



ISBA Advisory Opinion on Professional Conduct

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**Opinion No. 11-04
March 2011**

- Subject:** Conflict of Interest - Personal Interests; Imputed Disqualification
- Digest:** A lawyer may not represent a defendant in a criminal matter where the lawyer's spouse is a police officer who has been identified as a witness for the prosecution on a contested matter.
- References:** ABA Model Rule of Professional Conduct Rule 1.7(b)
Illinois Rule of Professional Conduct 1.7(b) & 1.10 (a)
Illinois Rule of Professional Conduct 1.10 Comment 3
- See also ISBA Ethics Advisory Opinions No.'s 09-02, 04-01 and 90-24

FACTS

Lawyer A is married to a police officer who is currently assigned to the drug unit. Lawyer A and Lawyer B are partners in a two person firm. Lawyer A represents defendants in criminal matters, including drug cases, as both a private practicing lawyer and as a court appointed public defender on behalf of indigent defendants.

QUESTIONS

1. Does Lawyer A have a conflict of interest if she is asked to represent a defendant when her police officer spouse has been identified as a witness for the prosecution on a contested matter?
2. If yes, may the client waive the conflict?
3. If yes, may Lawyer A's partner, Lawyer B, represent said defendant?
4. Is the analysis affected by the status of the client, i.e., whether the defendant/client is indigent and Lawyer A has been appointed to act as counsel by the county, or whether the defendant/client hires Lawyer A as an attorney in private practice?

OPINION

Does Lawyer A have a conflict of interest if she is asked to represent a defendant when her police officer spouse has been identified as a witness for the prosecution on a contested matter?

Rule 1.7 provides as follows:

- (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:
 - 1.) The representation of one client will be directly adverse to another client; or
 - 2.) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or 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 lawyer in the same litigation or other proceeding before a tribunal; and
 - 4.) Each affected client gives informed consent.

The committee believes it is clear that there is a significant risk that defense counsel's representation will be materially limited by a personal interest under 1.7 (a)(2) because counsel's spouse has been identified as a witness. The next consideration is

whether under 1.7 (b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation when her spouse has been identified as a witness for the prosecution on a contested matter. This is an objective standard. See ISBA Op. 09-02. The committee believes that the defense counsel could not reasonably believe that she will be able to provide competent and diligent representation when her spouse has been identified as a witness for the prosecution on a contested matter. Therefore, the conflict cannot be waived, and the possibility of consent after disclosure contemplated by the Rule is not applicable.

The next question is, because the conflict is personal to Lawyer A, is Lawyer B also disqualified? Rule 1.10(a) provides:

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 the 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.

Lawyer A's partner, Lawyer B, would be asked to cross-examine and perhaps to attack the credibility of Lawyer A's spouse. This is a situation where it would be reasonable to conclude that Lawyer B's loyalty to his partner would have an effect on Lawyer B's representation of the client, especially in a small firm. Lawyer B's zeal in cross-examining his partner's spouse would be materially limited because of his loyalty to Lawyer A. (See RPC 1.10, Comment [3].) Therefore, because Lawyer B's representation would be limited by his loyalty to his partner Lawyer A, Lawyer A's disqualification is imputed to Lawyer B, and he cannot represent the client.

The final question is whether the analysis is affected by the status of the client, that is whether the client has privately retained Lawyer A, or whether the client is indigent and Lawyer A has been appointed to represent the client. The Committee does not believe that those additional facts make any difference. There is no reference in the Rules to different standards applying when a client is indigent.