Advisory Opinion 1983-6

The following situation and questions have been presented to the committee:

> The Public Service Commission has a staff attorney position available. one of the applicants for the position (wife) is married to an attorney (husband). Husband is employed by a law firm which represents a utility regulated by the Commission. Husband does not practice utility law. wife, if hired, would not be involved in cases concerning the utility represented by husband's firm.
>
> However, wife's position as a staff attorney would include advising the Commission on policy matters, although the ultimate policy decisions are made by the Commissioners.

The Commission asks:

> 1. Would the Code of Professional Responsibility prevent the Commission from hiring wife?
>
> 2. Is the answer the same considering wife's potential role as advisor on matters of policy?
>
> 3. Is the answer the same considering the facts that the Commission is highly visible and that its decisions affect most of the individuals in the state?

The committee is of the opinion that the answers to these questions are:

> 1. No, qualified.
>
> 2. Yes, qualified.
>
> 3. Yes, the answer is the same as a matter of attorneys' professional ethics. However, as a political matter, the appearance of impropriety may cause the Commission to hesitate before hiring wife. It is not the function of this committee to give opinions on such political matters.

For purposes of analysis, it is helpful to consider four situations where spousal conflict might arise. First, husband and wife might personally represent opposing sides of the same controversy. Second, an associate of husband in a private firm may represent an opponent of a public entity who is personally represented by wife. Third, husband, a private attorney, may represent an opponent of a public entity, who is represented by a co-employee of wife. For purposes of this opinion, the committee considers the second and third situations to be sufficiently comparable to be considered as one. Although there is authority that private firms are treated differently than public employment for conflict of interest purposes, *see* ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 342 (1975), this opinion will analyze the propriety of representation by (1) spouse versus spouse, (2) spouse versus associate of other spouse, and (3) spouse's associate versus associate of other spouse.

GENERAL CONSIDERATIONS:

In formulating this opinion, the committee is mindful of two facts of life. The first fact is that lawyers are subject to the same human frailties as any other human being. The marital relationship being what it is, the situation of spousal representation of opposing sides of a controversy is fraught with a potential for conflict of interest. The second is that with the increasing number of women enrolling in law school, more lawyers are married to other lawyers. The committee is sensitive to the difficulties encountered by spouses in finding employment in the same community were we to adopt a per se rule of disqualification in all of the four situations given above. *See* "Note, Legal Ethics-Representation of Differing Interests by Husband and wife: Appearances of Impropriety and Unavoidable Conflicts of Interest?," 52 Denv. L.J. 735 (1975); "Comment, Ethical Concerns of Lawyers Who Are Related by Kinship or Marriage," 60 Ore. L. Rev. 399 (1981); "Recent Developments, Ethical issues Facing Lawyer-Spouses and Their Employers," 34 Vand. L. Rev. 1435 (1981).

Although there is no specific canon or disciplinary rule covering the subject of a lawyer declining employment when a spouse or other close relative represents the opposing party, a number of canons and rules are pertinent. Canon 4 requires a lawyer to preserve the confidences and secrets of his client; canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client; and canon 9 cautions that a lawyer should avoid even the appearance of

professional impropriety. In particular, NMSA 1978, Code of Professional Responsibility R. 5-IOI(A) (Repl. Pamp. 1982), states:

> 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 interests.

The committee first wishes to note that there can be no consent here by wife's client. The wife's client is the Public Service Commission which represents the public of the State of New Mexico. Where the public is concerned, there can be no waiver of a conflict of interest by consent. ABA Committee on Professional Ethics and Grievances, Formal Opinion No. 142 (1935).

SPOUSE VERSUS SPOUSE:

Notwithstanding the sensitivity of the committee to the difficulties encountered by husband and wife lawyers, the committee believes it would be ethically improper for husband and wife to personally represent opposite sides of the same controversy. Considering the normal incidents of the marital relationship, we believe it is inconceivable for husband and wife to be capable of complying with Rule 5-101(A) in the context of directly antagonistic representation.

Moreover, we believe that the appearances of impropriety in such a situation looms large. NMSA 1978, Code of Professional Responsibility R. 9-101(C) (Repl. Pamp. 1982) states, "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official." We believe the implication of such improper influence would be present in this case were husband to represent the utility in Commission proceedings in which wife participates. We are supported in this view by the following advisory opinions from other jurisdictions: Oregon, opinions of the Committee on Legal Ethics, Opinion No. 281; Oregon, opinions of the Committee on Legal Ethics, Opinion No. 424; Oregon, opinions of the Committee on Legal Ethics, Opinion No. 423; N.Y. State, No. 409 (1975); Colorado Revised opinion No. 52 (1975); Arizona Ethics Committee Opinion No. 73-6. *See* Florida Bar Professional Ethics Committee Advisory opinion No. 74-49. However, because the facts related by the Public Service Commission do not contemplate this scenario, it will not be discussed further.

