
E-80-6 Husband/wife conflict of interest

Question

Attorneys A and B are husband and wife. Attorney A is employed as assistant corporation counsel in _____ County. Attorney B is employed by a private law firm in the same county. In which of the following situations, if any, would representation be improper?

1. One lawyer-spouse representing interests and appearing against the other lawyer-spouse
2. The county employed lawyer-spouse appearing and representing interests directly against the office of the private practice lawyer-spouse (another attorney in that office)
3. A private practice lawyer-spouse appearing and representing interests directly against the county office of the county employed lawyer-spouse
4. Another attorney in the office of the private practice lawyer-spouse appearing against another attorney in the office of the county employed lawyer-spouse

Opinion

For the reasons hereinafter set forth, it is the committee's opinion that only the first of the situations enumerated above is a per se violation of the Code of Professional Responsibility.

In reviewing the Code of Professional Responsibility and other pertinent Bar opinions, we find that there are no express prohibitions against the conduct enumerated above, i.e., spouse appearing opposite spouse. The committee does note, however, that the Supreme Court Rules present ethical concerns, which must be addressed by all attorneys and which must be given special attention in situations similar to those being considered here. It is the committee's position that these concerns are, as are so many aspects of our profession, usually best resolved on a case-by-case basis and by individual applications of the Ethical Considerations and Disciplinary Rules. Nevertheless, it is the committee's opinion that the first situation enumerated above, while not explicitly prohibited

by the Code of Professional Responsibility, falls within the penumbras of several Ethical Considerations and, as a result, is implicitly prohibited in all circumstances.

In any situation where lawyer-spouse would appear opposite lawyer-spouse, the committee believe the intent, if not the letter of the following Ethical Considerations would almost always be jeopardized by the lawyers involved:

SCR 20.02(1) “Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.”

SCR 20.21(1) “A client must feel free to discuss whatever he or she wishes with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his or her client.”

SCR 20.23(1) “The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties.”

SCR 20.23(2)(a) “A lawyer should not accept proffered employment if his or her personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.”

SCR 20.34(1)(a) “The duty of a lawyer, both to his or her client and to the legal system, is to represent his or her client zealously within the bounds of the law. . . .”

SCR 20.48(6) “Every lawyer owes a solemn duty to uphold the integrity and honor of his or her profession; . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety.”

In ABA Formal Opinion 340 (1975) the committee stated in part:

It is not necessarily improper for husband-and-wife lawyers who are practicing in different offices or firms to represent differing interests. No disciplinary rule 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. Likewise, it is not necessarily improper for a law firm having a married partner or associate to represent clients whose interests are opposed to those of other clients represented by another law firm with which the married lawyer’s spouse is associated as a lawyer.

However, the committee hastens to add:

And it must also be recognized that the relationship of husband and wife is so close that the possibility of inadvertent breach of confidence or the unavoidable receipt of information concerning the client by the spouse other than the one who represents the client (for example, information contained in a telephone message left for the lawyers at home) is substantial. Because of the closeness of the lawyer husband-and-wife relationship, a lawyer who is married to a lawyer must be particularly 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.

In connection with this, we wish to call your attention to SCR 20.28—"Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer." Paragraph (4) of SCR 20.28 states: "If a lawyer is required to decline employment or to withdraw from employment under this rule, no partner or associate of the lawyer or his or her firm may accept or continue that employment.

The committee finds one further problem with your question: your question is limited to the facts in which Attorney A is an assistant corporation counsel and Attorney B is employed by a private law firm. However, a different set of facts, such as: Attorney A is a partner, associate, or employee of Law Firm A and Attorney B is a partner, associate, or employee of Law Firm B, might bring into play the following paragraph of ABA Formal Opinion 340 wherein it is stated:

If the interest of one of the marriage partners as an attorney for an opposing party creates a financial or personal interest that reasonably might affect the ability of a lawyer to represent fully his or her client with undivided loyalty and free exercise of professional judgement, the employment must be declined. We cannot assume, however, that certain facts, such as a fee being contingent or varying according to results obtained, necessarily will involve a violation of DR 5-101(A). In some instances the interest of one spouse in the other's income resulting from a particular fee may be such that professional judgement may be affected, while in other situations, it may not be; the existence of such interest is a fact determination to be made in each individual case. Wherever one spouse is disqualified under DR 5-101(A), the entire firm is disqualified under DR 5-105(D). (Now SCR 20.24(1) and SCR 20.28(4), respectively.)

The foregoing is further limited when a lawyer is a state employee, since, under a number of opinions from other states, a state cannot give the consent to representation permitted by SCR 20.28(3), and the committee would add that it is its opinion that neither may any instrumentality of the state give such consent.

Thus, the committee wishes to summarize its opinion as follows:

(1) It is unethical for one lawyer-spouse to represent interests and appear against the other lawyer-spouse.

(2) Unless the facts and circumstances are such that prohibition is required by SCR 20.24, SCR 20.28, and SCR 20.48, or either or any of them, neither the lawyer-spouse whose spouse in turn is a lawyer associated with another local law firm need fear consistent or mandatory disqualification when the two firms represent opposing interests. However, the committee does caution lawyer-spouses and their respective employers to be solicitously mindful of the possible ethical concerns and considerations which might arise via the increasingly prevalent trend of lawyers marrying lawyers. The committee also quotes, with approval, the closing sentence in ABA Formal Opinion 340: “Marriage partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by means of the marital relationship.”