

LEGAL ETHICS OPINION 1557

CONFLICT OF INTEREST - ZEALOUS
REPRESENTATION: REPRESENTATION
OF MINOR, THROUGH NEXT FRIEND,
WHERE MINOR'S INTERESTS MAY
DIVERGE FROM NEXT FRIEND'S
INTERESTS.

You have presented a hypothetical situation in which an attorney represents a wife in a heated and bitter divorce action. The wife/mother seeks complete custody of the minor child, no visitation by the husband/father, and a large monetary award. While the wife wins the custody and visitation issues through a separate proceeding, she does not obtain all of her monetary objectives in the divorce action in chancery.

You state that during the pendency of the divorce proceeding, and after denying the husband any access to or communication with the child for seven months, the wife accuses the husband of molesting the child. You state that the husband vigorously denies the wife's accusations and the claim is not resolved through adjudication during the divorce proceeding. Upon conclusion of the divorce proceeding, the ex-wife seeks to file, as the child's next friend, a tort action against the father/former husband alleging molestation and seeking monetary damages.

Furthermore, you indicate that the effect of a judgment against the defendant father/former husband would be to give the mother/ex-wife, as custodian of the child, control over funds which the court in chancery declined to award her, either through the distribution of marital property or through child and spousal support. Finally, you inform the committee that the statute of limitations for the tort action is tolled during minority and that the child may bring suit upon reaching the age of majority.

You have asked the committee to opine, under the facts of the inquiry, whether it is proper for a lawyer to accept representation of a minor, suing by next friend, where the child's interests may diverge from those of the next friend who is also the custodial parent.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-106(B) which provides that a lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services; and DR:7-101(A)(1) which prohibits a lawyer from intentionally failing to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. Further guidance is available through EC:5-21 which exhorts that "the obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment". [emphasis added] The committee is of the view that the mother/ex-wife's status as next friend does not create an attorney-client relationship. Thus, the multiple representation provisions of the Code of Professional Responsibility are not applicable here.

Committee Opinion
October 20, 1993

In the facts you present, the committee believes that it would not be per se improper for the lawyer to represent the minor, even where the interests of the minor diverge from those of the next friend/mother, provided that the lawyer's independent professional judgment on behalf of the minor is not compromised by direction or regulation of the next friend and further provided that the lawyers were able to provide zealous representation as required by Canon 7.

Committee Opinion
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