

LEGAL ETHICS OPINION 1516

ATTORNEY AS WITNESS — CONFLICT  
OF INTEREST — FORMER CLIENT:  
ATTORNEY REPRESENTING MOTHER  
IN CUSTODY MATTER AFTER HAVING  
REPRESENTED ADOPTIVE PARENTS  
OF MOTHER'S FIRST CHILD WHO ARE  
CUSTODIANS OF [SECOND] CHILD  
ABOUT WHOM CUSTODY MATTER IS  
CURRENT.

You have presented a hypothetical situation in which an attorney represents the young mother [“client”] of a child in Juvenile and Domestic Relations (J & DR) Court, having filed a petition to vacate a prior custody order, and return custody to her, with the express condition that the mother wishes to entrust the child to the local Department of Social Services (DSS) for placement in a foster home which has been the primary residence of the minor male child, born July 1991, for most of his life.

You indicate that the client, who has had substance abuse problems for several years, alleges that an agreement into which she entered in late 1992 asking that custody be granted to the present custodians, and the resulting order which was entered without a hearing and without her having the benefit of legal counsel at the time, were procured as a result of erroneous information supplied her by her own mother and others, and that the agreement and order did not set forth what the client understood to be the agreement. The client states that she believed she would have liberal access to her son, and that she could get the child back whenever she wanted. When she discovered that was not the case, she asked the attorney to assist her.

You indicate that, approximately one year earlier, the same attorney had represented the persons who now have custody of the male child when they adopted a child placed with them by the local DSS. You advise that that adoption was completed in March of 1992 when a final order was entered and that the attorney last represented the adoptive parents in July 1992 when he forwarded an amended birth certificate for the adopted child to the adoptive parents. The attorney's fees for the adoption were paid by the DSS.

The natural mother of the adopted child is the same mother now represented by the attorney, the adoptive parents are now the custodians of the “second” child, and the mother/client is aware of the earlier adoption.

You indicate that the petition filed by the client does not allege any wrongdoing by the present custodians and, in fact, stipulates to their fitness. However, the petition alleges that she is entitled to a return of custody based on a defective Order and procedure in granting the custody, since she believes they were improperly contacted by a previous employee of the DSS with the assistance of the client's own mother. The petition also alleges that the client is entitled to a preferred standing as the biological mother. The client believes the custodians entered into a custody agreement with the client without knowing that the client was proceeding on erroneous facts.

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You further state that the attorney had also advised the person who had been previously approved as a foster parent by DSS prior to the agreement as to custody and prior to any involvement by the present custodians. The attorney's services to the foster parent (who is the person who has cared for the child for most of his life) consisted of assistance in helping to get the foster parent approved by the DSS so that the child could stay with her. The client now alleges that her earlier efforts to revoke a prior entrustment agreement with DSS were procured as a result of fraudulent statements made to her by her own mother, and she now wishes the DSS and the foster parent to have the legal and physical custody of her child. She states that she fears the present custodians of the child, who adopted her former child, wish to adopt this child and she fears she will be kept away from this second child while the present custodians oppose efforts to return the custody of the child to her. The present custodians are represented by counsel and oppose the return of custody. (There is no issue as to the prior adopted child.)

The attorney has disclosed all prior representations of persons connected with this case to the client and has also contacted the present custodians (his former clients) by letter and phone to inform them of the situation. No objection was made of his representation of the client by the present custodian until their attorney filed a motion for the withdrawal of the attorney. You advise that the J & DR judge declines to act upon the motion for withdrawal, saying that it is a matter of legal ethics to be decided by the attorney and the Virginia State Bar.

Your facts indicate that the attorney has only met the present custodians of the child on two occasions in his office when the adoption proceeding was pending; has never been to the home of the present custodians; and has no information as to the personal life of the present custodians except for what is contained in the report filed by the DSS in the adoption proceeding, a copy of which was contained in his closed file, but was returned to the Circuit Court Clerk's Office at the conclusion of the adoption proceeding. The facts you provide indicate that the attorney does not believe he has in his possession a confidential information about the previous clients/adoptive parents. The attorney believes that the fitness of the present custodians is irrelevant to the present proceeding, as the petition has been filed to overturn the custody order on technical grounds rather than by a comparison of fitness of the various parties.

You indicate that the only information regarding the present custodians which will be presented at a hearing will be their stated desire to adopt the child, made to an employee of the DSS, and the method by which they became involved in the custody process. None of the evidence to be presented is derived from the attorney's files relative to the present custodians, as all information was gained from either the DSS or from the mother/client.

Finally, you indicate that a Court proceeding was held at which the attorney made a special appearance for the purpose of contesting a Motion for a continuance, filed by the present custodians, arguing that there were no issues of fitness of the parties that were relevant to the case and that the client was entitled to a hearing based on her allegations that the original Order was improper. The Court granted a continuance and ordered

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evaluations made of the client as to her mental competence and an investigation into the home of the present custodians.

You have asked the committee to opine whether, under the facts of the inquiry, (1) the prior representation of the present custodians by the attorney presents a conflict of interest in the present action; and (2) the attorney must withdraw as counsel for the present client if the attorney is called as a witness for the present custodians even if the present client's position is that the fitness of the parties is irrelevant.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:4-101(B) which provides, in pertinent part, that an attorney should seek to protect the confidences and secrets of his client; DR5-102(B) which states that if, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client; and DR5-105(D) which provides 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 after disclosure. [emphasis added]

The committee has repeatedly opined that the earlier representation of a client who is now the adverse party in a suit brought on behalf of another client is not *per se* sufficient to warrant disqualification on ethical grounds. *See* LE Op. 1399, LE Op. 1194, LE Op. 1139. Additional factors to the determination of disqualification are the relatedness of the two matters and the critical issue of whether the lawyer obtained secrets and confidences of the first client in the course of the representation. *See* LE Op. 441, LE Op. 569, LE Op. 672, LE Op. 792, LE Op. 933, LE Op. 1349.

Although your facts indicate that only the custody of the second child, and not the child previously adopted by the present custodians, is at issue, the committee is of the opinion that the current representation of the mother is substantially related to the prior representation of the custodians since the parties, i.e., the mother and the present custodians/prior adoptive parents, are the same as in the first proceeding.

In addition, your facts indicate that the attorney was in possession of information regarding the personal life of the present custodians. You indicate that such information was contained in a report filed by the DSS in the adoption proceeding, a copy of which was contained for a time in the attorney's file. Although your facts allege that the attorney neither read nor glanced at the report following the conclusion of the first child's adoption proceeding, the committee is of the opinion that the possession of confidential information may be imputed to the attorney based upon his having earlier been privy to the report.

The committee opines, therefore, that it would be improper for the attorney to represent the present client based upon the substantial relationship of the matters as well as upon

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the presumption that the attorney possesses confidential information which could be used to the disadvantage of the former clients/present custodians or to the advantage of the current client/mother.

Having concluded that it would be improper for the attorney to represent the present client, the committee finds that your question as to the former clients calling the attorney as a witness is moot.