

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105  
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

## **OPINION 93-7**

Issued August 13, 1993

*Withdrawn by Adv. Op. 2022-06*

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

**SYLLABUS:** An assistant county prosecutor and a criminal defense attorney who are spouses may not represent opposing parties in a criminal matter, except upon consent after disclosure of the spousal relationship and consultation concerning its implications. The disclosure for the criminal defense attorney would be to the client for the purpose of obtaining consent. The disclosure of the assistant county prosecutor would be to the supervising attorney and if possible placement on the record of the legal proceeding.

The law partners or associates of an attorney whose spouse is an assistant county prosecutor may represent criminal defendants prosecuted by the spouse or by other attorneys in the county prosecutor's office, however, consent after disclosure of the spousal relationship is required only if either the assistant prosecutor or the assistant prosecutor's spouse is participating in the representation. Where neither spouse is involved in the representation, no disclosure or consent is required. The disclosure for the criminal defense attorney would be to the client for the purpose of obtaining consent. The disclosure of the assistant county prosecutor would be to the supervising attorney and if possible placement on the record of the legal proceeding.

A lawyer whose spouse is an assistant county prosecutor may represent criminal defendants prosecuted by other attorneys in the county prosecutor's office.

**OPINION:** A law firm engaged in criminal defense work and other areas of law is interested in hiring an associate whose spouse is an assistant county prosecutor. The spousal relationship raises several questions regarding potential conflicts of interest.

1. Is it proper for an assistant county prosecutor and a criminal defense attorney who are spouses to represent opposing parties?
2. Is it proper for the law partners or associates of an attorney whose spouse is an assistant county prosecutor to represent criminal defendants prosecuted by the spouse or other attorneys in the county prosecutor's office?

3. Is it proper for an attorney whose spouse is an assistant county prosecutor to represent criminal defendants prosecuted by other attorneys in the county prosecutor's office?

Question One

The Code of Professional Responsibility does not expressly address the issue of spousal representation of opposing parties, but such conduct is governed through several general rules within the Code. Most relevant is Disciplinary Rule 5-101 (A) which is set forth below.

DR 5-101(A) Except with the consent of his [her] client after full disclosure, a lawyer shall not accept employment if the exercise of his [her] professional judgment on behalf of his [her] client will be or reasonably may be affected by his [her] own financial, business, property, or personal interests.

Also relevant are Disciplinary Rule 4-101 (B), prohibiting a lawyer from revealing or misusing a confidence or secret of a client; Canon 7, requiring a lawyer to represent a client zealously within the bounds of the law; and Canon 9, requiring a lawyer to avoid even the appearance of professional impropriety.

In comparison, the ABA Model Rules of Professional Conduct, not adopted in this state, expressly regulate spousal representation of opposing parties in Model Rule 1.8 (i): "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." Thus, in rule based states, the representation of opposing parties by spouses is generally permitted. See e.g., Connecticut Bar Ass'n 86-5 (1986); Maryland State Bar Ass'n, Op. 88-2 (1987); Michigan State Bar, Op. R-3 (1989); Rhode Island SupCt Ethics Advisory Panel, Op. 91-19 (1991).

However, even among rule based states, there exists some authority advising against opposing representation by a public defender or criminal defense attorney and a government prosecuting attorney who are spouses. See e.g., Connecticut Bar Ass'n, Op. 86-15 (1986); Delaware State Bar Ass'n, Op.1989-5 (undated); Maryland State Bar Ass'n, Op. 90-3 (1990); State Bar of Wisconsin, Op. E-89-3 (1989) (permitting it but suggesting it is not a prudent practice).

Among states interpreting ethical standards based on the Model Code, the issue of whether married lawyers must disqualify themselves from representing parties with adverse interests is unsettled. In some states the view is that representation of opposing parties by spouses is improper. See e.g., Alabama State Bar, Ops. 84-63 (1984) and 89-10 (1989); Illinois State Bar Ass'n, Op. 846 (1984); Virginia State Bar, Ops. 780, 860, 861 (1986).

In other states the interpretation of the code is that representation of opposing parties by spouses is permitted with some restrictions. See e.g., Colorado Bar Ass'n, Op. 75 (1987) (may in limited circumstances, but may not defend criminal cases prosecuted by spouse); Nebraska State Bar Ass'n, Op. 86-5(undated) (may so long as clients are informed of the familial relationship and they consent to the representation); Massachusetts Bar Ass'n, Op. 81-8 (1981) (no per se prohibition against simultaneous representation of adverse parties by attorneys who are married); Mississippi State Bar, Op. 112 (1986) (may represent opposing parties in a matter unless one spouse represents a public body or institution); State Bar of New Mexico, Op. 1983-6 (1983) (lawyer employed by state agency may not represent the agency in controversy where the lawyer's spouse represents the adverse party); Oregon State Bar, Op. 502 (1984) (must have client consent after full disclosure); SupCt of Tennessee Bd of Professional Responsibility, Op. 82-F-31 (1982) (must observe all disciplinary rules including preservation of confidence, avoidance of differing interests, and diligence).

The interpretation given by the American Bar Association Standing Committee on Ethics and Professional Responsibility is that “[n]o disciplinary rule [within the Model Code of Professional Responsibility] expressly requires a lawyer to decline employment if a husband, wife, son, daughter, brother, father, or other close relative represents the opposing party in negotiation or litigation.” ABA, Formal Op. 340 (1975). According to the ABA, the possibility of a violation of DR 5-101, in particular exists. The ABA committee suggests that a lawyer who is married to a lawyer must be careful to observe the suggestions and requirements of EC 4-1, EC 4-5, EC 5-1, EC 5-2, EC 5-3, EC 5-7, DR 4-101, and DR 5-101. The ABA committee also suggests that a lawyer married to opposing counsel should advise the client and let the client make the decision as to employment. Id.

This Board's view is that there are reasons to support a conclusion that it is improper for spouses who are lawyers to represent opposing parties in a criminal matter without proper consent after full disclosure. First, there is a hybrid of financial, business, property, or personal interests within a spousal relationship that reasonably might affect the exercise of a lawyer's judgment on behalf of a client in violation of Disciplinary Rule 5-101 (A). Second, there is a presumption of

shared confidences between a husband and wife that creates a substantial risk of inadvertent breach of the duty to preserve client confidences and secrets under Disciplinary Rule 4-101. Third, the duty of loyalty to a spouse may conflict with the duty of zealous representation of a client as required by Canon 7. Fourth, without consent and disclosure the representation of opposing parties by spouses could create an appearance of impropriety under Canon 9.

Nevertheless, the Code puts a high premium on allowing clients to select the lawyer of their choice. Thus, this Board advises that an assistant county prosecutor and a criminal defense attorney who are spouses may not represent opposing parties in a criminal matter, except upon consent after disclosure of the spousal relationship and consultation concerning its implications. The disclosure for the criminal defense attorney would be to the client for the purpose of obtaining consent. The disclosure of the assistant county prosecutor would be to the supervising attorney and if possible placement on the record of the legal proceeding.

For related opinions see Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 91-22 (1991) (addressing representation of opposing parties by a prosecuting attorney and a criminal defense attorney who are siblings and past law partners) and Ohio State Bar Ass'n, Op. 87-5 (1987) (addressing representation of opposing parties by an assistant prosecutor and a criminal defense attorney who are brothers).

### Question 2

Is it proper for the law partners or associates of an attorney whose spouse is an assistant county prosecutor to represent criminal defendants prosecuted by the spouse or other attorneys in the county prosecutor's office?

To answer this question and the following question, the Board must consider whether the disqualification of attorneys based on marital status should be imputed to colleagues.

In some states interpreting standards based on the Model Code, a lawyer is permitted to represent a client against an opposing party represented by the spouse of another lawyer in the same law firm or organization. See e.g., Colorado Bar Ass'n, Op. 75 (1987); Massachusetts Bar Ass'n, Op. 81-8 (1981); Virginia State Bar, Op. 951 (1987). But see Mississippi State Bar, Op. 111 (undated) (a lawyer who is an associate of the spouse of an assistant prosecutor may not represent defendant in criminal cases in district in which the prosecutor works). It is also considered proper among rule based states. See e.g., Bd. Of Overseers of the Bar of Maine, Op. 42 (1983), New Jersey SupCt Advisory Comm on Professional Ethics, Op. 600 (1987), Rhode Island SupCt Ethics Advisory Panel, Op. 91-19 (1991), State Bar of Wisconsin, Op. E-89-3 (1989).

