

SUBJECT: No disqualification for prosecutor and defense attorney who are married

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Keel, Riddle, Denny, Ellis, Hodge, P. Moreno

0 nays

1 present not voting — Dunnam

2 absent — Pena, Talton

WITNESSES: For — None

Against — None

BACKGROUND: Under the 5th and 14th amendments to the U.S. Constitution, defendants have the right to effective, uncompromised assistance from counsel.

Code of Criminal Procedure, art. 2.08, governs when district and county attorneys are disqualified. They must not be of counsel adversely to the state in any case, in any court; nor, after they cease to be district and county attorneys, can they be of counsel adversely to the state in any case in which they have been counsel for the state.

In February 2002, the Professional Ethics Committee for the State Bar of Texas issued Ethics Opinion 539 that held that if a lawyer represented a defendant in a criminal case in a county in which the lawyer's spouse was a prosecutor, a spousal conflict of interest would be attributed to the lawyer's spouse and every other prosecutor in that office. In other words, the spouse and all other district or county attorneys in the office would be prohibited from representing the state against the defense attorney spouse. The defense attorney only could represent a criminal defendant in the county if he or she reasonably believed the representation would not be materially affected by the spousal relationship and the defendant consented to such representation after full disclosure of the relationship.

DIGEST: HB 1428 would amend the Code of Criminal Procedure to specify that a spousal relationship between a prosecutor and a defense attorney would not be cause for disqualification unless otherwise required by the Code of Criminal Procedure, the Texas Constitution, or the U.S. Constitution.

The bill would take effect September 1, 2003.

SUPPORTERS SAY: HB 1428 would prevent the imputation of a spousal conflict to a lawyer's entire office absent a more specific conflict that rose to the level of a constitutional due process violation.

Ethics Opinion 539 adversely could affect the handling of indigent defendants' cases by requiring a court to replace an appointed defense lawyer or bring in a special prosecutor to try the case. Both of these alternatives would increase the cost to local counties, to the detriment of their indigent defender programs that already are strapped for cash. It particularly would cause problems in larger cities, where the likelihood of a local prosecutor being married to a defense lawyer is high.

Just because one district or county attorney happens to be married to a defense attorney does not mean that there is a conflict of interest, or even an appearance of impropriety. As long as the prosecutor spouse is not involved in the case handled by the defense attorney spouse, no problems should arise.

HB 1428 would continue to protect both sides from true conflicts of interest that rose to the level of a violation of law or the constitution. However, Ethics Opinion 539 was overly broad in its determination of the spousal conflict and could lead to adverse, unnecessary consequences.

OPPONENTS SAY: A marital relationship between the defense attorney and a prosecutor in the office creates the appearance of having compromised the defendant's constitutional right to effective assistance of counsel and could erode the public's confidence in the criminal justice system. Furthermore, if a plea bargain were reached in the case, the close personal relationship between the offices could create the appearance that the settlement resulted from less than arm's length negotiations. Spouses have a community interest in the income

of the other and therefore could lose sight of their client's best interest in favor of the other spouse's interest.