

Nebraska Ethics Advisory Opinion for Lawyers
No. 92-2

A LAWYER MAY REPRESENT A CRIMINAL DEFENDANT IN A CASE IN WHICH THE ATTORNEY'S SPOUSE WAS EMPLOYED BY THE SHERIFF'S DEPARTMENT IF NO ACTUAL CONFLICT EXISTS, FULL DISCLOSURE OF THE RELATIONSHIP IS MADE TO THE PROSPECTIVE CLIENT, AND THE CLIENT CONSENTS. FULL DISCLOSURE WOULD REQUIRE THE CLIENT TO BE AWARE OF ALL OF THE PERTINENT FACTS, LEGAL IMPLICATIONS, AND POTENTIAL AFFECTS SURROUNDING THE REPRESENTATION AND THE LAWYER'S RELATIONSHIP. A WRITTEN CONSENT IS ALWAYS PREFERRED.

FACTS

An attorney practices in a county in which there is no public defender's office and consequently, local judges appoint attorneys to act as defense counsel for indigent criminal defendants. The attorney's spouse is employed by the sheriff's office in the capacity of communications officer and deputy jailer. In the spouse's role as communications officer, the spouse answers and dispatches calls to 911 and monitors transmissions between the sheriff and his deputies. The spouse has access to information regarding the people and vehicles involved in criminal investigations. In the spouse's capacity as jailer, the spouse is responsible for security, booking the suspects, meal preparation, and laundry.

QUESTION PRESENTED

May an attorney represent a criminal defendant when the investigatory work and arrest were conducted through the county sheriff's office which employs the attorney's spouse?

AUTHORITY

Canon 5 A Lawyer Should Exercise Independent

Professional Judgment on Behalf of a Client.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

Canon 9 A Lawyer Should Avoid the Appearance of Professional Impropriety.

DR 9-101 Avoiding Even the Appearance of Impropriety.

. . . .

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

PREVIOUS NEBRASKA ADVISORY OPINIONS

[86-5](#) It is not per se unethical for attorneys who are married or closely related to represent parties with adverse interests as long as the attorneys make full

disclosure to their respective clients and obtain the consent of the clients to the representation. The attorneys should carefully examine the situation and one or more of the attorneys should decline employment or withdraw from the employment if it reasonably appears that a violation of any attorney's professional responsibilities will occur. Any disqualification of an attorney arising out of a familial relationship is imputed to the attorney's firm.

DISCUSSION

In Iowa State Bar Association Ethics Opinion 89-31 (12-11-89), summarized in ABA/BNA Lawyers Manual on Professional Conduct 901:3614, it states:

A lawyer whose husband is the chief of police may not represent parties in cases in which her husband or members of the police department are parties to the case or witnesses unless no actual conflict exists, full disclosure of the relationship is made, and all parties give their consent. Full disclosure must include an affirmative explanation of all the facts, legal implications and possible effects and circumstances of the representation. In addition, written express consent is preferred.

The Iowa opinion is consistent with Indiana State Bar Association Formal Opinion 5 of 1988 summarized in ABA/BNA Lawyers Manual on Professional Conduct 901-3304:

A lawyer may not represent a criminal defendant when a police officer who will be a witness in the case is the spouse of an associate in the lawyer's law firm, unless the lawyer reasonably believes his representation of the criminal defendant will not be adversely affected and the defendant consents after full disclosure of the potential

conflicts.

See, also, Virginia Formal Ethics Opinion 1092 summarized in ABA/BNA Lawyers Manual on Professional Conduct 901:8741; and Virginia Formal Ethics Opinion 1123 summarized in ABA/BNA Lawyers Manual on Professional Conduct at 901:8744.

Wisconsin has also previously addressed this issue. In Ethics Opinion of the State Bar of Wisconsin E-85-2, summarized in ABA/BNA Lawyers Manual on Professional Conduct 801:9115, it states:

A lawyer may represent a criminal defendant in the county in which the lawyer's spouse is a sheriff provided the lawyer advises his client of the possible adverse effect on his professional judgment and the client consents to the representation. The Code requires a lawyer to exercise independent professional judgment on behalf of each client. If a lawyer is disqualified based on a personal relationship, the law firm with which he is affiliated may handle the case. Imputed disqualification does not apply when the reason for disqualification is a personal conflict. A lawyer who represents a criminal defendant in a case in which the sheriff is involved directly must inform the client that the lawyer's associate is married to the sheriff. A lawyer must ensure that a prospective client makes an informed decision about retaining counsel.

CONCLUSION

A lawyer may represent a criminal defendant in a case in which the attorney's spouse was employed by the sheriff's department if no actual conflict exists, full disclosure of the relationship is made to the prospective client, and the client consents. Full disclosure would require the client to be aware of all of the pertinent facts, legal implications, and potential affects

surrounding the representation and the lawyer's relationship. A written consent is always preferred.

Nebraska Ethics Advisory Opinion for Lawyers
No. 92-2