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Steven A. Wadsworth
Gillespie County Attorney



125 W. Main St., Suite L41
Fredericksburg, Texas 78624
Phone: 830.990.0675
Fax: 830.992.2615

May 16, 2024

Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
Via email to opinion.committee@oag.texas.gov

RE: Request for Attorney General Opinion

Dear Attorney General Paxton:

It is increasingly becoming a common situation in which attorneys marry other attorneys. Sometimes those attorney-couples are also prosecutors and defense attorneys, often in the same county or jurisdiction. In my office, there is an assistant county attorney who just married an attorney in our local public defenders' office. The local public defenders' office provides services to both the misdemeanor and felony courts in our county. There is not a criminal district in Gillespie County, so the district and county attorney offices are separate. In reviewing the status of law on this matter, it seems that while this situation is happening, the law has not clearly addressed the issues presented by such relationships.

I am respectfully seeking an opinion from your office as to whether it is a conflict of interest under the Tex. Disciplinary Rules of Prof'l Conduct 1.06(a) or (b) for the defense-attorney (*Attorney D* – defense attorney) spouse of a prosecutor, specifically either a district or county attorney or their assistants (*Attorney P* – prosecutor), to represent defendants in the same court, and then further in the courts in the same county (*County 1*). It is assumed that County 1 does **not** have a *criminal district* so that there are separate district and county attorney's offices in the county.

I am also seeking an opinion as to whether it makes a difference if Attorney D is representing defendants on a retained or court-appointed or public defender basis. As an example, can Attorney D, who is the spouse of an assistant county attorney (Attorney P), represent defendants in the county court or county court at

law (court with misdemeanor jurisdiction in that county)? Can Attorney D represent defendants in the district court in the same county in which Attorney P is an assistant county attorney? If Attorney D does not appear in the same court as Attorney P and if Attorney D and P are both mutually ‘screened’ from any involvement in which the defendant has both felony and misdemeanor cases in the same county, is any potential violation of Tex. Disciplinary Rules of Prof’l Conduct 1.06(a) or (b) prevented notwithstanding Tex. Disciplinary Rules of Prof’l Conduct 1.06(f)?

Additionally, if these situations do present a conflict of interest, who has the authority on behalf of the prosecutor’s client, the State of Texas, to waive or consent to the continued representation by the prosecutor (Attorney P) pursuant to Tex. Disciplinary Rules of Prof’l Conduct 1.06(c)(2)? Furthermore, if a conflict of interest does exist and a waiver cannot be obtained from both clients, is the entire prosecutor’s office disqualified pursuant to Tex. Disciplinary Rules of Prof’l Conduct 1.06(f)?

Can spouses –defense-attorney spouse of a prosecutor (*Attorney D* – defense attorney) and prosecutor-spouse (*Attorney P* – prosecutor attorney) – represent opposing parties in the same case or criminal prosecution?

Is it a violation of Tex. Disciplinary Rules of Prof’l Conduct 1.06(a) or (b) for Attorney D to represent defendants in the same court as the Attorney P, either as the elected or assistant prosecutor?

Is it a violation of Tex. Disciplinary Rules of Prof’l Conduct 1.06(a) or (b) for Attorney D to represent defendants in the felony or district courts in the same county in which Attorney P is a misdemeanor prosecutor, either as the elected or assistant county attorney?

Does it make a difference in the situations described above if Attorney D works for a public defender’s office or accepts court-appointed representation?

If any of these situations do present a violation of Tex. Disciplinary Rules of Prof’l Conduct 1.06(a) or (b), who has authority on behalf of the State of Texas to waive or consent to the continued representation by the prosecutor pursuant to Texas Disciplinary Rules of Prof’l Conduct 1.06(c)(2)?

If any of these situations do present a violation of Tex. Disciplinary Rules of Prof'l Conduct 1.06(a) or (b) and a waiver is not obtained pursuant to Tex. Disciplinary Rules of Prof'l Conduct 1.06(c), is the entire prosecutor's office disqualified pursuant to Tex. Disciplinary Rules of Prof'l Conduct 1.06(f)?

An accompanying memorandum of law on these matters is attached for your consideration.

Thank you for your time and attention in this matter.

Respectfully yours,



Steven A. Wadsworth,
Gillespie County Attorney

Encl.

Via email to opinion.committee@oag.texas.gov

Memorandum of Law

Can spouses –defense-attorney spouse of a prosecutor (*Attorney D* – defense attorney) and prosecutor-spouse (*Attorney P* – prosecutor attorney) – represent opposing parties in the same case or criminal prosecution?

Is it a violation of Tex. Disciplinary Rules of Prof'l Conduct 1.06(a) or (b) for Attorney D to represent defendants in the same court as the Attorney P, either as the elected or assistant prosecutor?

Is it a violation of Tex. Disciplinary Rules of Prof'l Conduct 1.06(a) or (b) for Attorney D to represent defendants in the felony or district courts in the same county in which Attorney P is a misdemeanor prosecutor, either as the elected or assistant county attorney?

Does it make a difference in the situations described above if Attorney D works for a public defender's office or accepts court-appointed representation?

If any of these situations do present a violation of Tex. Disciplinary Rules of Prof'l Conduct 1.06(a) or (b), who has authority on behalf of the State of Texas to waive or consent to the continued representation by the prosecutor pursuant to Texas Disciplinary Rules of Prof'l Conduct 1.06(c)(2)?

If any of these situations do present a violation of Tex. Disciplinary Rules of Prof'l Conduct 1.06(a) or (b) and a waiver is not obtained pursuant to Tex. Disciplinary Rules of Prof'l Conduct 1.06(c), is the entire prosecutor's office disqualified pursuant to Tex. Disciplinary Rules of Prof'l Conduct 1.06(f)?

As an initial observation, Tex. Disciplinary Rules of Prof'l Conduct 1.06, specifically including Rule 1.06(b)(2) and the accompanying comments do not address these issues in a direct manner. Tex. Code Crim. Proc. art. 2.01, 2.07, and 2.08¹ each address the duties and obligations of prosecutors, but with respect to

¹ The revisions to chapter 2 of the Tex. Code Crim. Proc. do not substantially alter the analysis. See Tex. Code Crim. Proc. Ann., art. 2A.101-111.

conflict of interests, those statutes only speak in terms of *disqualification*. The applicable statutes and courts have held that a conflict of interest must rise to the level of a constitutional due process violation to support disqualification, which will usually involve cases in which there is a prior attorney-client relationship involving the defendant and/or witnesses. *Landers v. State*, 256 S.W.3d 295, 303-304 (Tex. Crim. App. 2008); and, *State ex re. Hill v. Pirtle*, 887 S.W.2d 921, 925-927 (Tex. Crim. App. 1994)(orig. proceeding)(en banc). See generally Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 Baylor L. Rev. 171, 177 (2002) and Edward L. Wilkinson, *Legal Ethics & Texas Criminal Law*, pp. 25-38 (2010 ed.).

The case of *Haley v. Boles*, 824 S.W.2d 796 (Tex. App.—Tyler 1992, orig. proceeding) is only cases that seems to address these issues.² The procedural context of *Haley* is a mandamus proceeding based upon a denial of a motion to withdraw by the court-appointed defense attorney. The court held that the law-partner of the spouse of the district attorney should be allowed to withdraw from *court-appointed* representation of criminal defendant being prosecuted by the district attorney's office because the situation created, "[T]he appearance of having compromised and limited the defendant's constitutional right to effective assistance of counsel." *Haley*, 824 S.W.2d at 798.³ The court in *Haley* based its holding largely upon Texas community marital property law and partnership law so that the spouses were potentially in violation of Tex. Disciplinary Rules of Prof'l Conduct 1.06(b)(2). *Haley*, 824 S.W.2d at 797-798. The *Haley* court then looked to Tex. Disciplinary Rules of Prof'l Conduct 1.06(f) to extend the conflict of interest to the entire law firm. *Id.* The court in *Haley* also emphasized that since the law-partner was court-appointed, the issue of the defendant's constitutional right to counsel of choice was not implicated, but rather focused upon the constitutional right to conflict-free representation. *Haley*, 824 S.W.2d at 797 (citing *Glasser v. United States*, 315 U.S. 60, 69-70 (1941)). At base, *Haley* holds that a spousal relationship creates *enough* of an appearance of a conflict of interest to support a mandamus petition for a motion to withdraw by the defense counsel.

As Wilkinson discusses, at the time of the adoption of the Texas rules, the American Bar Association's Model Rules of Professional Conduct (*ABA Model*

² The *Haley* court begins its analysis of the conflict of interest issue by stating, "The propriety of attorneys/spouses representing opposing parties in a criminal trial is one of first impression." *Haley*, 824 S.W.2d at 797.

³ The court then states, "For this reason alone, Haley's petition must be granted; our ruling here is, therefore, limited to the representation of indigent defendants in criminal cases by court-appointed counsel." *Haley*, 824 S.W.2d at 797.

Rules Prof'l Conduct) 1.08(i) contained a specific provision addressing the issue of spousal and familial conflicts, which was rejected by Texas. Wilkinson, *Legal Ethics & Texas Criminal Law*, pp. 27-28. It is not clear how much this rejection should factor into an analysis of these issues. The ABA Model Prof'l Conduct now has adopted Rules 1.10 and 1.11 which address these issues and again adopts the position that the personal conflict of interest of a single attorney is not necessarily imputed to all other attorneys in the firm so long as the personal conflict of interest will not 'present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.' ABA Model Prof'l Conduct Rules 1.10 & 1.11 (AM. BAR ASS'N 2024). Texas has not adopted this position. Based upon the current version of Tex. Disciplinary Rules of Prof'l Conduct 1.06(b)(2) & (f) and the rationale of *Haley*, in the context of indigent defendants, there is spousal conflict of interest present that cannot be waived due to the constitutional concerns expressed in *Glasser v. United States*, 315 U.S. at 69-70. For these purposes, there would seem to be no difference in either a court-appointed attorney or a public defenders' office being appointed to represent the defendant. In retained cases, there is also most likely a non-waivable conflict of interest in that the defendant has a constitutional right to the defense counsel of choice. *Gonzalez v. State*, 117 S.W.3d 831, 836-837 (Tex. Crim. App. 2003)(citing U.S. Const., 6th Amend., Tex. Const., Art. I§10, and Tex. Code Crim. Proc. Art. 1.05). As will be addressed in greater detail below, since there does not appear to be any mechanism to obtain the consent of the State to a waiver of a conflict of interest, the prosecutor's office will most likely be required to disqualify itself in these situations to protect the defendant's constitutional right to counsel of choice.

There are three ethics opinions that do address the issues raised in this request in varying degrees. *Tex. Comm. on Prof'l Ethics, Op. 539* does address most of these issues directly. *Tex. Comm. on Prof'l Ethics, Op. 539*, 65 Tex. Bar J. 368 (2002). Opinion 539 begins by stating, "No provision of the Texas Disciplinary Rules of Professional Conduct specifically addresses conflicts of interest based on a spousal relationship." *Tex. Comm. on Prof'l Ethics, Op. 539*, p. 1. *Tex. Comm. on Prof'l Ethics, Op. 539* does discuss the *Haley* case. The Opinion states, "Although the court's holding[in *Haley*] was that a writ of mandamus should be granted because the indigent defendant's constitutional rights were violated by his representation by an appointed lawyer whose law partner was married to the district attorney, the court's observations regarding disqualification of the appointed lawyer based on the spousal relationship of his partner are applicable to employed lawyers as well as appointed lawyers." *Tex. Comm. on Prof'l Ethics, Op. 539*, p. 1. Opinion 539 would then not treat retained or appointed defense attorneys differently for the purposes of a conflict of interest analysis. The Opinion then quotes at length from *Haley* in

which the court focuses upon the appearance of the tension with respect to the attorney's duties to the client, the legal system, and the attorney's own interests. *Haley*, 824 S.W.2d at 797-798.

Opinion 539 reviews numerous prior opinions and various factual situations, but bases its conclusion largely on the following argument:

Spouse B's representation of a criminal defendant in Alpha County appears to be adversely limited by Spouse B's responsibilities to Spouse A and by Spouse B's own interests. It would be unnatural for Spouse A not to be interested in the successful practice of Spouse B and for Spouse B not to be interested in the successful practice of Spouse A. Spouse B has an interest in the success of Spouse A as an assistant district attorney in Alpha County. That interest, even in the absence of a direct pecuniary interest in the efforts of Spouse A, prohibits Spouse B from representing criminal defendants *in the county* in which Spouse A is an assistant district attorney unless such prohibition is removed by complying with Rule 1.06(c). Similarly, if Spouse B represents a criminal defendant in Alpha County, Spouse A's representation of the State of Texas appears to be adversely limited by Spouse A's responsibilities to Spouse B and by Spouse A's own interests. *Tex. Comm. on Prof'l Ethics, Op. 539*, pp.4-5 (emphasis added).

Opinion 539 concludes by stating, "Therefore, Rule 1.06(b)(2) prohibits Spouse B from representing a criminal defendant in Alpha County unless (1) Spouse B reasonably believes the representation of such criminal defendant will not be materially affected by Spouse B's relationship and responsibilities to Spouse A and Spouse B's own interests, and (2) such criminal defendant 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, as provided in Rule 1.06(c)." *Tex. Comm. on Prof'l Ethics, Op. 539*, p. 5. Thus, the defense-attorney spouse—Spouse B— can represent clients so long as Spouse B complies with the waiver provisions of Rule 1.06(c) and the potential conflict is applied to **all** criminal prosecutions in Alpha County.

Opinion 539 also states:

If, however, Spouse B chooses to represent a criminal defendant in Alpha County, Spouse A's representation of the State appears to be adversely limited by Spouse A's own interests and responsibilities to

Spouse B. In that event, Spouse A and all other attorneys in the district attorney's office would be prohibited from representing the State against Spouse B's client unless (1) Spouse A and the other attorneys in the office who will represent the State in the prosecution of Spouse B's client reasonably believe the representation of the State will not be materially affected by Spouse A's relationship and responsibilities to Spouse B and Spouse A's own interests, and (2) the State of Texas 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, as provided in Rule 1.06(c). The State's consent could be conditioned on an agreement that Spouse A will not participate in any manner in the prosecution of Spouse B's client.

Tex. Comm. on Prof'l Ethics, Op. 539, p. 5.

Opinion 539 also states, "The Committee is aware of no provision in the Constitution or any statute of the State of Texas that authorizes any elected or appointed officer to waive disqualification of a county or district attorney and consent to representation by a disqualified county or district attorney, or an assistant in either office. However, the Committee does not decide questions of law and expresses no opinion on the question of whether or from whom the district attorney of Alpha County might obtain a valid consent if Spouse B represents a criminal defendant in that county while Spouse A is employed as an attorney in the district attorney's office." *Tex. Comm. on Prof'l Ethics, Op. 539, p. 5.*

The practical result of the arguments in Opinion 539 is that spouses cannot represent opposing sides in criminal cases in the same county regardless of whether the defense attorney is retained or court-appointed. Opinion 539 expands that conflict of interest to all criminal prosecutions in the same county. The rationale of Opinion 539 would also seem to apply to the situation of a criminal defendant having multiple cases, both felonies and misdemeanors, arising from the same criminal episode so that the spousal conflict of interest would affect the entire prosecutor spouse's office.⁴

⁴ Opinion 539 speaks in the context of an assistant district attorney, but then talks about representation within the county. The Opinion does not state if a criminal district exists in that county; therefore, the issue is not explicit as to whether the spousal conflict would apply between the separate courts and offices, although the Opinion strongly implies that it does. For example, does an assistant district attorney spouse have a conflict with the spouse defense attorney in a misdemeanor case if there is no criminal district in existence in that county so that there are separate and distinct prosecutor offices? Since county attorney prosecutors expressly can be

While Opinion 539 focuses upon representation by an assistant *district* attorney, the Opinion does not address the situation of the spouse defense attorney representing defendants charged with misdemeanor offenses. If a criminal district does not exist, then the offices of the county and district attorney are separate so that the rationale would not seem to apply; however, since Tex. Code Crim. Proc. Ann. art. 2.02 provides for county attorneys and their assistants to prosecute felonies, at least a potential spousal conflict of interest would seem to exist. The Opinion does not address this situation directly but strongly implies that the conflict of interest extends to all criminal prosecutions in the same county.

There are two other ethics opinions that deal with spousal conflict of interest questions, but in different contexts. *Tex. Comm. on Prof'l Ethics, Op. 666*, 80 Tex. Bar J. 48 (2017) and *Tex. Comm. on Prof'l Ethics, Op. 667*, 80 Tex. Bar J. 106 (2017). In Opinion 666, the question is asked explicitly in the context of **civil** cases, but the analysis would appear to be like that for criminal cases. The Opinion begins by stating, "The Texas Disciplinary Rules of Professional Conduct do not specifically address conflicts of interest based on spousal relationships. Instead, the issue is governed by Rule 1.06(b)(2), which addresses conflicts of interest arising from a lawyer's personal interests." *Tex. Comm. on Prof'l Ethics, Op. 666*, p. 1. The Opinion states, "A lawyer does not necessarily or automatically have a conflict of interest merely because the lawyer's law firm represents a party adverse to a party represented by the law firm of the lawyer's spouse. Such a lawyer will have a conflict of interest, however, if the lawyer's representation 'reasonably appears to be or become adversely limited' by the lawyer's relationship with his or her spouse. In most cases this will be a question of fact." *Tex. Comm. on Prof'l Ethics, Op. 666*, p. 1. The Opinion later notes that if there is no such appearance of an adverse limitation on the representation, then no conflict of interest arises, although it may be prudent still to disclose the situation to the client.

Opinion 666 continues its argument by stating, "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, or when either spouse, for whatever reason, has a material personal interest in the outcome of the matter." *Tex. Comm. on Prof'l Ethics, Op. 666*, p. 2. The implications of these arguments in the criminal context would seem to be that spouses cannot represent opposing parties in the same case. Whether a defense attorney or prosecutor would have a *material personal* interest in

requested to assist in felony prosecutions by the district attorney, how does this affect the analysis? Tex. Code Crim. Proc. Ann. art. 2.02.

the outcome of a client's case is debatable but could arguably extend the conflict of interest to all criminal prosecutions or cases arising from the same criminal episode because the result or verdict in one case will most likely influence the result of all other cases arising from that same criminal episode especially if viewed through the prism of the impact on the rate and collection of the attorney fee for the representation of the defendant.

The Opinion then states, "In other circumstances, resolution of the issue requires consideration of all the circumstances, including, without limitation, (1) the nature of the matter and the issues involved; (2) whether either spouse will be directly involved in the representation, and if so the nature and extent of such involvement;⁵ (3) whether and to what extent the outcome of the representation may have a financial effect on either spouse; (4) the positions of the spouses within their firms; and (5) whether the lawyers handling the representation have a close working relationship with the lawyer-spouse in the same firm. It should be noted that, under the facts considered in this opinion, each spouse knows that his or her firm is representing a client in a matter directly adverse to a client of the other spouse's firm."⁶ *Tex. Comm. on Prof'l Ethics, Op. 666*, p. 2. Following the analysis set forth, if a conflict of interest does exist, then either the waiver provisions of Tex. Disciplinary Rules of Prof'l Conduct 1.06(c) must be followed or the attorney must withdraw or decline representation.

Opinion 666 does address the difference between Tex. Disciplinary Rules of Prof'l Conduct 1.06(f) and the ABA Model Rules Prof'l Conduct 1.10(a)(1) (AM. BAR ASS'N 2024) in that Texas imputes the *personal* conflict of interest to the attorney's entire firm, but the ABA Model Rules Prof'l Conduct does not do so. "The Committee appreciates that the firm-wide imputation of spousal conflicts may in some cases lead to harsh results but those results are dictated by the current provisions of Rule 1.06(f)." *Tex. Comm. on Prof'l Ethics, Op. 666*, p. 3. If Opinion 666's arguments are applicable to the criminal law context, then an entire prosecutor's office would be affected by the personal or spousal conflict of interest of one of its attorneys, regardless of whether that attorney is the elected prosecutor or an assistant and irrespective of any 'screening' put in place.

⁵ This prong seems to be in tension with the firm-wide disqualification provision of Tex. Disciplinary Rules of Prof'l Conduct 1.06(f).

