

# ADVISORY ETHICS OPINION 2001-10

## SYNOPSIS:

A public defender may represent clients whose interests are adverse to an institution which employs the public defender's spouse so long as the public defender does not discuss matters pertaining to the representation with the spouse and as long as the spouse has no involvement in matters relevant to the client's case.

## FACTS:

Requesting attorney is a public defender whose work routinely involves representing indigent clients with respect to claims against the Vermont Department of Corrections (DOC). The attorney's spouse is employed by DOC in a position involving interactions with clients and decision-making which can lead to claims and appeals by the client in matters as to which the public defender's office provides representation. Requesting attorney asks whether such a circumstance bars the attorney from continuing to provide representation to clients in cases where the spouse had no involvement in the client's case and whether another attorney within the public defender's office may represent the client where the spouse did have involvement.

## OPINION:

The issue of disqualification of an attorney where the attorney's spouse is employed by the adverse party has been addressed by our committee in a number of different contexts, and the uniform conclusion has been that there is no per se rule of disqualification. See, e.g. Opinion 82-8 (spouse of Defender General may represent client on appeal where underlying case was handled by assigned counsel due to public defender conflict). We have noted, however, that where the spouse has a financial interest in the outcome of the matter as to which the attorney is providing representation which could be adversely affected by the attorney's diligent representation of the client's interests, a potential conflict does exist and the representation may occur only after full disclosure to the client and with consent. Opinion 84-02 (real estate attorney may represent buyer in a transaction in which attorney's spouse is the broker only after full disclosure to client of the potential for conflict and with consent).

Here, the spouse has no direct financial stake in matters that may be the subject of representation (although in a particular case a client might have a personal claim against the spouse as well as against the institution), but the spouse, nonetheless, will have a personal interest in having the spouse's position vis-a-vis the client vindicated if the client brings an action against DOC based on an action or decision of the spouse. Moreover, even if the spouse has no personal stake in the outcome of the client's case, the outcome could, nonetheless, have performance review consequences for the spouse. Therefore, in matters involving the spouse's actions as an employee of DOC, the requesting attorney must not participate in the matter. However, in such instances, after full disclosure to client and with client's consent, another attorney in the public defender's office may assume responsibility for the representation as long as requesting attorney has no involvement. Such an arrangement will avoid the potential that personal conflicts or at least conflicting interests between the spouses will affect the representation of the client.

In instances where the spouse had no involvement in the matters as to which requesting attorney is providing representation, the fact that the spouse is employed by the adverse party does not create a conflict under the Rules, and no consent is required.

The Rules of Professional Conduct support this conclusion. Rule 1.7 sets out the general standard for resolving conflicts of interest. Rule 1.7(b) is most applicable to the questions presented. That Rule states in pertinent part 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 consultation...

With respect to the requesting attorney representing a client in a matter as to which the spouse had no involvement, the mere fact that the spouse is employed by DOC cannot be said to "materially limit" the attorney's representation of the client. The attorney has no responsibility to a third party (the spouse) in that matter, so the requirement of consent does not apply. The situation would be different and would require a different analysis if the spouse were a supervisory employee of the department whose job performance evaluation might be adversely affected by an outcome successful to the client, even where the spouse had no direct involvement in the client's case, but those facts are not involved in the instant request. If, in a given case, after requesting attorney has accepted the representation of the client, it is learned that the spouse did have involvement in the client's case and may be a witness or that the spouse's actions or judgment in the matter may be challenged by the

representation, then the requesting attorney would have a conflict and would have to withdraw. Again, another attorney in the office could assume responsibility for the case after full disclosure to the client and with client consent.

As a matter of discretion, requesting attorney or the Defender General's Office may decide that the most prudent course is to make a blanket disclosure in every case to ensure that if a client has a concern, the concern can be addressed at the outset of the representation. However, this step is not mandated under the Rules.