

DOMESTIC RELATIONS – MULTIPLE REPRESENTATION: ATTORNEY REPRESENTING MOTHER IN CHILD CUSTODY DISPUTE ALSO REPRESENTING CHILD IN CRIMINAL MATTER, THE DISPOSITION OF WHICH MAY AFFECT THE CUSTODY ISSUE.

You have asked the Committee to opine on the following issue: Where a father/ex-husband has filed a petition to have a child's custody transferred to him from the mother/ex-wife, alleging lack of supervision and control, and where a criminal offense matter, a potential disposition for which would also be the resolution of the custody dispute, is pending against the child in Juvenile and Domestic Relations Court in the same jurisdiction, may the lawyer who represents the mother in the custody matter meet with her and the minor child to discuss substantive matters surrounding the child's pending alleged criminal offense. For purposes of this opinion, the Committee assumes that the reasons for the meeting and the substantive discussion regard the simultaneous representation of the child by the mother's attorney.

The appropriate and controlling rules relative to your inquiry are DR:5-105(A) and (C) which provide that a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, unless it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. (DR:5-105(A) and (C) The Committee opines that the multiple representation you describe would be improper because of the potential for the disposition of the child's criminal charges to have an adverse affect on the custody issue since the allegations against the mother arose as a direct result of the criminal activity with which the child has been charged. Under the fact scenario, representing the mother and child resounds with impropriety, not only because the matters are substantially related, but because the interests of the child, which interests may be adverse to the mother's, are not known under the facts and, as such, an attorney should avoid employment which may affect his independent judgment or dilute his loyalty to a client. (See EC:5-14) The Committee believes that contrary to DR:5-105(C), it is obvious that an attorney could not adequately represent the interest of the mother and the child in the instant matter. In addition to the obvious lack of adequate representation, the Committee also believes that the impropriety could not be cured with the clients' consent after full disclosure under the circumstances, since the minor child would not have the capacity to consent without proper authorization.

Committee Opinion
November 21, 1989