

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

State of Delaware,)	
)	
Plaintiff,)	
v.)	
)	
Marvin Swanson,)	C.A. No. 1505008759
)	
Defendant.)	
)	
)	
)	
)	
)	
)	

Submitted: September 23, 2015
Decided: September 29, 2015

Upon Counsel’s Motion to Provide Conflict Counsel for the Defendant
DENIED

MEMORANDUM OPINION

Matthew B. Frawley, Esquire, Jan A.T. van Amerongen, Esquire, Deputy
Attorneys General, Attorneys for State

Timothy J. Weiler, Esquire, Attorney for Defendant

JOHNSTON, J.

FACTS AND PROCEDURAL POSTURE

On May 26, 2015, Defendant Marvin Swanson (“Defendant”) was indicted on charges of Murder in the First Degree and Possession of a Firearm during the Commission of a Felony. The State is represented by Deputy Attorneys General Matthew B. Frawley and Jan A.T. van Amerongen (“Mr. van Amerongen”). Defendant is represented by Timothy J. Weiler (“Counsel”) of the Public Defender’s Office (the “PDO”). Kathryn van Amerongen (“Ms. van Amerongen”) is married to Mr. van Amerongen and employed as Homicide Unit Chief at the PDO.

On August 7, 2015, Counsel filed a Motion to Provide Conflict Counsel for the Defendant. On September 10, 2015, the State filed a letter opposing Counsel’s motion. On September 23, 2015, Counsel responded to the State’s opposition.

ANALYSIS

Parties’ Contentions

The sole basis of Counsel’s motion is the alleged significant risk that the representation of Defendant will be materially limited by the personal interest of Ms. van Amerongen. Under the Sixth Amendment of the United States Constitution, effective assistance of counsel provides for representation that is

“free from conflicts of interest or divided loyalties.”¹ A conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by...a personal interest of the lawyer.”²

The Comments to the Delaware Lawyers’ Rules of Professional Conduct (“DLRPC”) provide:

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant 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 that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.³

However, a lawyer still may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

¹ *Lewis v. State*, 757 A.2d 709, 714 (Del. 2000) (citing *United States v. Acty*, 77 F.3d 1054, 1056 (1996)).

² DLRPC 1.7, cmt. 11 (defining “Personal Interest Conflicts”).

³ *Id.*

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.⁴

Counsel contends that a conflict of interest exists and Defendant is unwilling to waive any conflict. Counsel states that the American Bar Association (ABA) Guidelines suggest a conflict can exist when a prosecutor is married to the court-appointed counsel's law partner. Further, Counsel cites a decision by the Texas Court of Appeals where a lawyer appointed to represent an indigent criminal defendant was disqualified because his law partner was married to the prosecuting attorney assigned to the case.⁵ Specifically, the Texas court found that "if there be impropriety in spouses representing adversaries, the disqualification extends to the partners and associates of the spouse."⁶

Counsel also contends that pursuant to the Office of Defense Services Manual and DLRPC 1.0, the PDO is considered a single law firm for purposes of determining whether a conflict of interest exists. The Comments to DLPRC 1.0 provide:

[2] *Firm.* -- Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts.... However, if they present themselves to the

⁴ DLRPC 1.7(b).

⁵ *Haley v. Boles*, 824 S.W.2d 796, 798 (Tex. Ct. App. 1992).

⁶ *Id.* at 797.

public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve.

...

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.

...

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.⁷

The State argues that Counsel's motion does not assert an actual conflict of interest and does not set forth any facts upon which the finding of an actual conflict of interest can be based. The State claims that the PDO database can be restricted by a firewall to prevent specific individuals from accessing data related to specific cases, and that Ms. van Amerongen does not have access to Defendant's case.

The State concedes it does not know at what point Ms. van Amerongen was screened from the relevant database, but states that Mr. and Ms. van Amerongen have not shared information regarding Defendant's case.

⁷ DLRPC 1.0, cmts. 2-4.

In response, Counsel contends that the conflict cannot be resolved by creating a firewall between Ms. van Amerongen and Counsel, and that while sharing of Defendant's case information is a concern, the larger issue is the appearance of impropriety.

Discussion

The Court finds that the PDO is a firm as defined by DLRPC 1.0. Pursuant to DLRPC 1.10(a), “while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, ***unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.***”⁸

Counsel represents Defendant and is employed at the PDO, and the State is represented by Deputy Attorneys General Frawley and Mr. van Amerongen. Mr. van Amerongen is married to Ms. van Amerongen, an employee at the PDO who is not personally involved with this case and whose access to Defendant's file can be prevented by a firewall.

A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or

⁸ DLRPC 1.10(a) (emphasis added).

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.⁹

The Court finds there is no concurrent conflict of interest as proscribed by DLRPC 1.7(a). There is no suggestion that Ms. van Amerongen has any information concerning or connection with Defendant's pending case. Pursuant to Comment 11, any potential conflict Ms. van Amerongen might have, as a result of her familial relationship with Mr. van Amerongen, is not imputed to the other members of the PDO "firm."

Further, there is no suggestion that there may be a significant risk that Defendant's representation will be materially limited by any PDO lawyer's responsibilities to another client. Therefore, the Defendant's refusal to give informed consent is irrelevant.

Additionally, the Court finds the holding in *Haley* to be distinguishable. In *Haley*, the Texas court found that the conflict of interest arose from the personal financial interest of the conflicted attorney's spouse.¹⁰ In this case, no personal financial interest is implicated.

CONCLUSION

⁹ DLRPC 1.7(a).

¹⁰ *Haley*, 824 S.W. at 798.

Limited to circumstances where there is a close familial relationship between an attorney for the State and an attorney employed by the PDO, the potential concurrent conflict of interest is personal and will not be imputed to other attorneys in the PDO or to the Department of Justice.

THEREFORE, Counsel's Motion to Provide Conflict Counsel is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston