

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-12**

A CLOSE FAMILIAL RELATIONSHIP DOES NOT DISQUALIFY AN ATTORNEY FROM APPEARING ON HIS OR HER CLIENT'S BEHALF IN A PROCEEDING ADVERSE TO ANOTHER ATTORNEY WHO IS RELATED BY BLOOD OR MARRIAGE OR ADVERSE TO A MEMBER OF AN OFFICE IN WHICH A BLOOD RELATIVE IS AN ATTORNEY, IF THE LAWYER DETERMINES THAT HIS OR HER PROFESSIONAL JUDGMENT WILL NOT BE AFFECTED BY THE RELATIONSHIP AND IF THE ATTORNEY OBTAINS THE CLIENT'S INFORMED CONSENT, CONFIRMED IN WRITING. IF THE LAWYER DETERMINES THAT HIS PROFESSIONAL JUDGMENT WILL BE AFFECTED THEN HE OR SHE CANNOT UNDERTAKE THE REPRESENTATION, BUT OTHER ATTORNEYS IN THE SAME OFFICE ARE NOT PROHIBITED FROM UNDERTAKING THE REPRESENTATION.

QUESTION PRESENTED

Does a relationship by blood or marriage disqualify an attorney from appearing on his or her client's behalf in a proceeding where he or she would be opposing another attorney to whom he or she is related by blood or marriage, or would be opposing another attorney in the same office in which the related attorney practices?

FACTS

A father has a position as a City Prosecutor. The father's son has been employed for the past five years as a prosecutor elsewhere. The son's duties have never required him to be involved in any of his father's cases. The son now anticipates a move to the private sector in the father's jurisdiction. This move would involve the son appearing as adversary in cases filed by the City Prosecutor's office. The father, although he is the City Prosecutor, rarely appears personally in court on cases and he rarely files charges himself. The father has dozens of deputies who determine charges, negotiate and try cases independent of his involvement. The City Prosecutor's office is primarily responsible for traffic and misdemeanor cases in one county. The cases are generally routine, minor matters, with few victims involved. The inability of the son to appear in these types of cases would significantly cripple any criminal practice the son might have.

APPLICABLE RULES PROVISIONS

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comments to Rule 1.7

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and

ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

...

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules:

...

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

DISCUSSION

This issue was addressed by Nebraska Ethics Advisory Opinion for Lawyers No. 78-9. That opinion stated it was not per se unethical for an attorney to represent defendants in a criminal case in a county in which a close relative of the attorney, such as a brother, sister, father or spouse, was the county attorney, whether or not the matter would be prosecuted by a deputy county attorney. The former opinion suggested that in most cases an attorney should make full disclosure to the client, and should refrain from accepting any such employment if there was any suggestion or possibility of disqualification before accepting the case. We have been asked to consider this opinion again in light of the above scenario and determine whether Advisory Opinion No. 78-9 is still applicable and what effect it has on the above scenario, given the recent changes in the profession responsibility rules in this jurisdiction.

The rules of professional conduct in this jurisdiction have changed. The Nebraska Rules of Professional Conduct were adopted effective September 1, 2005. It is necessary to analyze the new rules to determine whether they would cause us to retract or modify the conclusion it reached in Advisory Opinion No. 78-9.

According to Rule 1.7 a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer. If a concurrent conflict of interest exists, a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the affected client, the representation is not prohibited by law, and the client gives informed consent, confirmed in writing.

Comment 11 to Rule 1.7 provides more guidance on the application of the Rule. According to Comment 11, there is a significant risk that client confidences will be revealed and a lawyer's family relationship will interfere with his duty of loyalty and his independent professional judgment when lawyers represent different clients in the same matter and are closely related by blood or marriage. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyers agree to undertake the representation. Thus, a lawyer ordinarily may not represent a client in a matter where there is another attorney involved to whom he or she is related by blood or

marriage unless informed consent is given by each client. This disqualification arising from a close family relationship is not imputed to the members of the firms with whom the lawyers are associated.

