

# Ethics Opinions

## 950407

### QUESTIONS PRESENTED:

1. May spouses serve as opposing counsel, actively engaging in the same suit or matter on opposite sides?
2. May a law firm represent a party in a case when a member of the law firm is married to opposing counsel where that firm member is not assigned to or actively involved in the case?
3. May a Judge preside over a case in which he or she is married to a member of a law firm representing one of the parties?

### BRIEF ANSWER:

1. No.
2. Yes.
3. No.

### ANALYSIS:

1. In 1985, the Montana Supreme Court adopted the Model Rules of Professional Conduct which for the first time codified a basic principle to govern the practice of lawyers married to lawyers. Rule 1.8(i) now 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.

2. A law firm may represent a party in a case when a member of the firm is married to opposing counsel where that firm member is not involved with the case. Although Rule 1.8 prohibits two lawyers who are related to each other from representing clients whose interests are "directly adverse" without first getting the consent of the respective clients after consultation, the official Comment governing Family Relationships Between Lawyers accompanying Rule 1.8(i) notes that the disqualification stated in the rule is personal and is not imputed to the members of the firms with whom the married lawyers are associated.

Rule 1.8(i) and the Comment clearly permit a law firm to represent a party in a case when a member of the law firm is married to opposing counsel where that firm member is not assigned to or actively involved in the case.

Despite the guidance offered by Rule 1.8(i), a variety of concerns may still arise in certain situations. We will address two of them in this opinion. First, a financial conflict of interest may exist when an attorney will benefit financially if the spouse's firm prevails over the interests of his or her client. Second, a possibility exists that an attorney's emotional bond with his or her spouse may cause that attorney to represent a client less than zealously.

In 1975, the ABA published its first and only ethics opinion addressing the ethical obligations and restrictions governing attorneys married to each other. ABA Committee on Ethics and Professional Responsibility, Formal Op. 340 (1975). Though decided under the old Code of Professional Conduct, many of the principles discussed in ABA Opinion 340 still apply and were in fact incorporated into Rule 1.8(i). DeBroff, Stacey, "Lawyers as Lovers: How Far Should Ethical Restrictions on Dating or Married Attorneys Extend?" 1 Geo. J. Legal Ethics 433 (1987).

In that opinion, the Committee concluded in part that if a spouse has a financial or personal interest that reasonably might affect his or her ability to fully represent a client with undivided loyalty and free exercise of professional judgment, the employment must be declined. ABA Formal Op. 340. In some instances, the interest of one spouse in the other's income resulting from a particular fee may be such that professional judgment may be affected, while in other situations it may not be; the existence of such interest is a fact determination to be made in each individual case. ABA Formal Op. 340.

An example of a situation in which an attorney's professional judgment may be affected is the lawyer who finds herself defending a substantial personal injury case in which her husband is a partner in plaintiff's firm but not personally engaged in the case. She has an undeniable financial interest in seeing her husband's firm prevail because her husband would share in a large recovery. The intensity of any financial conflict of interest will depend on the facts of each case, including the size of the fee involved. To resolve this conflict, either the defense attorney should withdraw from representation or the attorney who is a partner in the plaintiff's law firm should decline his share of the partnership fees from the case. The attorneys involved must decide whether such action is necessary in light of the facts of each case.

Although the removal of any significant financial conflict of interest simplifies the inquiry, additional concern may remain regarding the zealotry of representation. For example, should a similarly situated defense attorney believe her husband's firm guilty of discovery abuses, she might hesitate to seek sanctions for fear of an adverse impact on that firm's reputation. Although problematic, such concerns do not preclude an attorney from representing a client where her husband's firm represents the opposing party. The ABA has recognized that "women are entering the [legal] profession in increasing numbers and that increasing numbers of these women are married to lawyers." ABA Formal Op. 340. The ABA has additionally refused to unduly restrict the practice of married lawyers. ABA Formal Op. 340. Since 1975, many states have addressed the ethical issues related to lawyers married to lawyers and have generally allowed husband and wife lawyers to practice independently in the same legal community with minimal restrictions.

Just as the ABA has expressly refused to assume that a lawyer married to a lawyer would necessarily by reason of that marriage relationship violate the disciplinary rules applicable to all lawyer generally, so too does this Committee refuse to make such an assumption. The nature of

the marital relationship does warrant special precautions, however, and attorney-spouses "must carefully guard at all times against inadvertent violations of their professional relationship by reason of the marital relationship." ABA Opinion 340. All attorneys, including attorney-spouses, should adhere to all of the Model Rules, including Rule 1.3 governing the lawyer's duty of diligence.

Having concluded that a law firm may represent a party in a case when a member of the firm is married to opposing counsel where that firm member is not involved in the case without the necessity of obtaining the express consent of the client, the matter of good client relations should not be ignored. As soon as such a situation is known by counsel to exist in the handling of any matter for a client, the client should be immediately informed by counsel rather than left to discover the relationship at some point later on during the representation or perhaps even after the matter is concluded. While we as professionals may believe that such representation is proper and does not require client consent, we should recognize that the client's view should ultimately be allowed to prevail in that circumstance. It is not inconceivable that a client may choose to change counsel if provided with information about the relationship at the outset of the engagement. Ultimately this kind of candor will only serve to strengthen the attorney/client relationship.

3. A Judge may not preside over a case in which he or she is married to a member of a law firm which represents one of the parties. M.C.A. 3-1-803 which governs disqualification of judges specifically provides that:

[a]ny justice, judge, justice of the peace, municipal court judge or city court judge must not sit or act in any action or proceeding:...(2) When he is related to either party or any attorney or member of a firm of attorneys of record for a party by consanguinity or affinity within the fourth degree, computed according to the rules of law;...

The statute offers no extenuating circumstances in which the rule would not apply. The existence of the relationship alone automatically results in disqualification.

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