

**Nebraska Ethics Advisory Opinion for Lawyers  
No. 10-02**

**IT IS NOT UNETHICAL, OR A CONFLICT OF INTEREST, FOR AN ATTORNEY TO ACCEPT AN APPOINTMENT AS GUARDIAN AD LITEM, OR AS COUNSEL FOR THE PARENTS IN A JUVENILE COURT PROCEEDING SIMPLY BECAUSE HIS SPOUSE IS EMPLOYED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AS A CHILD/FAMILY SUPPORT WORKER IN THE JURISDICTION OF THE JUVENILE COURT WHERE THE PROCEEDINGS ARE HELD. THIS ASSUMES THAT THE LAWYER'S PROFESSIONAL JUDGMENT IS NOT ADVERSELY AFFECTED AND THERE ARE NO OTHER SPECIAL CIRCUMSTANCES GIVING RISE TO A CONFLICT OF INTEREST. THE COMMITTEE RECOMMENDS, HOWEVER, THAT THE ATTORNEY DISCLOSE THE FAMILIAL RELATIONSHIP TO THE COURT, ALL LAWYERS, AND THE PARTIES INVOLVED.**

**IF THE ATTORNEY'S SPOUSE HAS BEEN INVOLVED IN THE MINOR'S CASE, SUCH AS HAVING BEEN ASSIGNED TO INVESTIGATE OR REPORT ON THE MINOR'S CIRCUMSTANCES, AND THIS INVOLVEMENT COULD POTENTIALLY LEAD TO HIS SPOUSE BEING CALLED AS A WITNESS IN THE PROCEEDING BEFORE THE JUVENILE COURT, THE ATTORNEY SHOULD NOT ACCEPT AN APPOINTMENT AS GUARDIAN AD LITEM OR AS COUNSEL TO THE PARENTS.**

**IF THE ATTORNEY IS CURRENTLY INVOLVED IN CASES AS GUARDIAN AD LITEM OR COUNSEL TO THE PARENTS, AND IT APPEARS THAT HIS SPOUSE WILL BE CALLED AS A WITNESS HE SHOULD SEEK THE COURT'S PERMISSION TO WITHDRAW.**

**QUESTIONS PRESENTED**

1. Whether an attorney, whose wife works for the Department of Health and Human Services in the jurisdiction where the attorney practices, can accept appointments in juvenile court as guardian ad litem for minor children or as counsel for the parents?
2. What, if any, existing appointments may counsel continue to handle?

## **FACTS**

A lawyer practicing in outstate Nebraska in a community of approximately 3,500 people has an active general practice in the community, including appointments as guardian ad litem and as counsel for parents in juvenile court cases. The attorney's wife, who is not an attorney, has accepted a position with the Nebraska Department of Health and Human Services as a child/family support worker in the community where the attorney practices. There are currently two child/family support workers in that office, with one in training.

The typical case in juvenile proceedings, where the attorney is appointed, involves some type of abuse and neglect of the juvenile or the juvenile's conduct is in some manner at issue. The child/family support worker who is assigned to a case is responsible for investigating the circumstances and rendering a report recommending a certain disposition for the juvenile.

The primary goal of the guardian ad litem and the Department of Health and Human Services is to seek a resolution in the best interest of the child. Occasionally, there may be differences in opinion between the guardian and the Department on how this may best be achieved. If counsel is appointed to represent the parents, his client's interests can be at odds with those of the Department if the rights of the parents are also at issue. The proceedings in juvenile court are usually initiated by the County Attorney who is responsible for prosecuting the complaint. The child/family support worker, including the wife of the attorney requesting this opinion, may be called upon to give testimony in the juvenile court proceedings.

The attorney requesting this opinion wants to know whether he can continue to accept appointments representing the parents, or as guardian ad litem, since his wife now works as a child/family support worker.

## **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

### **RULE § 3-501.7. CONFLICT OF INTEREST; CURRENT CLIENTS**

(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 the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

**COMMENT:**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "Informed Consent" and "Confirmed in Writing," see Rule 1.0(e) and (d).

**DISCUSSION**

The question presented is whether a conflict of interest exists for the requesting attorney, in accepting appointments as guardian ad litem or to represent the parents in juvenile court, because his wife is employed in that jurisdiction by the Nebraska Department of Health and Human Services as a child/family support worker. A concurrent conflict of interest exists under Section 3-501.7(1) if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer." And, as comment [1] emphasizes "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."

Prior opinions of this Committee have addressed whether a conflict of interest exists merely because an attorney's spouse or relative is employed by or in some manner associated with the opposing counsel or party. As a general rule, the answer is no. See, e.g., Opinion No. 89-6 (prosecuting attorney in juvenile court whose sister is employed by Nebraska Department of Social Services); Opinion No. 78-9 (criminal defense attorney whose close relative is the County Attorney); Opinion No. 86-5 (married attorneys representing adverse interests); Opinion No. 01-2 (employee of Public Defender's Office when spouse represents an interest adverse to the Public Defender); Opinion No. 76-3 (attorney appointed by court to represent defendant on drug charge in city where spouse as member of city council has reputation for insistence on strict enforcement of drug laws). While the above opinions do not find per se ethical violations, other additional circumstances may result in the need for disclosure, waiver of potential conflicts, or in some cases may disqualify counsel from accepting the representation.

The general premise of the foregoing opinions is not significantly affected by the current Nebraska Rules of Professional Responsibility. In Committee Opinion No. 06-12, the Ethics Advisory Committee was asked to determine whether Advisory Opinion No. 78-9, cited above, was still applicable in view of the recent changes in the professional responsibility rules in Nebraska. In that case the question was presented whether a city prosecutor's son could ethically act as defense attorney in cases prosecuted by his father's office. The opinion concluded under

Rule 1.7 and Comment 11 of the new rules "that when a father and a son represent clients who are adverse to each other, as a prosecutor and a criminal defense attorney . . . a personal conflict of interest is present." The opinion found that there is no "bright line" rule when opposite sides of the case are represented by a relative by blood or marriage because "[i]t is not the relationship itself which causes the conflict, but rather the effect of the relationship on the particular representation." The opinion stated that the son would first have to determine whether the relationship with his father would affect his ability to "zealously and ethically represent his client" and if it would not, it was still necessary for him to obtain the informed consent of his client before undertaking the representation.

Of the Committees previous opinions, Opinion No. 89-6 referred to above is most factually similar to this case. In that opinion, the Committee considered whether a deputy county attorney, whose sister was employed by the Nebraska Department of Social Services, could handle prosecutions and proceedings in juvenile court. While the deputy county attorney's sister was employed in the district office, which served the county in which her brother was deputy county attorney, the department intended to have his sister work only in other counties. However, she would still be on call and could, on an emergency basis, be involved in a case in her brother's county. Under these facts, the Committee concluded that the deputy could prosecute such cases in the same county in which his sister was employed as a social worker. However, the opinion further stated that "the lawyer must fully disclose the familial relationship to the Court, all attorneys, and the parties involved in any case, and should decline prosecution of the case should his professional judgment be adversely affected."

Based upon the foregoing, the Committee in this case likewise agrees that it is not per se unethical for an attorney to accept an appointment as guardian ad litem, or as counsel for the parents, in a juvenile court proceeding simply because his spouse is employed by the Department of Health and Human Services as a child/family support worker in the jurisdiction of the juvenile court where the proceedings are held. Furthermore, a formal informed consent in writing is not necessary under Rule § 3-501.7(b)(4) if the attorney's spouse has not been involved in processing that juvenile's case, and the attorney is satisfied that his professional judgment is in no way adversely affected by the mere employment relationship of his spouse. This is because that limited connection with the state agency poses no "significant risk that the representation . . . will be materially limited" as described under Rule § 3-501.7(a)(2). The Committee recommends, however, as it did in Opinion No. 89-6 that the attorney disclose the familial relationship to the court, all lawyers, and the parties involved.

The more difficult question arises when the attorney's spouse has been involved in processing the same case in which the attorney is appointed as guardian ad litem or as counsel to the parents. Being assigned to investigate or report on the minor's circumstances would constitute such involvement, particularly if there was a likelihood that the wife could be called as a witness in the proceedings before the juvenile court. In Opinion No. 89-6, discussed above, this Committee viewed the circumstances there very differently if the county attorney's sister were to be called as a witness in the juvenile court proceeding. The opinion stated:

"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."

