

ADVISORY ETHICS OPINION 90-06

SYNOPSIS:

In the course of representing an adoption agency and with the agency-client's consent, an attorney may assist both the relinquishing parents and the adopting parents with counseling and by preparing routine legal documents, provided that she first fully discloses areas of potential conflict between the agency-client and either or both sets of parents and that she receives no additional fee for the service from either or both sets of parents.

FACTS:

Attorney A represents an adoption agency licensed by the State of Vermont. On behalf of her agency-client she is called upon to counsel the birth mother or, in some cases, both biological parents. The advice given by Attorney A includes the assurance that the relinquishing parent or parents may change their minds about the adoption at any time prior to the date upon which relinquishment becomes final. This assurance is also provided by other members of the agency staff, including a social worker. In cases where the birth mother or parents decide to relinquish the child, Attorney A prepares the legal documentation associated with the termination of parental rights.

Prior to the date upon which relinquishment becomes final, Attorney A informs the adopting parents that the biological parent or parents may change their mind about the adoption at any time. After the baby has been relinquished to the agency, Attorney A sometimes assists the adopting parents with the Finalization Petition. They either retain separate counsel or appear *pro se* at the final hearing.

In the event of a dispute between the agency-client and either set of parents, Attorney A represents the agency and refers the dissatisfied party to other counsel.

ISSUE:

May Attorney A assist the relinquishing parents and the adopting parents with counseling and in the preparation of routine legal documents in the absence of any dispute between the assisted party and the agency-client?

ANALYSIS:

Under ideal circumstances an adoption agency provides a valuable service to the baby, the birth parents, and the adopting parents without any conflict between the interests of the involved parties and those of the agency itself. That is not to say, however, that no potential for conflict exists.

Generally speaking, adoption agencies rely upon the income which is generated by successful adoptions. It is possible that an agency, motivated by its own self interest, could provide counseling which is biased in favor of the relinquishment of parental rights. In addition, the general practice of collecting all fees associated with adoption from the adopting parents could lead to an unintentional bias in favor of the adopting parents or result in counseling weighted in favor of placement with a particular adopting couple. Even if most agencies properly put the welfare of the child above all other considerations, without undue bias toward either set of parents, the self interests of the agency are an ever present basis for caution. This is particularly true in light of the emotional nature of adoption proceedings and the enhanced vulnerability of all parties. The potential conflict takes on an additional ethical dimension for an attorney retained by an adoption agency when the attorney offers counseling or other legal assistance to either or both sets of parents on behalf of her agency-client. In doing so the attorney is furthering the business of her agency-client in a manner which also results in a benefit to the involved parents. The parent or parents receiving the attorney's assistance may not perceive the resulting benefit to the agency-client who is paying her fees.

DR 7-104(A)(2) provides that during the course of representing a client a lawyer should not give advice to a person who is not represented by counsel, other than to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of her client. While there may be many adoption proceedings in which the interests of all parties are the same and where the potential for conflict is limited, in light of the foregoing considerations, we believe that prior to assisting parents with counseling or in the preparation of legal documents, Attorney A should disclose that she is the attorney for the agency and not for the parties. She should discuss potential areas of conflict and suggest the possibility that the parent or parents may wish to retain their own attorney. In this way, all parties will clearly understand that Attorney A represents the agency and that by assisting involved parents she is also furthering the interests of her agency-client.

In the event that a reasonable possibility of conflict exists or in the event of an actual dispute, Attorney A should offer no advice to any non-client, except to secure counsel.

This opinion is consistent with the spirit of DR 5-105(C) which provides that a lawyer may represent differing interests if it is obvious that she can "adequately represent the interest of each and if each consents to the representation" after full disclosure of the conflict and its ramifications. DR 5-105(C) would apply if Attorney A received additional fees from the involved parents.

In reaching this conclusion we have been mindful of other safeguards afforded by the adoption process. Under existing procedures social workers are available to assist and advise the natural parents. In addition, the presiding judge will conduct an independent inquiry to insure that any relinquishment of parental rights is both knowing and voluntary. Finally, in the event that a birth parent has not reached the age of majority, a guardian ad litem will be appointed.