

ETHICS OPINION 2013-01

Rule: 1.7
Subject: Relationship to opposing attorney
Summary: Attorney is not precluded from defending criminal cases in jurisdiction where prosecutor is a close relative

Attorney is a member of Law Firm and routinely represents criminal defendants. Attorney's blood relative is serving as a prosecutor in a jurisdiction in which Attorney routinely appears. Attorney's blood relative is not a defendant of Attorney. Attorney therefore wants to know answers to the following questions:

- 1) May Attorney represent criminal defendants in the jurisdiction in which the blood relative is a prosecutor?
- 2) Are the other members of Law Firm barred by Attorney's conflict or is it strictly personal to Attorney?
- 3) If Attorney and Law Firm may represent clients in that jurisdiction, must particular steps be taken to comply with the Rules of Professional Responsibility in doing so?

OPINION

1) Attorney is not ethically barred from representing criminal defendants in a jurisdiction where a blood relative serves as a prosecutor.

A lawyer has a conflict of interest when there is a "significant risk" that the representation of a client will be "materially limited" by duties owed to another client, third person, or a personal interest. Rule 1.7(a)(2). If such a conflict exists, the lawyer may nonetheless represent the client if four criteria are met: 1) the lawyer reasonably believes they can deliver competent and diligent representation under the circumstances; 2) the representation is not prohibited by law; 3) lawyer is not asserting a claim for one client against another in the same litigation or proceeding; and 4) each client gives informed consent, confirmed in writing. Rule 1.7(b).

It is the opinion of the Committee that if Attorney meets the four criteria of Rule 1.7(b), Attorney may represent clients in cases brought by the blood relative as a prosecutor. It bears emphasis that Attorney must independently assess for each client if it is reasonably believed that competent and diligent representation can be provided and must obtain written consent of the client after disclosing the relationship.

It should also be noted that this has not always been the rule. Prior to the Ethics 2000 project of the American Bar Association, such a relationship to an opposing lawyer barred representation in the Model Rules of Professional Conduct. This reinforces the need for caution and to make sure that all clients are informed and make a knowing choice on Attorney taking their case.

This issue has been addressed elsewhere with the same decision the Committee renders. As an example, the Committee recommends Nebraska Ethics Advisory Opinion No. 06-12 which it consulted and discussed in rendering its opinion here.

Lastly, there may be instances of close familial relationships where there is no “significant risk” that representation will be “materially limited” and Rule 1.7 is not implicated. Those instances need not be explored or catalogued here because the conflict can be addressed in the manner set forth above. There may be instances, however, where circumstances are such that no conflict exists.

2) Attorney’s personal conflict is not imputed to Law Firm.

Although conflicts arising under Rule 1.7 impute to other members of a law firm, they do not do so when the conflict is personal to one attorney. Attorney’s conflict is personal in this instance and therefore does not impute to the other members of Law Firm.

3) No steps are necessary to address the conflict beyond those set forth in Rule 1.7(b).

As set forth above, Rule 1.7(b) lays out the course of action to address a personal conflict like that of Attorney. No additional steps are necessary.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota