

1. Title

Nepotism

2. Policy

Sec. 1 Purpose. The purpose of this policy is to provide guidance in the assignment of--and the awarding of contracts to--relatives of employees, in accordance with The University of Texas Board of Regents' *Rules and Regulations*, Rule 30106.

Sec. 2 Relatives of Members of the Board of Regents. Employment of certain relatives of a member of the Board of Regents in any capacity is prohibited by the Board of Regents' *Rules and Regulations* and State law.

Sec. 3 Statutory Requirement. *Texas Government Code* Chapter 573 prohibits public officials from appointing any individual to a position that is to be directly or indirectly compensated from public funds or fees of office if the individual is related to the public official within the second degree by affinity or within the third degree by consanguinity.

Sec. 4 Relatives of Employees. Relatives of existing employees of the U. T. System within the degree specified in Section 3 may be hired but neither relative may supervise the other nor be involved in any way with the appointment, salary, or promotion of the other. The Office of Employee Services must ensure that personnel transactions are in compliance with the Board of Regents' *Rules and Regulations* and assist with reporting of any exceptions annually via the institutional consent agenda or the annual operating budget.

Sec. 5 U. T. System Administration Requirement. Even though the appointment of a person would not be prohibited by the *Texas Government Code*, no employee of the U. T. System Administration may approve, recommend, or otherwise act with regard to the appointment, reappointment, promotion, or salary of any person related to such employee within the degree specified in Section 3 of this policy regardless of the source of funds for the payment of salary. This provision also includes individuals hired as private contractors.

5.1 Supervision. If the appointment, reappointment, or promotion of a person places him or her under an administrative supervisor related within the degree specified by Section 3 of this policy, all subsequent actions with regard to the evaluation, reappointment, promotion, or salary shall be the responsibility of the next highest supervisor.

- 5.2 Promotion. If the appointment, reappointment, or promotion of a person places him or her in an administrative or supervisory position with responsibility to approve, recommend, or otherwise act with regard to reappointment, promotion, or salary of a person who is related to him or her within the degree specified in Section 3 of this policy, all subsequent actions regarding the evaluation, reappointment, promotion, or salary of such person shall be made by the next highest supervisor.
- 5.3 Marriage. The provision of Section 5.1 of this policy shall apply to situations where two employees marry and one spouse is the supervisor of the other.
- Sec. 6 Private Contractors. The State of Texas Attorney General has issued an opinion letter indicating that nepotism law also applies to individuals hired as private contractors.
- Sec. 7 Disclosure Required for Purchasing Personnel.
- 7.1 State agency purchasing personnel must disclose certain family relationships with business entities receiving certain State agency contracts. Before a State agency may award a major contract for the purchase of goods or services to a business entity, each of the State agency's purchasing personnel working on the contract must disclose in writing to the administrative head of the State agency any relationship the purchasing personnel is aware about that the employee has with an employee, a partner, a major stockholder, a paid consultant with a contract with the business entity the value of which exceeds \$25,000, or other owner of the business entity that is within a degree described by *Texas Government Code* Section 573.002.
- 7.2 The form for use by purchasing personnel of a State agency to disclose information regarding certain relationships with, and direct or indirect pecuniary interests in any party to a major contract with the State agency prior to the award of a major contract, was developed by the State Auditor and can be found on the State Auditor's website at <http://www.sao.state.tx.us/resources/forms/NepotismDisclosureForm.pdf>
- 7.3 Section 7 applies only to a contract awarded or extended on or after September 1, 2005.

3. Definitions

Affinity - relationship by marriage. Two individuals are related to each other by affinity if (a) they are married to each other; or (b) the spouse of one of the individuals is related by consanguinity to the other individual. The ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

Consanguinity - relationship by blood or origin. Two individuals are related to each other by consanguinity if one is a descendant of the other or they share a common ancestor. An adopted child is considered to be a child of the adoptive parent for this purpose. The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. A parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree, and so on.

Major Stockholder - person who directly or indirectly owns or controls more than a 10% interest or a pecuniary interest with a value exceeding \$25,000 in a business entity.

Public Official -

1. an officer of this State or of a district, county, municipality, precinct, school district, or other political subdivision of this State;
2. an officer or member of a board of this State or of a district, county, municipality, school district, or other political subdivision of this State; or
3. a judge of a court created by or under the statute of this State.

Purchasing Personnel - employee of a State agency who makes decisions on behalf of the State agency or recommendations regarding (a) contract terms or conditions on a major contract; (b) who is to be awarded a major contract; (c) preparation of a solicitation for a major contract; or (d) evaluation of a bid or proposal.

4. Relevant Federal and State Statutes

[Opinion, State of Texas Attorney General, No. DM-76 \(1992\)](#)

[Texas Government Code Section 573.002, Degrees of Relationship](#)

[Texas Government Code Chapter 2263, Ethics and Disclosure Requirements for Outside Financial Advisors and Service Providers](#)

[Texas Education Code Section 61.003, Texas Higher Education Coordinating Board, Definitions](#)

5. Relevant System Policies, Procedures, and Forms

[The University of Texas System Board of Regents' *Rules and Regulations*, Rule 30106, Nepotism](#)

[Disclosure Form for Purchasing Personnel](#)

6. System Administration Office(s) Responsible for Policy

Office of Employee Services

7. Dates Approved or Amended

February 1, 2006

July 22, 2009

August 16, 2011

1. Title

Nepotism

2. Rule and Regulation

Sec. 1 Statutory Requirement. *Texas Government Code*, [Chapter 573](#) prohibits public officials from appointing any individual to a position that is to be directly or indirectly compensated from public funds or fees of office if the individual is related to the public official within the second degree by affinity or within the third degree by consanguinity.

Sec. 2 System Requirement. Even though the appointment of a person, would not be prohibited by the *Texas Government Code*, no employee of The University of Texas System or any of the institutions may approve, recommend, or otherwise act with regard to the appointment, reappointment, promotion, or salary of any person related to such employee as outlined in Sections 2.4 or 2.5 regardless of the source of funds for the payment of salary. This provision also includes individuals hired as private contractors.

2.1 Supervision. If the appointment, reappointment, or promotion of a person places him or her under an administrative supervisor related within the specified degree, all subsequent actions with regard to the evaluation, reappointment, promotion, or salary shall be the responsibility of the next highest administrator to make a written review of the work performance of such employee at least annually and to submit each review for approval or disapproval by the institution's Chief Human Resources Officer in the case of classified employees or the Chancellor or the president in the case of faculty or non-classified employees.

2.2 Promotion. If the appointment, reappointment, or promotion of a person places him or her in an administrative or supervisory position with responsibility to approve, recommend, or otherwise act with regard to reappointment, promotion, or salary of a person who is related to them within the above degree specified, all subsequent actions regarding the evaluation, reappointment, promotion, or salary of such person shall be made by the next highest supervisor.

- 2.3 Marriage. The provision of Section 2.1 of this Rule shall apply to situations where two employees marry and one spouse is the supervisor of the other.
- 2.4 Relationship by Blood. Relationship by blood (consanguinity) as determined by *Texas Government Code*, [Chapter 573](#) (see also Figure 1 in the [Relationships by Consanguinity or Affinity chart](#)):
- (a) First degree is the employee's father, mother, son, or daughter.
 - (b) Second degree is the employee's brother, sister, grandfather, grandmother, grandson, or granddaughter.
 - (c) Third degree is the employee's uncle or aunt (who is a brother or sister of the employee's parent), nephew or niece (who is a child of the employee's brother or sister), great grandfather, great grandmother, great grandson or great granddaughter.
- 2.5 Relationship by Marriage. Relationship by marriage (affinity) as determined by *Texas Government Code*, [Chapter 573](#) (see also Figure 2 in the [Relationships by Consanguinity or Affinity chart](#)):
- (a) First degree is the employee's spouse, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, or stepchild.
 - (b) Second degree is the employee's brother-in-law (sister's spouse or spouse's brother), employee's sister-in-law (brother's spouse or spouse's sister), spouse's grandfather, spouse's grandmother, spouse's grandson, spouse's granddaughter, spouse of the employee's grandparent, or spouse of the employee's grandchild.

3. Definitions

Affinity – relationship by marriage. According to *Texas Government Code* [Section 573.024](#), two individuals are related by affinity if:

1. they are married to each other; or
2. the spouse of one of the individuals is related by consanguinity to the other individual.

Consanguinity – relationship by blood or origin. According to *Texas Government Code* [Section 573.022](#):

(a) Two individuals are related to each other by consanguinity if:

1. one is a descendant of the other; or
2. they share a common ancestor.

(b) An adopted child is considered to be a child of the adoptive parent for this purpose.

Public official – defined in *Texas Government Code* [Section 573.001\(3\)](#) as:

1. An officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;
2. An officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
3. a judge of a court created by or under the statute of this state.

4. Relevant Federal and State Statutes

Texas Government Code, [Chapter 573](#) – Nepotism Prohibitions

5. Relevant System Policies, Procedures and Forms

[The University of Texas System Administration Policy UTS120, Spousal Travel Policy](#)

6. Who Should Know

Board of Regents
Administrators and Supervisors

7. System Administration Office(s) Responsible for Rule

Office of General Counsel
Office of Human Resources

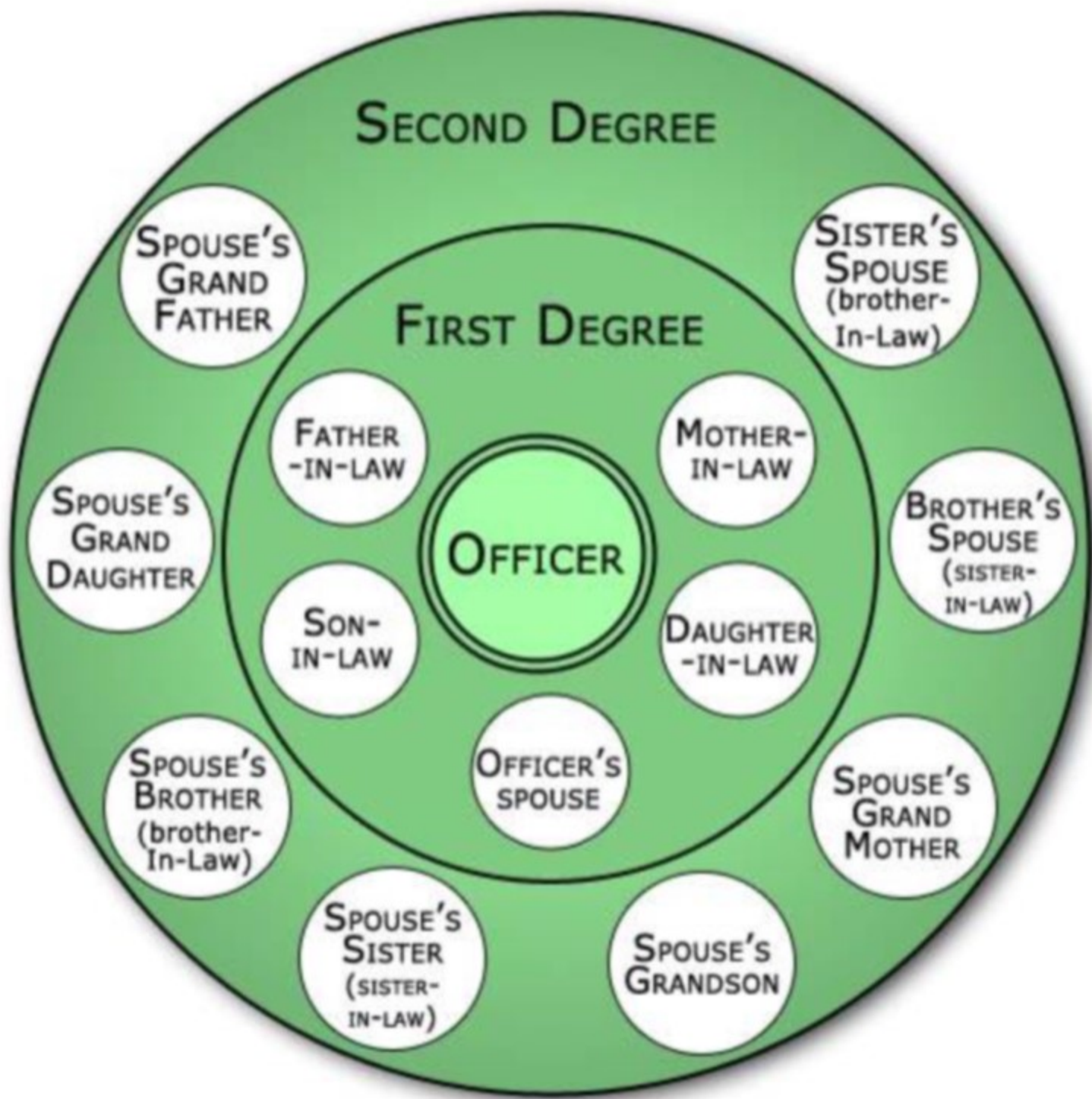
8. Dates Approved or Amended

Editorial amendment to Number 7 made March 7, 2017
December 10, 2004

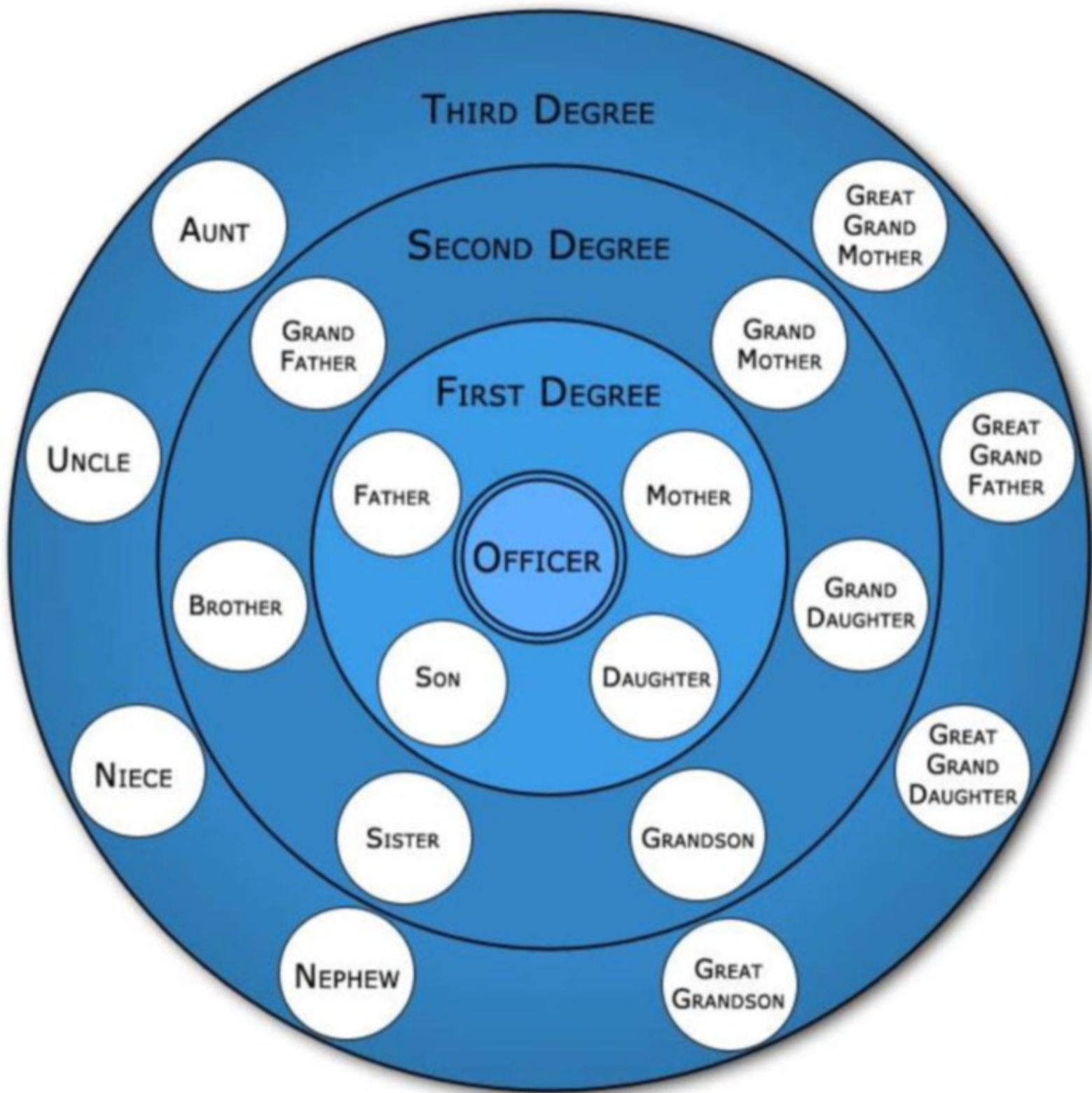
9. Contract Information

Questions or comments regarding this Rule should be directed to:

- bor@utsystem.edu



AFFINITY KINSHIP
Relationship by Marriage



CONSANGUINITY KINSHIP

Relationship by Blood

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 661**

July 2016

QUESTION PRESENTED

Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company?

STATEMENT OF FACTS

Recognizing that many potential clients search for a lawyer by using internet search engines, Lawyer A uses various search-engine optimization techniques to try to ensure that his name appears on the first page of the search results obtained when a potential client uses a search engine to seek a lawyer. One way Lawyer A seeks to achieve this goal is by participating in internet search-based advertising programs offered by search engines that are in widespread use by many types of businesses.

These search-based advertising programs allow a business to select specific words or phrases (“keywords”) that will cause the business’s advertisement to pop up in the search results of someone using that keyword in a search. The advertiser does not purchase exclusive rights to specific keywords; the same keywords can be used by a number of advertisers.

Lawyer B is a competing lawyer in Lawyer A’s town. Lawyer B’s area of practice is similar to Lawyer A’s. Lawyer A and Lawyer B have never been law partners or engaged in joint representation in any case.

One of the keywords selected by Lawyer A is the name of Lawyer B. Lawyer A’s keyword selection causes Lawyer A’s name and a link to his website to be displayed on the search engine’s search results page any time an internet user searches for Lawyer B using the search engine. Lawyer A’s advertisement will appear to the side of or above the search results in an area designated for “ads” or “sponsored links.” In addition to displaying Lawyer A’s name and a link to Lawyer A’s website, the ad or sponsored link may contain additional text concerning Lawyer A and his practice. Usually Lawyer B’s name would also be listed in the search results. Moreover, if Lawyer B had also purchased similar advertising services from the search engine and had used his own name as a keyword, Lawyer B’s name would also be listed in the ad or sponsored link section as well as in the regular search results when Lawyer B’s name was used by a potential client as a search term.

Lawyer A's keyword advertisement or sponsored link does not indicate whether or not Lawyer A and Lawyer B are affiliated. Lawyer B did not authorize Lawyer A to use Lawyer B's name in connection with Lawyer A's keyword advertisement.

DISCUSSION

Advertising, including internet advertising, is addressed in Part VII of the Texas Disciplinary Rules of Professional Conduct. The Texas Disciplinary Rules do not specifically address the question of whether it is permissible for a lawyer to use a competitor's name to enhance the lawyer's internet advertising. However, several provisions of the Texas Disciplinary Rules must be considered with respect to this question.

Rule 7.01(d) states that "[a] lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates."

Rule 7.02(a) prohibits a lawyer from making or sponsoring "a false or misleading communication about the qualifications or the services of any lawyer or firm." A communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading[.]" Rule 7.02(a)(1). Comment 3 to Rule 7.02 explains the standard set forth in Rule 7.02(a)(1) as follows:

"Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

Under these Rules, if Lawyer A's use of Lawyer B's name as a keyword in search-engine advertising results in an advertisement that holds out Lawyer A to be a shareholder, partner, or associate of Lawyer B, then Lawyer A's use of Lawyer B's name would violate Rule 7.01(d). Furthermore, if such use of Lawyer B's name would lead a reasonable person to believe that Lawyer A and Lawyer B are associated in some way, then the use of Lawyer B's name as a keyword would be a misleading communication in violation of Rule 7.02(a).

In the opinion of this Committee, the use of a competitor's name as a keyword in the factual circumstances here considered would not in normal circumstances violate either Rule 7.01(d) or Rule 7.02(a). The advertisement that results from the use of Lawyer B's name does not state that Lawyer A and Lawyer B are partners, shareholders, or associates of each other. Moreover, since a person familiar enough with the internet to use a search engine to seek a lawyer should be aware that there are advertisements presented on web pages showing search results, it appears highly unlikely that a reasonable person using an internet search engine would be misled into thinking

that every search result indicates that a lawyer shown in the list of search results has some type of relationship with the lawyer whose name was used in the search. Compare *Habush v. Cannon*, 828 N.W.2d 876 (Wis. Ct. App. 2013) (finding no violation of Wisconsin right-of-privacy statute when one law firm used the name of a competing law firm as a keyword in search-engine advertising).

In addition to Rules 7.01(d) and 7.02(a), Rule 8.04(a)(3) must also be considered. Rule 8.04(a)(3) prohibits a lawyer from engaging in conduct “involving dishonesty, fraud, deceit or misrepresentation.” In the opinion of the Committee, given the general use by all sorts of businesses of names of competing businesses as keywords in search-engine advertising, such use by Texas lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve misrepresentation. Thus such use of a competitor’s name in internet search-engine advertising is not a violation of Rule 8.04(a)(3). In reaching this conclusion, this Committee has considered but does not concur with 2010 Formal Ethics Opinion 14 of the Ethics Committee of the North Carolina State Bar (April 27, 2012) (ruling that a lawyer’s use of a competitor’s name as a keyword in a search-engine advertising program violates the equivalent of Texas Disciplinary Rule 8.04(a)(3) because such use constitutes “conduct involving dishonesty” in that the conduct shows “a lack of fairness or straightforwardness”).

It should be noted that this opinion addresses only whether the use of a competitor’s name in internet search-engine advertising programs violates the Texas Disciplinary Rules of Professional Conduct. Although such use of a competitor’s name as a keyword in advertising programs does not in the opinion of the Committee involve a violation of the Texas Disciplinary Rules, a Texas lawyer’s participation in such an advertising program must comply with the other provisions of the Texas Disciplinary Rules applicable to advertising, in particular Disciplinary Rule 7.04 on advertisements in the public media. Moreover, depending on the circumstances, a Texas lawyer advertising through keywords on internet search engines may be subject to other requirements or prohibitions imposed by federal or state law or by professional ethics rules of other jurisdictions.

CONCLUSION

A lawyer does not violate the Texas Disciplinary Rules of Professional Conduct by simply using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company. The lawyer’s statements included in this advertising program must not contain false or misleading communications and must comply in all respects with applicable rules on lawyer advertising.

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 662**

August 2016

QUESTIONS PRESENTED

May a Texas lawyer respond publicly to a former client's adverse comments on the internet? If so, what information may the lawyer disclose?

STATEMENT OF FACTS

A former client posted negative comments about a Texas lawyer on an internet review site. The lawyer believes that the client's comments are false. The lawyer is considering posting a public response that reveals only enough information to rebut the allegedly false statements.

DISCUSSION

The internet allows consumers to publish instant reviews and comments about goods or services. Once posted, consumer reviews are usually searchable, easily accessible to other potential consumers, and effectively permanent. With the internet becoming an increasingly common source of referrals for legal services, consumer reviews on various sites have assumed a greater importance for attorneys in recent years.

Vendors of commercial goods or services are relatively free to respond to negative reviews as they see fit. But when a former client posts a negative review about a lawyer, the lawyer's duty of confidentiality limits the information the lawyer may reveal in a public response.

In general, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines the scope and extent of a Texas lawyer's duty of confidentiality. Rule 1.05(a) broadly defines "confidential information" to include not only information protected by the lawyer-client privilege but also "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client."

A lawyer may not publicly reveal the confidential information of a former client unless expressly permitted by an exception stated in Rule 1.05. Absent an applicable exception found in Rule 1.05, a lawyer may not post a response to a negative review that

reveals any information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. This is true even though the information may have become generally known. Compare Rule 1.05(b)(3) (allowing lawyer to use confidential information to the disadvantage of a former client after the information has become generally known) with Rule 1.05(b)(1) (generally prohibiting revelation of confidential information absent an applicable exception).

No exception in Rule 1.05 allows a lawyer to reveal information in a public forum in response to a former client's negative review. The only exceptions potentially applicable to the facts presented in this opinion appear in Rule 1.05(c) and (d):

“(c) A lawyer may reveal confidential information:

* * *

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

* * *

(d) A lawyer also may reveal unprivileged client information:

* * *

(2) When the lawyer has reason to believe it is necessary to do so in order to:

* * *

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.”

It is the opinion of the Committee that each of the exceptions stated above applies only in connection with formal actions, proceedings or charges. The exceptions to Rule 1.05 cannot reasonably be interpreted to allow public disclosure of a former client's confidences just because a former client has chosen to make negative comments about the lawyer on the internet. This approach is consistent with the guidance issued by the ethics authorities in other jurisdictions. *See, e.g.,* Los Angeles County Bar Association Professional Responsibility and Ethics Committee Formal Opinion No. 525 (Feb. 2013); Bar Association of San Francisco Ethics Opinion 2014-1 (Jan. 2014); New York State Bar Association Ethics Opinion 1032 (Oct. 2014); and Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014).

Accordingly, a lawyer may not reveal confidential information, as that term is defined in Rule 1.05, merely to respond to a former client's negative review on the internet. A lawyer may, however, post a response to a former client's negative review so long as the response is proportional and restrained and does not reveal confidential information or violate any other provision of the Texas Disciplinary Rules. For example, posting the following response, suggested in Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014), would not violate the Texas Disciplinary Rules:

“A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.”

Nothing in this opinion is intended to suggest that a lawyer may not seek judicial relief against a former client who commits defamation or other actionable misconduct through an internet publication.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may not publish a response to a former client's negative review on the internet if the response reveals any confidential information, i.e., information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. The lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 666**

December 2016

QUESTIONS PRESENTED

Does a conflict of interest exist where attorneys, who are married to each other, either represent, or are members of firms who represent, opposing parties to the same civil matter? If so, can the conflict be cured?

STATEMENT OF FACTS

Alpha Firm and Beta Firm have been retained by opposing parties in a civil matter, such as a transaction or a lawsuit. Spouse A is employed by Alpha Firm and Spouse B is employed by Beta Firm. Each spouse knows that his or her respective firm represents a client in a matter directly adverse to a client of the other spouse's firm. In one scenario, Spouse A is not directly involved with the matter, but Spouse B is directly involved. In another scenario, neither Spouse A nor Spouse B is directly involved with the matter.

DISCUSSION

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. Rule 1.06 provides, in part:

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
 - (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
- (c) A lawyer may represent a client in the circumstances described in (b) if:
 - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - (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.

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.

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. 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; (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.

If, under the circumstances, it reasonably appears that the lawyer's representation will not be adversely limited by the lawyer's interests arising from the marital relationship, the lawyer is free to undertake or continue with the representation. Even in that event, it may be wise (although not required) for the lawyer to disclose the spousal relationship to the client, notwithstanding the absence of a conflict of interest.

If, under the circumstances, it reasonably appears that the lawyer's representation will be adversely limited by the lawyer's interests arising from the marital relationship, the lawyer must either (1) decline or seek to withdraw from the representation, or, if appropriate, (2) seek to undertake or continue the representation by obtaining client consent in accordance with Rule 1.06(c).

Obtaining consent under Rule 1.06(c) is a two-step process. First, before seeking client consent a lawyer must reasonably believe that the representation of the client will not be materially affected by the lawyer's relationship with the spouse. Rule 1.06(c)(1). A "reasonable belief," when used in relation to conduct of a lawyer, denotes both "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Terminology Section of the Texas Disciplinary Rules of Professional Conduct. "[W]hen 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." Comment 7 to Rule 1.06.

If the lawyer reasonably believes that, under the circumstances, the representation will not be materially affected by the lawyer's relationship with the spouse, the lawyer may then seek the client's consent. In order to obtain effective client consent, the lawyer must first fully disclose the existence, nature, implications, and possible adverse consequences arising from the marital relationship and the advantages involved, if any. Although the Rules do not require written consent, the lawyer would be prudent to obtain written consent. If the client provides informed consent, the lawyer may accept or continue with the representation. If the client does not consent, the lawyer and the lawyer's firm must decline the representation or withdraw.

In many United States jurisdictions, a conflict arising from a lawyer's marriage to another lawyer at an opposing law firm is not necessarily imputed to all other lawyers in the firm. In particular, many jurisdictions have adopted a version of ABA MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(1), under which "personal interest" conflicts of one lawyer are not imputed to other lawyers in the firm so long as they do not "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

Although there is significant merit to the ABA's approach regarding imputation of "personal interest" conflicts, no such exception exists under the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(f) provides:

"If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."

Rule 1.06(f) requires imputation of personal interest conflicts under Rule 1.06(b)(2). Consequently, if a lawyer would be prohibited from undertaking representation on a matter because the representation "reasonably appears to be or become adversely limited" by the lawyer's relationship with the lawyer's spouse, no other lawyer in the firm may undertake the representation without obtaining the client's informed consent under Rule 1.06(c). 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).

The foregoing analysis applies independently to each lawyer spouse and his or her firm. A determination of whether a conflict exists by one spouse and his or her firm will not necessarily call for the same determination by the other spouse and his or her firm. Similarly, if a conflict exists and consent is appropriate, one client may give informed consent under Rule 1.06(c) independently of whether the other client does so.

Finally, the Committee notes that in one situation a lawyer's marriage to opposing counsel may require withdrawal regardless of client consent under Rule 1.06(c). In *Haley v. Boles*, 824 S.W.2d 796 (Tex. App.—Tyler 1992, orig. proceeding, no writ), the court held that the trial court abused its discretion in denying a motion to withdraw filed by counsel appointed to represent an indigent criminal defendant when the appointed counsel's law partner was married to the district attorney. The court observed that constitutional concerns would require withdrawal even if the

indigent defendant had consented to the conflict under Rule 1.06(c). *Id.* The court expressly limited its holding to situations involving indigent criminal defendants represented by court-appointed attorneys because, as the court explained, the indigent defendant does not have the full ability to evaluate and consent to the representation. *Id.*

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a marriage between lawyers affiliated with opposing firms engaged on the same adverse matter may give rise to a conflict of interest. Whether a conflict exists will depend on the circumstances. If the circumstances are such that it reasonably appears a lawyer's spousal relationship will adversely limit the lawyer's representation, neither the lawyer nor any other lawyer in his or her law firm may undertake or continue the representation without obtaining the client's informed consent under Rule 1.06(c).

To obtain effective consent under Rule 1.06(c), the lawyer must first reasonably believe the representation can be undertaken or continued with no material adverse effects on the client. Whether such a belief is reasonable depends on the circumstances. Assuming the lawyer can form such a reasonable belief, the lawyer may then seek the client's consent by making full disclosure of the existence, nature, implications, and possible adverse consequences of the representation under the circumstances and the advantages involved, if any. The lawyer may undertake or continue the representation only when the client has provided such informed consent.

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 667**

December 2016

QUESTION PRESENTED

May the prosecuting attorney or another attorney in the prosecuting attorney's office represent the government in a criminal case against a defendant in which the prosecuting attorney's spouse acts as the defendant's bail bondsman?

STATEMENT OF FACTS

Spouse Bondsman, a bail bondsman, and Spouse Attorney, the county attorney, are married to each other. Spouse Bondsman is the criminal bail bondsman for a criminal defendant charged with a misdemeanor in a county court in Alpha County. Spouse Attorney is employed as the county attorney in the county attorney's office for Alpha County. Spouse Attorney and other attorneys in the county attorney's office prosecute the misdemeanor cases in Alpha County.

DISCUSSION

No provision of the Texas Disciplinary Rules of Professional Conduct specifically addresses conflicts of interest based on a spousal relationship. Consequently, the general conflict rule, Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, governs. Professional Ethics Committee Opinions 666 (December 2016) and 539 (February 2002) addressed conflicts of interest based on spousal relationships in situations in which both spouses are lawyers. In contrast, this opinion addresses conflicts of interests based on spousal relationships in which only one of the spouses is a lawyer.

Rule 1.06 provides in pertinent part as follows:

“(b) . . . except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

. . . .

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

- (c) A lawyer may represent a client in the circumstances described in (b) if:
 - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - (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.
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- (f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in the conduct."

The starting point in any conflict of interest analysis under Rule 1.06 is whether a conflict of interest exists. Whether a conflict of interest exists requires an analysis of the facts of each case. Attorneys must determine whether conflicts of interest exist at the outset of the representation and be mindful of conflicts that may arise during the course of the representation.

Rule 1.06(f) provides that if one lawyer in a firm is prohibited by Rule 1.06 from a particular representation, all lawyers who are members of or associated with that lawyer's firm are also prohibited from the representation. "Firm" is defined in the Terminology section of the Rules to include those lawyers "in a unit of government." As a result, from the standpoint of a conflict of interest analysis, every lawyer in the county attorney's office must determine whether a conflict of interest exists if Spouse Attorney were the lawyer prosecuting the misdemeanor case. Thus, the conflict of interest analysis in this opinion will consider whether Spouse Attorney would have a conflict of interest in representing the government in misdemeanor case in which her spouse is the bail bondsman. If Spouse Attorney has a conflict of interest, then every lawyer in her office also has a conflict of interest.

Under Rule 1.06, the concern is whether Spouse Attorney's representation in this misdemeanor case reasonably appears to be (or becomes) adversely limited by Spouse Attorney's responsibilities to a third person (Spouse Bondsman) or by her own interests. Rule 1.06(b)(2).

It would not be surprising for Spouse Attorney to be interested in the success of the business of Spouse Bondsman. *See e.g.* Opinion 539 (February 2002). Nor would it be surprising for Spouse Attorney to be interested in how a non-appearance by the defendant would affect Spouse Bondsman's business, including the resulting legal consequences to Spouse Bondsman and the financial consequences to both Spouse Bondsman and Spouse Attorney.

If Spouse Attorney knew that her spouse was going to be the bail bondsman from the inception of the matter, it might influence Spouse Attorney's recommendation on the amount of

the initial bond or subsequent increases or decreases in the amount of the bond. If Spouse Attorney learned that the defendant was not going to make a required appearance in court, the impact of that failure on Spouse Bondsman could impact Spouse Attorney's decisions about how to prosecute the case including considerations regarding whether it would be appropriate to dismiss the pending charges, which could relieve Spouse Bondsman of potential liability on the bond. Tex. Occ. Code Ann. § 1704.208; *Apodaca Bail Bonds v. State*, 720 S.W.2d 279 (Tex. App.--El Paso 1986, writ dismissed).

Spouse Attorney might also be influenced by the possibility of Spouse Bondsman, as surety, being named as a defendant if a bond forfeiture action arose. Under current Texas statutes, when a criminal defendant is bound by bail and fails to appear, a judicial declaration of forfeiture must be taken against the defendant and the sureties on the bond, which in this case would include Spouse Bondsman. Tex. Code Crim. Proc. Ann. arts. 22.01, 22.02. Thereafter, the clerk files suit, naming the State of Texas as plaintiff and the principal and any sureties as defendants, and issues citation "notifying the sureties of the defendant, if any, that the bond has been forfeited, and requiring them to appear and show cause why the judgment of forfeiture should not be made final." Tex. Code Crim. Proc. Ann. arts. 22.10, 22.03(a). The case proceeds under the rules governing other civil suits to trial or settlement. Tex. Code Crim. Proc. Ann. arts. 22.10, 22.125. Because Texas is a community property state, a judgment against Spouse Bondsman may result in financial loss to Spouse Attorney. *See also* Tex. Occ. Code Ann. § 1704.155(6) (requiring a bail bond surety applicant's spouse to sign a sworn statement agreeing to transfer to the bail bond board any right, title or interest that the spouse may have in non-exempt real property that the bail bond surety applicant intends to execute in trust to a county bail bond board pursuant to section 1704.154(b)(3)).

These are examples of possible limitations on Spouse Attorney's representation of the government in the misdemeanor case that could arise based on Spouse Attorney's own interests and her responsibilities to Spouse Bondsman, depending on the facts actually present. Whether these issues or others create a conflict of interest will depend on the specific facts present in each particular case. *See* Comment 4 to Rule 1.06.

If Spouse Attorney's representation reasonably appears to be adversely limited by her responsibilities to Spouse Bondsman or by Spouse Attorney's own interests at the outset of the case or at some later time during the prosecution, then Spouse Attorney would be prohibited from prosecuting the misdemeanor case from that point forward unless the representation is properly consented to under the provisions of Rule 1.06(c).

In that situation, two parts of Rule 1.06(c) must be met for the representation to continue. First, Spouse Attorney must reasonably believe that the representation of the government will not be materially affected. "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Terminology section of the Rules. Comment 7 to Rule 1.06 adds that "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." Whether a request for consent is appropriate

will be determined based on the specific facts present in each case. If the lawyer reasonably believes that the representation of government will not be materially affected by consenting to the conflict, then the lawyer may attempt to obtain the necessary consent to continue the representation as provided in Rule 1.06(c)(2).

If it would be appropriate to request client consent under Rule 1.06(c)(1), Spouse Attorney must obtain the consent of the government after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any. Rule 1.06(c)(2). The determination of whether consent can be given at all and, if it can, the appropriate person or entity to give that consent is beyond the purview of the Committee. *See* Opinion 540 (February 2002).

CONCLUSION

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