

Nebraska Ethics Advisory Opinion for Lawyers
No. 01-2

THE OPINION OF THE ADVISORY COMMITTEE HAS BEEN REQUESTED CONCERNING A WOMAN BEING CONSIDERED FOR A POSITION WITH THE LANCASTER COUNTY PUBLIC DEFENDER'S OFFICE IN WHICH SHE WOULD WORK ON A PART-TIME, TEMPORARY BASIS HANDLING THE OFFICE'S CIVIL MENTAL HEALTH COMMITMENT DEFENSE WORK, SHE INDICATED THAT FROM TIME TO TIME THE PUBLIC DEFENDER'S OFFICE REFERS CASES TO THE NEBRASKA COMMISSION ON PUBLIC ADVOCACY WHEN A CONFLICT OF INTEREST ARISES WITH THE PUBLIC DEFENDER'S OFFICE HANDLING THE MATTER. SHE INDICATED THAT HER HUSBAND IS CHIEF COUNSEL FOR THE NEBRASKA COMMISSION ON PUBLIC ADVOCACY. HER LETTER GOES ON TO STATE THAT IT IS HER UNDERSTANDING THAT ETHICS OPINION 86-5 ALLOWS A HUSBAND AND WIFE TO SERVE AS ATTORNEYS ON OPPOSING SIDES OF A CASE SO LONG AS THE CONFLICT IS FULLY DISCLOSED AND THE CLIENT WAIVES THE CONFLICT.

Following receipt of her letter, additional information was received from her via a telephone conference. Specifically, the issue was discussed as to whether the mental health commitment cases that she would be working on would be those that would be sent to her husband's office in the event of a conflict. She stated that the mental health cases that she would be handling would not be the type of cases sent to the Commission on Public Advocacy. Therefore, she indicated that she did not foresee any situation in which she and her husband would be on opposing sides of a case. Her work would be limited to civil commitments, and she would not be handling any criminal matters in the Public Defender's Office.

Following that conversation, more information as to the scope of the issue was received from Lancaster County Public Defender Dennis Keefe. According to Keefe, the factual situation on which an opinion is being sought from the Committee is as follows: two co-defendants are eligible for representation by the Public Defender's Office. Because of the applicable ethical rules, the Public Defender's Office could not represent both co-defendants, and one co-defendant would be referred out of the office for representation by the Nebraska Commission on Public Advocacy. The issue is whether any conflicts arise in that situation where one co-defendant is represented by the husband-attorney at the Nebraska Commission on Public Advocacy (or some other attorney from the Commission on Public Advocacy) and where the other co-defendant is represented by a member of the Public Defenders Office. of which wife-attorney would be affiliated.

Issue #1: Where a wife-attorney is employed in some capacity by the Public Defender's Office, may other members of the Public Defender's Office ethically represent a defendant where a co-defendant is concurrently represented by the husband-attorney who is employed by Commission on Public Advocacy?

Issue #2: Where a wife-attorney is employed in some capacity by the Public Defender's Office, may other members of the Public Defender's Office ethically represent a defendant where a co-defendant is concurrently represented by a member of the Commission on Public Advocacy (other than the husband-attorney)?

STATEMENT OF APPLICABLE CANONS, ETHICAL CONSIDERATIONS AND DISCIPLINARY RULES

Canon 5. A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client

DR 5-101. Refusing employment when the interests of the lawyer may impair the lawyer's independent professional judgment.

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

. . . .

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, or any other lawyer affiliated with the lawyer or his or her firm may accept or continue such employment.

Also relevant is Disciplinary Rule 4-101(B), prohibiting a lawyer from reviewing or misusing a confidence or secret of a client. In addition, Canon 7 requires a lawyer to represent a client zealously within the bounds of the law, and Canon 9 requires a lawyer to avoid even the appearance of professional Impropriety.

