles thousands of criminal cases per year. The county public defender's office has almost fifty

lawyers on staff. Some of the lawyers on staff may have personal relationships with lawyers in the prosecutor's office.

Question 1: Opposing Counsel Spouses

A conflict of interest exists when there is a substantial risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited by the lawyer's responsibilities to a third person or by the lawyer's own personal interest. Prof.Cond.R. 1.7(a)(2). The Rules of Professional Conduct address conflicts arising when opposing counsel are closely related by blood or marriage in Prof.Cond.R. 1.7, cmt. [21]:

When lawyers who are closely related by blood or marriage represent different clients in the same matter or in substantially related matters, there may be a substantial risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling, or spouse, ordinarily may not represent a client in a matter where the related lawyer represents another party, unless each client gives informed, written consent.

The ethical concerns regarding spouses or those involved in intimate personal relationships representing opposing parties arise from the nature of the underlying relationship. Inherent characteristics of an intimate personal or spousal relationship may include the presumption of shared confidences, feelings of loyalty to the significant other, and the potential for shared financial, business, property, or personal interests. Thus, spouses may not represent opposing parties

in the same or a substantially related matter without obtaining informed written consent from their respective clients.²

Question 2: Other Lawyers in Criminal Defense Law Firm

The Rules of Professional Conduct address imputation of personal conflicts to members of a firm in Prof.Cond.R. 1.10 and the comments to Prof.Cond.R. 1.7. Prof.Cond.R. 1.10(a) indicates that when “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” then the conflict is not imputed to other members of the firm. Comment [21] to Rule 1.7 further clarifies that “[t]he disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.”

The concerns about the characteristics of intimate personal or spousal relationships referenced above are typically absent when other law firm members represent criminal defendants prosecuted by a firm member’s spouse or other prosecutors in the prosecutor’s office. Thus, any personal prohibition of the lawyer-spouse from representing a criminal defendant need not be rigidly imputed to other members of the law firm. The question then arises as to whether disclosure and consent is necessary.

Firm members must assess whether their own personal relationship with their colleague and the colleague’s prosecutor-spouse presents a significant risk of materially limiting the representation of the client. The mere possibility of subsequent harm from a potential material limitation conflict, by itself, does not require disclosure and consent. Prof.Cond.R. 1.7, cmt. [14]. Adv. Op. 2016-12. The lawyer should consider the nature and degree of their own relationship with the colleague and the colleague’s spouse. A potential material limitation conflict, aside from the conflicts of the spouses, could exist

² The Board has previously cautioned government employees from seeking consent to representation burdened by a conflict. Adv. Op. 2019-05. Rather than seek written consent to representation where a prosecutor’s spouse is opposing counsel, the best practice is for the prosecutor’s office to assign a different prosecuting attorney to the matter pursuant to Prof.Cond.R. 1.11(d), cmt. [2].

depending on the degree of friendship the colleagues share.³ If the firm member does not share a close personal friendship with the prosecutor-spouse and it is unlikely that the representation will be materially limited, then consent and disclosure is not necessary. If the firm member has such a close personal friendship with the prosecutor-spouse that his or her loyalty would inhibit the ability to represent the criminal defendant, then the law firm member should not take on the representation without disclosure of the relationship and consent of his or her client pursuant to Prof.Cond.R. 1.7(b). The Board recommends appropriate and timely screening of the lawyer-spouse from any matters in which the prosecutor-spouse is involved.

Question 3: Criminal Defense Lawyer Spouse and Other Prosecutors

To determine if a lawyer-spouse may represent a client prosecuted by other prosecutors in his or her spouse's office, the lawyer must first look to see if the spouse's conflicts are imputed to other prosecutors in the office. As referenced above, comment [21] to Prof.Cond.R. 1.7 indicates that personal conflicts due to close family relationships are not imputed to other members of an office. *See* Prof.Cond.R. 1.7, cmt. [21]. Further, Prof.Cond.R. 1.11, cmt. [2] reads, "[b]ecause of the special problems raised by imputation within a government agency, division (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." Therefore, the prosecutor-spouse's conflicts are not imputed to the other prosecutors in his or her office. For the same reasons indicated in question two, the Board concludes that the ethical concerns related to spousal representation are absent in this instance as well. Consequently, a lawyer married to a prosecutor may represent criminal defendants prosecuted by other lawyers in the prosecutor-spouse's office.

