ETHICS OPINION 2013-06

Rules: 1.9
Subject: Conflict based on prior representation
Summary: Lawyer does not have a conflict in child custody proceeding against former client who Lawyer represented in an unrelated divorce and child custody proceeding

Lawyer represents Father in an action seeking physical custody of his daughter. At her deposition, Mother asserted that Lawyer had a conflict of interest. The assertion was based on the fact that Lawyer represented Mother in the initial stages of an earlier divorce and child custody action. The earlier action involved a different father and child; the child involved in the current matter was born 14 years later. Mother changed lawyers prior to proceeding to trial in the earlier action. Lawyer represents having obtained no confidential information about Mother in the earlier representation that would be relevant to the current action. In fact, the earlier representation was brief enough that Lawyer did not remember Mother until she mentioned the earlier case.

Application of Rule 1.9 in this instance is quite simple. The earlier divorce and child custody action is not the same or a substantially related matter creating a conflict pursuant to Rule 1.9(a). Accepting as true Lawyer's representation that the former representation did not provide Lawyer with confidential information about Mother that could be used in this action, Rule 1.9(c) does not apply either. Obviously if Lawyer did have such information, the Committee's opinion would be different.

It should be noted that the facts here are unique. The child at issue was born almost a decade and a half after Lawyer's earlier work for Mother. Absent such a gap in time, the Committee would be mindful of Note 3 to Rule 1.9 which cites the "substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." The note cites the impropriety of representing a CEO in business matters and subsequently being adverse in a divorce due to the knowledge of intimate financial details. Similarly, in most child custody representations a lawyer will learn intimate facts about parenting skills and personal traits that could be used adversely in an action about other children from another parent. Given the gap in time, different children involved, and representation by Lawyer that the earlier representation was so brief that such information was not learned, the Committee does not believe a conflict exists in this case although it well might in other settings.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota