L.E.I. 86-2

The West Virginia Department of Human Services requested an opinion regarding the ethical resolution of hypothetical matters which might face a Child Advocate.

DISCUSSION

West Virginia Code § 48A establishes a scheme unique among the 50 states to resolve domestic relations disputes. It creates a Child Advocate office within the Department of Human Services (DHS) (W. Va. Code § 48A-2-1) which will employ attorneys licensed in this State to provide legal services to the 21 regional Child Advocate areas (W. Va. Code § 48-3-2). These Child Advocate attorneys establish and enforce support orders (W. Va. Code § 48-A-3-3) not only for DHS to reduce the costs to the federal government of the Aid for Families with Dependent Children (AFDC) program but also for non-AFDC individuals upon an application for services. The Child Advocate also investigates, mediates and enforces child custody and visitation disputes (W. Va. Code §§ 48A-3-3, -5 and -6).

The Code of Professional Responsibility does not address the definition of "client" in the unique context where a State employee attorney is statutorily mandated to represent divergent interests in the same litigation. There is no guideline as to who is the Child Advocate's client. A review of the ethical considerations and disciplinary rules under Canons 4 and 5 is necessary for resolution of the inquiry.

Canon 4 pertains to the preservations of client confidences and secrets. An attorney may disclose client confidences with the consent of the client (EC 4-2 and DR 4-101(C)(1)). An attorney also must use reasonable care to insure that his or her employees or associates do not reveal client confidences except where the attorney may do so.

Canon 5 concerns conflicts of interest in client representation. An attorney (or his associates) cannot be both an advocate and a witness, and he or she in most circumstances will have to withdraw from representation (EC 5-9 and 5-10; DR 5-102). Canon 5 also considers the difficulty of multiple client representation. An attorney cannot represent a client if such would affect his independent professional judgment or involve him in representing differing interests (EC 5-14 and 5-15; DR 5-105(A) and (B)) unless he can adequately represent everyone's interests and they consent after a full disclosure (EC 5-15 and DR 5-105(C)). If the attorney withdraws from representation, no attorney associated with the principal attorney may continue such representation (DR 5-105(D)).

I. Does an application for Child Advocate services create an attorney-client relationship subject to the Code of Professional Responsibility (DR 4-101)? If so, between whom?

The West Virginia Code provides that the Child Advocate has a "State office which, as its primary function, protects and promotes the best interests of the children; . . ." (§ 48A-2-2); further, such office is to be "operationally and functionally distinct" (§ 48A-2-6) from other human services programs. Given such

wording, it appears that the legislature intended the child to be the client of a Child Advocate.

Given this legislative intent and the framework in which the Child Advocate functions, it is the Committee's opinion that the child is the client of the Child Advocate. The questions posed in the inquiry imply the possibility that either a parent or other applicant might believe the Child Advocate is acting as his or her attorney. Since the legislation has several requirements for the Child Advocate to publicize the program, the Committee suggests these programs be utilized as a vehicle for explaining the consequences of an attorney-client relationship, that the child is the attorney's client, the limitation of representation of others, and the lack of confidentiality of the information furnished the Child Advocate.

There is a substantial possibility that family members (other than the child) utilizing the Child Advocate system will believe the Child Advocate is "their attorney." The Committee believes you have an ethical duty to assure, to the maximum extent possible, that this does not occur.

In some cases the statute prescribes that the Child Advocate enter into an attorney-client relationship with some other person than the child. In those cases, the traditional rules apply.

It is recognized that the statute limits certain forms of representation, e.g., the determination of paternity, when the Commissioner indicates it is not in the child's best interest (§ 48A-3-3(c)). If a problem arises because of such limitations,

the Child Advocate may be forced to withdraw and follow the appropriate ethical rules.

II. Considering the attorney-client relationship is between the Child Advocate and the child, the disclosures concerning the nonconfidentiality of the information furnished the Child Advocate and the general ethical rules concerning multiple representation and confidentiality, the answers to the hypothetical questions posed in the inquiry are as follows:

Q1. A, the custodial parent, applies for Child Advocate services to recover support arrearages. A is <u>not</u> receiving AFDC benefits at the time of application. However, A previously received AFDC benefits and had assigned this right to support to DHS for the period of assistance. B, the former spouse, has not paid the entire court-ordered support obligation for when A received AFDC and since A ceased receiving AFDC; while receiving AFDC, A accepted from B some direct support payments which B can document but which A denies receiving.

a. Can the Child Advocate attorney represent A at all because A has possibly committed welfare fraud by retaining payments which were assigned to DHS?

b. Is the representation severable? Can the Child Advocate represent A against B for the support arrearage accrued since A ceased receiving AFDC? Can the Child Advocate represent DHS against B to recover the arrearage accrued and due DHS while A received AFDC?

c. Whom does the Child Advocate attorney represent for the period of time of the possible welfare fraud?

Assume the same facts without the welfare fraud problem and the Child Advocate attorney proceeds to represent both DHS and A for the support respectively due them.

Can the Child Advocate adequately represent DHS to recover the arrearage due it if the circuit court judge directs B to pay A the arrearage due A but orders no repayment to DHS?

A. The attorney represents the child for the entire period and can also act for A, after adequate disclosures, only to the extent it is consistent with the best interests of the child. (Canon 5, ECs 5-14 through 5-20) Additionally, the attorney may act for DHS against B for arrearages accrued and due while A received AFDC; he or she may not represent DHS if the court directs B to pay the arrearage due A but orders no repayment to DHS.

Q2. A, the custodial parent, has applied to the local Child Advocate office for mediation, alleging former spouse B has retained their child beyond the visitation period. A has signed the waiver of confidentiality in the Child Advocate office application. A divulges to a Child Advocate worker in confidence that A has abused their child. The Child Advocate worker reduces this admission to writing in A's case file.

a. The mediation is conducted by a mediator employed by the Child Advocate office. The mediator recommends no action against B and that custody be changed to B based in part upon the entry of child abuse in A's case file.

Can the mediator consider A's admission in the decision process?

If A had not signed a waiver of confidentiality, would your opinion change?

b. After the mediator's decision and recommendation, B retains legal counsel to gain custody of the child. B subpoenas A'a case file and the worker to whom A made the confidential remark.

What does the Child Advocate do in regard to the subpoena to appear and testify?

If A had not signed the waiver of confidentiality, would your opinion change?

A. The mediator can consider A's admission in making his decision, regardless of whether A has signed a waiver of confidentiality. Canon 4 and DR 4, which discuss the privilege rule, are quite clear that the obligation relates solely to information received from a client. (Canon 4) The Child Advocate and his or her employee must necessarily respond to the process of the court.

Q3. B, the noncustodial parent, applied to the local Child Advocate office for visitation enforcement against former spouse A. The Child Advocate, unable to resolve the visitation informally, filed a contempt proceeding in circuit court against A to enforce visitation and represented B in the contempt hearing. A was found in contempt. Now B has ceased

paying child support. A applies for child support enforcement services by the Child Advocate.

Can the Child Advocate represent A against B?

Assume the same facts except A was not found in contempt. In fact, B's case was frivolous and apparently brought in an attempt to "beat" A to the Child Advocate office.

Can the Child Advocate represent A against B? If A is receiving public assistance and DHS is assigned A's right to support owed by B, can the Child Advocate proceed in court against A to enforce B's right to visitation? Is a statement made to a Child Advocate worker in one Child Advocate geographic area imputed to the Child Advocate attorney in another Child Advocate geographic area? Or, put another way, if a conflict of interest exists, can a Child Advocate attorney be brought in from another geographic area to assist one of the parties?

A. In general, the Child Advocate cannot represent either A or B in light of his representation of the child. However, in determining whether to enter litigation in coordination with another party (either A or B), the attorney should be guided by the provisions of Canon 5. Should the original Child Advocate need to withdraw, it is the opinion of the Committee that an attorney from a Child Advocate office in another county would not be disqualified from representation. Additionally, appropriate procedures to ensure that improper information does not reach the new Child Advocate will, of course, need to be implemented.

Q4. The Child Advocate office, pursuant to circuit court order, makes an investigation of the respective residences of divorced parents A and B in order to file a written recommendation as to custody. During the investigation of A, A admits to child abuse of the children of A and B. This is reduced to writing and placed in a Child Advocate office business record. Custody is awarded to B. Subsequently, A marries C, has a child, and divorces C. A is awarded custody of the child of the marriage of A and C. After the divorce, A seeks child support from C through the Child Advocate; C petitions for custody. A has signed the waiver of confidentiality.

Can the Child Advocate decline to represent A?

Can the Child Advocate disclose the admission of child abuse if subpoenaed by C?