Disciplinary Rule 5-105 is sometimes cited in the analysis of whether disqualification based on a spousal relationship should be imputed to colleagues. However, that rule by its language applies to potential conflicts among multiple clients. To illustrate this point, the rule is set forth below.

DR 5-105 REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF **ANOTHER CLIENT** MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue **multiple employment** if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent **multiple clients** if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment **under DR 5-105**, no partner or associate of his or his firm may accept or continue such employment. (Emphasis added).

Nevertheless, the ABA has applied the rule of imputed disqualification to an entire firm when an attorney is disqualified based on a spousal relationship with opposing counsel. See ABA, Formal Op. 340 (1975). See also Tennessee SupCt Bd of Professional Responsibility, Op. 82-F-31 (1982). In comparison, the Comment to ABA Model Rule 1.8 (i) states that the disqualification based on spousal relationship is personal and is not imputed to members of firms with whom the lawyers are associated.

Further, it is unsettled as to whether the rule of imputed disqualification applies only to lawyers in firms or to attorneys in other organizations. The ABA construes DR 5-105 (D) to be inapplicable to other government lawyers associated with a government lawyer disqualified by reason of DR 4-101, DR 5-105, DR 9-101 (B) or similar disciplinary rules. ABA, Formal Op. 342 (1975). In contrast, this Board has applied the rule of imputed disqualification to government attorneys when the conflict involved the representation of multiple clients. Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 88-008 (1988).

Nevertheless, this Board does not feel bound to rigidly apply the rule of imputed disqualification when the disqualification is based upon a spousal relationship, since in our view DR 5-105 (D) does not govern the question presented. Disciplinary Rule 5-105 (D) by its language is a rule of imputed disqualification governing representation of multiple clients. The issue of disqualification of an attorney based on a spousal relationship to opposing counsel is distinct from the issue of disqualification of an attorney based on conflicting interests between multiple clients.

The ethical concerns regarding spouses representing opposing parties arise from the marital relationship. The shared financial, business, property, or personal interests, the presumption of marital confidences, the appearance of impropriety, and the duty of spousal loyalty are inherent in spousal representation of opposing parties. However, these concerns are all relatively remote when the representation involves an attorney whose spouse is in the same firm or organization as the opposing counsel.

In conclusion, this Board's view is that the disqualification of lawyers based on a spousal relationship with opposing counsel is of such a personal nature that it should not be rigidly imputed to other attorneys within the firms or offices. To do so would serve no purpose. Thus, the Board advises that it is not improper for the law partners or associates of an attorney whose spouse is an assistant county prosecutor to represent criminal defendants prosecuted by the spouse or by other attorneys in the county prosecutor's office, however, consent after disclosure and consultation is required only if either the assistant prosecutor or the assistant prosecutor's spouse is participating in the representation. Where neither spouse is involved in the representation, no disclosure or consent is required. The disclosure for the criminal defense attorneys would be to the client for the purpose of obtaining consent. The disclosure of the assistant county prosecutor would be to the supervising attorney and if possible placement on the record of the legal proceeding.

Question 3

Is it proper for a lawyer whose spouse is an assistant county prosecutor to represent criminal defendants prosecuted by other attorneys in the county prosecutor's office?

Once again, there is authority to support contrasting views. For example, one state advises that it is not proper for an attorney who is married to an assistant district attorney to represent defendants against felony charges in the district. See, Mississippi State Bar, Op. 140 (1985). Other states permit representation of criminal defendants by a spouse of an assistant prosecuting attorney. See e.g., Colorado Bar Ass'n, Op. 75 (1987), Connecticut Bar Ass'n, Op. 86-15 (1986); Maryland State Bar Ass'n, Op. 85-24 (1984), Maine Bd of Overseers of the Bar, Op. 70 (1986), New Jersey SupCt Advisory Comm on Professional Ethics, Op. 604 (1987); Virginia State Bar, Ops. 185 (1980) and 780 (1986).

Nevertheless, having concluded that disqualification of a lawyer based on a spousal relationship is personal and should not rigidly be imputed to members of the firms or offices with whom the lawyers are associated, this Board easily reaches a conclusion as to Question Three. This Board advises that a lawyer whose spouse is an assistant county prosecutor may represent criminal defendants prosecuted by other attorneys in the county prosecutor's office.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**