

You advised that an attorney prepared on behalf of the paternal grandparents, after consultation, a petition for the custody of their infant grandson. The same attorney is contemplating appearing and filing an answer and cross bill on behalf of the infant's mother in a divorce proceeding commenced by the infant's father in which the father is seeking custody of his son. Both the grandparents and the father of the infant have objected to representation of the mother by this attorney.

You wish to know whether it is proper for an attorney to represent the mother of an infant in a custody contest between the infant's mother and father after having previously represented the paternal grandparents of the same infant in a separate custody proceeding.

The Committee believes the appropriate and controlling disciplinary rules relative to your inquiry are DR4-101(B) and DR5-105(D). The rules provide that an attorney may not reveal a confidence or secret of his client or use the same to the disadvantage of a client or his own advantage or the advantage of a third person, unless the client consents after full disclosure. (See DR4-101(B)) Disciplinary Rule 5-105(D) provides that a lawyer who has represented a client in the matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client, unless the former client consents after full disclosure.

The Committee would direct your attention to LE Op. 895 in which the Committee opined that it is improper for an attorney to represent the mother in a petition for custody, after having been originally employed by the maternal grandparents in a custody proceeding of the same minor child, if the interests of the clients are different. The Committee opined that it was not improper for the attorney to continue to represent the mother if the interests of the mother and the grandparents are not adverse, if it is obvious that the attorney is able to adequately represent the interest of each, and if each consents after full and adequate disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment. However, the intentions of the mother were unclear, and her interests were likely to be adverse to the interest of the maternal grandparents.

The Committee has also opined that an attorney may be in violation of DR4-101(B) if he received information in the course of a prior representation which could be used in a current matter to the unfair advantage of another client. (See: LE Op. 766)

Under the facts as you have presented them in your inquiry, the Committee would opine that representation of the mother in a custody contest over the infant son by the attorney who previously represented the paternal grandparents in a substantially related matter would be improper. It is extremely likely that the interest of the mother will be adverse to that of the paternal grandparents, and the instant representation would be over the objection of the grandparents, the former clients. Regardless of the belief that he may properly represent multiple clients, a lawyer must defer to a client who holds the contrary belief and withdraw from that representation. (See: EC 5-19)

The Committee further opines that if any confidential information or secrets were obtained by the attorney in the prior representation of the paternal grandparents, representation of the mother in a subsequent and substantially related matter would be unethical if the same privileged information could be used to the detriment of the paternal grandparents or the unfair advantage of the mother.

Committee Opinion
February 13, 1989