A. The Child Advocate can decline to represent A if he or she feels it is not in the child's best interest. He or she may, regardless of any waiver, disclose the admission of child abuse. If called upon to testify, the lawyer should withdraw. (DR 5-102)

Q5. A applied to the local Child Advocate office for child support enforcement against former spouse B. A signed the waiver of confidentiality. The Child Advocate successfully enforced A's order against B. Subsequently, A disclosed to a Child Advocate worker that A has abused their child. A

refuses B visitation. B applies to the Child Advocate for visitation enforcement.

Can the Child Advocate provide visitation enforcement services to B?

What is the Child Advocate's responsibility as to A's admission of child abuse?

If A had not signed the waiver of confidentiality, would your opinion change?

A. The Child Advocate can assist B. He or she may, regardless of any waiver, disclose the admission of child abuse.

Q6. B, the noncustodial parent, asks for a downward modification of the child support order. The Child Advocate office investigates and finds that B is correct and the child support should be modified downward.

a. If A, the custodial parent, receives public assistance, can the Child Advocate (an employee of the Department of Human Services) petition the court and appear in court to have B's support order lowered?

b. If A, the custodial parent, does not receive public assistance but has previously applied for and received Child Advocate services, can the Child Advocate petition the court and appear in court to have B's support lowered?

B, the noncustodial parent, asks the Child Advocate office for a downward modification of the child support order. The Child Advocate office investigates and finds that the child support should be modified upward.

a. If A, the custodial parent, receives public assistance, can the Child Advocate petition the court and appear in court on behalf of the Department of Human Services to have B's support order raised?

b. If A, the custodial parent, does not receive public assistance but has previously applied for and received Child Advocate services, can the Child Advocate advise A and then petition the court and appear in court to have B's support order raised?

A. The Child Advocate should consider what is in the best interest of the child. If modification (either upward or downward) of the support order is deemed to be in the child's interest, then the Child Advocate should assist A regardless of whether or not that custodial parent receives public assistance or has received Child Advocate services.

Q7. A Child Advocate is representing A in court to obtain child support from B. During A's testimony under oath, A admits to child abuse. What is the Child Advocate's position relevant to A and the child in this occurrence?

A. The attorney must make a determination of what is in the best interest of the child and determine if he or she can adequately represent the conflicting interests concerned; if he or she cannot, then the attorney must withdraw.

Q8. Is a statement made to a Child Advocate worker imputed to the Child Advocate attorney?

A. The Child Advocate attorney should follow the guidelines issued in the Model Rules of Professional Conduct 5.3 and be held responsible in accordance with paragraph (c) thereof.

Erwin L. Conrad, Chairman
Committee on Legal Ethics

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August 12, 1986

RE: Reply to Inquiry No. 86-2

Dear Counsel:

On behalf of the Legal Ethics and Professional Responsibility Committee of the Pennsylvania Bar Association, this informal opinion is in response to your letter of inquiry dated March 13, 1986, supplemented by letter dated April 9, 1986.

Specifically, you have requested advice concerning whether a spouse attorney may practice criminal law in ABC County while the other spouse attorney serves as an Assistant District Attorney in ABC County.

Your inquiry revolves around the concern that your representation for the District Attorney's Office may be in conflict of interest with that of your spouse who has in the past and may in the future practice criminal defense law in ABC County.

Your recitation of the facts discloses that Ms. X is an Assistant District Attorney with ABC County. She has a private law practice, known as X and X, with her husband, Mr. X. Mr. X withdrew from approximately twenty (20) criminal cases effective November 1, 1985, upon Ms. X's employment with the District Attorney's Office. Since November 1, 1985, Mr. X has not engaged in any criminal defense work in ABC County.

Ms. Y is an Assistant District Attorney with ABC County. Ms. Y, formerly Ms. Z, was married to Mr. Y in of 1986. Ms. Y and Mr. Y never have appeared as direct adversaries in court nor do they have any business relationship. Mr. Y is currently practicing criminal defense law in ABC County.

The ABC County District Attorney's Office employs nine attorneys. It is not highly departmentalized as are other, larger District Attorney offices in the Commonwealth.

Based upon the foregoing, you have each requested advice concerning the following:

> (1) May Mr. X and Mr. Y practice criminal law in ABC County while Ms. X and Ms. Y are employed as Assistant District Attorneys by the District Attorney's office of ABC County?

