

CONFIDENTIALITY – CONFLICT OF
INTERESTS – DOMESTIC RELATIONS
REPRESENTATION: DECLINING
EMPLOYMENT WHEN MATTERS ARE
SUBSTANTIALLY RELATED AND
CLIENT’S INTERESTS ARE ADVERSE
TO FORMER CLIENT.

You advise that an attorney represents Husband in a claim against the Division of Child Support Enforcement (“DCSE”) and subsequent to having undertaken such employment, the attorney is approached by Husband's Ex-Wife seeking representation in her petition for support against another father for her two younger children who were born prior to the Ex-Wife and Husband having obtained a divorce. You have indicated that paternity has been admitted for one of these two children and the father is paying support. However, with regard to the second child, paternity has not yet been determined. You ask the Committee to consider the propriety of the attorney continuing to represent the Ex-Wife while simultaneously engaged in the representation of Husband in an action challenging a debt for child support owed to Ex-Wife.

The Committee believes the appropriate and controlling rules relative to your inquiry are DR:5-105(D) and DR:4-101(B) which provide that a lawyer who has represented a client in a 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. (See DR:5-105(D)) Also, DR:4-101(B) states that a lawyer shall not knowingly reveal a confidence or secret of his client or use the same to the disadvantage of the client or to his own advantage or the advantage of a third person.

The Committee directs your attention to LE Op. 538 in which the Committee opined that an attorney may represent the wife in custody and support hearings even though the same attorney had several years earlier represented the husband in a traffic charge of driving under the influence, provided that the current custody and support matters will not involve any evidence arising out of the earlier traffic charge. Even though the matters were not substantially related, the Committee opined that if at any time the attorney learned that the information gained during the course of the earlier representation of the husband would then be relevant in the custody and support hearing, the attorney must withdraw pursuant to DR:5-105(D).

Under the facts as you have presented them in your inquiry, the Committee would opine that, the representation of Ex-Wife is substantially related to the representation of Husband, and the interests of both Husband and Ex-Wife are potentially adverse and conflicting because of the possibility that former client, Husband, may be the biological father of the second child whose paternity is in question. Hence, the attorney may find himself in the untenable position of having to represent Ex-Wife against former client, Husband, in a matter substantially related to the Husband's claim against the DCSE once the paternity issue is resolved. In addition, although the Committee has previously opined

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that the former representation of a person who is now the adverse party in a suit brought by the lawyer on behalf of another client is not sufficient to warrant disqualification of the lawyer on ethical grounds, a violation of DR:4-101(B) might result if the lawyer possessed confidential information which he obtained from his former clients. (See LE Op. 445, LE Op. 672, LE Op. 770 and LE Op. 774)

The Committee is of the view that because of the substantial relatedness of each client's matter, together with the fact that the paternity issue which has yet to be resolved may implicate the former client, Husband, it would be improper for the attorney to accept or continue representation of the Ex-Wife in her petition for child support against a third party. Since it is likely that the Ex-Wife's interests and representation is materially adverse to that of the Husband's, representation would be improper unless the Husband consents after full and adequate disclosure of the potential conflict. Should the potential conflict become a reality, the attorney will need to then withdraw from representation of both Husband and Ex-Wife. If, however, the paternity issue were resolved and the Husband not implicated, the representation of Ex-Wife would not be substantially related and, therefore, ethically permissible.

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