Legal Ethics - Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interest

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NOTE

LEGAL ETHICS—REPRESENTATION OF DIFFERING INTERESTS BY HUSBAND AND WIFE: APPEARANCES OF IMPROPRIETY AND UNAVOIDABLE CONFLICTS OF INTEREST?

INTRODUCTION

One of the most noticeable changes in law schools in recent years has been the increase in the number of women enrolled.¹ In the beginning of the 1963 academic year, 1,883 women were enrolled in law schools approved by the American Bar Association,² constituting 3.8 percent of the total enrollment. In the fall of 1968, there were 3,704 women enrolled,³ or 5.9 percent. By the 1973-74 school year, the number of women had grown to 16,760,⁴ 15.8 percent.

One effect of the increased number of women in law schools is that more and more lawyers are married to other lawyers. Where lawyer-spouses are not associated in the practice of law, questions have arisen about the propriety of a lawyer's accepting employment on behalf of a client whose interests differ from those of a client represented by the lawyer's spouse or by that spouse's firm. These questions have been considered in ethics opinions issued by the bar associations of four states: Arizona,⁵ Colorado,⁶ Illinois,⁷ and Virginia.⁸ The Arizona and Illinois opinions are lim-

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² Id. at 183.
³ Id.
⁴ Id.
⁵ ARIZONA ETHICS COMM., OPINION No. 73-6 (Reconsideration of OPINION No. 71-27) (1973) [hereinafter cited as ARIZONA OPINION No. 73-6].
⁶ Colorado Bar Ass'n Ethics Comm., Opinion No. 52, 3 COLO. LAWYER, Apr. 1974, at 55 [hereinafter cited as COLORADO OPINION No. 52]. Opinion 52 was adopted on February 9, 1974. Since its adoption, the ethics committee has voted to reconsider the opinion's holdings, but until a new opinion is issued the present one is considered in effect.
⁷ ILLINOIS STATE BAR ASS'N, PROFESSIONAL ETHICS OPINION NO. 311 (1968) [hereinafter cited as ILLINOIS OPINION No. 311].
⁸ Letter from R. J. Lilliard, Chairman, Legal Ethics Committee, The Virginia State Bar, to a Grafton, Virginia, lawyer, Nov. 12, 1974, on file with Professor Cathy S. Krendl, University of Denver College of Law [hereinafter cited as Virginia opinion].

In addition to the ethics opinions on this subject, the Nevada Supreme Court rules forbid representation of conflicting interests by attorneys related in a number of different ways, including “consanguinity within the third degree.” Nev. Sup. Ct. R. 170. Although “consanguinity” does not include the marriage relationship, it is probable that any restriction of representation of conflicting interests by spouses in Nevada would be achieved by amendment of this court rule, and not by an ethics opinion.
ited to fact situations involving criminal cases; they hold that it is improper for one spouse to seek to represent a defendant prosecuted by the other spouse or by another member of the public office which employs the spouse.

The Virginia opinion was in response to an inquiry concerning the propriety of a lawyer's representing one party to a divorce action when the other party is represented by the firm which employs the lawyer's spouse. Because of wide interest in the subject, however, the Virginia Legal Ethics Committee, in addition to addressing the question posed, discussed additional situations, both those involving direct representation by lawyer-spouse against lawyer-spouse and those involving representation of opposing interests by the spouses' firms. The committee concluded that representation in which one spouse is actively involved against the other spouse or the other spouse's firm is not ethically permissible. So long as neither spouse is directly involved, according to the committee, representation of opposing clients by the two firms is permissible.

Colorado's opinion is similar to that adopted in Virginia, except that it includes consideration of the propriety of a lawyer's representation of a defendant in a criminal case prosecuted by a district attorney's office which employs that lawyer's spouse. The opinion's conclusion coincides with that of the Virginia Legal Ethics Committee: It is not proper for a lawyer to accept employment by a client whose interests differ from those of a client of the lawyer's spouse or a member of the spouse's firm; it is proper for the firms to represent clients with differing interests so long as neither spouse participates in the representation.

One result of the ethical questions raised by the representation of the opposing sides of pending legal matters by spouses might be a reluctance on the part of law firms to hire any applicant for a job if the applicant's spouse is employed by, or seeking law-related employment with, another law firm in the same com-

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9 Arizona Opinion No. 73-6 at 1; Illinois Opinion No. 311 at 1.
10 Virginia opinion at 1.
11 Id. at 2.
12 Id.
13 Id.
14 Colorado Opinion No. 52 at 55.
15 Id. at 56.
16 Id. at 57.
munity. That such a reaction by employers is a reality is indicated by a rule adopted by the Committee on Placement at Harvard Law School stating that employers who use the school's placement office for interviews may not refuse to hire an applicant merely because the applicant's spouse is or will be a lawyer in the same town.\footnote{Memorandum from Ass't. Dean Russell A. Simpson, Law School of Harvard University, to Interviewers Regarding Placement Office Rule 5, September 30, 1974, on file at Harvard [hereinafter cited as Simpson Memorandum].}

The Committee concluded . . . that the likelihood of unprofessional conduct . . . is insufficient in these situations to justify the substantial hardship worked on married couples by a policy of refusing to hire a lawyer whose spouse works for another firm in town.\footnote{Id.}

Where a law firm's recruiting policy is supported by an ethics committee opinion, married couples face a greater likelihood that one or both of them will have difficulty finding employment in the same community.\footnote{See text accompanying notes 125-26, infra.} For instance, if one spouse obtains a position with a state or local prosecuting office, the other may find it impossible to work in criminal defense matters, at least in that jurisdiction. Or, if both spouses are interested in, for example, commercial law, and seek employment with firms specializing in that area, they may face great unwillingness on the part of such firms to risk the possibility of creating a conflict of interest between themselves and other firms which they frequently encounter in litigation. The married lawyers may find that they must choose to work in greatly dissimilar fields of law, or to live where each may work in a different city, or to enter practice in the same firm, their own or an established one without a policy against hiring close relatives. "Substantial hardship" seems an apt description of such results.

Even if the lawyer-spouses are able to find employment with different law firms, ethics opinions like those described previously may present clients of their firms with difficult circumstances. For instance, if a lawyer represents a bank in making a construction loan to a client represented by the lawyer's spouse, may granting of the loan be made contingent upon the borrower's obtaining different counsel in order to avoid possible charges of conflict of interests? If the borrower does retain a different lawyer solely to complete the loan transaction, how may the new
lawyer comply with the lender’s request for a statement by the borrower’s general counsel (presumably the first firm) that the transaction will not be jeopardized by any of the other business dealings of the borrower?

In addition to the impact of these opinions on lawyers and clients, adoption and enforcement of such opinions at this time may subject bar associations to criticism because the effect of the opinions may be harsher on women’s prospects for employment than men’s. Such criticism might note that, in general, wives complete their career education after their husbands. Thus, generally the husbands are employed as lawyers before an actual conflict arises, and it is the wives who must face the restrictions on hiring which stem from the marriage relationship. The Arizona Ethics Committee took note of this pattern in Arizona Opinion 73-6, a reconsideration of an earlier, more restrictive opinion. The committee reconsidered the first opinion at the request of the Board of Governors of the Arizona Bar Association, and the request was prompted, at least in part, by recognition that “the restrictive position therein taken may adversely affect the employment opportunities of women lawyers who are increasing in number and who have never had an easy time of it in our profession.”

The harshness of the opinions considered here on married lawyers is accentuated by the fact that few similar restrictions are placed on lawyers related to each other in different ways (for

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20 See THE CARNegie COMMISSION ON HIGHER EDUCATION, OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION (1973). This study of American graduate and professional students found a marked difference in the age distribution of men and women; in particular, about one-fourth of the women students were married, divorced, or separated and 35 or older. Id. at 83-4. Data in the study indicated that more than one-half of the married women graduate students, as opposed to only one-fourth of the married men, had spouses attending graduate school or who had attained a graduate degree, suggesting “that women who are married to graduate students or to men who have attained a graduate degree are especially likely to seek graduate education.” Id. at 85. In the case of medical students, the Commission reported that more than one-half of women who obtain M.D. degrees are married to physicians. Id. at 24, citing Powers, Parmelle, & Wiesenfelder, Practice Patterns of Women and Men Physicians, 44 J. MED. Ed. 481, 482 (1969). Although no similar study could be found involving women law students, it seems reasonable to assume that a significant number of women now receiving the J.D. degree are married to lawyers.

21 ARIZONA ETHICS COMMITTEE, OPINION No. 71-27 (1971). This opinion concluded that, where a husband was regularly employed and engaged in prosecuting criminal cases, his wife could not accept and defend cases prosecuted by the husband or any other member of his office, and neither could any other member of the wife’s firm.

22 ARIZONA OPINION No. 73-6 at 4.
example, parent-child), or on their firms. Certainly, one must not minimize the importance of avoiding the harm to the profession and the public which could result from representation of opposing clients by lawyers married to each other. However, in view of the consequences described above, it is necessary to scrutinize carefully ethics opinions in this area to determine if their objectives of giving valid guidance to lawyers in such situations may be achieved without such a harsh impact.

Because the Colorado and Virginia ethics committees have considered inter-spousal conflicts most broadly, this analysis will primarily focus on these two opinions. Consideration will be given to whether the opinions offer a consistent and logical application of the Code of Professional Responsibility, and whether they violate the due process and equal protection clauses of the U.S. Constitution. Finally, alternative approaches will be suggested for dealing with possible conflicts of interests between lawyer-spouses, approaches more in harmony with the Code and with the Constitution.

I. THE CODE OF PROFESSIONAL RESPONSIBILITY

Colorado's Opinion 52 is based on three hypothetical fact situations involving Lawyer A and Lawyer B, husband and wife not associated in the practice of law. In the first situation, Lawyer A seeks to represent a client whose interests differ from those

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23 See, O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970), under index heading "Conflict of interests, relatives." E.g., where son is a substitute justice in civil and police courts, whether his father-partner may practice in those courts is a local problem which must be considered on the merits of each case. Id. ¶ 4440 (The Virginia State Bar). Many opinions have held it proper for a father to defend in a criminal case prosecuted by his son. E.g., id. ¶ 1047 (Kansas Bar Ass'n); ¶ 1434 (The Missouri Bar); ¶¶ 3103, 3171, 3332 (North Carolina State Bar).

After Opinion 73-6 was issued, the Arizona ethics committee considered the case of an attorney whose father-in-law was a member of a zoning board which passed a regulation being challenged by a client of the son-in-law's firm. The committee ruled that so long as the relationship between the lawyer and the board member was disclosed to the client and the client consented it was proper for the firm to accept the employment. ARIZONA ETHICS COMM., OPINION No. 73-19 (1973).

The main thrust of this particular point is the integrity and the honesty of the lawyer involved, to himself and to his client. So long as there is complete disclosure and acceptance by the client, there is no harm done.

Id. at 4.

24 ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971) [hereinafter cited as ABA Code].

25 COLORADO OPINION No. 52 at 55.
of a client represented by Lawyer B. \(^{26}\) In the second situation, Lawyer A seeks to defend a client prosecuted by a district attorney's office which employs Lawyer B. \(^{27}\) In the third, Lawyer C, a member of Lawyer A's firm, seeks to represent a client with interests different from those of a client represented by Lawyer D, a member of Lawyer B's firm. \(^{28}\)

The Virginia ethics opinion also considers three hypothetical situations: 1) lawyer-spouse against lawyer-spouse, each actively involved in the same case; 2) lawyer-spouse actively participating in a case against lawyer-spouse's firm; 3) lawyer-spouse's firm against lawyer-spouse's firm, neither spouse directly involved. \(^{29}\) The second and third situations are applications of the principle of "vicarious disqualification," \(^{30}\) a concept also considered in Opinion 52's third fact situation. \(^{31}\) Although the Virginia opinion does not specifically discuss the question of representation in a criminal case, as does the Colorado opinion, \(^{32}\) that question is really only a more specialized version of the spouse-against-spouse and spouse-against-spouse's-firm questions decided by the Virginia committee. \(^{33}\)

In analyzing the two opinions, this section will discuss the committees' treatment of the direct confrontation of lawyer-spouse against lawyer-spouse, and the extension of the principles developed therein to representation by one spouse's firm against the other spouse's firm. Finally, additional problems which arise when one spouse is employed by a public prosecutor's office will be analyzed with reference to the opinions from Arizona and Illinois.

A. Lawyer-spouse Against Lawyer-spouse

In considering whether there is a conflict of interest when husband and wife represent clients with differing interests, the

\(^{26}\) Id. In the Code of Professional Responsibility the phrase "differing interests" is defined as including any interest that will have an adverse effect on the judgment or loyalty of a lawyer to a client, "whether it be a conflicting, inconsistent, diverse, or other interest." ABA Code, Definitions.

\(^{27}\) Colorado Opinion No. 52 at 55.

\(^{28}\) Id.

\(^{29}\) Virginia opinion at 2.

\(^{30}\) See ABA Code Disciplinary Rule [hereinafter DR] 5-101, and authorities cited therein, n. 29; DR 5-105(D).

\(^{31}\) Colorado Opinion No. 52 at 55, 57.

\(^{32}\) Id. at 55, 56.

\(^{33}\) Virginia opinion at 2.
Colorado Bar Association's Ethics Committee looks at what it considers "the realities of the marital relationship and the possibility at least that the domestic and professional responsibilities of lawyers A and B may be on a collision course when they represent conflicting interests." Given the possibility of such a conflict, the committee finds the situation covered by the following provision of the Code:

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.

In spite of the provision for consent in DR 5-101(A), the ethics committee decides that consent may not be given to the representation of conflicting interests by husband and wife because it "gives rise to such an appearance of impropriety . . . that such representation should be scrupulously avoided." To support its position that consent is not available to allow employment of lawyers in matters which may conflict with their personal interests, the committee quotes the following statements from Drinker's treatise on legal ethics:

The Canon does not sanction representation of conflicting interests where such consent is given, but merely forbids it except in such cases. The American Bar Association has acquiesced in numerous decisions of its Ethics Committee construing the exception as not exclusive and consent is unavailable where the public interest is involved. There are, also, certain cases in which such representation is improper or at least unwise even with consent.

It is worth noting, however, that the Drinker statement cited comes from a discussion of the consent exception to Canon 6 of the old Canons of Professional Ethics, which differs significantly from the comparable sections of the Code. Canon 6 began with a requirement that, before accepting employment, a lawyer disclose any interests or relationships he has to the parties or subject matter of the employment. It then continued, "It is unprofessional to represent conflicting interests, except by express consent

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34 Colorado Opinion No. 52 at 55.
35 ABA Code DR 5-101(A) (footnote omitted).
36 Colorado Opinion No. 52 at 56.
37 Id., quoting H. Drinker, Legal Ethics 120 (1953).
38 ABA Canons of Professional Ethics No. 6 [hereinafter cited as Canon 6].
39 ABA Code DR 5-101; DR 5-105.
of all concerned given after a full disclosure of the facts." Thus, the Drinker excerpt which appears in Opinion 52 refers to representation of opposing interests by one lawyer, the situation considered in present disciplinary rule 5-105. This excerpt does not refer to the consent exception to representation of an interest which conflicts with the lawyer's personal interests, now covered in disciplinary rule 5-101(A). Furthermore, immediately following the excerpt cited in Opinion 52, the Drinker text continues:

There are, however, not infrequently cases in which it is highly desirable and to the advantage of everyone concerned that the same lawyer should, at the desire of both parties, represent them both.

Professor Drinker continues:

In order that mutual consent be effective, full disclosure must, of course, be made and the effect of the dual relationship fully explained to both parties. Also, all parties concerned must consent, a majority not being enough.

There are, of course, situations in which a lawyer's personal interests would conflict so strongly with those of his client that representation would be improper even with the client's consent. However, in Opinion 52 the ethics committee decides that consent can be made unavailable to allow direct representation of opposing clients by lawyer-spouses simply because of appearances of impropriety which might result. To support this limitation of consent, the committee refers to the Code requirement that "[a] lawyer should avoid even the appearance of profes-

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43 CANON 6.
44 ABA Code DR 5-105(C).
45 Id., DR 5-101(A).
47 Drinker, supra note 37, at 121 (footnotes omitted).
48 Charles R. Frederickson, Chairman of the Colorado Bar Association's Ethics Committee, has stated that the committee assumed consent by the parties in the following hypothetical situation when considering the spouse-against-spouse fact pattern: A is lawyer for an insurance company, paid a regular salary. A's spouse, B, represents the plaintiff in a $500,000 damage suit against the company A represents. B is paid on a contingent fee basis. Address by Charles R. Frederickson to a Denver Bar Association topical luncheon, in Denver, Dec. 11, 1974. Certainly, consent to such representation, if it could be demonstrated, would not suffice to make the representation acceptable under the Code. However, a finding that such a conflict was improper would not be based only on appeals to appearances of impropriety, but on the facts, which reveal the kind of conflict with personal financial interests which would be unacceptable whether the lawyers involved are husband and wife, parent and child, or related in other ways.
SPOUSES AND CONFLICTS OF INTEREST

sional impropriety." Specifically quoted is the following ethical consideration:

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to a layman to be unethical. . . . 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. The ellipses in the material quoted in Opinion 52 mark the omission of several sentences which significantly change the impact of Ethical Consideration 9-2:

In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. Thus, the cited Code provision in fact applies to the "champion of an unpopular cause," and not to lawyers whose professional actions are misinterpreted by some members of the lay public, even though the lawyers are acting in accord with the "explicit ethical guidance" available in the Code for dealing with questions of conflict of interests.

While the Colorado opinion relies on a finding of appearances of impropriety, even where no actual conflict may exist, the Virginia opinion is based on a finding of actual conflict. The Virginia committee states that it is "most reluctant to conclude

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46 ABA CODE Canon 9.
47 Id. Ethical Consideration [hereinafter EC] 9-2, cited in COLORADO OPINION No. 52 at 56.
48 ABA CODE EC 9-2.
49 See, e.g., ABA CODE DR 5-101; DR 5-105; EC 5-1 to 5-3; EC 5-14 to 5-17; EC 5-19; EC 5-21; EC 5-22.
50 This is not to impute improper intentions to any lawyer, nor to ignore the fact that in many marriage situations no actual conflict would exist.
COLORADO OPINION No. 52 at 55 (emphasis added).
We are of the opinion that Fact Situation 1 gives rise to such an appearance of impropriety, even though such impropriety may not in fact exist, that such representation should be scrupulously avoided.
Id. at 56 (emphasis added).
that under no circumstances would [such representation] be proper." Examples of situations that might be proper, according to the committee, are representation in a completely uncontested matter after full disclosure and consent, and representation by married lawyers who are in fact legally separated. The committee continues, however:

Even these situations give rise to problems but the Committee is not prepared to say that such representation is improper per se. . . . [T]he Committee feels that these instances would be so isolated that it should be enunciated as a general rule that representation under these circumstances is in violation of the Code of Professional Responsibility.52

In support of this rule, the committee cites the following Code provisions: 1) Every client's right to his lawyer's totally independent judgment and undivided loyalty;53 2) a lawyer's duty to guard zealously against any personal interest or involvement which might impair dedication to his client's cause;54 and 3) the client's right to feel free to discuss whatever he wishes with his lawyer without any question of the lawyer's integrity in keeping the client's confidences inviolate.55 "To allow a husband and wife to advocate opposing positions in the same controversy . . . tends to compromise these well-established principles of professional ethics."56

The committee also notes that the public considers the marital relationship uniquely close, and states that allowing representation of differing interests by lawyer-spouses would be to approve an appearance of impropriety "in derogation of Canon 9."57 Clearly the Virginia committee finds the likelihood of actual impropriety in representation of opposing clients by lawyer-spouses much greater than does the Colorado committee.

Furthermore, reliance by both committees on the need to avoid appearances of impropriety may be contrary to some recent court decisions in which the concept has been considered. In Coles, Manter & Watson, P.C. v. Denver District Court58 former

51 Virginia opinion at 1.
52 Id.
53 ABA Code EC 5-1.
54 Id. EC 5-2.
55 Id. EC 4-1.
56 Virginia opinion at 1-2.
57 Id. at 2.
members of the public defender's office sought to represent certain defendants on a private basis at the request of their clients. The Denver District Court found the representation improper because of appearances that the lawyers had engaged in solicitation of clients or that they had previously mis-stated the defendants' indigency in order to qualify them for representation by public defenders. This decision was reversed by the Colorado Supreme Court, which found those appearances insufficient to justify interference with the defendants' right to the counsel of their choice. According to the court the proper remedy was not to disqualify the lawyers from the case, but to bring disciplinary proceedings against the lawyers based on evidence of actual, not apparent, violations of the Code. 59

An even stronger statement against an overboard application of the concept of appearance of impropriety is found in the case of Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, 60 in which the defendants moved to disqualify the plaintiff's lawyers because one partner in that firm had previously worked as an associate in the law firm representing the defendants. The defendants argued that the standard for vicarious disqualification should be set broadly, encompassing participation in suits against any interest ever represented by a previous firm by all partners and associates of that firm in order to avoid even the slightest appearance of impropriety. 61 In rejecting this contention, the court stated that such important considerations as the right of clients to counsel of their choice and the need to avoid restricting the careers of young lawyers required that disqualification be based on proof of actual work in specific cases by the former lawyer from which it would be reasonable to infer that he had gained information of value to his present client. "The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification." 62

Colorado bases its disqualification of lawyers from cases in opposition to their spouses on grounds of avoiding appearances of impropriety, while observing that actual impropriety may not

59 Id. at 214, 493 P.2d at 375.
61 370 F. Supp. at 589.
62 Id.
Virginia states that such representation may not be allowed because it will in fact compromise well-established ethical principles, although the committee offers no facts from which an inference of compromise of principles could be drawn, but bases its conclusions upon ideas held by "the public" about the nature of the marital relationship. In effect both decisions disqualify married lawyers from certain representation on the basis of "unfounded charges of impropriety."

B. Lawyer-spouse's Firm Against Lawyer-spouse's Firm

It has been stated under the original Canons, under the present Code, and by numerous opinions of this Committee that what a lawyer cannot do because of ethical precepts neither his partner, associate, employee or co-shareholder may do.

This principle of vicarious disqualification has also been applied by courts, particularly in actions where, for example, the plaintiff seeks to disqualify the defendant's lawyer because of a former association of that lawyer and the plaintiff's lawyer. It has been embodied as a disciplinary rule in the Code of Professional Responsibility by an amendment adopted by the American Bar Association. Previously, disqualification of lawyers in an entire firm was required (as a minimum standard) only when one member of the firm could not accept employment because it conflicted with the interests of another client. Under the amended rule, however:

If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or

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63 See note 50 supra.
64 Virginia opinion at 2.
66 COLORADO OPINION No. 52 at 56, citing COLORADO BAR ASS'N ETHICS COMM., FORMAL OPINION No. 27 (1963), and ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 33 (1931).
68 If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

ABA CODE DR 5-105(D) (1971).
any other lawyer affiliated with him or his firm, may accept or continue such employment.\footnote{Id., as amended, March 1, 1974.}

Both the Colorado and Virginia opinions have concluded that representation of clients with conflicting interests by husband and wife is not ethically proper, and that consent of the clients involved is not available to lawyers under such circumstances. Because they cannot obtain consent of their clients, the lawyers are required to decline the employment according to Disciplinary Rule 5-101(A).\footnote{Id. DR 5-101(A).} Under the strict standard of vicarious disqualification described in the preceding paragraphs, one would assume that the lawyers' firms must also be unable to accept the employment.

Both opinions apply this strict standard to the situation in which one lawyer-spouse actively participates in a case against the other spouse's firm.\footnote{COLORADO OPINION No. 52 at 56-57; Virginia opinion at 2.} But both decline to rule that the two firms must refuse representation against each other so long as neither spouse participates in the matter, holding that such representation does not present such an appearance of impropriety as to require disqualification.\footnote{The simple fact that spouses practice with firms representing clients with conflicting interests should not automatically invoke the disqualification of DR 5-105(D). . . . [T]he potential for an appearance of impropriety as proscribed by Ethical Consideration 9-2 is not great enough to ethically preclude representation. COLORADO OPINION No. 52 at 57. Conclusion 3 [that the firms may represent opposing interests when neither spouse participates] was reached in recognition that in such cases the Committee cannot arbitrarily conclude . . . that an appearance of impropriety must necessarily result. Virginia opinion at 2.} This reasoning fails to recognize that it is not an appearance of impropriety which requires firm disqualification, but the fact that one lawyer in the firm is precluded from accepting the representation because of ethical precepts.\footnote{See text accompanying notes 66 and 69 supra.}

The anomaly created by the opinions is readily apparent. If the proper interpretation of the Code requires the conclusion that spouses cannot directly represent opposing interests, then a consistent interpretation of Disciplinary Rule 5-105(D) requires that
both firms which employ the spouses must decline that representation. The committees' reluctance to adopt this latter rule casts doubt upon the correctness of the former conclusion.

Obviously, applying a broad requirement of vicarious disqualification, as the Code seems to require, would produce very harsh results. The committees were correct in holding that such representation does not create serious appearances of impropriety. However, to reach this conclusion they had to misinterpret or ignore Disciplinary Rule 5-105(D). Recognizing the necessity for exercising great care in the prohibition of any kind of representation would avoid such inconsistency and obtain a result reasonable under both the Code and accepted principles of legal ethics. Such prohibitions should not be made on the basis of unsubstantiated claims of "appearances of impropriety."

C. Representation Involving Public Office

Opinion 52 concludes that it is improper for a lawyer to defend a person in a criminal case prosecuted by a member of the district attorney's office which employs the lawyer's spouse. Although not specifically stated, presumably the committee would not permit representation directly against the lawyer's spouse, but would permit it by a member of one spouse's firm against a member of the other spouse's office.

Similar conclusions are drawn by the Arizona Ethics Committee. That committee applies its opinion to any situation in which one spouse is a member of the staff of a public office engaged in criminal prosecution, and the other is a member of a firm engaged in private practice in the same community. The committee holds that representation would be improper if either spouse is directly involved in the prosecution or defense. It then sets forth strict guidelines for maintaining complete separation of the case from either spouse, and determines that, if those guidelines are complied with, other members of the private firm can defend in a case prosecuted by other members of the prosecuting office.

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74 Colorado Opinion No. 52 at 55, 56.
75 Arizona Opinion No. 73-6.
76 Id. at 1.
77 Id. at 12, 13.
78 Id. at 14.
The Illinois opinion was in answer to the question posed by a lawyer whose wife was an assistant state's attorney as to whether he could represent defendants prosecuted by his wife or another assistant in that office. The primary responsibility of the state's attorney was in domestic matters, but she did prosecute many misdemeanors and "an occasional" felony case. The ethics committee said:

We speak of husband and wife being united as one. How two people can live together as husband and wife while they are in the midst of contending with all the strength, energy and ability at their command as opponents in a lawsuit and particularly in a criminal case, is difficult to understand.

The committee then found such representation improper, due to the fact that defendants might seek out the spouse in private practice, who might receive special consideration in the defense of the case. On this basis, the committee held not only that the husband cannot represent defendants in criminal cases prosecuted by the state's attorney's office, but also that he cannot represent plaintiffs in civil cases involving a criminal violation, whether or not there is or has been a prosecution. The opinion does not consider whether a lawyer associated with the husband could defend a person prosecuted by another member of the state's attorney's office, nor does it indicate how it might decide this question.

All three opinions find that the potential conflict presented when lawyer-spouses take opposite sides of a criminal case is not one which can be avoided by full disclosure and consent. Arizona relies on the grounds that the state cannot consent to such representation, and that, even if it could, to do so would be to sanction an appearance of impropriety. The Colorado committee says that consent is not available to sanction representation of conflicting interests in cases which involve the public interest. The Illinois opinion finds consent unavailable because of the na-
ture of the conflict itself. That committee states that consent is designed to permit employment of a lawyer in a situation where the conflict of interests arises from separate, unrelated transactions, not from the very transaction in which employment is sought.\textsuperscript{87} All these statements about consent apply a principle developed in the context of consent to representation of opposing clients by one lawyer to a different situation—conflict between the lawyer's personal and professional interests.\textsuperscript{88}

A holding that, solely because of the marriage relationship, consent is unavailable to allow a lawyer to defend a client represented by the prosecuting office which employs the lawyer's spouse requires a conclusion that the private spouse's entire firm must be precluded from defense work against the public spouse's office. This situation was considered by the Philadelphia Bar Association Ethics Committee in 1961.\textsuperscript{89} That committee concluded that the marriage relationship itself did not ethically preclude one spouse or the spouse's partners and associates from engaging in criminal practice, but that any situation which would impair the community's confidence in the administration of justice had to be avoided.\textsuperscript{90} Such loss of confidence would be most likely, according to the committee, if the two spouses were directly involved in the matter, and might occur even if neither spouse were involved.\textsuperscript{91} Ways to decrease the likelihood of such a loss of confidence include insulating both spouses from the case, and obtaining the defendant's informed consent to the representation.\textsuperscript{92} This approach avoids a flat prohibition based on the marital status of the lawyers, and there is thus no requirement under the principle of vicarious disqualification that the private firm is barred from criminal defense work.

\textsuperscript{87} ILLINOIS OPINION No. 311 at 2, citing ILLINOIS STATE BAR ASS'N, PROFESSIONAL ETHICS OPINION No. 166 (1958). This opinion considered the question of whether full disclosure and consent would permit two lawyers in the same firm to represent opposite sides in the same matter, and concluded that it would not.

\textsuperscript{88} See text accompanying notes 37-42 supra.

\textsuperscript{89} PHILADELPHIA BAR ASS'N ETHICS COMM., OPINION No. 61-3 (1961) [hereinafter cited as PHILADELPHIA OPINION No. 61-3], cited in ARIZONA OPINION No. 73-6 at 6. The Philadelphia committee considered whether a lawyer or his partners or associates are barred from representing criminal defendants when the lawyer's spouse is an assistant district attorney. A digest of its opinion appears in MARU, supra note 23, ¶ 4031.

\textsuperscript{90} PHILADELPHIA OPINION No. 61-3, cited in ARIZONA OPINION No. 73-6 at 13.

\textsuperscript{91} Id.

\textsuperscript{92} ARIZONA OPINION No. 73-6 at 14.
One may also limit the facts which reasonably support an inference that the criminal justice system has been impaired by a careful definition of the public spouse's official function. For instance, the Arizona committee states that, when its opinion refers to a member of a public prosecutor's staff which employs one spouse "we have reference solely to a lawyer actively engaged in the prosecution of criminal cases, and not to a lawyer whose duties pertain solely to matters other than criminal prosecutions (e.g., a lawyer working solely on civil matters).”

This approach is consistent with the attitude shown by the Colorado Supreme Court in a case involving charges of unethical conduct by lawyers who were or had been public employees. In *Medberry v. People* a defendant appealed his conviction of murder on the ground that his trial lawyer was a county attorney in the county where the case was prosecuted and should have been disqualified. In rejecting this contention, the Colorado Supreme Court observed that the county attorney was employed to serve as adviser to the county commissioners, and took no part in initiating criminal proceedings. Therefore,

"[I]n defending one charged with crime, at least where the county has no interest beyond that ordinarily attaining, a county attorney does not represent conflicting interests nor serve two masters.