DISCUSSION

The Committee believes that the 'issue of whether such representation may ethically occur must first be analyzed in terms of the rules regarding spouse versus spouse representation, then by analyzing the issue in terms of husband-attorney vs. wife-attorney's office (where wife is not involved in the representation), and finally by analyzing the issue in terms of husband-attorney's office vs. wife-attorney's office (where neither husband nor wife are involved in representation of either defendant).

1. Spouse Adverse to Spouse

The Committee is aware that under the facts of this particular case, the wife-attorney would never be involved in the representation of a co-defendant of the husband-attorney's client. Her role in the Public Defender's Office will be limited to handling civil mental health commitment hearings. But the first issue in determining whether there is any imputed disqualification to the members of the Public Defender's Office is to first look at whether the wife-attorney herself would be precluded from representing a defendant whose co-defendant is represented by her husband. We conclude, based upon Formal Opinion [78-9](#) and [86-5](#), along with Advisory Committee Opinion Letter 1855-1858 (April 18, 1998), that there would be no per se prohibition against wife-attorney representing a defendant while husband-attorney represents a co-defendant. In Formal Opinion [86-5](#) we said:

It is not per se unethical for attorneys who are married or closely related to represent parties with adverse interests as long as the attorneys make full disclosure to their respective clients and obtain the consent of the clients to the representation. The attorney should carefully examine the situation and one or more of the attorneys should decline employment or withdraw from employment if it reasonably appears that a violation of any attorney's professional responsibilities will occur. Any disqualification of an attorney arising out of a familial relationship is imputed to the attorney's firm.

Hence under [86-5](#), if wife-attorney was disqualified because of the familial relationship, such disqualification would be imputed to the entire Public Defender's Office, unless some other exception applied (as is discussed in Part II of this opinion).

II. Husband-Attorney Adverse to Public Defenders Office (where wife-

attorney not involved in representation)

Because there is no per se prohibition against spouses representing adverse interests, it follows that there would be no per se prohibition against any other member of the Public Defenders Office (i.e. an attorney other than the wife-attorney) representing a defendant where a co-defendant is represented by husband-attorney. The issue becomes then whether each instance of representation of co-defendants would have to be examined to determine whether there would be a conflict if in fact the spouse herself were representing the co-defendant. If no conflict existed, then not only could wife-attorney represent the co-defendant, but so too could the other members of the Public Defender's Office. If it would be determined that a conflict would exist by wife's representation, the issue is then whether that disqualification is imputed to the remainder of the Public Defender's Office. It is the opinion of the Committee that it would be an unnecessary exercise for the Public Defenders Office to determine whether the wife-attorney would have a conflict in representing a co-defendant because 1) the wife here will never be representing a co-defendant and is only handling mental health hearings; and 2) even if the wife-attorney would have a conflict in directly representing the co-defendant, the governmental lawyer exception previously recognized by this Committee would permit the other members of the Public Defender's Office to handle the matter. Stated more simply, it is the opinion of the Committee that the wife-attorney can be screened from all cases in which her husband represents a co-defendant of a client of the Public Defenders Office, rather than requiring the Public Defender's Office to go through the preliminary steps of determining "what-if" the wife-attorney were involved in the case.

ABA Formal Opinion 342 (November 24, 1975) addressed the issue of the governmental lawyer exception to DR 5-105(D), and did so in the context of a government lawyer who has come from private practice. Nevertheless, the pronouncement has applicability here, even though this is not a situation involving a lawyer who has changed employment:

When the Disciplinary Rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) was so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have

the financial interest in the success of departmental representation that is inherent in private practice.

Accordingly, we construed DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar Disciplinary Rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.

This governmental exception was applied by this Committee in Advisory Opinion [93-5](#), wherein we held that, although a county attorney would be disqualified from handling a case where her police officer husband is or may be called as a witness, her exclusion did not extend to the entire office (unless an appearance of impropriety would exist under the facts of a particular case). We recognized that under DR 5-105(D) the disqualification of an attorney affects the eligibility of the firm or office. However, we applied the governmental exception of ABA Formal Opinion 342 and held that the county attorney-spouse's exclusion did not extend to the entire office, unless the appearance of impropriety existed under the facts of a particular case. We held that appropriate measures should be taken to assure that the disqualified attorney was isolated through the use of a screening process commonly known as a "Chinese Wall," which would assure that the disqualified attorney would not be associated with the case in any way.