In other words, the relative's involvement as a witness in a proceeding in which her brother represented one of the parties completely changed the circumstances in the Committee's analysis.

The Committee has reached the same conclusion in a similar situation in Opinion No. 93-5. There a county attorney's husband was a member of a police department in the same county. On occasion, her husband would be called to testify as the investigating officer in cases prosecuted by the county attorney's office. The county attorney would not assign those cases to herself. The opinion found that the county attorney's office was not disqualified from handling the cases where her husband was a witness, but clearly added that the county attorney "should exclude herself from the case if her husband will or may be called as a witness."

A 1996 Opinion of the Michigan Standing Committee on Professional and Judicial Ethics has considered these issues in very similar circumstances. In that case, a lawyer's spouse served as a coordinator of security at a county youth home which deals primarily with youths who are involved in delinquency proceedings. The spouse had little involvement with the juvenile court other than transporting youths to the court. Also, the lawyer's parent-in-law worked as an investigator for the prosecutor's office which represented the Department of Social Services which initiates and advocates abuse and neglect cases. The parent-in-law did not, however, investigate cases for the Department of Social Services. The lawyer inquired whether under these circumstances the lawyer would be prohibited from accepting appointments as guardian ad litem. The committee there found that the lawyer was not prohibited from accepting those appointments merely because of the employment situation of his spouse and parent-in-law. However, the committee added that in the present situation the inquirer's spouse was "neither representing an opponent nor likely to be involved as a witness or source of information concerning the case." The committee also found that disclosure was not necessary:

"Because neither of the inquirer's relatives is in a sensitive position that could or likely would have any impact upon an abuse and neglect case, not only is there no conflict of interest in the lawyer serving as guardian ad litem in abuse and neglect cases, but there is not even an ethical requirement for disclosure."

Michigan Ethical Opinion RI-250 (March 1, 1996).

The circumstances are very different when a lawyer's spouse becomes a witness in an adversarial proceeding, as recognized by the Committee's opinions in prior cases and the Michigan Opinion discussed above. Whether it be during cross examination, direct examination, or otherwise during the course of the proceedings, the close relationship between husband and wife poses a significant risk to the lawyer's independent judgment and loyalty to his client. (See § 3-501.7(a)(2). The parties, counsel, or the court should not be placed in the position of having to question the attorney's judgment in proceeding with the representation under those circumstances, or assume the risk of any unintended consequences. The Nebraska Supreme Court, while addressing a different factual setting, has nevertheless been particularly sensitive to the perils of conflicting interests in litigation. See Wendell's, Inc. v. Malmkar, 225 Neb. 341,

344, 405 N.W.2d 562 (1987). ("We specifically disapprove the actions of attorneys in representing conflicting interests in litigation, even with the consent of the clients involved.")

We therefore believe that, absent some extenuating circumstances, counsel should decline representation of a party in litigation when his or her spouse is sufficiently involved in the underlying facts to potentially be a material witness.

### **CONCLUSION**

It is not unethical, or a conflict of interest, for an attorney to accept an appointment as guardian ad litem, or as counsel for the parents in a juvenile court proceeding simply because his spouse is employed by the Department of Health and Human Services as a child/family support worker in the jurisdiction of the juvenile court where the proceedings are held. This assumes that the lawyer's professional judgment is not adversely affected and there are no other special circumstances giving rise to a conflict of interest. The Committee recommends, however, that the attorney disclose the familial relationship to the court, all lawyers, and the parties involved.

If the attorney's spouse has been involved in the minor's case, such as having been assigned to investigate or report on the minor's circumstances, and this involvement could potentially lead to his spouse being called as a witness in the proceeding before the juvenile court, the attorney should not accept an appointment as guardian ad litem or as counsel to the parents.

If the attorney is currently involved in cases as guardian ad litem or counsel to the parents, and it appears that his spouse will be called as a witness he should seek the court's permission to withdraw.