

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-323
Issued: September 1987

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Background: An attorney who is a partner in Firm X is married to an attorney in Firm Y. Both firms follow a general policy of not having their attorney work on a matter in which the attorney's spouse is involved. Nevertheless, a variety of situations have arisen, and might arise in the future, involving such "spousal conflicts". Accordingly, the following questions have been posed to the Committee.

Question 1: Is it necessary for either firm to disclose to a client that the spouse of one of their attorneys is employed by the firm retained by the client's opponent, when both of the spouses are working on the matter?

Answer 1: Yes.

Question 2: Is the answer the same when only one of the spouses is working on the matter?

Answer 2: Yes.

Question 3: Is the answer the same when neither spouse is working on the matter?

Answer 3: No, with a caveat.

References: ABA Formal Opinion 340 (1975); KBA Ethics Opinion 206 (1979); Proposed Model Rule 1.8(i); Blumenfeld v. Borenstein, 247 Ga. 406, 276 S.E. 2d 607 (1981); G. Hazard and W. Hodes, The Law of Lawyering 171 (1985).

OPINION

To some extent these questions were addressed in KBA E-206 and ABA OP. 340, both of which cited the Ethical Considerations of the Code, and reiterated the general principle that a lawyer should advise a client of all circumstances that might cause the client to question the undivided loyalty of the law firm and let the client make the decision as to the firm's employment in the matter.

While so-called "spousal conflicts" are not explicitly addressed in the Disciplinary Rules, the above described scenarios may give rise to a suggestion that the firms' ability to adequately

represent and safeguard their clients' interests may be materially limited. See DR 5-101 (lawyer's personal interests in conflict with client interests) and DR 4-101 (protection of the confidences and secrets of the client). On the other hand, it has been recognized that disqualification should not turn on "status" alone, and that the rules of discipline should not be applied in a manner that would necessarily inhibit a lawyer's entry into practice. Blumenfeld v. Borenstein, 247 Ga. 406, 276 S.E.2d 607 (1981).

All of these considerations were before the ABA House of Delegates when Proposed Model Rule 1.8(i) was adopted by that body. Model Rule 1.8(i) is a rule of discipline, and was drafted as narrowly as possible. As Comment (5) to that Rule points out, discipline or disqualification is appropriate when closely related lawyers are personally representing clients whose interests are directly adverse, unless client consent has been secured after consultation. On the other hand, the Model Rules do not impute the personal disqualification of either spouse to his or her firm. In addition, the Rule and Comments indicate that scenarios other than "head-to-head" representation may present risks that the representation of one or both of the clients may be "materially limited". In such situations prudence would ordinarily dictate that the counseled consent of the clients be sought. *See* Model Rule 1.7(b) (the affected lawyers must reasonably believe that the representation of the client(s) will not be materially limited, and secure the consent of the client after consultation).

Taking into consideration our earlier opinion under the Code, ABA Op. 340, and the interests analysis that led to Proposed Model Rule 1.8(i), the Committee concludes that the answers to Questions 1 and 2 above are "yes". With respect to Question 3, we believe that disclosure is not mandatory in all circumstances, but should instead rest within the informed discretion of the firm, with the caveat that disclosure may be the prudent course. *Cf.* G. Hazard and W. Hodes, The Law of Lawyering 171 (1985).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.