

FORMAL OPINION NO. 64

The question asked is whether it is proper for an attorney, whose wife is employed as a Deputy Clerk, Auditor and Recorder, to serve as Prosecuting Attorney in the same county. Also asked, is whether the result is changed if the attorney's wife performs only auditor or recording work and if such a Prosecuting Attorney also engages in private practice.

Assuming there is no violation of Chapter 7 of Title 59, Idaho Code, relating to nepotism, the ethical question is whether the circumstances described will result in a conflict of interest or other impropriety.

The question admits the possibility that the wife might be present in Court at a trial or other hearing as Clerk of the Court at the same time that her husband appears in an adversary matter as attorney for one or the other of the parties. Canon 9 of the Code of Professional Responsibility, is a mandate to attorneys to avoid "even the appearance of professional impropriety" and is clearly applicable to such possibility.

The answer to the remainder of the question cannot be as specific because the circumstances at any given time must be examined to determine if there is a conflict of interest or problem. Canons 4 and 5 of the Code of Professional Responsibility furnish guidance but the same principles are more clearly stated in Canons 6 and 37 of the Canons of Professional Ethics.

Canon 6 provides in part as follows:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge

his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Canon 37 provides in part as follows:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

It has been consistently stated that the duties and consideration of possible conflicts are such that what a lawyer cannot do because of these ethical precepts, neither his partner nor associate may do. It must follow that the same restrictions or limitations are equally as applicable to a lawyer and his wife if a conflict of interest develops by reason of the public offices either may hold or by reason of the wife's public office and the attorney's private practice.

Except as otherwise herein qualified, it does not seem likely that any conflict of interest or impropriety would evolve out of the circumstances that can be contemplated from the question asked. If there is no conflict of interest, nor violation of confidence that arises out of any act, transaction or function of or by the attorney and his wife in their respective public offices or his profession, there would be no reason for the attorney or his wife to give up their offices or for the attorney to give up his private practice. We cannot, however, rule

out the possibility of a conflict or even the possibility of a series of conflicts. Regardless of what precipitates the problem, neither the fact that the attorney's wife is a public officer nor that she is not an attorney, can alter the attorney's responsibility.

Our conclusion is that every attorney in every situation is expected to recognize a conflict of interest when it exists and to always preserve his client's confidences. If and when a problem arises he is expected to conduct himself as required by the applicable Canons, but inevitably, their interpretation requires candor, judgment and discretion.

DATED June, 1973.