Marital Status as a Reason for Attorney-Spouse Disqualification

As more women become lawyers, many lawyers will find themselves confronting their spouse or their spouse's law firm on the opposite side of the courtroom. The marital relationship poses several ethical considerations for lawyer-spouses who represent opposing interests. Inherent in the lawyer-spouse relationship is the potential for a conflict of interest based on the appearance of impropriety.[1] At the core of the issue is whether marital status, in and of itself, is a satisfactory reason for disqualifying lawyer-spouses or their firms from representing adverse clients. Lawyer-spouses representing opposing interests can adhere to the ethical principals of the legal profession by preserving client confidences and exercising independent judgment.[2] The ultimate question is whether marital status without evidence of improper conduct is sufficient reason for disqualifying an attorney.

Lawyer-Spouses' Representation of Adverse Clients

In Blumenfeld v. Borenstein,[3] the Georgia Supreme Court refused to disqualify a husband-attorney whose firm represented a will challenge simply because his wife had represented the executrix of the will.[4] The major issue confronting the court was whether the Model Code of Professional Responsibility either mandates or justifies attorney disqualification based on marital status.[5] The court concluded:

> While we cannot disagree with the proposition that the marital relationship may be the most intimate relationship of a person's life, it does not follow that professional people allow this intimacy to interfere with professional obligations. If this court endorsed a rule imputing professional wrongdoing to an attorney on the basis of

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as MODEL CODE], Canon 9 (1979). ("A lawyer should avoid even the appearance of impropriety.").

2. MODEL CODE Canons 4 and 5 (1979) ("A lawyer should preserve the confidences and secrets of a client"; "A lawyer should exercise independent professional judgment on behalf of a client.").

3. 247 Ga. 406, 276 S.E.2d 607 (1981).

4. *Id.* at 276 S.E.2d at 608. (At the time of this action, the wife-attorney was no longer involved in the suit. However, the executrix still moved to disqualify the husband attorney's firm because of the wife's earlier representation).

5. *Id.* at ____, 276 S.E.2d at 608.

> marital status alone, it would be difficult to avoid the extension of that rule to other relationships as well.[6]

The court refused to allow disqualification unless an actual violation of client confidentiality or independent judgment was involved.[7] The court also found the appearance of impropriety "based not on conduct but on status alone"[8] was "an insufficient ground for disqualification."[9]

The possible disqualification of an attorney due to a potential conflict of interest also has a significant impact on the client. The *Blumenfeld* court advised that the "curtailment of the client's right to counsel of choice be approached with great caution."[10] "The mere fact that the public may perceive some conduct as improper is, without some actual impropriety, insufficient justification for interference with a client's right to counsel of choice."[11]

Another dimension in cases involving lawyer-spouses who are opposing counsel is the consideration of the effect that such a per se rule of disqualification would have on the legal profession. The court in *Blumenfeld* noted that such a rule would "create a category of legal 'Typhoid Marys,' chilling both professional opportunities and personal choices."[12]

An interesting aspect of the *Blumenfeld* case is that it involves a lawyer-spouse versus a lawyer-spouse's firm. Because the court refused to disqualify the attorney in this case, one may infer that the court would not disqualify either attorney where a lawyer-spouse's firm was opposing a lawyer-spouse's firm. The decision may be different in a case where both spouses are directly involved in a case. Due to the court's concern for the potential harm of a per se disqualification based on status alone, however, the decision might be the same regardless of the paradigm of representation involved.

The American Bar Association, concerned with the lawyer-spouse issue, published a formal opinion,[13] stating "[w]e cannot assume that

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6. *Id.* at ____, 276 S.E.2d at 609.
7. *Id.* at ____, 276 S.E.2d at 608-9.
8. *Id.* at ____, 276 S.E.2d at 609.
9. *Id.* at ____, 276 S.E.2d at 610.
10. *Id.* at ____, 276 S.E.2d 609.
11. *Id. See also* Brennan's, Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 172 (5th Cir. 1979) ("the likelihood of public suspicion must be weighed against the interest in retaining counsel of one's choice").
12. *Id.* at ____, 276 S.E.2d at 609.
13. ABA Comm. on Ethics & Professional Responsibility, Formal Op. 340 (1975).

a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, such as those that protect a client's confidences, that proscribe neglect of a client's interest and that forbid representation of differing interests."[14] The opinion suggests, however, that where a client may question his attorney's loyalty, the attorney should fully explain the situation and allow the client to make the final decision.[15] The ABA further advised, "[m]arriage partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by reason of the marital relationship."[16]

The ABA opinion does not specifically address a particular paradigm of representation. The refusal of the ABA to assume a violation without further evidence of impropriety, however, indicates that the organization would not require per se disqualification based on status alone under any circumstances. This argument is supported by the recent Model Rules of Professional Responsibility which state:

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.[17]

The Florida Bar Association noted in an advisory opinion[18] that it should not be assumed that an attorney will divulge professional confidences to a spouse and that "the marital relationship does not automatically create a situation proscribed by Canon 5 of the Code of Professional Responsibility."[19] The opinion stated that whether or not there is an appearance of impropriety should be determined by the firms involved on a case by case basis.[20] The opinion also stated that "it would be preferable for the husband-attorney and wife-attorney to avoid personal confrontations."[21] The Michigan Bar Association advised in a

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14. *Id.*
15. *Id.*
16. *Id.*
17. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.8(i) (1983).
18. Florida Bar Professional Ethics Comm., Advisory Op. 74-49 (1974), 49 Fla. B.J. 252 (1975). (The author recognizes that bar association opinions do not carry the authoritative weight of judicial decisions. They are used in this comment, however, to a limited extent to illustrate the difference in attitudes concerning this issue and the potential for even greater diversity in the future).
19. *Id.*
20. *Id.*
21. *Id.*

formal opinion[22] that attorney-spouses should not directly represent adverse clients, and in a case where they do not directly represent adverse clients, consent should be obtained from the client.[23]

Analogous to the lawyer-spouse situation is the situation when an attorney can potentially acquire confidential information by reason of a previous relationship with a now adverse client or the law firm who represented the client, or when an attorney has a connection with the adverse client through another type of organizational relationship. The Court of Appeals for the Second Circuit in *Board of Education v. Nyquist*, refused to disqualify an attorney who could potentially acquire information concerning the adverse party's case.[24] The court stated, "when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."[25] The case involved the use of separate seniority lists for male and female physical education teachers for the purpose of layoff determinations.[26] The male teachers contended that the use of separate seniority lists was unconstitutional, while the female teachers asserted that a merged list would perpetuate past discrimination and result in six times the number of females laid off as men.[27] The issue of impropriety arose because the male instructors' attorney was employed by an organization financed by another group whose membership included the female physical education teachers.[28] The court concluded:

> There is no claim, however, that Mr. Sandner [the male defendants' attorney] feels any sense of loyalty to the women that would undermine his representation of the men. . . .There is also no claim that the men have gained an unfair advantage through any access to privileged information about the women.[29]

As in the case of *Blumenfeld*, the court required specific evidence of impropriety in order to disqualify the attorney. In the absence of evidence of specific conduct, the assumption is that the attorney is acting

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22. Michigan Bar Comm. on Professional & Judicial Ethics, Formal Op. C-213 (1975), 55 Mich. B.J. 130 (1976).

23. *Id.*

24. Board of Ed. v. Nyqusit, 590 F.2d 1241, 1247 (2d Cir. 1979).

25. *Id.*

26. *Id.* at 1243.

27. *Id.*

28. *Id.* at 1248. (The female and male defendants in the case were adverse parties by way of a cross claim.).

29. *Id.* at 1347.

professionally and responsibly in representing the client's interest. The attorney's status and ability to acquire confidential information is not enough for a per se disqualification.

In *Woods v. Covington County Bank*,[30] where a former government lawyer later in private practice was in a position to acquire confidential information,[31] the court found "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur."[32] As in *Blumenfeld* and *Nyquist*, this court found that status or former status is not enough for disqualification of an attorney; evidence of a specific impropriety is required.[33] Other courts have also found that the appearance of impropriety alone is not enough to justify per se disqualification.[34]

The Argument Against Lawyer-Spouse Representation of Adverse Clients

A Federal District Court in Connecticut disqualified a lawyer who was on the board of directors of a local legal services agency where the opposing counsel was an employee of that agency.[35] The concern of the court in *Estep v. Johnson* was the appearance of impropriety.[36] This is analogous to the lawyer-spouse situation in that there is a bond between the two lawyers and the defendant's lawyer could potentially influence the actions of the plaintiff's attorney through his board affiliation. The court found that while the "mere possibility of disclosure ought not to incur the consequence of disqualification,"[37] there was still the appearance of impropriety and required that the defendant's attorney withdraw or resign from the board of directors for at least two years.[38]

The *Estep* court required the attorney to resign from a case in which the relationship between opposing counsel was not as close as

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30. 537 F.2d 804 (5th Cir. 1976).
31. *Id.* at 809.
32. *Id.* at 813.
33. *Id.*
34. *See, e.g.*, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1980); Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1970); *But see* United States v. Miller, 624 F.2d 1198 (3d Cir. 1980) (for a strict application of Canon 9).
35. Estep v. Johnson, 383 F. Supp. 1323, 1324 (D. Conn. 1979).
36. *Id* at 1327.
37. *Id.* at 1326.
38. *Id.* at 1327.

that of lawyer-spouses. This indicates that the court would require disqualification for the appearance of impropriety in the lawyer-spouse situation, especially where the lawyers directly represented adverse interests. Since a lawyer-spouse could not "resign" from the marriage for a specified period of time, the sole remedy would be disqualification.

The Georgia Supreme Court in *Stephens v. Stephens*[39] disqualified a judge for the appearance of impropriety and partiality because a member of his son's law firm was representing a party in the case before the judge.[40] Although the appearance of impropriety in a case involving a family relationship with the judge would probably have a greater negative impact on the public, it is analogous to the lawyer-spouse situation because it involves a per se disqualification based solely on status.[41] Therefore, a per se disqualification based on status alone is not per se rejected as a matter of course and so there remains a possibility that in some states a per se disqualification rule could encompass the lawyer-spouse situation.

The appearance of impropriety can also be a concern in a situation where a lawyer-spouse or lawyer-spouse's firm representing the plaintiff is working on a contingent fee basis and a lawyer-spouse is representing the defendant for a set fee. In this situation, both spouses would reap greater financial gain with a victory for the plaintiff. Is the potential for greater financial gain, however, enough to disqualify an attorney?

A court disqualified plaintiff's counsel in *Greene v. Greene*[42] because he was formerly a member of the law firm which was being sued.[43] The attorney would actually be hurt financially if he won the case.[44] The court stated:

> By the same token, where it is the lawyer who possesses a personal, business or financial interest at odds with that of his client, these prohibitions [ethical considerations] apply with equal force.

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39. 249 Ga. 700, 292 S.E.2d 689 (1982).

40. *Id.* at ____, 292 S.E.2d 692.

41. This case concerned the Judicial Code of Conduct as well as the ethical considerations concerning the lawyers involved. This decision, decided by the same court as *Blumenfeld*, seems inconsistent with that case in that the court here requires disqualification without evidence of partial or improper conduct. The dissent, at page 692, states that the *Blumenfeld* case authorizes a holding of no disqualification and notes, "[p]er se disqualifications are not only harsh they most often lead to impractical results."

42. 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979).

43. *Id.* at ____, 391 N.E.2d at 1357, 418 N.Y.S.2d at 381.

> Viewed from the standpoint of a client as well as that of society, it would be eggregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit.[45]

In *Zylstra v. Safeway Stores, Inc.*,[46] the court required per se disqualification of lawyers who were members of or closely related to a member of a class in a class action.[47] The court stated, "[w]henever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents, there is a reasonable probability that some specifically identifiable impropriety will occur."[48] Thus, where a substantial financial interest is involved, there is an argument for attorney disqualification in the lawyer-spouse area, particularly when contingent fees are involved.

Conclusion

The absence of decisions in this area of potential conflict may be attributed to three possible hypotheses. First, the potential conflict is a fairly recent phenomenon. As the number of women lawyers increases, the issue may become of greater concern to the professional bar and the public.

The second hypothesis is that lawyer-spouses prefer to avoid such confrontations and decide between themselves not to represent adverse clients. Although this is a viable solution in some instances, such a decision could restrict career opportunities in mid-to-small sized communities where there are a limited number of clients. This "self-regulating" hypothesis is supported by the absence of cases where close family members are opposing counsel. This suggests that in the past, family members have avoided such confrontations.

Finally, lawyer-spouses become involved in different areas of legal work thereby limiting the potential for representing adverse clients. Although this is also a possible solution, it also can limit career choices and opportunities.[49]

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44. *Id.* (The attorney whose firm was representing the plaintiff was potentially liable to the plaintiff.).

45. *Id.* at ____, 391 N.E.2d at 1358, 418 N.Y.S.2d at 382.

46. 578 F.2d 102 (5th Cir. 1978).

47. *Id.* at 104.

48. *Id.*

49. The author realizes that both the second and third hypotheses would require statistical, empirical studies.

If the lawyer-spouse issue becomes an area of greater concern for courts, arguments exist for both allowing representation of adverse clients and creating a per se rule of disqualification. At present, the question of whether there are any conflicts of interest when lawyer-spouses or lawyer-spouse firms represent adverse interests cannot be answered on the basis of hypothetical facts and situations.

The variety of fact patterns inherent in this issue may lead to rules that differ with respect to each paradigm of representation. Decisions will have to evolve on a case by case basis as there are many considerations involved. As the level of discussion becomes increasingly narrowed there may be differences even in decisions that are based on geographical location. For example, there may be less concern for the appearance of impropriety in a large city than in a small town.

Despite the various fact patterns that will likely arise in the future, at present, lawyers should continue to uphold the honesty and integrity of the legal profession. Therefore, at the very least, when lawyer-spouses are representing adverse clients, the lawyers should make full disclosure and allow the final decision to rest with the client.

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