

Nebraska Ethics Advisory Opinion for Lawyers  
No. 89-6

A DEPUTY COUNTY ATTORNEY WHOSE DUTIES INCLUDE PROSECUTION OF CASES IN THE JUVENILE COURT, IN WHICH THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES MAY BE INVOLVED, MAY PROSECUTE SUCH CASES IN THE SAME COUNTY IN WHICH HIS SISTER IS EMPLOYED AS A SOCIAL WORKER WITH THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES. HOWEVER, THE LAWYER MUST FULLY DISCLOSE THE FAMILIAL RELATIONSHIP TO THE COURT, ALL LAWYERS, AND THE PARTIES INVOLVED, IN ANY CASE, AND SHOULD DECLINE PROSECUTION OF THE CASE SHOULD HIS PROFESSIONAL JUDGMENT BE ADVERSELY AFFECTED. IF THE DEPUTY COUNTY ATTORNEY SHOULD FIND HIMSELF TO BE DISQUALIFIED, THE DISQUALIFICATION IS NOT IMPUTED TO THE LAWYERS WITHIN HIS OFFICE, UNLESS APPEARANCE OF IMPROPRIETY IS CREATED UNDER THE FACTS OF A PARTICULAR CASE.

FACTS

A deputy county attorney handles prosecutions and proceedings involving the juvenile court and the Nebraska Department of Social Services.

Recently the deputy county attorney's sister has been employed by the district office of the Nebraska Department of Social Services which serves the county in which her brother is a deputy county attorney. Although the district office intends to have the sister work in other counties, she will be on call and in the case of an emergency, she may be involved in a case in the county in which her brother is employed as a deputy county attorney.

QUESTIONS PRESENTED

Whether a deputy county attorney would be disqualified from prosecuting a case in which the deputy's sister.

who is a social worker, may be involved as an investigator and/or a witness? Would the remainder of attorneys in the county attorney's office be disqualified if the deputy county attorney has a conflict of interest?

## DISCUSSION

Generally, a lawyer in private practice must obtain the client's consent where the possibility exists that a familial relationship will adversely affect the lawyer's independent judgment or the facts may create the appearance of impropriety. [Advisory Opinion No. 86-5](#) of the Committee. The lawyer should also take the additional precaution of seeking the court's approval especially where the rights of minors are concerned. Opinion 82-2 of the Committee on Professional Ethics of the Association of the Bar of the City of New York.

DR 5-101(A) states:

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

Although the Code does not contain a specific provision dealing with this situation, EC 9-2 notes, that on occasion, otherwise ethical conduct "may appear to be unethical" and "when explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Formal Opinion No. 340 of the American Bar Association Committee on Ethics and Professional Responsibility stated that a husband and a wife who are both lawyers, but are not practicing in association with one another, are not necessarily prohibited from representing differing interest or being associated with firms who represent differing interests. That opinion also held that

like all lawyers, they must comply with and obey all disciplinary rules, confidentiality and conflicts of interest rules as do other lawyers, and that familial relationship must be fully disclosed and client's consent must be obtained.

[Advisory Opinion No. 78-9](#) of the Nebraska Advisory Committee relied on formal Opinion No. 340 and stated:

It is not per se unethical for an attorney to represent defendants in criminal cases in a county in which a close relative of the attorney, such as a brother, sister, father or spouse, is the county attorney, whether or not the matter may be prosecuted by a deputy county attorney.

The opinion went on to further state that because of the sensitivity involved, extreme caution must be observed to prevent violations of the lawyer's professional responsibilities and that the client's wishes also be carefully observed.

In concluding, the Committee found that the disqualification was neither mandatory or consistent and suggested that:

The lawyers involved should carefully examine the circumstances in each case before accepting employment, should make full disclosure to the client, and should refrain from accepting any such employment if there is any suggestion or possibility of disqualification.

[Advisory Opinion No. 86-5](#) of the Committee also provides guidance wherein it was decided that it was not per se unethical for married or closely related attorneys to represent adverse interests provided the guidelines as set forth above are complied with.

In this case, since a deputy county attorney is a governmental employee, and he is not specifically representing a private client, disclosure of the familial

relationship should be made to the court, all lawyers, and parties involved in the dispute, when the attorney's sister may have been the investigator or otherwise involved in the case. Full disclosure would require a complete description of the nature of the relationship and the effect such relationship may have on the attorney's professional performance and on the outcome of the case. Factors involved in deciding whether the deputy county attorney should decline such prosecution are, whether his relationship will adversely affect his independent professional judgment, and whether under such circumstances he can represent all interests involved zealously and within the bounds of the law as prescribed by Canon 7 of the Nebraska Code of Professional Responsibility.

Furthermore, should it become apparent that the deputy county attorney's sister will be called as a witness in a case in which the deputy county attorney is involved, the deputy county attorney should withdraw and be effectively screened from any further contact with the case.

If for any ethical reason the deputy county attorney should be disqualified from the case, this disqualification is not imputed per se to the remaining attorneys in his office under DR 5-105(D).

In formal Opinion No. 342 of the American Bar Association on Ethics and Professional Responsibility, the committee clearly states:

The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference is, recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a

client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B) or similar Disciplinary Rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.

If their deputy county attorney is disqualified from a case, he must thereafter be effectively screened and separated from any participation and discussion of matters concerning that which the deputy county attorney is disqualified. If effective screening is observed, the disqualification of the entire county attorney's office is unnecessary, provided no appearance of impropriety is created under the facts of a particular case.

#### CONCLUSION

A deputy county attorney whose duties include prosecution of cases in the juvenile court, in which the Nebraska Department of Social Services may be involved, may prosecute such cases in the same county in which his sister is employed as a social worker with the Nebraska Department of Social Services. However, the lawyer must fully disclose the familial relationship to the Court, all lawyers, and the parties involved, in any case, and should decline prosecution of the case should his professional judgment be adversely affected. If the deputy county attorney should find himself to be disqualified, the disqualification is not imputed in the lawyers within his office, unless an appearance of

impropriety is created under the facts of a particular case.

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