

## ETHICS OPINION

RO-90-12

Payment of lawyer's fees by third party must not impair independent professional judgment of lawyer

### QUESTION:

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"1. Female contacts attorney stating she wishes to give up the child she is due to deliver or a child she has just delivered. Attorney advises female of the various agencies available and encourages female to consider the use of an agency rather than private adoption. Female refuses and expresses desire to continue with private adoption. Female does not know any family she wishes to adopt the child and requests the attorney to provide her with a biographical sketch of families whom the attorney knows who would wish to adopt her child. Attorney provides female client said biographical sketches and a family is selected by female client. Female client does not know the name or location of the couple selected, client understands she will not be given that information, and client continues with process of adoption. Representation is made to client that adoptive couple will pay all medical, hospital, prescription, or other medical expenses directly related to prenatal care and delivery of the child. Adoptive couple will also pay the attorney's legal fee. No payment of any kind will be made to female at any time. Attorney proceeds to obtain court order allowing release of infant from hospital and places physical possession with adoptive parents who have their own attorney.

a. Potential adoptive couple contacts attorney concerning adopting a child who has already been born. Attorney advises couple of the various agencies available and encourages couple to consider the use of an agency rather than private adoption. Couple refuses and expresses desire to continue with private adoption. Attorney contacts birth mother and requests that potential adoptive parents be permitted to adopt the child. Representation is made to birth mother that all hospital and delivery costs of the child will be paid by prospective adoptive couple. Birth mother is not given the identity or actual location of potential adoptive parents and is advised that she will not receive that information in the future. Birth mother agrees to the adoption and attorney proceeds to obtain the court order and transport the child as stated in paragraph one. No money changes hands between prospective adoptive couple and the birth mother. Attorney represents birth mother and adoptive couple pays her fee. Adoptive couple obtains their own attorney.

b. Same except attorney represents adoptive couple and birth mother is provided an attorney with adoptive couple paying legal fee. Birth mother approves selection of her attorney.

2. Third party i.e., attending physician, friend, or relative of birth mother contacts attorney concerning the adoption of a child due to be born or one that has just been delivered. Attorney advises third party of the various agencies available and encourages third party to have birth mother consider the use of an agency rather than private adoption. Third party advises attorney birth mother refused agency intervention and expresses desire to continue with private adoption. Attorney contacts birth mother and verifies her desire to have child adopted through private adoption. Attorney provides birth mother with information on families wishing to adopt child. Birth mother is not given their identity or location and is advised she will not receive that information in the future. Adoptive parents pay birth mother's medical costs, hospital bills, and prescriptions in connection with birth of child. Attorney represents birth mother. Adoptive parents have independent attorney. Adoptive parents pay all legal fees. Birth mother receives no money from anyone. No money other than the payment of the normal medical, hospital, and prescription bills of the birth mother are paid on behalf of birth mother.

Please advise me concerning each of these situations, and what, if any, violation there would be of the Code of Professional Responsibility and any applicable State Laws. My questions only relate to children born and adopted in the State of Alabama."

ANSWER:

The Disciplinary Commission can express no opinion regarding what is or is not the law of the State of Alabama in regard to the fact situations posed. The Commission can note certain ethical considerations that would appear to apply to each of the fact situations posed and does hereby address those issues. The Code of Professional Responsibility provides in DR 5-107(A) and (B) as follows:

"DR 5-107           \* \* \*

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

- (1) Accept compensation for his legal services from one other than his client.
- (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

- (B) 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."

The application of DR 5-107 is plain on these facts and requires professional independence of the attorney regardless of the source of compensation and consent to employment and payment when compensation is made by someone other than the client.

Disciplinary Rule 5-105(A) provides in pertinent part as follows:

"DR 5-105     \* \* \*

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests ...."

Further provisions of DR 5-105 provide for multiple representation after consent [see DR 5-105(C)] but that would not seem to apply on these facts as confidentiality regarding identity of each prospective client is a prerequisite to the transaction. Accordingly, through application of DR 5-105(A), the attorney would have to identify his client and represent only that client in any negotiations between potential adoptive parents and birth parents. (It is noted, without additional comment, that none of the hypothetical questions posed make mention of the status, position, or involvement of the birth father.)

In a previous opinion, RO-89-66, the Disciplinary Commission has stated that a lawyer who represents a step-parent in an uncontested adoption proceeding should not advise the natural parent regarding the legal implications of consenting to an adoption because such action might involve the lawyer in a conflict of interest situation. The Commission held that the lawyer should simply advise the unrepresented natural parent to obtain independent counsel. Expanding upon that principle we are of the opinion that the attorney herein having undertaken representation of a client in relation to an adoption, should not advise and counsel a potentially adverse party or interest in connection therewith, other than to advise that party to obtain independent counsel.

The Commission expressly reserves any comment regarding the application of the Code of the State of Alabama to the fact situations posed. Private adoption services, rendered by an attorney, can easily be perceived by the public as black market adoptions or "baby selling" and as such any involvement by an attorney in such an undertaking must be carefully scrutinized from both an ethical and a legal point of view.

AWJ/vf

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