

LEGAL ETHICS OPINION 1700

CONFLICT; REPRESENTATION OF  
WIFE IN CHILD SUPPORT MATTER  
WHEN ATTORNEY'S FORMER FIRM  
REPRESENTED HUSBAND IN  
ORIGINAL CUSTODY CASE.

You have presented a hypothetical situation in which Attorney B represents a wife in a proceeding to reduce child support when Attorney A, at Attorney B's former firm represented husband in the original child support case. Attorney A advises Attorney B that the husband objects to Attorney B's representation of the wife. Subsequently, Attorney B takes action to effect a change of venue, with no notification to Attorney A. Attorney A then moves to have Attorney B disqualified and to have case returned to original venue. Attorney B, without obtaining dates from Attorney A, files a notice of hearing under the name of his associate and has a subpoena duces tecum issued for service on the husband in a jurisdiction outside of Virginia, also through his associate.

Under the facts you have presented, you have asked the committee to opine as to the propriety of Attorney B's 1) representation of the wife when husband was represented by Attorney A while a law partner with Attorney B; 2) obtaining a transfer of venue without notification to Attorney A; and 3) attempting to get service on the husband in a foreign jurisdiction. Also, you have inquired whether Attorney B's ethical obligations are altered by the fact that Attorney B acted through his associate.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101(B) which requires an attorney to protect client confidences and secrets; DR:5-105(D) which prohibits a successive employment adverse to a former client if the matters are substantially related unless the former client consents after disclosure; DR:5-105(E) which imputes the conflict of one attorney to all other attorneys in the same law firm; and DR:1-102(A)(4) which prohibits an attorney from engaging in conduct involving fraud, dishonesty, misrepresentation or deceit reflecting adversely on the lawyer's fitness to practice law.

The committee assumes that Attorney B's representation of wife in a proceeding to reduce child support is substantially related to the child support proceeding in which Attorney A represented the husband while B was a member of the old firm.

The committee has previously opined that a lawyer who has left a law firm may subsequently represent a client adverse to a client of the former law firm, if the lawyer can rebut the presumption of shared confidences and secrets. LE Op. 993, LE Op. 1043, LE Op. 1082, LE Op. 1085 and LE Op. 1428. Thus, for example, even if the client represented by an attorney's former law firm is unwilling to waive any conflict, the attorney may nevertheless represent a client adverse to his former law firm's client in the same or substantially related matter, if the attorney had no knowledge of and did not

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actively participate in the handling of the case with the old law firm. LE Op. 993 (attorney who left law firm which represented plaintiff in a real estate matter could accept representation of defendant in same matter because attorney had no knowledge of and did not actively participate in former law firm's handling of plaintiff's case even without waiver of conflict by plaintiff).

In LE Op. 1629, the committee opined that a lawyer who left a firm in which he was actively engaged in the defense of medical malpractice cases to join a firm which represented medical malpractice plaintiffs could not pursue any plaintiffs' cases involving a doctor represented by the former firm in which the attorney was involved or had participated. However, if the attorney had not participated in the defense of a doctor and did not receive any confidential information while employed at the former firm, the attorney could represent a plaintiff adverse to a defendant physician represented by his former law firm.

In the facts you present, the committee believes that whether Attorney B's continued representation of wife is proper depends on whether he participated in the representation of husband while employed at the former firm or whether Attorney B acquired and confidences and secrets relative to husband's case. Since you do not indicate whether these circumstances exist in your hypothetical, the committee cannot reach a conclusion as to whether Attorney B's continued representation of wife is proper.

Your second inquiry concerns the failure of Attorney B to notify Attorney A of an action to transfer venue and filing a notice of hearing without obtaining available dates from Attorney A. The committee believes that Attorney B's conduct is governed by the applicable Rules of Court, local rules, custom and professional courtesy, but not the Code of Professional Responsibility, unless it can be shown that Attorney B intentionally or habitually violated an established rule of procedure or disregarded a standing rule of a tribunal. DR:7-105(A); DR:7-105(C)(5).

Your third inquiry involves the propriety of Attorney B having a subpoena duces tecum served on the husband /1 outside of Virginia. In LE Op. 1495 the committee opined that DR:1-102(A)(4) is violated where a Virginia attorney requests a Virginia court to issue a subpoena duces tecum to obtain documents from an out-of-state individual, knowing that the subpoena is unenforceable unless the witness has agreed to accept service. Assuming that Attorney B knows that a subpoena duces tecum served on an out-of-state individual is not enforceable, and further assuming that the documents served on the individual threaten contempt for non-compliance and the husband has not accepted service, Attorney B's conduct may be in violation of DR:1-102(A)(4).

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