⁶ In criminal cases, the identity of the opposing counsel is a matter of knowledge; however, the issue becomes more complicated if a juvenile case is involved in some manner such as with the situations with co-defendants.

Opinion 666 also notes that one client may consent to the *conflicted* representation, while the other may not because the matter is independent as to each client and attorney. Tex. Comm. on Prof'l Ethics, Op. 666, p. 3. The Opinion concludes by noting that in the situation described in *Haley*, withdrawal from or declination of representation may be mandated regardless of client consent because clients with court-appointed attorneys have constitutional protections and a right to a conflict-free representation. *Haley*, 824 S.W.2d at 797 (citing *Glasser v. United States*, 315 U.S. at 69-70). This would assume that the prosecutor-spouse's office does not recuse itself, which would seem to resolve the constitutional concerns.

Tex. Comm. on Prof'l Ethics, Op. 667, also addresses these issues but through the lens of the spouse of the prosecutor being a bail bondsman/person in the same county as the spouse-prosecutor, who is specifically stated to be the county attorney.⁷ Opinion 667 begins the same as Opinion 666 by noting that there is no express provision in the Tex. Disciplinary Rules of Prof'l Conduct addressing spousal conflicts of interest. Op. 667, p. 1. Opinion 667 approaches these issues by examining Tex. Disciplinary Rules of Prof'l Conduct Rule 1.06 and cites to Opinions 539 and 666. Op. 667, p. 1. The Committee notes that Texas adopts an imputation of a conflict of interest on a firm-wide basis, which specifically includes governmental units. Op. 667, p. 2.

Op. 667 then looks to how the bail bond business meshes with court proceedings which are affected by the recommendations and actions of prosecutors. The Committee discusses that under Texas marital property law and bail bond forfeiture law, the spouse-prosecutor may become personally liable on a bond forfeiture obligation incurred by the spouse-bail-bondsman/person. While this situation is factually specific for each situation, a conflict of interest in violation of Tex. Disciplinary Rules of Prof'l Conduct Rule 1.06(b) could arise which would require compliance with the consent provisions of 1.06(c) to continue representation. Op. 667, p. 3. The Committee then declines to address the issue of who can consent to continued representation on behalf of the State. Op. 667, pp. 3-4.

The factual statement in Op. 667 expressly speaks of the prosecutor being the *county attorney*. This opinion concludes by stating:

Under the Texas Disciplinary Rules of Professional Conduct, a prosecuting attorney may not represent the government in a criminal

⁷ This factual scenario strongly implies that there is not a criminal district arrangement in place in this county (County Alpha).

case against a defendant in which the spouse of the prosecuting attorney acts as the defendant's bail bondsman without properly obtaining the government's consent to the representation in accordance with the provisions of the Rules, unless, under the specific facts present in the particular case, the attorney's representation of the government does not reasonably appear to be adversely limited by the attorney's responsibilities to the bail bondsman or by the attorney's own interests. If the prosecuting attorney cannot represent the government in the case, no attorney in prosecuting attorney's office can represent the government. Op. 667, p. 4.

Based upon the rationale of Op. 667, unless a proper consent from the State can be obtained⁸, then the entire county attorney's office must recuse itself from further representation in **any criminal** case in which the spouse-bail-bondsman/person acts as the surety for the defendant and the basis of the representation (*i.e.* court-appointed or retained) does not seem to be a relevant consideration.

The rationale of Op. 667 would seem to imply that spouses cannot represent opposing sides in criminal cases and most likely even in the same county because it is problematic to envision a factual scenario in which there is not an adverse limitation of the prosecutor's spouse's responsibilities, especially when the financial implications are considered. Absent compliance with the consent provisions of Tex. Disciplinary Rules of Prof'l Conduct Rule 1.06(c), the entire prosecutor's office would have to recuse itself. Under the apparent rationale of Op. 667, the potential spousal conflict of interest would include all criminal prosecutions in the same county as well regardless of whether the defense representation is on a retained or court-appointed basis.

⁸ As previously noted, there is no known procedure or mechanism by which to obtain the consent of the State to waive a conflict of interest under Tex. Disciplinary Rules of Prof'l Conduct Rule 1.06(c).