

**Nebraska Ethics Advisory Opinion for Lawyers
No. 86-5**

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 ATTORNEYS SHOULD CAREFULLY EXAMINE THE SITUATION AND ONE OR MORE OF THE ATTORNEYS SHOULD DECLINE EMPLOYMENT OR WITHDRAW FROM THE 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.

FACTS

Three attorneys, members of the same family, are pursuing independent career paths. One is a prosecuting attorney, one represents creditors, and the last represents both debtors and defendants in criminal cases. It is likely that these independent activities will result in these related attorneys meeting in adversarial professional capacities.

QUESTIONS PRESENTED

If the client of each attorney has been advised of the familial and professional relationships involved, may all of the attorneys continue to represent their individual clients or must one attorney withdraw? If such representation is not prohibited per se, are there any specific circumstances warranting consideration by the related attorneys?

DISCUSSION

The Committee is of the opinion that there is no consistent or mandatory disqualification involved in the situation presented. The attorneys may continue to ethically represent their clients as long as full disclosure of the family relationship has been made to the clients, the clients consented, and the attorneys are in no danger of violating their professional responsibilities as a result of the representation.

The Committee has previously considered the issue of related attorneys meeting in adversarial capacities in its [Opinion 78-9](#). [Opinion 78-9](#) concluded:

It is not per se unethical for an attorney to represent defendants in criminal cases in a county in which a close relative of the attorney, such as a brother, sister, father or spouse, is the county attorney, whether or not the matter may be prosecuted by a deputy county attorney.

The American Bar Association's (A.B.A.) Standing Committee on Ethics and Professional Responsibility in its Formal Opinion 340 (1975) has taken the position that the Code of Professional Responsibility (Code) does not necessarily prohibit representation of adverse parties either by spouses or by

lawyers otherwise closely related. The related lawyers must comply with the same confidentiality and conflict of interest rules as other lawyers, they must disclose the familial relationship and obtain client consent to the representation, and if they are disqualified for a conflict of interest, this disqualification is imputed to their firms.

The Code lacks any provision expressly addressing the question of whether lawyers related by blood or marriage may represent opposing parties. Therefore, reference must be made to the general provisions that can be applied to the specific situation. The first of these is Canon 9 which calls on lawyers to "avoid even the appearance of professional impropriety." EC 9-2 notes that on occasion otherwise ethical conduct "may appear to be unethical," and states that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." EC 5-1 states that the professional judgment of lawyer "should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." DR 5-101(A) provides:

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

Under DR 5-105(D), if a lawyer is required to decline employment or withdraw, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment. DR 4-101 requires a lawyer to preserve the confidences and secrets of a client.

The Model Rules of Professional Conduct (Rules) were adopted by the A.B.A. in 1983, subsequent to the issuance of A.B.A. Formal Opinion 340 and this Committee's [Opinion 78-9](#). The Model Rules deal specifically with the issue of immediate family relationships in Model Rule 1.8(1), which provides:

A lawyer related to another lawyer as parent, child, sibling or spouse, shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

While the Model Rules have not been adopted by our Court, the Committee finds no conflict with the Nebraska Code of Professional Responsibility. While some authorities have found that the representation of directly opposing parties by related attorneys is per se improper under the portions of the Code cited above, the Committee again rejects the concept of per se disqualification. The mere fact that the public may perceive some conduct as improper is, without some actual impropriety, insufficient justification for interference with a client's right to counsel of choice, particularly where the perceived impropriety is not conduct at all but is, instead, status. However, counsel should be required to advise the client of all circumstances that might impair the undivided loyalty of the attorney and to let the client make the decision as to employment. Further, the attorneys involved should carefully examine the circumstances in each case before accepting employment, being particularly sensitive to situations in which any possibility or suggestion of

disqualification might arise. Where the representation of adverse parties by the related attorneys 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 judgment, the attorney should decline employment or withdraw.

There are situations that require closer scrutiny by the attorneys where a financial or personal interest might affect the ability of the lawyer to represent fully his or her client with undivided loyalty and free exercise of professional judgment or where a breach of confidences and secrets may occur. Specifically, the interest of one relative or spouse in the other's income that could result from a particular contingent fee arrangement may be such that professional judgment would be affected. There may also be situations in which the risk of an inadvertent breach of confidence, or the unavoidable receipt of information concerning the client by the attorney other than one who represents the client, would be substantial. However, the Committee is of the opinion that it should not summarily prohibit the representation of differing interests by related attorneys in the absence of specific acts of misconduct. Such a per se prohibition would unduly interfere with the client's right to counsel of choice. It would also affect the hiring practices of law firms and chill the professional opportunities and personal choices of attorneys. See *Blumenfeld v. Borentstein*, 276 S.E.2d 607 (Geo. 1981). Moreover, the Committee is concerned about the hardship a per se prohibition might work upon attorneys in rural communities in Nebraska.

CONCLUSION

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 attorneys should carefully examine the situation and one or more of the attorneys should decline employment or withdraw from the 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.

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