

**DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS**

**OPINION 1999-2**

**October 27, 1999**

**This opinion is merely advisory and is not binding on  
the inquiring attorney or the Courts or any other tribunal.**

INTRODUCTION

A member of the Delaware Bar (the “attorney”) has requested an opinion from the Committee regarding his firm’s appearance before the attorney’s spouse, a Delaware Judge.

FACTS

The attorney is married to Judge B. Judge B was recently sworn in as a Judge of a Delaware State Court. The inquiring attorney is a partner at a law firm (the “Firm”). The attorney acknowledges that he can not appear before Judge B.

The attorney asks the Committee for its opinion whether the Delaware Rules of Professional Conduct prohibit members or associates of the attorney’s law firm from appearing before Judge B.

CONCLUSION

The other lawyers in the Firm are not precluded by the Delaware Rules of Professional Conduct from appearing before Judge B.

ISSUES PRESENTED

1. To what extent may the Committee address the inquiry?
2. Does Rule 3.5 of the Rules of Professional Conduct prohibit other lawyers in the Firm from appearing before Judge B?
3. Does Rule 8.4 of the Rules of Professional Conduct prohibit other lawyers in the Firm from appearing before Judge B?

## DISCUSSION

### A. What Is the Proper Scope of the Committee’s Opinion in Response to This Inquiry?

The first question is whether the Committee has the jurisdiction to decide such an inquiry, and if so, what is the extent of that jurisdiction. Section 1.01 of the By-Laws for this Committee state:

The purpose of the Committee on Professional Ethics (the “Committee”) shall be to advise members of the Delaware State Bar Association (the “Association”) in respect to professional conduct of lawyers and ethics of the profession; to express its opinion concerning proper professional conduct; to maintain a record of its ethics opinions as a resource to Delaware attorneys; to educate the legal community as to the role of the Committee and as to other resources available for resolving ethical issues; and to perform such other duties as may from time to time be assigned to the Committee by the Association.

Section 6.14 of the State Bar Association’s Charter states:

The Committee on Professional Ethics. The Committee on Professional Ethics shall:

- (a) Propose to the Executive Committee for its review and adoption standards of ethics and conduct in the practice of the law and methods for effective enforcement thereof.
- (b) Upon request, advise members of the Association in respect to professional conduct of lawyers and ethics of the profession.
- (c) Be authorized, when consulted by any member of the Bar or by any officer or committee of the Association, to express its opinion concerning proper professional or judicial conduct, but these opinions shall not deal with questions of judicial decisions or judicial discretion and shall not be given until considered by the Committee and approved by the majority of all members thereof.

Delaware Judges are subject to the Delaware Judges’ Code of Judicial Conduct (“Judicial Code”). The Judicial Code contains seven Canons setting normative guidelines for judicial conduct.

Applying section 1.01 and 6.14 as stated above, and in recognition of the Judicial Code, the

Committee believes it may and should opine on whether the Rules of Professional Conduct prohibit members or associates of the attorney's law firm from appearing before Judge B.

The Committee further believes that it may not address whether normative guidelines, such as those contained in the Judicial Code or contained in other sources of authority applicable to judicial conduct, prohibit or limit the ability of Judge B to hear matters involving lawyers from the inquiring attorney's law firm.

B. Rule 3.5 Does Not Prohibit Lawyers in the Firm from Appearing Before Judge B.

No Rule directly addresses whether other lawyers in the attorney's firm may appear before the attorney's spouse, Judge B. One Rule, however, refers to a lawyer's conduct before a tribunal, Rule 3.5. This rule states as follows:

**Impartiality and decorum of the tribunal.**

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law; or
- (c) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct which is degrading to a tribunal.

This Rule certainly prohibits the attorney from communicating with the attorney's spouse about any matter in which the attorney's firm is involved that is or might be before Judge B. This rule does not by itself prohibit other lawyers in the Firm from appearing before Judge B.

