

# ADVISORY ETHICS OPINION 82-08

## SYNOPSIS:

The public defender program may enter into a contract with the spouse of the Defender General for appellate representation in conflict cases. Such representation does not create a per se conflict of interest.

## OPINION:

The Defender General's office asks the Committee for an opinion on the ethical propriety of contracting with the spouse of the Defender General for appellate representation in cases handled at trial by assigned counsel. These cases are usually those where a public defender may not provide the representation because of a conflict of interest. In essence, the question reduces to whether the spouse of the Defender General can handle cases that may not be handled by a public defender (or the Defender General) because of a conflict of interest.

The subject of conflicts between clients represented by a wife and those represented by her husband is fully explored in ABA Ethics Committee Formal Opinion 340 (1975). The opinion concludes that the fact of marriage imposes no per se disqualification but the spouses must be particularly diligent not to allow for even an inadvertent breach of confidentiality or to continue representation with divided loyalty. It finds that disqualification might be required if one lawyer has a financial stake in a result adverse to the client – for example, where one spouse is providing representation for a contingent fee. The opinion suggests informing the client of any circumstances that might affect loyalty and leaving it to the client whether to proceed.

This Committee followed the ABA opinion in VBA Professional Responsibility Committee Opinion No. 77-6. We were asked whether a member of the wife's firm can defend a case brought by the husband as a city grand juror. We answered that the firm could defend if the husband determined his judgment would not be impaired and confidentiality is maintained. We suggested that the clients should be advised and allowed to determine whether the representation could continue. In answer to a second question, we found that the fee arrangement is relevant where the firms of the husband and wife are representing opposing civil litigants. Where either spouse is directly involved in the case, we found client direction to be mandatory.

These decisions control this request. Absent some sort of special financial arrangement that does not exist here, there is no reason to adopt a per se rule against a wife representing criminal defendants where members of the husband's firm are also representing criminal defendants with conflicting interests. If anything, the need for a per se rule is less here because the Defender General is not directly involved in the representation given by the public defenders. While a disqualification of the Defender General may vicariously disqualify the whole program<sup>1</sup>, it is unlikely that the Defender General's involvement would be such that there is a serious risk of divided loyalty in his spouse's handling of a criminal appeal.<sup>2</sup> Further, there is less concern about disclosure of confidential information where the representation is only in appeals.

While no per se rule is indicated, it is important to repeat the cautions of Formal Opinion 340. It is the responsibility of each lawyer to ensure that his or her loyalty to the client is not impaired by the action of the spouse. Similarly, it is the responsibility of each spouse to guard against the disclosure of confidential information. If these obligations can not be met, the conflicting representation can not continue.

The suggestion of Formal Opinion 340 that client consent be obtained was precatory. While client consent may be desirable in all such cases, it is not necessary to comply with the Code.

For the reasons stated above, there is no breach of the Code in the contract with the spouse of the Defender General.

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<sup>1</sup> See DR 5-105(D).

<sup>2</sup> See Informal Opinion 1418 (1978).