If such careful consideration of a public official's function allows one lawyer to represent potentially conflicting interests, similar care should be taken in defining a lawyer's duties so as to allow the lawyer's spouse to accept such representation.

In conclusion, the Virginia and Colorado opinions apply a rule of consent which was developed with reference to representation of two clients with conflicting interests by one attorney in order to forbid representation of two such clients by husband and wife. Under DR 5-105(D), this prohibition requires that the lawyer-spouses' firms should also be disqualified from such representation. The opinions eschew such vicarious disqualification because representation of opposing interests by firms which employ lawyer-spouses does not present a sufficient appearance of impropriety. This conclusion, although correct, is inconsistent with the logical system of ethics presented by the *Code of Profes-

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83 *Id.* at 1.
84 107 Colo. 15, 108 P.2d 243 (1940).
85 *Id.* at 19, 108 P.2d at 245.
sional Responsibility. The same result could be achieved in accord with the Code if the opinions permitted representation of conflicting interests by husband and wife or their firms after full disclosure to and consent by the clients.

Similarly, completely forbidding defense by one spouse of criminal cases prosecuted by the other solely because of their marital relationship should require that the private attorney's firm is precluded from defense work against the other spouse's office. Vicarious disqualification of married lawyers' firms can be avoided, however, by opinions which focus, not on the lawyers' status, but instead on public confidence in the criminal justice system and which prohibit facts which might decrease that confidence, as did the Philadelphia Bar Association's Opinion Number 61-3. Such opinions could require insulation of lawyers with potentially conflicting personal interests from participation on either side of criminal cases, taking care to define the function of a lawyer in public office precisely so that such insulation is as narrow as possible.

II. THE CONSTITUTION

The opinions under consideration are subject to criticism not only because of their strained interpretations of the Code of Professional Responsibility, but also because there exist serious questions as to their constitutionality. Before those questions can be analyzed, however, one must determine whether the issuance of the opinions by the various ethics committees constitutes state action sufficient to activate the protections of the fourteenth amendment.

A. State Action

Governmental action sufficient to be subject to constitutional restrictions is most clearly found in the issuance of the Arizona and Virginia opinions. In each of those states, the bar association is an official arm of the state supreme court, created for the purpose of assisting in the regulation of the legal profession, and all lawyers admitted to practice must belong to the bar association. In Goldfarb v. Virginia State Bar the Court recog-

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96 See notes 89-91 supra, and accompanying text.
97 ARIZ. REV. STAT. ANN. § 32-201 (1956) (creation of the Association); ARIZ. SUP. CT. R. 27(a) (membership requirements); VA. CODE ANN. § 54-49 (1974 Replacement Vol.).
nized that the Virginia Bar was a state agency when acting within its statutory mandate, although holding that the ultra vires enforcement of a minimum fee schedule was not state action for Sherman Act purposes. Accordingly, the integrated bars' ethics opinions, unless untra vires, would constitute state action.

The Illinois State Bar Association is a private organization, and issuance of its opinion might initially seem to be private action. However, the inquiry and hearing divisions of the association's disciplinary committee are commissioned by the Illinois Supreme Court to serve on the court's disciplinary commission. As commissioners, they are charged with investigating and hearing complaints against lawyers, and with recommending the disciplinary action to be taken by the supreme court in each case. Given this official function of a part of the bar association in the discipline of attorneys, the opinions of its ethics committee on the same subject would arguably also constitute state action because of the committee's involvement with a state agency in performing the public function of regulating the legal profession.

The Colorado Bar Association is also a private organization, and it has no official function in the discipline of Colorado attorneys. However, a variety of supposedly private activities have been found subject to constitutional restrictions. No precise test for recognizing state action has been formulated, since "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

One approach to the question of state action has been to

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10 Id. at 2015.
101 ILL. SUP. CT. R. 753(a) (Supp. 1974).
102 Id. 753(a)-(c).
determine whether the state is so involved with the private activity as to make it subject to constitutional limitations.\textsuperscript{108} The most recent cases applying the "state involvement" test have concentrated especially on whether the involvement amounts to governmental control of, or right to control, the nominally private action.\textsuperscript{109} "Under this control standard state \textit{ex officio} membership on policy-making bodies and state veto power over institutional decisions might be important factors."\textsuperscript{110} In the context of this test, it is worth noting that the Board of Governors of the Colorado Bar Association is made up of lawyers representing different geographic regions of the state and representatives of such state organizations as the District Attorneys Association, the House of Representatives and State Senate, the County and District Judges Associations, the Court of Appeals, and the Supreme Court.\textsuperscript{111} Also, on at least one occasion, the Colorado Supreme Court has reacted to an opinion of the bar association's ethics committee by stating that lawyers affected should ignore the opinion.\textsuperscript{112} This is action tantamount to veto power over the committee's decisions, and therefore within the control test set forth in \textit{Pendrell v. Chatham College}.\textsuperscript{113}

The second approach courts have used in finding that nominally private action constitutes state action has been the "public function" test.\textsuperscript{114} "[S]tate action exists where a private entity performs what would ordinarily be a municipal, governmental function. . . ."\textsuperscript{115} One recent case applying this doctrine is \textit{United States v. Wiseman},\textsuperscript{116} which held that private process servers performed a public function.\textsuperscript{117} In \textit{Dacey v. New York}

\begin{footnotesize}
\textsuperscript{108} Cases cited note 103 \textit{supra}.
\textsuperscript{112} Address by Charles R. Frederickson, \textit{supra} note 45.
\textsuperscript{114} Cases cited note 104 \textit{supra}.
\textsuperscript{116} 445 F.2d 792 (2d Cir.), \textit{cert. denied}, 404 U.S. 967 (1971).
\end{footnotesize}
County Lawyers' Association\textsuperscript{118} the author of the book \textit{How to Avoid Probate!} sued the New York County Lawyers' Association for denial of his civil rights.\textsuperscript{119} Dacey charged that the Association's petition to adjudge him in contempt for unlawful practice of law was an attempted abridgement of his rights to freedom of speech and press.\textsuperscript{120} The Second Circuit applied the doctrine of judicial immunity to the suit by Dacey, noting that "when the Association instituted its proceedings against Dacey, its role was analogous to that of a public prosecutor."\textsuperscript{121}

Many cases have found that the practice of law is a public function.\textsuperscript{122} The Colorado Supreme Court has held that restraint of illegal practice of law benefits both the legal profession, by protecting lawyers' private interests in having business, and the general public, by protecting lay people from the harm of having unqualified people act as lawyers.\textsuperscript{123} In the context of disbarment proceedings, the same court has stated, "It is the privilege, if not the duty, of every attorney to call to the attention of this court any act of a licensed attorney which may fairly be considered to disqualify him."\textsuperscript{124}

In addition to formal regulation of the legal profession by the courts, most state bar associations issue opinions like those under consideration interpreting the ethical rules for their members.\textsuperscript{125} Although such opinions may not have final authority,

[they] do have a considerable informal force. There are no scientific studies to prove this, but bar executives and officers, Ethics Committee members, and others with experience have repeatedly stated that this is so.\textsuperscript{126}

\textsuperscript{118} 423 F.2d 188 (2d Cir. 1969), cert. denied, 398 U.S. 929 (1970).
\textsuperscript{119} The suit was brought under 42 U.S.C. § 1983 (1970).
\textsuperscript{120} The Association's petition was eventually dismissed. New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967).
\textsuperscript{121} 423 F.2d at 192.
\textsuperscript{122} See, e.g., \textit{In re Lavine}, 2 Cal. 2d 324, 327-28, 41 P.2d 161, 162 (1935); \textit{In re Thomas}, 16 Colo. 441, 446, 27 P. 707, 708 (1891); \textit{People ex rel. Chicago Bar Ass'n v. Johnson}, 344 Ill. 132, 143, 176 N.E. 278, 282 (1931).
\textsuperscript{123} Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 409, 312 P.2d 998, 1003-04 (1957).
\textsuperscript{124} \textit{People ex rel. Colo. Bar Ass'n v. Class}, 70 Colo. 381, 384, 201 P. 883, 884 (1921) (dictum).
\textsuperscript{125} \textit{Maru, supra} note 23, at 1.
\textsuperscript{126} \textit{Id.} at 2-3. Following this statement, \textit{Maru} cites several authorities, including D. Sears, then Chairman of the Ethics Comm., Colo. Bar Ass'n, in 33 \textit{TENN. L. REV.} 145 (1966).
In Colorado the present rules of procedure for the discipline of attorneys were drafted by the grievance committee of the Colorado Bar Association and submitted by its Board of Governors to the Colorado Supreme Court, which adopted rules "substantially the same" as those submitted to it.