Pursuant to Rule 1.7, and Comment 11 to Rule 1.7, it appears that when a father and a son represent clients who are adverse to each other, as a prosecutor and a criminal defense attorney would be, a personal conflict of interest is present. Despite this conflict, the attorneys may still accept representation if: they reasonably believe that they can provide competent and diligent representation to their clients; they disclose this conflict to their client; they discuss the conflict and its implications with the client; and the client gives informed consent confirmed in writing. The personal conflict does not run to the other members of either attorney's office. Therefore, if the attorneys involved in the action were the son and another member of the prosecutor's office who was not related by blood or marriage to the son, then there would be no conflict of interest. Likewise a member of the son's firm would be able to represent a client against the father, or another member of the father's office.

Rule 1.7 is not the only rule applicable here. Rule 1.8, titled "Conflict of Interest: Current Clients: Specific Rules" provides further instruction. The Nebraska Rules of Professional Conduct were modeled after the American Bar Association's Model Rules of Professional Conduct, with some modifications. ABA Model Rule 1.8 originally contained a subsection (i) which stated, "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 who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. " In 2002, on the recommendation of the ABA Ethics 2000 Commission, subsection (i) was deleted from the Model Rules. The Commission felt it was under inclusive because it did not address all personal interest conflicts such as couples living together or close family relationships not specifically listed, such as an aunt or uncle. The rule was over inclusive because it allowed representation with the consent of the client regardless of whether the conflict would otherwise be deemed non-consentable under Rule 1.7. When Nebraska drafted its version of the Rules, Nebraska decided not to include Subsection (i). Therefore, it can be inferred that Nebraska did not want a "bright line" rule based on the degree of the relationship, but rather preferred a case by case analysis of the circumstances of the representation as provided by Rule 1.7.

After analysis of the applicable rules, it appears that there is no "bright line" rule whether lawyer can represent a client when an adverse party in the same matter is being represented by a relative by blood or marriage. It appears that this determination must be made on a case by case basis. It is not the relationship itself which causes the conflict, but rather the effect of the relationship on the particular representation. A lawyer's analysis whether to accept the representation involves a two step process.

First, a lawyer must first look at the potential representation and determine if his or her professional judgment on behalf of the client will be or reasonably may be affected by his or her own personal interest. A lawyer's personal interest surely includes his or her interest in maintaining amicable relations with his or her relatives, and his or her spouse.

Second, if, within the lawyers reasonably good judgment, it is determined that the lawyer's representation may be significantly limited by his ties to his or her relatives or spouse, professional ethics demand that the lawyer not take on the representation. If, on the other hand, a reasonable attorney using his or her good faith determines that he or she can vigorously represent the client without be adversely affected by his or her blood or marriage relationship with the other attorney, then he or she must obtain informed consent, confirmed in writing, to the representation. When informing the client of the relationship, the potential client should be advised of all circumstances that could impair the attorney's undivided loyalty or professional judgment, and then decide whether accept the lawyer or select a different lawyer. Nebraska Ethics Opinion 86-5.

Even if the lawyer determines his or personal interest in regards to the opposing attorney would adversely affect his or her potential client, this conflict is personal and does not taint other lawyers in the attorney's office. It would be ethical for a member of that attorney's office to represent such a client, given that there is no independent personal conflict for that attorney.

CONCLUSION

It is this committee's opinion that there is no rule forbidding a son from representing a client against his father, who is the City Prosecutor, or his office. If the father and the son were to be directly adverse to each other in the same matter, it would be necessary for the son to determine whether or not his personal relationship with his father would in any way impair his ability to fully and ethically represent his client. If he determines the relationship would affect his ability to competently and ethically represent the client, then the son would have to turn down the representation. If he believes this personal relationship would not affect his ability to zealously and ethically represent his client, then he must obtain informed consent from the client before the representation begins.

Since this conflict is a personal conflict, a member of the son's firm would not be tainted by the father-son relationship of his colleague. Therefore, a member of the son's firm would be able to represent a client against the father or a member of the father's office. Likewise, the son would not have a personal conflict with a member of the father's office, and therefore would be able to take the representation if the opposing attorney was a member of the father's office. However, given that there may still be the impression of impropriety by a client

who is not aware of this relationship at the time of the engagement, but may find out later, the son should disclose the relationship and obtain informed consent whenever he represents a client whose interest are adverse to those of his father's office whether or not his father is personally involved.