ISBA Advisory Opinion on Professional Conduct

ILLINOIS STATE BAR ASSOCIATION

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4, 1.7 and 1.9. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 90-24
March 9, 1991

Topic: Conflicts of Interest - Married Lawyers

Digest: Marriage relationship does not per se disqualify spouses from representing differing client interests.

Ref.: 1990 Illinois Rules of Professional Conduct, Rules 1.4, 1.7(b) and 1.9(a)
ISBA Opinion Nos. 783 and 85-8

FACTS

A married couple were both members of a law firm which represented Cities A and B. One spouse who formerly prosecuted ordinance violations for City A is now a full time Assistant Public Defender. The other spouse continues to handle prosecutions for Cities A and B on rare occasions as a member of the law firm.

The Assistant Public Defender defends felony cases prosecuted by the State's Attorney. Police officers from Cities A and B may be called as witnesses in felony cases as arresting officers or members of special tactical units from various police departments. As tactical unit members, the police officers are advised by the State's Attorney, not the City Attorney.

QUESTION
May the Assistant Public Defender accept the assignment of felony cases in which officers are employed by cities represented by the spouse's firm and if so, is the Assistant Public Defender required to make disclosure of the spouse's law firm representation of cities employing prosecution witnesses?

OPINION
The Rules of Professional Conduct lack any provision specifically addressing the question of whether lawyers related by blood or marriage may represent opposing parties. Significantly, the Illinois Supreme Court omitted subparagraph (i) of ABA Model Rule 1.8 which permits a lawyer related by marriage to another lawyer to represent a client whose interest is adverse to the spouse's client upon consent after consultation regarding the relationship. A few authorities have found the representation of directly opposing parties by spouses to be per se improper considering the likelihood of adverse influence upon the lawyer's judgment, the difficulty of assuring complete confidentiality and the appearance of impropriety. Most of those jurisdictions adopt the comment to that provision of the Model Rule which states that the disqualification is personal and not imputed to other firm members. In the absence of any express prohibition against married lawyers representing opposing parties, reference must be made to the general provisions of the Rules that can be applied to this situation.

Rule 1.7(b) states as follows:

> "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities 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 disclosure."

Rule 1.9(a) provides, in part:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
> > (1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure, or
> > (2) use information relating to the representation to the disadvantage of the former client ..."

ISBA Opinion 783 described a factual situation similar to that presented here except the relationship was by blood rather than by marriage. The issue was whether it was professionally proper for the lawyer to prosecute cases for the municipality where the defendant is represented by his uncle. In that situation, the opinion held that "the fact that a lawyer has a family relationship with opposing counsel does not per se disqualify him. Rather, it is whether that relationship will or reasonably may affect the lawyer's exercise of professional judgment..."

ISBA Opinion 85-8 found that it was not improper for a lawyer to represent defendants in criminal

cases in the same county where his son was Assistant State's Attorney where the prosecutions were handled by other Assistant State's Attorneys and, under those circumstances, the father need not disclose the relationship or secure client consents.

It should not be assumed that a marriage relationship will necessarily produce a breach of client's confidences or forbid representation of differing interests. However, the possibility of a violation of the Rules, which may be inadvertent, is real and must be carefully considered. If the inquiring lawyer reasonably believes that the representation of a defendant may be materially limited by the marriage relationship in a particular case, the representation must be declined. However, that marriage relationship, standing alone, does not disqualify the Assistant Public Defender.

Even though the Rules may not require disclosure and client consent to the representation in every felony prosecution, disclosure of the marriage relationship is the better practice in this situation where the loyalty of the Assistant Public Defender may be questioned. To make that disclosure is consistent with Rule 1.4 requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.

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