In summary, state officials with the power to discipline attorneys have been involved to a considerable extent with the Colorado Bar Association, as evidenced by their representation on the organization's Board of Governors and by the fact that, on at least one occasion, the supreme court has, in effect, vetoed an opinion issued by the association's ethics committee. Moreover, given the attitude that regulation of the practice of law is a public function, participation in that function by the bar association in such ways as drafting rules of procedure for the discipline of attorneys and issuing opinions on questions of professional ethics adds support to a finding that the issuance of Colorado's Opinion 52 constitutes state action.

If the opinions under consideration are deemed to constitute state action, they are subject to the restrictions imposed on the states by the fourteenth amendment. The effect of the opinions may be considered under four aspects of constitutional rights: The burden on a lawyer's choice to marry another lawyer; the restriction of the lawyer-spouses in the exercise of their rights to work in the occupations they choose; the interference with clients' rights to counsel of their choice; and the use of an irrebuttable presumption that lawyers married to one another cannot zealously and professionally represent clients with differing interests.

B. Right to Marry

The effect of an ethics opinion which absolutely precludes
representation of differing interests by lawyers married to each other is to penalize a lawyer's choice to marry another lawyer. A lawyer may find, for example, that he is unable to represent defendants in criminal cases because his wife is an assistant district attorney. Or both spouses may find themselves unable to obtain jobs, because prospective employers wish to avoid possible conflicts with other law firms in the community.\(^{138}\) This harsh effect on lawyers related to each other by marriage is in striking contract to the relative leniency with which representation of differing interests by lawyers related in other ways is treated.\(^{137}\)

The marriage relationship has long been conceded to occupy a protected position under the Constitution:

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.\(^{138}\)

A variety of state regulatory schemes have been found unconstitutional because of their effects on the marriage relationship: A state tax law under which income of the wife and children living with the husband was taxed as the husband's;\(^{139}\) mandatory maternity leave rules for school teachers;\(^{140}\) and laws forbidding use of contraceptives by married people.\(^{141}\)

In addition to those schemes, anti-miscegenation statutes have been held invalid because they interfere with the freedom to marry.\(^{142}\) In *Perez v. Lippold*\(^{143}\) the California Supreme Court held that marriage is “a fundamental right of free men” which could not be infringed by the state except for important objectives and by reasonable means.\(^{144}\) Furthermore, the court said:

\(^{134}\) See text accompanying notes 17-19 supra.

\(^{137}\) See note 23 supra.


\(^{139}\) *Hooper v. Tax Comm'r*, 284 U.S. 206 (1931).


\(^{143}\) 32 Cal. 2d 711, 198 P.2d 17 (1948).

\(^{144}\) *Id.* at 714, 198 P.2d at 18-19.
Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and therefore restricts his right to marry.\textsuperscript{145}

Under this reasoning, the harsh effects which result from the opinions under discussion amount to a penalty on a lawyer's choice to marry another lawyer, and therefore restrict his or her right to marry. Certainly, the states' objective, protection of the public by prevention of conflicts of interests between lawyer-spouses, is important. Whether absolute preclusion of such representation by lawyers married to one another is a reasonable means to that objective is open to serious question.\textsuperscript{146}

C. Right to Work

As already discussed, one effect of the opinions under consideration may be to close employment opportunities for lawyers, at least in certain fields within the profession.\textsuperscript{147} To determine whether such an effect renders the opinions unconstitutional, it is necessary to examine the somewhat complicated line of cases in the area of the right to work.

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.\textsuperscript{148}

However, the right to work is not an absolute one, and this is particularly true of what the Colorado Supreme Court has called "the learned professions," for which the state may require a license of one who wishes to practice.\textsuperscript{149} Although the states may regulate admission to, or practice of, such professions in order to protect the public, they cannot do so "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{150} At least one court has warned

\textsuperscript{145} Id. at 715, 198 P.2d at 19.
\textsuperscript{146} See text accompanying notes 176-80 infra.
\textsuperscript{147} See text accompanying notes 17-19 supra.
\textsuperscript{148} Truax v. Raich, 239 U.S. 33, 41 (1915), quoted in In re Griffiths, 413 U.S. 717, 720 (1973). A similar view of the right to work as a fundamental right is found in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Van Zandt v. McKee, 202 F.2d 490, 491 (5th Cir. 1953); Battaglia v. Moore, 128 Colo. 327, 332, 261 P.2d 1017, 1020 (1953); People v. Love, 298 Ill. 304, 310-11, 131 N.E. 809, 811 (1921).
that standards of professional ethics must not be interpreted in such a way as "to unnecessarily circumscribe the career of a young professional. The Canons may not be used... to obtain the advantages of an implied restrictive covenant that would be of doubtful validity in any other employment situation."\(^{151}\)

Although one may have a right to work as a lawyer which may not be infringed by the state, it is not as clear that one has a right to work as, for example, a criminal lawyer. A strong argument demonstrating the existence of such a right may be found in the case of *Prouty v. Heron.\(^{152}\) There, the plaintiff had been licensed as a professional engineer, without restriction. Thereafter, he sought renewal of his license, and was classified as a civil engineer. He sued to enjoin the Colorado Board of Examiners for Engineers and Land Surveyors from restricting his practice to that branch of the profession, and the injunction was granted. The Colorado Supreme Court ruled that he acquired a valuable right protected by the due process clause of the Colorado and United States Constitutions when he qualified for a license to practice without restriction under the standards prevailing at the time of his admission. "It follows, therefore, that the legislature cannot... deny or abridge that right in any manner except for cause," and then only in accordance with due process requirements.\(^{153}\) The limitation on an engineer’s right to practice all specialties within his profession is analogous to the restrictions which the opinions studied in this article impose on the practice of law by lawyers married to other lawyers. As with the opinions’ effect on the right to marry, it is necessary to inquire whether the limitation on a lawyer’s right to practice his profession is necessary to achieve an important state objective. While the importance of the state’s objective is conceded, whether the means chosen is reasonable is doubtful.\(^{154}\)

D. *Clients’ Rights to Counsel of Their Choice*

As discussed above,\(^{155}\) there are many situations in which

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\(^{153}\) Id. at 174-75, 255 P.2d at 758.

\(^{154}\) See text accompanying notes 176-80 infra.

\(^{155}\) See text following note 19 supra.
clients may undergo substantial hardship because of the opinions under consideration. This is particularly true in instances where one spouse is employed in a matter against the other spouse's firm, as, for instance, where the husband seeks to represent the buyer of a house who obtains a mortgage loan from a bank represented by the wife's law firm. The flat prohibition against representation of differing interests by lawyers married to each other may also work hardship in highly-specialized areas of law where relatively few lawyers with the required training and experience may be available. In such a field, the question of conflicts of interests may be complicated by the fact that attorneys may move from one firm to another as they gain experience in the field; it is thus instructive to review the doctrines which have developed regarding conflicts with the interests of clients of one's former firms.

