

# ADVISORY ETHICS OPINION 79-07

## SYNOPSIS:

Spouse of trial judge may represent a party in a case where the trial judge has previously signed a temporary order or otherwise been involved in the case.

## FACTS:

A Vermont practicing attorney is married to a Vermont trial judge. In some matters the attorney is asked to represent a party in a case where the attorney's spouse has previously signed a temporary order or otherwise been involved in the case. This Committee has been asked whether the practicing attorney may properly appear in the case.

## OPINION:

We find that such an appearance does not violate the Canons.

Under the present Judicial Canons, a judge may not be involved in any proceeding in which his or her spouse or a closely-related person acts as an attorney. Canons of Judicial Ethics, Canon 3 C(1)(d)(ii). No similar proscription applies to the related attorney since the Code of Professional Responsibility does not explicitly preclude an attorney from representing a party before a tribunal where he or she is related to the acting judge.<sup>1</sup>

Under our Canons, a lawyer must “. . . strive to avoid not only professional impropriety but also the appearance of impropriety.”<sup>2</sup> This Canon does not require that an attorney withdraw from any case in which some individual might perceive a conflict, regardless of the merit of that perception.

An overly broad application of Canon 9 . . . would ultimately be self-defeating. Therefore, what has been said with respect to judicial conduct is equally applicable here: a lawyer need not “yield to every imagined charge of conflict of interest, regardless of the merits . . . Surely there can be some objective content to any inquiry into whether the appearance of justice (or impropriety) has been compromised in a given case.”<sup>3</sup> Consequently, while Canon 9 does imply that there need be no proof of actual wrong doing, we conclude that there must be at least a reasonable probability that some specifically identifiable impropriety did in fact occur.<sup>4</sup>

Our Canons further provide that

[a]ll litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with the judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.<sup>5</sup>

This ethical consideration and its related Disciplinary Rule proscribe communication with the judge as to the merits of the matter before the judge. However, we find no proscription of communication on matters unrelated to the matter before the judge, hence no prohibition of the judge and his spouse discussing matters unrelated to the case.

We believe that the specific question before us poses less difficulties for a practicing attorney than if the attorney was asked to enter a case in which his or her spouse presided as judge. In the question posed, the trial judge is no longer involved and, if requested to sit in any further proceedings in the case, must disqualify him or herself pursuant to Canon 3 of the Canons of Judicial Ethics. We assume that the judge did not know at the time of his or her involvement in the case that the practicing attorney's spouse would later become involved. Also we assume that although the attorney may have informed the judge, in no way has he or she any ability to directly or indirectly influence a judge in an improper manner.<sup>6</sup>

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<sup>1</sup> American Bar Association, Formal Opinion 200; Massachusetts Bar Association, Committee on Ethics, Opinion #76-5.

<sup>2</sup> EC 9-6.

<sup>3</sup> J. MacKenzie, *The Appearance of Justice*, 240 (1974).

<sup>4</sup> *Woods v. Covington County Bank*, 537 F.2d 804 at 812 (5<sup>th</sup> Cir. 1976).

<sup>5</sup> EC 7-35.

<sup>6</sup> DR 9-10(c).

The practicing attorney should determine his or her “conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.”<sup>7</sup> Further, the attorney should not accept “proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advise to be given or services to be rendered to the prospective client.”<sup>8</sup> Within these guidelines and those of EC 4-1, 4-5 and 5-1, the attorney must ascertain that he or she can properly represent a client and, if so satisfied, may undertake representation even though his or her spouse has acted as trial judge in a previous portion of the case.

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<sup>7</sup> EC 9-2.

<sup>8</sup> EC 5-2.