In responding to these inquiries, some background first should be provided:

Your inquiry is governed generally by DR 5-101(A), DR 5-105(A), DR 5-105(C), DR 4-101, Canon 4, and Canon 9 and the related disciplinary rules of the Code of Professional Responsibility as enacted by the Supreme Court of the Commonwealth of Pennsylvania and by Model Rule 1.8(i) and the comments thereto, which Model Rules were adopted by the American Bar Association on August 2, 1983, and are currently pending consideration for adoption before the Supreme Court of the Commonwealth of Pennsylvania.

Unlike the Code of Professional Responsibility as enacted in Pennsylvania, Model Rule 1.8(i) of the ABA Model Rules of Professional Conduct specifically addresses the question of whether spouses can represent opposing parties.

Model Rule 1.8(i) provides that:

> 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. (Emphasis supplied)

Model Rules of Professional Conduct, Rule 1.8(i) (1983). The Comment to Model Rule 1.8(i) further provides that "the disqualification in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated." Model Rules of Professional Conduct Rule 1.8(i), Comment (1983). The Model Rules do not directly address whether it is permissible for a District Attorney to consent on behalf of the state.

The Code of Professional Responsibility, as presently in force in the Commonwealth of Pennsylvania, does not address specifically the question of whether spouses can represent opposing parties. Analysis must be made under the general provisions of the Code applying Disciplinary Rule 5-101(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"); Disciplinary Rule 5-105(A) ("A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)"); Disciplinary Rule 5-105(C) ("In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each"); Canon 4 and related disciplinary rules (relating to a lawyer's duty to preserve the confidences and secrets of a client); and Canon 9 and related disciplinary rules (relating to avoiding "even the appearance of professional impropriety").

Attention also must be paid to the material difference between the Comment to Model Rule 1.8(i), as noted above, and Disciplinary Rule DR 5-105(D). DR 5-105(D) provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

The Code, as contrasted with the Model Rules, does not permit a disqualified lawyer's partner to handle a case against the disqualified lawyer's spouse. The Code vicariously imputes disqualification to all members of the firm. The Model Rule does not.

ABA Formal Opinion 340, September 23, 1975, takes the position that representation of differing interests by both spouses or by one spouse and an associate of the other spouse is not per se prohibited, but must be evaluated under the facts and circumstances of each case. The opinion suggests that spouses must determine whether the interest of one spouse "creates a financial or personal interest that reasonably might affect the ability of a lawyer to represent fully his or her client with undivided loyalty and free exercise of professional judgment." ABA Comm. on Ethics and Professional Responsibility, Form Opinion 340 (1975). The opinion does impute the disqualification of a spouse to the entire firm based on DR 5-105(D). The opinion also requires that the attorney always should disclose the potential conflict of interest to the client.

Opinions issued on this subject in the various states vary from one extreme to the other: some usually permit spouses to represent adverse parties; others articulate a per se prohibition and never permit such representation. Some states prohibit only representation by spouses of opposite or differing sides of the same matter or case, while others impute disqualification of a spouse to other members of the firm or office, as the case may be.

In Blumenfeld v. Borenstein, 276 S.E.2d 607 (1981), the Georgia Supreme Court followed ABA Formal Opinion 340, September 23, 1975, and refused to adopt a per se rule of disqualification, commenting that "per se disqualification based on marital status is neither mandated nor justified by the Code of Professional Responsibility." The Georgia court, citing Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), warned that "[a] per se rule would effectively create a category of legal 'Typhoid Marys', chilling both professional opportunities and personal choices."

In 1981, in Informal Opinion 6, the Advisory Committee, Missouri Bar Administration, concluded that the "entire staff of a public defender's office is disqualified from handling any criminal case being prosecuted in a county where one spouse is the prosecuting attorney and the other spouse is the public defender who supervises the defense of indigents. If the supervising public defender instead becomes an assistant public defender, the staff would not be disqualified provided she does not handle any cases being prosecuted in her spouse's county and provided she is screened from information about those cases." (Opinion 6) ABA/BNA Law. Man. Prof. Conduct 801:5255.

In 1985, the Oregon State Bar Legal Ethics Committee (Opinion 502) held that "[a] lawyer may represent a party whose opponent is represented by the lawyer's spouse provided the spousal relationship does not affect or interfere with the lawyer-client relationships and the clients consent after full disclosure of the potential conflicts." The Committee warned that married lawyers "shoulder a heavy responsibility" in obtaining informed consent.