In general, a former client need show only that the attorney representing his present adversary represented him in a matter substantially related to the present case, and such a showing will establish an irrebuttable inference that the attorney received confidential information of value to the adversary.\(^{154}\) This inference becomes rebuttable, however, where the attorney is to be "vicariously disqualified"—for example, by virtue of his partner's former association with a firm which represents the client.\(^{157}\) One reason given for allowing a lawyer to rebut the presumption is that the "effect of an over-harsh rule of disqualification must be to hinder adequate protection of clients' interests in view of the difficulty in discovering technically trained attorneys in specialized areas who were not disqualified. . . ."\(^{158}\)

It is important to note that this recognition of the need to protect clients' interests in obtaining qualified counsel has arisen in the context of representation by an attorney which conflicts with the interests of another of his clients,\(^{159}\) present or past. Certainly similar protection of that right should be offered for


\(^{159}\) ABA CODE DR 5-105.
clients where the representation conflicts with the lawyer’s personal, financial, or property interests, \(^{160}\) provided that the client gives informed consent to such representation. Protection of this right should not require a showing of special hardship such as lack of other qualified counsel to allow the client’s knowledgeable choice of his lawyer to be honored.

E. Conclusive Presumptions

To the extent that the opinions absolutely forbid representation by a lawyer of interests which differ from those represented by his spouse solely because of the marital relationship they act as conclusive presumptions that the lawyers are not capable of professionally representing their clients. \(^{161}\) The use of such a presumption of unfitness raises serious questions as to the opinions’ constitutionality.

The classic discussion of the role of presumptions in statutory schemes is given by the Supreme Court in the case *Mobile, J. & K.C.R.R. v. Turnipseed*. \(^{162}\) The Court there holds that it is permissible for a given regulatory scheme to allow or require an inference of one fact from evidence of another, without denial of due process of law, but only if

there [is] some rational connection between the fact proved and the ultimate fact presumed, and [if] the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary matter. . . .

If a legislative provision not unreasonable in itself prescribing a rule of evidence . . . does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him. \(^{163}\)

Thus, there are two approaches to challenging a presumption in a regulatory scheme. First, one may show that there is no rational relationship between the fact proved and the fact presumed. An example of this approach appears in *United States Department of Agriculture v. Murry*. \(^{164}\) *Murry* involved a challenge to a rule which denied eligibility for food stamps to any person over 18 who was claimed in the previous year as a depen-

\(^{160}\) Id. DR 5-101.

\(^{161}\) See text accompanying notes 63-65 supra.

\(^{162}\) 219 U.S. 35 (1910).

\(^{163}\) Id. at 43.

\(^{164}\) 413 U.S. 508 (1973).
dent child for tax purposes by a taxpayer not in a household eligible for food stamps, and to all members of the dependent's household. The Court recognized Congress' interest in preventing abuses of the food stamp program by children of wealthy parents, particularly college students. However, it rejected the rule because the standard it set had no rational relation to the dependent child's present indigency or need for food stamps, and even less rationality as a measure of the need of other members of his household.66 "It therefore lacks critical ingredients of due process . . . ."67

The second approach is to show that the presumption prevents a defense to the fact presumed by the one on whom it operates. This argument was advanced early in this century to overturn tax regulations which presumed conclusively that gifts made within a certain time before a taxpayer's death were in contemplation thereof and so were taxable as part of the donor's estate.68 In rejecting such statutes, the Court said, "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."69

In recent years, the doctrine that conclusive presumptions violate due process by preventing a defense to the fact presumed has been applied by the Supreme Court to invalidate a number of legislative or regulatory schemes. Carrington v. Rash70 involved a provision of the Texas constitution which denied the right to vote in state elections to a member of the Armed Forces not registered to vote in Texas prior to induction. Forbidding a soldier any opportunity to controvert the presumption of nonresidence "implies an invidious discrimination in violation of the Fourteenth Amendment."71 Similarly, suspension of a driver's license of a driver involved in an accident who failed to give proof of financial responsibility was found unconstitutional because the

66 Id. at 513.
67 Id. at 514.
69 Heiner v. Donnan, 285 U.S. 312, 325 (1932). Note that present federal tax law contains a rebuttable presumption that gifts made within three years of death should be taxed as part of the decedent's estate. Int. Rev. Code of 1954, § 2035(b).
70 380 U.S. 89 (1965).
71 Id. at 96.
statutory scheme did not consider whether the driver was in fact liable;\textsuperscript{171} a regulation which allowed children to be taken away from their unwed father without a hearing on his fitness was struck down;\textsuperscript{172} and a state regulation under which the classification of residency or non-residency for tuition purposes was unchangeable while the student remained enrolled in the state university was found void.\textsuperscript{173}

Most recently, the Supreme Court heard a case involving rules which required pregnant school teachers to take unpaid leaves of absence upon reaching a designated month of pregnancy.\textsuperscript{174} The school systems sought to justify their rules on the ground that they were protecting their interest in preventing unfit teachers from teaching. This interest was found legitimate, but the Court held that the challenged regulations swept too broadly, amounting to a conclusive presumption that all pregnant women are unfit to teach after a particular point of pregnancy. Under this reasoning, the regulations were found unconstitutional, because "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."\textsuperscript{175}

The Colorado and Virginia ethics opinions are subject to challenge in both respects. By prohibiting representation of opposing interests by husband and wife, they prevent the lawyers from showing that there is in fact no conflict of interest, or that the clients have given informed consent to the representation. Furthermore, neither opinion suggests a basis in fact which would support an inference of professional misconduct from the fact that the lawyers are married to one another. Instead, both rely on "the public's" view of the marital relationship, without any attempt to demonstrate that "the public," or even a significant minority of it, holds such a view. Because the opinions lack ra-

\textsuperscript{172} Stanley v. Illinois, 405 U.S. 645 (1972).
tonal relationship between the fact proved and the fact inferred, and because they prevent any defense to the fact presumed, they are subject to challenge as invalid conclusive presumptions.

III. REGULATING CONFLICT OF INTERESTS BETWEEN SPOUSES

In determining whether it is necessary to forbid representation of conflicting interests by lawyers married to each other, one should consider whether there is an adequate system available to provide satisfactory discipline in any cases where the lawyers do in fact act improperly. This approach has been used by the U.S. Supreme Court in cases in which lawyers were denied admission to the bar. The Court has required a showing that exclusion of the individual or class of individuals is essential to accomplish the state's interest in maintaining high professional standards. The same showing should be made before flatly denying a lawyer the right to accept a certain kind of representation, but the opinions under examination have failed to do so.

In Colorado the machinery for disciplining attorneys has recently been strengthened by a requirement that attorneys admitted to the bar and actively practicing in the state must pay an annual fee to defray the cost of disciplinary procedures against lawyers. The system has been used frequently to discipline attorneys for a variety of unprofessional conduct. Even if disciplinary proceedings are not brought, representation which presents a serious conflict of interest may be challenged by a party to a case through a motion to disqualify the attorney involved.

In view of the unsatisfactory results which arise from the prohibition of representation by spouses of clients with differing interests, and the fact that suitable means to discipline lawyers who act unprofessionally in such a situation are available, the opinions' conclusions that consent may not be given to represen-
tation which pits lawyer-spouse against lawyer-spouse or the spouse's firm is unnecessary. A better approach to the question of such representation could be made if the ethics committees had begun their inquiries with the following assumption:

There is no reason to doubt that these are mature, capable individuals who will honor the Code of Professional Responsibility. Any . . . policy that, in effect, denies equal opportunity to either spouse on a contrary assumption should accordingly be discouraged, for it resists the new reality from which clients and the profession itself benefit that accords married men and women equal treatment.180

**CONCLUSION**

The author realizes that, at the present time, most clients' consent would probably result in restrictions similar to those set forth in the opinions under discussion. That is, most clients would consent to representation by the firms so long as neither spouse is involved; some clients would consent to representation by a lawyer against a client represented by the lawyer's spouse's firm; and only a few clients would knowingly consent to direct representation of conflicting interests by husband and wife.

