

Ethics Opinion No. 82-2

Propriety of an Assistant District Attorney Retaining Position when the Spouse is a Judge.

The Committee has been asked the following question:

My husband has recently been appointed to the Superior Court bench. I am employed as an Assistant District Attorney in the same community. I would like to continue in the District Attorney's Office if it does not present a problem of ethics for myself or my husband.

I believe the following procedures would be necessary for me to continue prosecution on a regular basis:

1. I would not appear in my husband's court, nor in any respect on cases assigned to him; for example, I could not have appeared at a preliminary hearing in District Court on a case ultimately assigned to him; obviously, the reverse of the situation would apply my husband could not sit on any case in which I have made an appearance for the State. The method this office uses for assigning cases makes this relatively practical;

2. Cases assigned to my husband would be noted on the outside of our files (by some sort of marking system) and I would not look at the file or discuss the case with the other lawyers in my office;

3. As in any case assigned to my husband, civil or criminal, we would not discuss the case at home or anywhere else;

4. For those criminal matters prosecuted by the other lawyers in my office and assigned to my husband, his relationship with me should be explained to the defendant on the record, and the defendant should have the decision as to whether he or she wishes to challenge the court for cause; in other words, not affecting the defendant's right to a peremptory challenge.

The Committee can find no provision in the Code of Professional Responsibility which would make the mere fact of marriage between a Superior Court judge and a member of the District Attorney's office a violation of the Code, on the assumption that the safeguards outlined in the question are scrupulously observed. In other specific factual circumstances, of course, similarly designed safeguards would be necessary. In these circumstances, however, the Committee does not feel that it constitutes a violation of DR 5101 or 5105, or a violation of DR 9101 for either the judge or the assistant district attorney to continue with their respective employments. In our view, the

admonitions of EC 92 are fully observed by the conditions suggested in the question.

Adopted by the Board of Governors on February 5, 1982