Without considering the size of the firm, the Committee commented that "[w]here neither spouse is directly involved, the personal conflict of one spouse will not be imputed to either firm." ABA/BNA Law. Man. Prof. Conduct 801:7114-15.

In Informal Opinion 82-15, the Committee on Rules of Professional Conduct, State Bar of Arizona, decided that spouses who are members of two different firms may not represent clients having interests adverse to a person whom either spouse knows is represented by the other unless the client consents after full disclosure. ABA/BNA Law. Man. Prof. Conduct 801:1314. Oregon permits a lawyer to represent a party whose opponent is represented by his spouse provided the spousal relationship does not interfere with the relationship and the client consents. ABA/BNA Law. Man. Prof. Conduct 801:7114-15. A more recent Oregon opinion suggests that consent is required only if some potential for conflict exists. 1 ABA/BNA Law. Man. Prof. Conduct 688 (1985). The Virginia State Bar Standing Committee on Legal Ethics (Opinion 185) permitted an attorney to practice before the criminal courts of a jurisdiction in which the attorney's spouse is an assistant commonwealth attorney so long as the attorney's spouse has no contact with the matter at issue and the attorney's client consents after full disclosure. ABA/BNA Law. Man. Prof. Conduct 801:8799.

The issue of whether consent is required (or can be tendered) becomes more difficult when a government office is involved. Some states permit the district attorney or attorney general to consent. In 1983, in Informal Opinion 42, the Professional Ethics Commission of the Board of Overseers, Maine State Bar Association, overruled its earlier position and held that an assistant district attorney may prosecute a criminal case against a person represented by a lawyer whose partner is the spouse of the assistant district attorney. Although the opinion does not suggest that an assistant district attorney may prosecute a criminal case against a defendant represented by their spouse, the opinion would seem to permit an attorney to practice criminal law in the same county where his spouse is an assistant district attorney as long as they do not directly oppose each other. In simplifying the consent process, the Maine court commented:

> Although the prosecuting lawyer represents the public's interest, there is no persuasive reason to consider the public's consent to the lawyer's representation in such a case. The prosecuting lawyer, however, must obtain the informed written consent of the district attorney or the attorney general to continue a representation involving possible conflicts of interest.

ABA/BNA Law. Man. Prof. Conduct 801:4207 (Maine).

Other courts have concluded that the state is incapable of waiving the conflict. (Opinion 82-22) ABA/BNA Law. Man. Prof. Conduct 801:4316 (Maryland), (Opinion 82-15) ABA/BNA Law. Man. Prof. Conduct 801:1314 (Arizona) Although Arizona agrees that the state is incapable of waiving the conflict, the state would require an attorney, employed by the public, to decline representation only where the presence of his spouse as the opposing attorney creates a reasonable probability of personal or financial interest interfering with his representation of the public. Arizona would appear to permit an attorney to represent a criminal defendant as long as the attorney's spouse was not directly prosecuting the case for the state. Id.

Both Maine and Maryland cite ABA Formal Opinion 6, June 11, 1929, to support their conclusion that a district attorney may consent on behalf of the state. We can find no language in ABA Formal Opinion 6 which would support either the Maine or the Maryland interpretation. We also can find no worthy authority which holds that a district attorney could not consent on behalf of the state. Maine's position, which seems to represent the majority view, receives support from Virginia. In Informal Opinion 185, the Virginia State Bar Standing Committee on Legal Ethics held that "[a]n attorney may practice before the criminal courts in a jurisdiction in which the attorney's spouse is an assistant commonwealth attorney. The attorney's spouse may not have any contact with the matter at issue, and the attorney's client must consent after full disclosure." Citing Disciplinary Rule 5-101 and Canon 9. ABA/BNA Law. Man. Prof. Conduct 801:8799.

Many states have discussed whether a so-called "Chinese wall" or "cone of silence" can be established in such settings. No opinion was located which suggested that a Chinese wall alone was sufficient to prevent vicarious imputation of disqualification. However, sometimes such a concept has been used together with other considerations. See (Informal Opinion 6) ABA/BNA Law. Man. Prof. Conduct 801:5255 (Missouri); (Opinion 846) 801:3017 (Illinois). One state expressly rejected the need to establish a Chinese wall based on the attorney's obligation to preserve confidentiality. (Opinion 502) ABA/BNA Law. Man. Prof. Conduct 7114-15 (Oregon).