The reader might inquire why the decision of clients is preferable to the holdings of the opinions if in fact it is likely that the effect of the two will be similar. One answer is that there is great value gained by achieving a result acceptable to lawyers and nonlawyers without sacrificing consistent application of the Code of Professional Responsibility. Furthermore, the number of lawyers married to other lawyers will continue to increase with the increased enrollment of women in law school, and that increase will no doubt be accompanied by greater acceptance of husband and wife lawyers as professionally responsible, competent individuals. Allowing clients who wish it the right to consent to representation of differing interests by husband and wife will allow smooth adjustment to that increased acceptance.

*Nancy B. Calvin*

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180 Simpson Memorandum, *supra* note 17, at 3.
Syllabus

It is improper for a lawyer to represent a client having interests which differ from those of a client represented by the lawyer's spouse, and such impropriety may, but does not necessarily extend to members and associates of the firms with which each spouse is associated.

Facts

Lawyer A and Lawyer B are husband and wife. They are not associated in the practice of law.

1. Lawyer A seeks to represent a client whose interests differ from those of a client represented by Lawyer B.
2. Lawyer A seeks to represent a client being prosecuted by a district attorney's office which employs Lawyer B.
3. Lawyer C, a member of Lawyer A's firm, seeks to represent a client having interests which differ from those of a client represented by Lawyer D, a member of Lawyer B's firm.

Opinion

These fact situations raise the question of whether there is any conflict of interest when husband and wife represent clients having differing interests. Closely aligned are subsidiary questions of whether, if such conflict exists, it can be eliminated by full disclosure and consent by the clients or whether there is such an appearance of impropriety that the employment must be declined. Finally, these fact situations raise the question of whether the ethical obligation to decline employment must extend to members of a firm with which either spouse practices.

Our opinion recognizes the realities of the marital relationship and the possibility at least that the domestic and professional responsibilities of lawyers A and B may be on a collision course when they represent conflicting interests.

It takes little imagination to anticipate innumerable situations where either spouse might find it difficult to exercise professional judgment solely for the benefit of the client and free of personal considerations. This is not to impute improper intentions to any lawyer, nor to ignore the fact that in many marriage situations no actual conflict of interest would exist. It simply recognizes that this situation is generally fraught with great potential for conflict of interests. See particularly EC 5-21. Thus, to the extent that their clients' conflict may lead lawyers A and B into either domestic or financial conflict, one disciplinary rule immediately comes into play. 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."

For purposes of this opinion, we assume full consent from the clients. We note, however, that:

"The Canon does not sanction representation of conflicting interests where such consent is given, but merely forbids it except in such cases. The American Bar Association has acquiesced in numerous decisions of its Ethics Committee construing the exception as not exclusive and consent is unavailable where the public interest is involved. There are, also, certain cases in which such representation is improper or at least unwise even with consent." Drinker, *Legal Ethics*, p. 120 (1953).
The question, therefore, is whether this conflict of interest, real or potential, may still allow for representation after consent is given. Obviously, without consent the proffered representation must be declined. The primary ethical consideration is whether such representation raises the appearance of impropriety. Ethical Consideration 9-2 reads:

"Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to a layman to be unethical. ... 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."

We are of the opinion that Fact Situation 1 gives rise to such an appearance of impropriety, even though such impropriety may not in fact exist, that such representation should be scrupulously avoided.

The same considerations are applicable where either spouse is in public office. Formal Opinions 14, 18, 45, 46 and 48. The additional ethical consideration which is applicable to Fact Situation 2 is EC 8-8, which states:

"... A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

See also ABA Opinions 34 and 186 and New York State Bar Opinion 149. Thus, we conclude that because of the public visibility of Lawyers A and B the relationship described in Fact Situation 2 is improper.

Fact Situation 3 involves the concept generally referred to as "vicarious disqualification." This concept is incorporated into DR 5-105(D), which states:

"If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

This disciplinary rule and its associated ethical concepts support strongly the statements in the Preamble to the Code of Professional Responsibility that while ethical considerations are primarily "aspirational in character and represent the objectives toward which every member of the profession should strive," lawyers must nonetheless "with courage and foresight be able and ready to shape the body of law to the ever-changing relationships of society." Traditionally the opinions of this Committee and those of other state bar associations and the American Bar Association have construed the concept of "vicarious disqualification" broadly. It has been stated under the original Canons, under the present Code, and by numerous opinions of this Committee that what a lawyer cannot do because of ethical precepts neither his partner, associate, employee or co-shareholder may do. Formal Opinion 27 and ABA Opinion 33. We do not wish to change or affect this body of well-reasoned opinion. In our view, the same rationale which requires a lawyer to decline employment in Fact Situations 1 and 2 applies to either Lawyer C or D when the client is directly and personally represented by one spouse or the other. In other words, if Lawyer A's personal client has an interest which differs from that of a client of the firm in which Lawyer A's spouse practices, there would be a requirement to decline the employment. Even though the client's consent is obtained after full disclosure, this appearance of impropriety cannot be avoided.

The same rationale is inapplicable, in our opinion, where firm clients—as opposed to personal clients—have differing interests. The simple fact that spouses practice with firms representing clients with conflicting interests should not automatically invoke the disqualification of DR 5-105(D). Where the clients are fully informed of the situation and choose to consent to continued representation, the potential for an appearance of impropriety as proscribed by Ethical Consideration 9-2 is not great enough to ethically preclude representation.
Of course, we assume that neither spouse actually obtains information about the clients represented by the other spouse's firm as the result of the marital relationship. If either Lawyer A or B receives information inadvertently or otherwise by reason of the marital relationship, the confidences thus obtained must be preserved inviolate. See ABA Opinion 47.
APPENDIX B


This is in response to your letter of March 29, 1974, regarding the propriety of a lawyer representing one party to a divorce action when the other party is being represented by a firm of which the lawyer's spouse is a member.

Since receiving your inquiry the Legal Ethics Committee has received several other inquiries and memoranda relating substantially to the same issue. In addition, we had appear before us at our meeting in Richmond on May 22, 1974, two young ladies whose presentations were most helpful. We have given all of this our most careful consideration.

The Committee is most reluctant to conclude that under no circumstances would it be proper for an attorney to represent one party to an action when the attorney's spouse represents the other party. Indeed, there could conceivably be circumstances where such representation would not be improper per se; for example, in a completely uncontested matter after full disclosure by both attorneys and acquiescence by the clients, or where the husband and wife attorneys are in fact legally separated. Even these situations give rise to problems but the Committee is not prepared to say that such representation is improper per se. However, the Committee feels that these instances would be so isolated that it should be enunciated as a general rule that representation under these circumstances is in violation of the Code of Professional Responsibility.

Every client has the right to expect his lawyer's totally independent judgment and undivided loyalty. (EC 5-1). Every lawyer should zealously guard against any personal interest or involvement which might impair in any way his total, unrestrained dedication to his client's cause. (EC 5-2). And every client must feel free to discuss whatever he wishes with his lawyer. There should be no question of his lawyer's integrity in keeping these confidences inviolate, and the client should feel no inhibition whatever in making such revelations to his lawyer. (EC 4-1). To allow a husband and wife to advocate opposing positions in the same controversy, in the opinion of our Committee, tends to compromise these well-established principles of professional ethics.

We recognize the wide interest in the subject of your inquiry and that to limit our response would leave related questions unanswered. Therefore, within the limits permitted by the ethical considerations cited above, DR 5-105 (A through D), and Canon 9, it is the consensus of our Committee that:

1. Lawyer-spouse against lawyer-spouse (i.e., each actively involved in the same case) is not ethically permissible, absent circumstances such as set out above.
2. Lawyer-spouse actively participating in a case against lawyer-spouse's firm is not ethically permissible, (your inquiry), again absent similar circumstances.
3. Lawyer-spouse's firm against lawyer-spouse's firm (neither spouse actively participating) is permissible.

Conclusions 1 and 2 were reached in recognition that the public generally considers the husband-wife relationship uniquely close, and that to hold otherwise would be to approve the appearance of impropriety in derogation of Canon 9.

Conclusion 3 was reached in recognition that in such cases the Committee cannot arbitrarily conclude either that an actual conflict of interest exists or that an appearance of impropriety must necessarily result.