

Ethics Opinion

950721

FACTS: Attorney's spouse has been hired as a full time deputy sheriff. Attorney is in a two person firm that does criminal defense work. The attorney has also been asked to act as Judge Pro Temp when the local Justice of the Peace is absent.

QUESTIONS PRESENTED:

1. Can a law firm provide criminal defense representation when a spouse of an attorney in the firm is employed as a deputy sheriff in the same jurisdiction?
2. Can an attorney whose spouse is a deputy sheriff serve as Judge Pro Temp in the same jurisdiction?

SHORT ANSWERS:

1. Yes, if the lawyer reasonably believes that the client in question will not be adversely affected; and the client consents after full disclosure and consultation.
2. Yes, but only in actions which do not involve counsel's wife or the sheriff's office.

ISSUE 1. Criminal defense representation may be provided by the attorney upon satisfaction of two conditions: 1. That the attorney reasonably believes the purported criminal defendant client's interests will not be adversely affected, and 2. That the client is fully informed as to the nature and extent of the attorney's relationship with the sheriff's department and consents after the consultation.

The controlling Rule of Professional Conduct is 1.7(b), which states in pertinent part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and*
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.*

As to the first condition, the Comments to the Model Rules advise a lawyer to do a self-assessment of the conflict. The lawyer should not proceed with a representation, even with client consent, "...when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances..." RPC 1.7, comment 5. The critical area of inquiry in the self-assessment is the likelihood that a conflict will develop and, if it does, whether it will materially interfere with the lawyer's independent professional judgment. Loyalty to the client

can be impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Consideration also should be given to whether the client wishes to accommodate the other interest involved. RPC, comment 4.

The second condition necessary for curing an otherwise impermissible conflict is that the client must consent after consultation. "Consultation" includes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. Counsel must advise their clients of all circumstances that might cause them to question the undivided loyalty which is offered to the clients and allow the clients to make the decision as to their choice of counsel. So long as the client still desires the services of the attorney and the attorney does not encounter any factor which might affect his ability to represent the client, with undivided loyalty and free exercise of professional judgment, the representation would be permissible.

ISSUE 2. An attorney whose spouse is a deputy sheriff may act as Judge Pro Temp, however, only in those matters that do not involve either the spouse or the sheriff's office. The reason for the restriction is stated simply in Ethics Opinion 881130:

"in the United States, where the stability of the courts - and for that matter, all the departments of government - rests upon the approval of the populace, it is essential that the system for dispensing justice be so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the democracy to a great extent depends upon the maintenance of such a justice system, pure and unsullied. It cannot be so maintained unless the conduct and motives of the members of the legal profession are such, and appear to be such, as to merit the approval of all."

These principles, though stated in the context of prosecutorial conflict, apply to the facts before us, finding parallel considerations in the following quoted rules contained in the Canons of Judicial Ethics:

Rule 13: Kinship or Influence. A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

Rule 24: Inconsistent Obligations. A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

Rule 31: Private Law Practice. The justices of [the Supreme Court] and the district judges are forbidden to practice law. In justice and police courts where it is permitted one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

Rule 33: Social Relations. *It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.*

The taint of potential for conflict in the scenario described is too great to overcome. In order to avoid all appearance of impropriety, the attorney in his capacity as Judge Pro Temp should excuse himself from any action involving not only his spouse, but the sheriff's office.

THIS OPINION IS ADVISORY ONLY