

Nebraska Ethics Advisory Opinion for Lawyers
No. 93-5

A COUNTY ATTORNEY, WHOSE HUSBAND IS A POLICE OFFICER IN THE SAME COUNTY, IS NOT DISQUALIFIED FROM PROSECUTING A CASE IN WHICH THE POLICE DEPARTMENT IS INVOLVED UNLESS THE HUSBAND WILL BE CALLED AS A WITNESS. HOWEVER, THE FAMILIAL RELATIONSHIP MUST BE DISCLOSED TO THE COURT, ALL LAWYERS, AND THE PARTIES INVOLVED. IF THE HUSBAND IS OR MAY BE A WITNESS, THE COUNTY ATTORNEY MAY NOT HANDLE THE CASE PERSONALLY. THE COUNTY ATTORNEY'S EXCLUSION DOES NOT EXTEND TO THE ENTIRE OFFICE UNLESS THE APPEARANCE OF IMPROPRIETY EXISTS UNDER THE FACTS IN A PARTICULAR CASE.

FACTS

Attorney A is employed as a County Attorney. Her husband is a member of a police department in the same county. The County Attorney's office, on occasion, must prosecute cases where Attorney A's husband was the investigating officer and will therefore be called as a witness. Attorney A does not assign cases to herself where her husband is involved.

QUESTION PRESENTED

Whether the entire County Attorney's office is disqualified from handling cases where the County Attorney's husband, a police officer, will be called to testify.

DISCUSSION

In [Advisory Opinion 89-6](#), The Advisory Committee addressed a question quite similar to this. The situation in [Advisory Opinion 89-6](#) involved a Deputy County Attorney whose duties included prosecution of cases in juvenile court. The Department of Social Services was sometimes involved in these cases. The Deputy County

Attorney's sister was employed as a social worker for the Department of Social Services. The Advisory Committee found that the Deputy County Attorney could continue to prosecute cases in the same city where his sister was employed with Social Services. However, the Committee provided that:

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.

Attorney A can prosecute cases in which the Police Department is involved. However, the familial relationship between Attorney A and her husband should be disclosed to the Court, all lawyers, and the parties involved in the case. Attorney A should exclude herself from the case if her husband will or may be called as a witness.

This exclusion will assure compliance with DR 5-101. DR 5-101 concerns refusing employment when the interest of a lawyer may impair his or her independent judgment. DR 5-101(A) states:

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.

An attorney may feel that his or her professional judgment will not be influenced by a situation such as the one presented. However, exclusion would still be necessary to avoid any violations of Canon 9 and the

appearance of professional impropriety.

This exclusion will not extend to the entire County Attorney's office when the County Attorney's husband is only a witness. Generally, the disqualification of an attorney, due to a conflict of interest, may affect the eligibility of the entire firm or office. DR 5-105(D) states:

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 ABA's Standing Committee on Ethics and Professional Responsibility addressed this issue in ABA Formal Opinion 342. The Committee stated:

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 the colleagues concerning the relevant transaction or set of transactions is prohibited by these rules.

The Committee determined that if DR 5-105 was strictly applied to the entire governmental division, the "government's ability to function would be unreasonably impaired." ABA Formal Opinion 342.

Appropriate measures should be taken to assure the disqualified attorney is isolated from any case in which a conflict of interest arises. The disqualified attorney should be isolated through a screening process commonly known as a "Chinese Wall," which assures

that the disqualified attorney is not associated with the case in any way.

The entire office should be excluded, and a special prosecutor appointed, when the facts of a particular case create the appearance of impropriety. Such a case would arise, for example, when the County Attorney's husband has been a victim in a case. Exclusion of the entire office when the County Attorney's husband has been a victim is necessary to avoid violations of Canon 9 and the appearance of professional impropriety. The County Attorney should exercise her independent judgment in determining whether other factual situations, which have not been specifically discussed, would require the exclusion of the entire office to avoid even the appearance of professional impropriety.

CONCLUSION

A County Attorney, whose husband is a police officer in the same county, is not disqualified from prosecuting a case in which the police department is involved unless the husband will be called as a witness. However, the familial relationship must be disclosed to the court, all lawyers, and the parties involved. If the husband is or may be a witness, the County Attorney may not handle the case personally. The County Attorney's exclusion does not extend to the entire office unless the appearance of impropriety exists under the facts in a particular case.