

**Nebraska Ethics Advisory Opinion for Lawyers
No. 07-03**

A JUDGE'S SPOUSE'S LAW FIRM OR OFFICE IS NOT DISQUALIFIED FROM REPRESENTING A CLIENT IN FRONT OF THAT JUDGE UNLESS IT IS DETERMINED BY THE FIRM OR OFFICE THAT SUCH A REPRESENTATION WOULD PRESENT A SIGNIFICANT RISK OF MATERIALLY LIMITING THE REPRESENTATION OF THE CLIENT.

QUESTION PRESENTED

1. Does a judge's spouse who is employed by a County Attorney's Office, a Public Defender's Office, or a law firm that regularly appears before that judge impute to the office or firm, thus disqualifying the entire office or firm from appearing before that judge?
2. If the office or firm is not disqualified by imputation what, if any, measures must be taken to maintain ethical standards?

FACTS

A judge's spouse is employed by the Public Defender's Office, the County Attorney's Office, or another law firm which appears regularly before that judge. Other members of the spouse's office or firm desire to continue to appear before that judge.

APPLICABLE RULES

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:

(2) there is a significant risk that the representation of one or more clients will be materially limited 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] 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.

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

CANON 3(E) OF THE NEBRASKA CODE OF JUDICIAL CONDUCT

E. Disqualification

- (1) A judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, including but not limited to instances where:

Comment to Section 3(E)(1)

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in section 3(E)(1) apply.

(d) The judge, or the judge's spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(ii) is acting as a lawyer in the proceeding.

(iii) is known by the judge to have a more than de minimus interest that could be affected substantially by the proceeding.

Comment to Canon 3(E)(d)

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under section 3(E)(1), or that the relative is known by the judge to have an interest in the law firm that could be "affected substantially by the outcome of the proceeding" under section 3(E)(1)(d)(iii) may require the judge's disqualification.

DISCUSSION

The first issue presented is whether the affiliation of a judge's spouse with the County Attorney's Office, Public Defender's Office, or a law firm that regularly appears in front of that judge will impute to the entire office or firm, thus disqualifying the office or firm from the representation. While there is no Nebraska Rule of Professional Conduct regarding the relationship between a judge and a spouse acting as an attorney in a proceeding over which that judge presides, Rule 1.7(a)(2) states that a concurrent conflict of interest may arise in this situation because there is the possibility of a material limitation to the representation of a client because of a personal interest of the lawyer. However, regardless of whether a concurrent conflict of interest exists, subsection (b) permits such a representation to occur 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. So while the spouse of the judge would be disqualified from appearing in front of that judge under the Nebraska Rules of Professional Conduct because they would be unable to provide competent and diligent representation, and because the representation would be prohibited by law (Nebraska Code of Judicial Conduct, Canon 3(E)(1)(d)(ii)), Comment 11 to Rule 1.7 states that this

disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.

Rule 1.10 further deals with the imputation of a conflict to a lawyer's firm which would subsequently disqualify the entire firm. In accord with Rule 1.7, Rule 1.10(a) states that if a lawyer would be disqualified from representation under Rule 1.7, as is the case here, such a disqualification would impute to the entire firm and the firm would also suffer disqualification. Thus, under the first part of Rule 1.10(a), the firm would be disqualified. However, Rule 1.10(a) continues with an exception to the first part of the Rule exempting a firm from disqualification if the individual attorney would be disqualified because of a personal interest which would not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. Here, because the judge's spouse's disqualification arises from a personal interest, the law firm should not be disqualified from representation unless such a representation would present a significant risk materially limiting the representation of the client by the remaining lawyers in the firm.

Further, Rule 1.10(c) removes imputation with the informed consent of the affected client under the conditions stated in Rule 1.7(b) (see above). Thus, if the remaining attorneys in the firm determine that such a representation would not be prohibited under Rule 1.7(b), the client may cure the conflict with his/her consent, confirmed in writing.

With regards to the disqualification of the judge in this case, Section 3(E)(d)(ii) of the Nebraska Code of Judicial Conduct states that the spouse of a judge would be disqualified from participation in a proceeding in the role of an attorney. Comment to section 3(E) states that while the spouse of a judge is disqualified from a proceeding in front of that judge, another attorney is not disqualified because of that affiliation alone. This Comment provides that in this situation, the only factor that would impute the disqualification to the firm would be if the judge's impartiality might reasonably be questioned or if the judge knows that his or her spouse's interest in the firm could be affected substantially by the outcome of the proceeding.

The second issue presented is if the judge's spouse's office or law firm is not disqualified by imputation, what, if anything, the office or firm must do to remain within the Nebraska Rules of Professional Conduct. Since the judge's spouse will be disqualified under Rule 1.7(b), Rule 1.10 applies to prohibit the disqualification from being imputed to the judge's spouse's office or firm if such a representation does not present a significant risk of material limitation of the representation of the client. Also, Rule 1.10(c) states that the client may waive the firm's disqualification by consenting, in writing, to the

representation of a remaining attorney. Thus, while Rule 1.10(a) should excuse the judge's spouse's office or firm from disqualification, the office or firm should nonetheless make a full disclosure to the client and, if the client does not object, obtain that client's consent to the representation in writing.

CONCLUSION

A judge's spouse's law firm or office should not be disqualified from representing a client in front of that judge unless the remaining attorneys in the firm or office determine that such a representation would present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm or office. Also, the judge will not be disqualified from presiding over a proceeding in which an attorney from the judge's spouse's office or firm is acting as counsel unless the judge's impartiality might be reasonably questioned under Canon 3(E)(1) of the Nebraska Code of Judicial Conduct, or if the judge's spouse is known by the judge to have an interest in a firm that would be affected substantially by the outcome of the proceeding.

The representing attorney must first determine, under Rule 1.7(b), that the representation may take place, regardless of the existence of a concurrent conflict of interest. If the attorney determines that the representation is permissible under Rule 1.7(b), then the representing attorney should fully and completely inform the affected client of the relationship between the co-worker of the attorney and the judge. The client must give consent in writing, or the client's consent must be confirmed in writing.