As discussed above, there is no general agreement about whether a spouse can represent a client in a matter where the other spouse represents a differing interest. Similarly, there is no general agreement on whether disqualification is vicariously imputed to the associates of both spouses.

States that impute disqualification base it on factors such as Canon 9's prohibition against "even the appearance of professional impropriety." ABA/BNA Law. Man. Prof. Conduct 801:2063 (Connecticut), and Disciplinary Rule 5-105(D) of the Code, ABA/BNA Law. Man. Prof. Conduct 801:3914 (Kentucky). Illinois looks at

the facts and circumstances of each case to determine whether to impute disqualification. Illinois State Bar Association Committee on Professional Responsibility Op. No. 846 dated 1/20/84, 1 ABA/BNA Law. Man. Prof. Conduct 87 (1985).

Several states simply do not impute disqualification. (Opinion 556) ABA/BNA Law. Man. Prof. Conduct 801:8822 (Virginia); (Opinion 82-15) 801:1314 (Arizona); (Opinion CI-803) 801:4847-48 (Michigan); (Opinion E-85-2) 801:9115 (Wisconsin).

Using this foregoing evaluation and strictly applying the Code of Professional Responsibility, as presently adopted in Pennsylvania, and not the Model Rules, to address the issue which you have raised, the Committee concludes as follows:[1]

1. The Committee construes DR 5-101(A), DR 5-105(A) and Canon 9 broadly to prohibit Mr. X and Mr. Y from practicing criminal law in ABC County while their spouses are employed by the ABC County District Attorney's Office unless the clients consent, in writing, after full disclosure. The Committee also construes Canon 9 as prohibiting an Assistant District Attorney from prosecuting a case directly against a person represented by the Assistant District Attorney's spouse without regard to consent.

2. The District Attorney has the ability to and may consent on behalf of the state, but the District Attorney must evaluate the facts and circumstances of each case before tendering or withholding such consent.[2]

3. Pursuant to DR 5-105(D), a disqualification is imputed to the other members of the lawyer's firm.

4. If the interest of one of the marriage partners as an attorney for an opposing party creates an economic or personal interest that reasonably might affect the ability of that lawyer to fully represent his or her client with undivided loyalty and free exercise of professional judgment, the employment by the criminal defense attorney must be declined.

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[1]The Committee cautions that this interpretation of the Code is specifically addressed to the District Attorney's Office in ABC County. The ABC County District Attorney's Office consists of only nine attorneys, several of whom work on a part-time basis. This holding should not be strictly applied to a similar spousal situation in a larger, highly departmentalized District Attorney's Office.

[2]The Committee further cautions that this opinion does not address or evaluate the factors which a District Attorney must consider when deciding whether to tender or withhold such consent.

5. The Committee construes Canon 5, Canon 9 and the Disciplinary Rules therein to prohibit the law firm of X and X from practicing criminal law in ABC County while Ms. X, a partner in the law firm of X and X, is employed by the ABC County District Attorney's Office.

Special sensitivity must be paid to the importance of maintaining the integrity and outward appearance of integrity of the criminal justice system. A criminal defendant must be assured of his attorney's zealous representation and loyalty. Similarly, the public must be assured that the independence of public prosecutors is not impaired by spousal, economic or other relationships and interests.

Given the current status of the Model Rules,[3] the Committee recognizes that the conclusions reached in this opinion do not and cannot provide you with certainty. Upon adoption of the Model Rules, which are currently pending adoption by the Supreme Court of the Commonwealth of Pennsylvania, the Committee's opinion may change.

Nevertheless, it has been our intention to identify the issues in order to place you in the best position to make reasoned judgments concerning whether Mr. X and Mr. Y should continue to practice criminal law in ABC County while their spouses are employed as Assistant District Attorneys with the ABC County District Attorney's Office.

On behalf of the Committee, I remain

Sincerely,

Michael A. Bloom
Chairman
Committee of Legal Ethics and
Professional Responsibility

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[3]Which now have been adopted in 14 states, including New Jersey and Maryland. (Since issuance of this opinion, Florida became the 15th state to adopt the Model Rules.)

Caveat: Please be advised that the opinions contained in this letter are only those of the Committee and are entitled only to such weight as a reviewing authority might wish to give them.