ADVISORY ETHICS OPINION 79-20

SYNOPSIS:

A Vermont practicing attorney who is married to a Vermont trial judge is not barred from practicing before a district court bench in general and a practicing attorney's associates in the attorney general's office are not precluded from practicing before the practicing attorney's spouse.

FACTS:

A Vermont practicing attorney is married to a Vermont trial judge. The Vermont Attorney General anticipates hiring the attorney and has submitted the following questions to the Committee:

1. Is the attorney barred from practicing before the entire Vermont District Court?
2. Is the entire Attorney General's office precluded from practicing before the attorney's husband even though the matter before the Court is unrelated to the area in which the attorney specializes?
3. If the entire Attorney General's office is so precluded from practice, will disclosure of the relationship and consent by adverse parties alleviate the conflict of interest?

We find that practicing attorney is not barred from practicing before the District Court bench nor would her associates in the Attorney General's office be precluded from practicing before her husband.

OPINION:

Under the present Judicial Canons, a judge may not be involved in any proceeding in which his or her spouse or closely-related person acts as an attorney.[1] 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.[2]

Under our Canons, a lawyer must ". . . strive to avoid not only professional impropriety but also the appearance of impropriety."[3] 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 to whether the appearance of justice (or impropriety) has been compromised in any given case."[4] 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 indentifiable impropriety did in fact occur.[5]

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.[6]

This ethical consideration and its related Disciplinary Rule proscribe communication with the judge as to the merits of the matter before that 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.

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[1] Canons of Judicial Ethics, Canon 3C (1)(d)(ii).
[2] American Bar Association, Formal Opinion 200; Massachusetts bar Association, Committee on Ethics, Opinion 76-5. See also VBA Opinion 79-07.
[3] EC 9-6.
[4] J. MacKenzi, The Appearance of Justice, 240 (1974).
[5] Woods v. Covington County Bank, 537 F.2d 804 at 812 (5th Cir., 1976).
[6] EC 7-35.

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 was presiding as judge. In the question posed, the spousal trial judge is not involved and, if requested to sit in any proceedings in the case, must disqualify him or herself pursuant to Canon 3 of the Canons of Judicial Ethics. Our Canons do not proscribe the trial attorney from practicing before the District Court bench.

As stated above, our Code of Professional Responsibility does not explicitly preclude an attorney from practicing before any particular tribunal. The prohibition exists for the judge, who must disqualify him or herself in certain specific situations. Whatever conflict of interest might occur, would appear to be most prevalent when the matter before the spousal trial judge relates to taxation. Since the Attorney General proposes to preclude any such situation, this Committee does not find anything in the Code of Professional Responsibility precluding members of the Attorney General's staff from practicing before the spousal trial judge.