

DELAWARE STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 1989-5

BACKGROUND

The Committee has been asked whether the Delaware Lawyers Rules of Professional Conduct (Rules) prohibit an attorney from participating in a program whereby she would regularly receive court appointments to represent criminal defendants while her husband, who is also an attorney, acts as a prosecutor in the Attorney General's office. The committee has been advised that the husband is a prosecutor in a different county than that in which the attorney will receive her appointments. The attorney has also stated that her husband will not be involved with any criminal matter in which she is involved. She also referred the Committee to Opinion No. 17 of the Advisory Committee to the Supreme Court on Litigation Ethical Problems which indicated that a Superior Court judge could hear criminal cases although his brother was a member of the Attorney General's office, so long as the judge did not hear cases in which his brother was involved.

ISSUE

Whether a conflict of interest arises which disqualifies the attorney from representing criminal defendants by virtue of her husband's employment with the State as a prosecutor, even though he is not involved in cases in which she is representing criminal defendants?

CONCLUSION

So long as adequate safeguards are put in place and followed, the attorney will not be prohibited from representing criminal defendants while her husband is a prosecutor with the state

Attorney General's office.

DISCUSSION

The issue presented by the inquiring attorney is specifically addressed by Rule 1.8(i) which states:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

The comment accompanying Rule 1.8(i) specifically states that the disqualification of the Rule is personal and not imputed to members of firms with whom the lawyers are associated. Thus, the language of the Rule and comment makes clear that it is only direct adverse representation -- where the husband and wife are actually serving as lawyers for opposing parties -- that is forbidden. Accordingly, Rule 1.8(i) does not prohibit the lawyer from accepting representation of a criminal defendant while her husband is a prosecutor with the Attorney General's office.

Other jurisdictions also have eschewed disqualification of one spouse's firm because the adverse party is represented by the other spouse. Blumenfeld v. Borenstein, Ga. Supr., 276 S.E.2d 607 (1981), holds that absent a showing that special circumstances exist which prevent adequate representation of the client, disqualification based solely on marital "status" is not justified. The court stated that a per se rule requiring mandatory disqualification would effectively create a category of "legal Typhoid Marys", chilling both professional opportunities and personal choices. Cf., Armstrong v. McKelverin, 625 F.2d 433 (2d Cir. 1980).

The rejection of a broad imputed disqualification for spouses, embodied in Rule 1.8(i), is supported by the commentators and by case law. C.W. Wolfram in Modern-Legal Ethics § 7.6, P. 407-08 (1986), wrote that while there are reasons to apply some kind of imputed disqualification rule to lawyers who are married to each other, there are weighty reasons to apply only minimal disqualification rules. A chief concern of the commentators is that inflexible rules impose a disproportionate burden on women lawyers. Studies have shown that as many as one-half of all married women lawyers are married to lawyers. See C. Epstein, Women In Law 340 (1983). In addition, imputed disqualification might create a disincentive for lawyers to marry one another and would impose serious constraints on the ability of married lawyers to find employment in their profession in the same community.

Other jurisdictions have formulated various guidelines which permit prosecutors to be married to defense attorneys without a breach of either's ethical duties. We believe that the following compilation of these guidelines, if strictly followed, would provide appropriate safeguards.

The lawyer may represent parties in criminal defense where the other spouse is employed by the agency which is prosecuting the case provided that the spouses do not actively participate in the same case in adversarial roles at any time during the proceeding. Rule 1.8(i). Active participation may include:

- (a) Investigation, trial preparation or review or trial or case materials in a matter;
- (b) The exercise of responsibility for any aspect

of the case;

- (c) Knowledge of any confidential matter of the

case; and

- (d) Case supervision by one attorney spouse over

lawyers actively participating in a case in which the other

attorney spouse is litigating.

In addition to the foregoing we believe that additional safeguards would be prudent under the circumstances. The primary safeguard would be the establishment of a "Chinese wall" (also sometimes referred to as "the Cone of Silence") around the nonparticipating spouse which would include:

- (a) Administrative segregation from the case (lawyers or administrative

staff should not discuss any aspect of the case with the spouse and procedures should be in place to ensure that files, documents and other confidential matters are secured from the spouse); and

- (b) Disclosure of the lawyers I relationship to the appropriate parties.

Specifically, the lawyer participating in the program which will result in her being appointed as a criminal defense attorney should ensure that the court is aware that she is married to a prosecutor in the Attorney General's office. Similarly, the husband prosecutor should alert his superiors in the Attorney General's office so that conflicts can be avoided.

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