In Formal Opinion [89-6](#) we again relied on ABA Formal Opinion No. 342 and its governmental lawyer exception to conclude that the disqualification of a deputy county attorney would not be imputed to the other lawyers in his office, unless an appearance of impropriety would be created under the facts of a particular case.

In Advisory Committee Opinion letter 1381-1384 (Jan. 13, 1994), we considered the situation where a member of a County Attorney's Office was married to a district court judge, and addressed the issue of whether the other members of the County Attorney's Office could practice before that judge. Based on ABA Formal Opinion 342, we concluded that the disqualification of the spouse-attorney from appearing in matters conducted by the spouse-judge would not be imputed to the other members of the County Attorney's Office. Hence, any marital conflict was not imputed to the remainder of the office, under the governmental lawyer exception to DR 5-105(D).

In reaching our conclusion that the wife-attorney here may, pursuant to the governmental lawyer exception to DR 5-105(D), be screened from any contact with, or discussion about, cases in which the Public Defender's Office is representing a client who is a co-defendant of husband -attorney, we are mindful of, and do recognize that, Formal Opinion [94-4](#) explicitly rejected the use of "Chinese Walls." It did so in situations involving an attorney whose change of employment causes him or her to "switch sides." The rejection of "Chinese Walls" was made applicable to private lawyers and governmental lawyers alike. The issue is whether the prohibition of the use of Chinese Walls was meant to extend to all potential conflict situations, or just to situations where a change of employment has caused an attorney to switch sides. Neither the Nebraska Supreme Court nor this Committee has explicitly answered this question.

Formal Opinion [94-4](#) arose out of the Nebraska Supreme Court's holding in State of Nebraska ex rel. FirstTier Bank, N.A. v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993). Our reading of Buckley leads us to the conclusion that the court's disapproval of the use of Chinese Walls was limited to situations where an attorney's change of employment causes him or her to switch sides of a case. This Committee believes that the decision in Buckley, and our Formal Opinion [94-4](#), should not be read so broadly so as to prohibit the use of Chinese Walls in all instances. The Committee believes that the present situation, which does not involve the switching of sides or changing of employment, presents a situation where the use of a Chinese Wall would be appropriate. We believe that the governmental exception to imputed disqualification, while no longer available under Formal Opinion [94-4](#) in a situation where an attorney switches sides, should not necessarily be unavailable in all instances, and that application of the governmental exception is appropriate under the facts of this particular situation. Our conclusion is bolstered by the fact Opinion [94-4](#) rescinded only Formal Opinion [93-2](#) (which also dealt with an attorney's change of employment), but did not rescind Formal Opinions [93-5](#) and [89-6](#) (discussed above). Therefore those Formal Opinions remain in effect.

Assuming that the necessary screening procedures of a "Chinese Wall" have been implemented at the Public Defender's Office, the next issue is whether disclosure to, and consent from, each of the co-defendants is necessary. On the one hand, the Committee believes that if there is no imputed disqualification to the other members of the Public Defender's Office, disclosure and consent would not be necessary. However, the Committee believes that because the cases involved herein are criminal cases, in which defendants' additional rights not possessed by clients in civil matters, including the effective assistance of counsel, that it would be necessary and prudent to make full disclosure of the spousal relationship to each of the

clients and to obtain the client's consent. Such conclusion is supported by decisions from ethics committees in other states. For instance, Opinion 93-7 of the Ohio Supreme Court's Board of Commissioners on Grievance and Discipline stated:

[T]his 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 firm for 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 prosecutors 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.

Formal Opinion 75 of the Ethics Committee of the Colorado Bar Association, in addressing the issue of spouse versus uninvolved spouse's office, concluded:

To resolve the Canon 5 problems presented in this situation, the Committee believes that the participating spouse who discovers that he or she represents a client adverse to a client represented by the uninvolved spouse's organization is obliged to disclose that fact to his or her own client and to the opposing organization. The organization, in turn, must disclose the fact to its own client. Each client, having been fully informed, should be permitted to decide whether to retain or continue with the lawyer or law firm.

The Colorado Ethics Committee went on to state:

Accused persons in criminal cases are afforded a panoply of rights by State and Federal Constitutions and Statutes, including the right to effective assistance of counsel. While the relationship between these rights and ethical precepts is beyond the scope of an ethics opinion, the Committee believes it particularly prudent and appropriate in criminal cases that a private firm contacted by an accused who is being prosecuted or investigated by a prosecutor married to a lawyer in the firm should always make full disclosure of the spousal relationship to

the client and permit the client to decide whether to commence or continue the relationship.

Therefore, because the representation of the clients herein involves criminal charges, we believe it necessary that a disclosure be made to each of the co-defendants and their consent be obtained. We make no pronouncement at this time as to whether such rule would also be necessary in a civil case involving private law firms.

III. Husband-Attorney's is Adverse to Wife-Attorney's Office (where neither spouse involved in the representation)

The final issue that arises is whether disclosure to, and consent from, clients need be made if neither husband-attorney nor wife-attorney are involved in the representation of the co-defendant. In other words, must consent and disclosure be made if a member of the Public Defender's Office represents one defendant and a member of the Nebraska Commission on Public Advocacy represents the co-defendant, but neither husband-attorney nor wife-attorney are involved in the representation of either defendant- In such a situation, where neither spouse is involved in the representation, we conclude that no disclosure or consent is required, provided that the necessary screening procedures of "Chinese Walls" are implemented by both offices. We adopt the reasoning contained in Formal Opinion No. 75 of the Ethics Committee of the Colorado Bar Association, wherein it was held:

The situation where legal organizations with which the spouse-lawyers are affiliated represent opposing interests, but neither spouse is directly involved, presents only remote and insubstantial possibilities of ethical improprieties, provided certain common-sense precautions are observed by the organizations and the members of the organizations. The inadvertent disclosure of confidences prohibited by Canon 4 will be minimal 1) if the involved members of both organizations scrupulously refrain from discussing the matter with the respective spouses and 2) if the organizations institute procedures to ensure that files, documents, and other confidential information are screened from the lawyer-spouses. For example, files and similar materials might be marked with a warning to serve as a constant reminder that their contents should not be shared with the spouses and that lawyers handling the case should remain sensitive to the problem.

Canon 5 problems are likewise remote where neither spouse is directly involved in the contested matter, because the lawyers

performing professional obligations on behalf of the clients do not themselves have any "personal" interest which might conflict with that of the clients.

Finally, the Committee believes that there is ordinarily no appearance of impropriety in the organization's representation of opposing interests, even where one of the organizations is a public prosecutors office or other group of governmental lawyers. So long as 1) the lawyers handling the contested matter do not discuss the matter with the spouses; 2) there are in place other procedures (discussed above) ensuring that confidential information is protected; and 3) neither spouse has a professional responsibility for representation of the clients in the matter or is in a position to influence handling of the matter, then, although "there are always those who will find a hint of impropriety in any situation involving dual attorney-spouses, it does not appear that such would be the reaction of any significant portion of the bar or public at large, if informed of the circumstances."

CONCLUSION

Approval is given to the use of a Chinese Wall to screen the attorney-wife from any involvement with cases handled by the Public Defender's Office in which a co-defendant is represented by the husband-attorney. Disclosure must be given and consent must be obtained where husband-attorney is representing one defendant and a member of the Public Defender's Office (other than the wife-attorney) is representing a co-defendant. The Committee concludes that if a member of the Public Defenders Office (other than the wife-attorney) is representing a defendant, while a member of the Nebraska Commission on Public Advocacy (other than the husband-attorney) is representing the other co-defendant, then no disclosure and consent need be given, provided that appropriate screening measures are implemented.