However, the lawyer-spouse should also assess whether his or her own personal relationship with the specific prosecutor(s) assigned to each case presents a significant risk of materially limiting the representation of the client, aside from the conflict personal to his or her spouse. The mere possibility of subsequent harm from a potential material limitation conflict, by itself, does not require disclosure and consent. Prof.Cond.R. 1.7,

³ Additional discussion regarding whether a friendship is likely to raise conflicts between opposing counsel can be found in response to question four.

cmt. [14]. Adv. Op. 2016-12. The lawyer should consider the nature and degree of his or her own friendship with the prosecutor-spouse's colleague(s).⁴ If the criminal defense lawyer does not share a close personal friendship with the prosecutor colleague(s) of his or her spouse, then disclosure and consent is unnecessary. If the criminal defense lawyer has such a close personal friendship with his or her spouse's colleague(s) assigned to case that his or her loyalty would inhibit the ability to represent the criminal defendant, then the lawyer should not take on the representation without disclosure to and consent of his or her client pursuant to Prof.Cond.R. 1.7(b). The Board recommends appropriate and timely screening of the prosecutor-spouse from any matters in which his or her spouse is representing a criminal defendant.

Question 4: Duties of Lawyers Regarding Other Personal Relationships

The Rules of Professional Conduct do not address personal relationships beyond those of lawyers related by blood or marriage. The Board recognizes that other personal relationships may also create conflicts of interest depending on the nature and degree of the relationship. The American Bar Association has identified at least three different types of relationships that may implicate conflicts of interest. Those relationships are (1) intimate relationships, (2) friendships, and (3) acquaintances. ABA Formal Op. 20-494 (2020). The Board finds that ABA Formal Op. 20-494 provides appropriate guidance in identifying characteristics of these types of relationships and applying them to potential conflict situations.

Intimate Relationships

The Board concludes that lawyers who (1) cohabit in an intimate relationship, (2) are classified as domestic partners, (3) are engaged to be married, or (4) are in an exclusive intimate relationship, regardless of their living situation, should be treated in the same manner as married couples for conflicts purposes. ABA Formal Op. 20-494 (2020). *See also* N.C. State Bar Formal Op. 2019-3 (2019). There is a substantial risk in these situations that the lawyer's conduct will be materially limited by his or her duties to the opposing counsel. The inherent characteristics of the spousal relationship are also present in intimate personal relationships. These types of relationships lend themselves

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to potential conflicts of interest for the reasons described above in question one. A client should be informed of these relationships and potential conflicts in order to allow the client to make an informed decision about the representation. *See* Prof.Cond.R. 1.4. If the client wishes to continue the representation, informed written consent must be obtained. Prof.Cond.R. 1.7(b).

Friendships

Thoughtful analysis of the nature of a friendship is required in order to determine if a conflict of interest exists and if it must be disclosed to an affected client. A lawyer faced with opposing counsel whom he or she considers a friend must exercise professional judgment in determining the action to take. The Board offers the following factors to consider when analyzing the nature of the relationship: (1) the degree of mutual affinity for one another, (2) the length of the relationship, (3) whether the lawyer regularly socializes with opposing counsel, and (4) the frequency of contact with opposing counsel. *See* ABA Formal Op. 20-494 (2020).

Engaging in some, if not all, of the following activities suggests the existence of a close friendship: (1) regularly socializing outside of professional activities, (2) spending time at each other's homes, (3) coordinating activities with each other's spouses and children, (4) exchanging gifts at holidays or special occasions, (5) vacationing together, or (6) sharing confidences or intimate details of their lives. *Id.* Conversely, one may consider opposing counsel a friend, but not a close friend, because of their past relationship in college, law school, or while working together after many years. Despite this shared past, they may only stay in touch through occasional correspondence or periodically meet up when their schedules permit but do not go out of their way to regularly see one another. *Id.* These types of friendships do not create a close relationship.

There is a substantial risk that a lawyer may forgo taking appropriate action on behalf of a client when opposing counsel is a close friend. For example, the lawyer may forgo filing a motion for sanctions out of loyalty to the close friend. *Id.* When a close friend is opposing counsel, the lawyer must disclose the relationship and obtain informed written consent from the client. When the lawyer regards opposing counsel as a friend but interacts with him or her on a limited basis, the lawyer may exercise his or her professional judgment as to whether to disclose the relationship and obtain consent.