ASSOCIATE VERSUS ASSOCIATE:

Question 1 posed by the Commission appears to contemplate the fourth analytical situation presented above, i.e. , the associate of the husband opposing the co-employee of the wife. While the authorities on this are divided, *compare* the opinions cited above and ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 340 (1975); Philadelphia Bar Ass'n Committee on Professional Guidance, opinion No. 61-3; *with* New Jersey Advisory Committee on Professional Ethics, opinion No. 288, the committee is of the opinion that the better rule is that associates of the husband may represent opponents represented by co-employees of the wife. In light of the oath taken by attorneys, we see no reason to assume that husband and wife attorneys will violate disciplinary rules. Moreover, the appearances of impropriety in this situation is attenuated on both sides of the representation. Of course, both husband and wife in this situation must be particularly careful to observe the suggestions and requirements of Ethical Considerations 4-1, 4-5, 5-1, 5-2, 5-3, 5-7, 5-21, and Disciplinary Rules 4-101, 5-101, and 9-101. we are further reinforced in this opinion by what appears to be the only case addressing this issue. *Blumenfeld v. Borenstein*, 247 Ga. 406, 276 S.E.2d 607 (1981), held that there is no per se rule of disqualification simply because spouses work at firms representing opposing sides of a controversy. Thus, the committee's answer to question 1 is no, with the qualification that both spouses must be careful.

SPOUSE VERSUS ASSOCIATE:

The second question posed by the Commission appears to be a variant of the second and third analytical situations presented above. Here, the wife is taking an active part in representing her client in counseling the Commission on policy matters. Although there may be a question whether advice on policy matters is tantamount to legal representation, this opinion proceeds on the assumption that they are the same. The issue raised is whether there must be vicarious disqualification in this situation. NMSA 1978, Code of Professional Responsibility R. 5-105(D) (Cum. Supp. 1983), provides, "If a lawyer is required to decline employment or to withdraw from employment under R. 5-105, no partner or associate of his or her firm may accept or continue such employment."

We believe it noteworthy that our Supreme Court has not seen fit to amend D.R. 5-105(D), as it has been amended by the ABA. The amended ABA rule requires a lawyer to decline employment or withdraw from employment if *any disciplinary rule* requires any lawyer affiliated with him to withdraw. our disciplinary rule limits vicarious disqualification to the very specific conflicts covered by Rule 5-105, i.e., conflicts created by other clients or multiple representation. It does not encompass conflicts created by Rule 5-101, i.e., due to personal interest. Nor does it encompass canon 4 on confidentiality or canon 9 on the appearance of impropriety.

Although the courts in our State have not read D.R. 5-105(D) in the limited fashion we do, *see State v. Hernandez,* 22 S.B.B. 951 (Ct. App. 1983), *cert. granted*, 22 S.S.B. 939; *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct. App. 1974), we believe these decisions to be distinguishable from the situation here presented. Both *Hernandez* and *Chambers* dealt with actual conflicts of interest due to a lawyer's previous representation of a different client in the same controversy. Here, none of the lawyers actually represent or ever actually represented the opposing client. We do not believe that the mere existence of a spousal relationship would disqualify the wife from giving advice to the Commissioners. This is particularly true inasmuch as it is the Commissioners who make the ultimate decision.

The basis for our decision is our reluctance to indulge in any assumptions that a spouse will place personal loyalties to his spouse over fidelity to one's client and upholding the standards and integrity of the profession. Further, we will not indulge in the assumption that spouses will relate confidential information to one another. Of course, if there are special factors present in a given case, those would take precedence over our general reluctance to engage in assumptions.

For example, if husband were a partner in the law firm and if the firm's fee were contingent on the result achieved before the Commission, a different situation would be presented. In such a case, wife would have a financial interest in the matter which would prevent her from giving undivided loyalty to her client. Similarly, if the Commission's decision-making process on policy matters is highly confidential and extends over a long period of time, our willingness to engage in the assumption that wife would not discuss what she does at work with husband would be harder to support. In such a case, it may well be that the Commission could not ethically hire wife.

In this connection, two statutes should be noted. NMSA 1978, § 62-6-3, precludes Commission employees from making contracts or performing services for regulated utilities. This statute does not seem to apply here. More troublesome is the Conflict of Interest Act, NMSA 1978, §§ 10-16-1 through 10-16-15 (Repl. Pamp. 1983). Section 10-16-4 requires disqualification of a state employee from participating in an official act directly affecting a business in which he has a financial interest. Financial interest, according to § 10-16-2(F), includes an ownership interest or employment by a spouse in a business. In light of the fact that decisions are made by Commissioners, it is doubtful that Commission staff attorneys perform official acts. Even i f they do, whether wife is disqualified depends on the effect of the act on the business of the law firm. As stated previously, the nature of the fee agreement or retainer appears to be the paramount concern.

Thus, the committee's answer to the second question is that the answer does not change because wife has a role in advising the Commission on matters which may affect a client of another attorney in husband's firm. The answer may change, however, depending on the specific facts regarding the client's agreement with the firm. The committee suggests that one way to minimize the chances of vicarious disqualification is to utilize "Chinese Wall" screening devices on both sides of the representation. *See* "Recent Developments," 34 Vand. L. Rev. 1435, *supra*.