ADVISORY ETHICS OPINION 91-01

SYNOPSIS:

A firm may employ as an associate an attorney whose spouse is employed by a state agency which regulates the business conduct of a client of the firm which employs the associate.

FACTS:

A firm serves as general counsel to a company whose activities are subject to significant state regulation. At any given time, most, if not all, attorneys of the firm have pending matters on behalf of the company. The firm proposes to hire as an associate an attorney whose spouse is employed by a state agency which regulates the company. The spouse, also a lawyer, but not acting in the capacity of an attorney, is a middle level manager in the state agency which regulates the company's activities. The agency division which employs the spouse is occasionally involved in activities which affect the affairs of the company. The only area of potential conduct by the division affecting the company is in developing industry-wide policy affecting the company.

OPINION:

The Committee subscribes to the view that the Code of Professional Conduct regulates all conduct of a lawyer "whether acting in his [or her] professional capacity or otherwise."[1]

In addressing the situation where one spouse/attorney represents a client whose interests are opposed to those of another spouse/attorney, the Committee has two concerns. First, is the independent professional judgment of either attorney compromised? Second, is an appearance of impropriety projected?[2]

Turning to the first concern, the present case asks the Committee to determine the applicability of DR 5-105 to a factual situation where the requesting firm proposed to hire a lawyer whose spouse is employed by a division of a regulatory agency. The agency is charged with regulating the affairs of a company, but the particular division, so we are told, has not had occasion to become involved in the affairs of the company.

> (A) A Lawyer shall decline proffered employment if the exercise of his [or her] professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment . . . except to the extent permitted under DR 5-105 (C).
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> (C) In the situation [ ] covered by DR 5-105 (A) . . ., a lawyer may represent multiple clients if it is obvious he [or she] can adequately represent the interest of each, and if each consents to the representation after full disclosure of the possible affect of such representation on the exercise of his (or her) independent professional judgment on behalf of each.

The reported ethics opinions from this and other jurisdictions agree that no *per se* disqualification exists simply because attorneys are married. This policy recognizes that "it is undesirable to impose unnecessarily severe restraints on lawyers who are spouses of other lawyers."[3]

On the other extreme, no jurisdiction expressly permits spouses to appear on opposite sides of the same case. The harder cases, such as the present matter, are resolved on a case by case basis. Here, the attorney/spouses potentially are involved in the affairs of a common client. Were the attorneys thrust into being involved in a common matter affecting the company, one or both might be disqualified. (To the extent that the governmental spouse is acting in a quasi-judicial capacity, the disqualification of that spouse would be automatic).[4] Where the spouse in private practice represents the client in matters unrelated to the work of the governmental spouse, such representation is acceptable if approved by the respective clients. (The burden on the government spouse of obtaining consent may be somewhat weightier because, since that spouse represents an incorporeal entity, assent to the conflict is more difficult to obtain.)

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[1] ABA Formal Opinion 336 (June 3, 1974), our Opinion 90-4; *contra* 13 Me. Bar Bulletin 8 (1979) ("A lawyer who does not practice law does not become subject to the [Code of Professional Responsibility] simply because his/her occupation has law-related elements.")
[2] *See* South Carolina Bar Ethics Advisory Opinion No.85-17.
[3] District of Columbia Opinion 50, June 27, 1978.
[4] . *See* VBA Opinion 79-20.

"An attorney, despite being married to another attorney, can objectively determine when a potential conflict exists and necessitates withdrawal from the case."[5] When this potential for emotional or financial conflict is called to the attention of the parties, it is then up to the parties to decide whether or not each believes that its interests will be adequately represented.

The rules permitting or precluding representation of competing interests by attorney/spouses also serve to protect the spirit of Canon 9 which enjoins the appearance of impropriety. Because the existence of a marital relation- ship could by some persons be construed to "imply that [an attorney] is able to influence improperly or upon irrelevant grounds . . . a public official," DR 9-101(c), it might be prudent to decline the representation.

[5] *See* DR 5-101(A). Oregon State Bar Legal Ethics Committee, Opinion 502, February 22, 1985.