

“...’Til Conflict Do Us Part”

Unique ethical considerations for lawyer spouses

By Thomas K. Byerley

Lawyers who are married to lawyers or judges frequently seek ethics guidance on the unique conflict of interest considerations that arise because of their marriage. These conflict of interest considerations also affect the other lawyers working in the firm of the lawyer married to another lawyer or judge. This article will summarize the existing ethics guidance on the issues surrounding this unique ethical relationship.

The Michigan Rules of Professional Conduct (MRPC) provide some guidance on the issue of lawyer spouses, and those rules have been interpreted by the State Bar of Michigan's Standing Committee on Professional and Judicial Ethics through the issuance of written ethics opinions.

MRPC 1.8(i) provides guidance for when lawyer spouses directly represent adversaries. That rule provides:

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

Therefore, lawyers are disqualified from representing opposing parties in litigation unless the clients give explicit consent after consultation. When the clients fail to consent, however, MRPC 1.8(i) clearly prevents lawyer spouses from representing adversaries. The comment to this rule states that this disqualification is “personal and is not imputed to members of firms with whom the lawyers are associated.”

In formal ethics opinion R-003, the Ethics Committee was asked to provide ethics guidance for the situation where one spouse

is directly representing a client whose adversary is represented not by the other spouse, but by the firm of the other spouse. In that opinion the committee concluded that a lawyer may represent a client where the adverse party is represented by the lawyer's spouse's law firm, but if the relationship between the spouses or other factors result in any of the lawyers having a personal interest in the outcome of the litigation, that interest must be disclosed to the clients and the clients must consent to the representation.

Opinion R-003 also clarifies that law firms of lawyer spouses may represent clients with adverse interests and must only disclose the existence of the marital relationship between the lawyers in the two firms if the facts indicate that the relationship has given the lawyers handling the case a personal interest in the outcome of the litigation.

MRPC 1.7(b), the general conflict of interest rule, provides additional guidance for lawyer spouses. That rule provides:

(b) 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.

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In informal opinion RI-228, the Ethics Committee was asked whether a lawyer may represent a criminal defendant when the lawyer's spouse is employed as an assistant prosecuting attorney. In that opinion, the committee interpreted MRPC 1.7(b) and 1.8(i) and opined that the criminal defense attorney is not specifically prohibited from representing the client in such a situation, as long as the client consents to continued representation and the lawyer continues to evaluate the representation for conflicts of interest throughout the representation.

The Ethics Committee has also been asked to offer guidance in the situation where a criminal defense lawyer's spouse is subpoenaed to testify for the prosecution. In opinion RI-242, the committee opined that the defense lawyer would have a conflict of interest in this case and would be prohibited from acting as the defendant's lawyer unless the lawyer determines that the representation would not be materially limited by the relationship with the witness and if the client consents to the continued representation. The opinion further provides that a lawyer's disqualification under these circumstances has the effect of disqualifying all the associates in the defense firm from representing that client.

In a further interpretation of MRPC 1.7(b), the Ethics Committee stated in RI-289 that a lawyer may continue to represent a client in administrative proceedings against a municipality when the lawyer's spouse is elected to the city commission, if the lawyer reasonably believes that the representation will not be adversely affected and if the client consents after consultation.

Lawyers who are married to judges also have unique ethics concerns. MCR 2.003 (B)(6) states that a judge is disqualified if

the judge's spouse (or other closely related person):

- (a) *is a party to the proceeding, or an officer, director or trustee of a party;*
- (b) *is acting as a lawyer in the proceeding;*
- (c) *is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or*
- (d) *is to the judge's knowledge likely to be a material witness in the proceeding.*

In R-003, the Ethics Committee interpreted MCR 2.003 and opined that a judge is disqualified from presiding over a case where his or her spouse appears as an advocate for either party. That opinion further states that a judge is disqualified from presiding over a case where the law firm of the judge's spouse appears as an advocate for either party, unless the parties request the judge to continue presiding in the case after the relationship is disclosed.

A judge whose spouse is an assistant prosecutor must disclose the relationship on the record whenever the prosecutor's office appears before the judge. The prosecutor who appears in such matters needs to disclose to the judge whether the judge's spouse participated personally and substantially in the pending matter, and in this situation the judge is recused unless the parties voluntarily ask the judge to proceed. See JI-101.

In JI-062, the Ethics Committee opined that a judge is not disqualified from presiding in a matter in which the employer of the judge's spouse is a witness, when the work assignment of the judge's spouse does not involve participation in the preparation of the testimony or the reports, unless the judge has actual bias.

When a lawyer and the lawyer's spouse both serve as judicial officers, one spouse may not supervise the performance of or review judicial decisions of the other. However, un-

der the direction of ethics opinion JI-031, a judge's disqualification from reviewing decisions of the judge's spouse is not imputed to the other members of the judge's court.

Therefore, lawyers and judges who are married to other lawyers or judges have to continually monitor their activity to make sure that the conflict of interest rules are followed. With that careful monitoring, conflicts of interest pitfalls can be avoided. ♦

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