C. Rule 8.4(e) and Rule 8.4(f) Do Not Prohibit Lawyers in the Firm from Appearing Before Judge B.

Rule 8.4(e) states:

**Misconduct.**

It is a professional misconduct for a lawyer to:

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- (e) state or imply an ability to influence improperly a government agency or official; ...

This Rule prohibits the attorney or others in the attorney's firm from stating or implying an ability to influence Judge B, but does not otherwise prohibit the other lawyers in the Firm from appearing before Judge B.

Rule 8.4(f) states:

**Misconduct.**

It is a professional misconduct for a lawyer to:

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(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Rule 8.4(f) explicitly refers to “applicable rules of judicial conduct,” which includes the aforementioned Judicial Code.

Canon 3.C of the Judicial Code states in part:

Disqualification: (1) A judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might be reasonably questioned, including but not limited to instances where:

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(d) The judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge’s knowledge likely to be a material witness in the proceedings.

The Committee concludes that Canon 3.C(1)(d)(ii), read in conjunction with Rule 8.4(f) prohibits the attorney from appearing before Judge B, a conclusion to which the attorney stipulates.

The Committee is aware that certain types of “conflicts” are imputed to other lawyers in a firm by operation of Rule 1.10. The Committee, however, does not believe that Rule 1.10, by its language or underlying policies, operates to prohibit other lawyers in the attorney’s firm from appearing before Judge B merely because Canon 3.C(1)(d)(ii), read in conjunction with Rule 8.4(f) prohibits the attorney from appearing before Judge B.

The question remains whether the other “instances” stated in the other subsections of Canon 3.C.(1)(d), read in conjunction with Rule 8.4(f), prohibits the other lawyers in the Firm from appearing before Judge B. The Committee believes that application of those subsections to determine whether “the judge’s impartiality might reasonably be questioned” requires the type of normative analysis in which this Committee may not engage. Thus, to the extent of the Committee’s authority to opine on the attorney’s inquiry, the other lawyers in the Firm are not prohibited from appearing before Judge B.

D. Further Discussion

Opinions from other State Ethics Committees have addressed the same or similar inquiry presented by the attorney. Direct comparison with those opinions from other States is complicated by the fact that the Committee in that State may have been free to apply normative guidelines contained in the applicable Judicial Code, or may have applied the Code of Professional Responsibility as opposed to a version of the Model Rules.

For example, Virginia Ethics Opinion 624 (Nov. 13, 1984) (the “Virginia Opinion”) addressed the same inquiry as is presented here. The Virginia Opinion applied the applicable Code of Professional Responsibility, including DR 8-101, and concluded that where a member of a firm was married to a Judge, other lawyers in the firm could appear before that Judge. The Virginia Opinion did impose certain restrictions on the member of the firm: (1) that she not inspect files of cases assigned to her spouse or discuss them with him; and (2) that she not discuss with others in her firm cases assigned to her spouse. The Virginia Opinion imposed these restrictions to prohibit the member of the firm from engaging in conduct which creates the appearance of impropriety. In Delaware, the “appearance of impropriety” standard no longer exists in the Rules. The Committee does not view the Virginia Opinion as inconsistent with the result reached here.

The Committee has located one State Ethics opinion that applies a version of the Model Rules to the same inquiry as presented to this Committee. Pennsylvania Ethics Informal Opinion 92-177 (Dec. 10, 1992) (discussing Rules 1.8(i), 1.10, & 3.5). That opinion concluded that lawyers associated with a lawyer whose spouse is a Judge are not per se prohibited from appearing before that Judge. That opinion was careful to observe that it was not addressing the potential conflicts that the Judge might face, as those issues were beyond the strict purview of the Pennsylvania Bar Association Committee on Legal Ethics (as they are before this Committee). The opinion further commented, that the Judge might deem it appropriate to recuse herself due to the benefit of shared fees that would inhere to the spouse-lawyer.

## CONCLUSION

Apart from the restrictions imposed by Rule 3.5 and Rule 8.4, the Rules of Professional Conduct do not themselves prohibit other lawyers in the attorney's law firm from appearing before Judge B.

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Two members of the Committee dissented from this opinion.