Typically, in this situation, the lawyer will not be required to disclose the relationship and obtain informed written consent to the representation. *Id.* The lawyer may however choose to disclose the relationship to maintain a positive relationship with the client. *Id.*

Acquaintances

An acquaintance may be distinguished from a friend when there is little mutual affinity and attachment between one another. *See id.* The lawyers may greet each other cordially and engage in polite but relatively superficial conversation. *Id.* The following may be characteristics of this type of relationship, (1) attending the same professional events such as bar association meetings, committee meetings, board meetings, or CLE presentations, or (2) interacting cordially with one another in shared community spaces such as places of worship, businesses, school events, sporting events, neighborhood events, country clubs, or gyms. *Id.* Because there is little risk of the representation being materially limited in this instance, lawyers who are acquaintances do not need to disclose the relationship to clients. *Id.* The lawyers may however choose to disclose the relationship to maintain a positive relationship with the client. *Id.*

Roommates

Application of conflict of interest rules is challenging when considering lawyers who are roommates but do not share an intimate relationship. “Within the framework of [the] rules * * * many difficult issues of professional discretion can arise.” Preamble [9]. The relationship of lawyer-roommates could resemble a close friendship, a friendship, or one more akin to that of an acquaintance. Roommate relationships also may be short-term or borne purely out of financial convenience. As indicated above, the mere possibility of subsequent harm from a potential material limitation conflict does not require disclosure and consent. Prof.Cond.R. 1.7, cmt. [14]. Adv. Op. 2016-12.

Lawyer-roommates are advised to use the criteria referenced above describing close friendships, friendships, and acquaintances to guide their professional judgment as to whether to disclose and seek consent from an affected client. In exercising professional judgment, lawyers must always be mindful of the impact to a client’s underlying matter if a decision is made to proceed without disclosing the relationship to the affected clients. A client whose lawyer is the roommate of opposing counsel is likely to have questions and concerns about whether the relationship will compromise the lawyer’s duty of

loyalty to the client. This concern may be heightened if the information is not disclosed by the lawyer and later discovered by the client. The client's concern, even if unfounded, may lead to an unnecessary appeal resulting in delay and potentially greater expense for the client. While not strictly required under the rules, lawyers may choose to disclose the relationship to maintain a positive relationship with the client. In these situations, the Board advises that lawyers err on the side of caution.

Regardless of the lawyer's final determination regarding disclosure, lawyers living together must take appropriate steps to ensure client confidentiality. Examples of such steps include password protecting devices, taking phone calls in a location where they cannot be overheard, and using care to secure any written materials brought into a common living arrangement.

Question 5: Disclosure of Relationship

When disclosing to a client a personal relationship with opposing counsel that may impact the representation, the disclosure should reflect an accurate description of the relationship. First, a lawyer may not make or use a false or misleading communication about the lawyer or the lawyer's services. Prof.Cond.R. 7.1. "A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading." *Id.* at cmt. [2]. Second, a lawyer must communicate adequate information to allow the client to make informed decisions about the representation. Prof.Cond.R. 1.4. When considering if a conflict of interest is present and if the client is comfortable consenting to representation, the nature of the relationship between opposing counsel is a material fact. Therefore, when a personal relationship is required to be revealed, an accurate description of that relationship is necessary. A general statement that opposing counsel is a "household member" of the lawyer may be misleading because it lacks specificity and omits material facts. This may be especially true if opposing counsel is the spouse or intimate partner of the lawyer. It may be that a client would be comfortable waiving a conflict if opposing counsel is simply a roommate, which the description of "household member" may infer, but not comfortable consenting to a conflict if opposing counsel is a spouse or an intimate partner.

Question 6: Implications to be Discussed

Depending on the type of personal relationship, there may be several implications related to a conflict of interest that should be discussed with a client before obtaining consent to representation. First, in a spousal or intimate relationship there is a hybrid of interests, such as financial, business, property, and personal interests that reasonably might affect the exercise of a lawyer's independent judgment on behalf of a client. Second, there is a presumption of shared confidences between spouses and those in intimate relationships that creates a substantial risk of inadvertent breach of the duty of loyalty to the client, including the duty to preserve client confidences and information related to the representation. Finally, a client should be advised that the lawyer may feel a duty of loyalty to his or her spouse, an intimate partner, or even a close friend that may impede the lawyer's ability to represent the client. For example, the lawyer may refrain from making certain arguments if related to opposing counsel's performance in prosecution of the matter or forgo filing a motion for sanctions based on loyalty to the individual. This list of potential implications which should be discussed is not exhaustive as specific factual circumstances unique to each situation may be present.

Question 7: Informed Consent

Informed consent requires that a lawyer obtaining consent to representation burdened by a conflict communicate adequate information and explanation about the material risks of and reasonably available alternatives to the proposed representation. *See Prof.Cond.R. 1.0(f)*. At a minimum, in this context, the information contained in a written conflict waiver should include the precise nature of the relationship that prompted the disclosure, any material risks giving rise to the conflict, such as those described above in question six, and any reasonable alternatives to the representation, such as assignment of another lawyer in the office or obtaining other counsel altogether.