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Ernest W. Stephens, Retired

January 8, 1988

Re: Ethics Opinion No: 88-1

Please let this serve as the response of the Ethics Committee to your inquiry to it. We set out in detail the inquiry as you presented the same as follows:

> In 1981 attorney represents client-parent in a divorce. There are two children and custody is awarded to opposing party-parent. Immediately after the divorce opposing party-parent marries stepparent which results in considerable violence and alcohol abuse at the custodial home. Because of custody proceedings brought by client-parent, opposing party-parent agrees to allow a change of custody with respect to one of the two children. Difficulties in the new marriage of opposing party-parent result in a quick divorce.
>
> Five years later, client-parent brings child who has remained with the opposing party-parent to attorney's office with a request that additional change of custody proceedings be brought. In a private conference with child, child (now age 14) disclosed that child was "sexually abused" by former stepparent four to five years ago. Attorney neither asked for nor does child volunteer details of the "sexual abuse". Child further discloses that child has told opposing party-parent of the "sexual abuse" but has not told client-parent. Child does not want client-parent to know of abuse and feels that it would cause trouble. Attorney also concludes that it is likely that client-parent will react violently to the disclosure of this information. Opposing party-parent was told of the abuse recently and did arrange for counseling for the benefit of the child.
>
> Change of custody proceedings are discontinued after

attorney explains the proceedings and encourages client-parent to contact opposing party-parent and discuss the child's problems. Apparently both parents and the child engage in what could be the most constructive discussions they've had in six years. Child's desire to live with client-parent appears to be based upon normal teenage difficulties that are aggravated by a move to another state, attempted suicide of a friend, and the accidental death of a neighbor's child. There is no on-going threat to the child from the former stepparent and there appears to be no threat by any other member of the opposite sex at opposing party-parent's residence.

Privately, attorney concludes that child is in no on-going danger of sexual abuse; that the abuse is not relevant to the current custody issue; that opposing party-parent is doing as well as client-parent would in assisting the child both with respect to the former abuse and the normal teenage problems (in that child is receiving counseling for the abuse and opposing-part parent is trying to improve communications with child and find a job closer to client-parent's residence); and that child custody proceedings would probably disrupt what appears to be the mending of a relationship between the parents and child. Client-parent made the decision to abandon child custody proceedings without knowing of the past sexual abuse.

1. May the attorney hold the private conversation with the child in confidence from:

(a) his client; and
(b) law enforcement; and
(c) the Court?

2. Should the attorney attempt to provide disclosure to his client through direct communication with:

(a) the child; or
(b) the child's current counselor; or
(c) opposing party parent?

We will attempt to discuss each part of the question separately in this response. We trust the inquiry means:

Does the attorney have a duty to disclose to any of the above mentioned individuals or organizations the facts, without being asked?

Obviously, the most difficult question which is presented is whether the attorney has an obligation to disclose the information received to his client, without a direct inquiry from the client. The attorney owes the obligation of the preservation of confidence to the client (Canon 4), the duty of loyalty and

independence of judgment to client (Canon 5), the duty to act competently (Canon 6), and a duty to represent zealously the client's interest (Canon 7).

The question which must then be answered is whether an attorney is required to inform his client of all information which might be learned during the course of representation. Ethical Consideration 7-10 provides that:

> The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

Correspondingly, Ethical Consideration 5-21 provides in part:

> 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.

Additionally, Disciplinary Rule 7-102 (A) (3) provides that:

> In his representation of a client a lawyer shall not: "conceal or knowingly fail to disclose that which he is required by law to reveal."

Weighing and balancing the ethical considerations with the facts involved, a majority of the committee believe that the attorney should reveal to his client the facts learned from the child. The majority recognizes that it is important to not interfere needlessly with the child's future, however, they likewise felt that the first duty owed by an attorney was to his client and that he should reveal facts which may be of relevance, or lead to relevant information.

A strong minority on the committee felt that the attorney's determination that the facts learned were not relevant is the telling point in the question presented. They felt that in such a situation where as represented old wounds are starting to heal and the schism that resulted in the 1981 divorce is narrowing, that the relevation of the complaint would only tend to create more problems. They felt that inasmuch as the child is receiving treatment for the abuse and injuries received, and the attorney's judgment that the client would react violently or cause trouble if he or she learned of the past abuse, it was their opinion that the attorney was not required to inform the client of the information he received from the child in the interview.

As noted herein, the committee felt the question very close and would rely heavily on the attorney's determination of relevance in the facts presented. Nonetheless, the committee felt that the general rule should be for disclosure and that non-disclosure should be employed only in exceptional circumstances

as deemed appropriate by the attorney.

B. The committee felt there was no responsibility upon the attorney to reveal this particular information to law enforcement authorities. The comments of the child referred to events which occurred four or five years ago. The child is presently receiving counseling and the counselor may well be required under SDCL 26-10-10 to reveal the information received. Additionally, the attorney asked for and received no details and indications are that the child might be uncooperative in view of her concern that the client-parent would cause trouble. The consequences of reporting this conversation to law enforcement officials should be carefully weighed, and due to the passage of time and the sketchy nature of the information now held by the attorney and the substantial risk of damage to the welfare of the child, it is our opinion that the attorney does not have an obligation to report the conversation of the child to law enforcement officials.

As regards whether the report should be given to the Court, inasmuch as there is presently no action pending before the Court, and as the question of reporting to law enforcement officers is in large measure the same question as reporting to the Court, the committee would require no report to the Court for the same bases as set forth above.

As regards your inquiry of whether the attorney should attempt to provide disclosure to his client through direct communication with the child, the child's current counselor or opposing party parent, inasmuch as the majority of the committee believed contact with the client-parent would be appropriate, the need for an answer to this question does not appear. If, however, the information was not revealed directly to the client-parent, and if the attorney has continuing contact or opportunity for discussion, it may be well to raise the issue: however, it would appear to be a judgment call based upon the attorney's evaluation of the individuals involved.

Obviously, the questions you have presented have proven difficult for the committee. The welfare of the child must be given considerable importance and we encourage you to act with that factor in mind. Nonetheless, the committee felt it inappropriate to adopt a general rule allowing for non-disclosure of information of this nature, while simultaneously recognizing that in exceptional circumstances non-disclosure would be appropriate, and strong argument could be made that your case presents such a situation.

Respectfully submitted this 8th day of January, 1988.

RITER, MAYER, HOFER & RITER

By: Robert C. Riter, Jr., Chairman
Ethics Committee

South Dakota Ethics Opinions

Ethics Opinion 87-3

May 29, 1987

Rules: D.R. 5-107(A)(1); E.C. 5-21, 5-22, 5-23
Subject: Attorney Fees.
Summary: It is permissible for an attorney handling a voluntary termination of parental rights to have his/her fees paid by the prospective adoptive parents. However, the same attorney should not handle the termination and adoption.

FACTS

This is written in response to your request for an opinion from the Ethics Committee. You presented the following issue:

Is it appropriate for an attorney handling a voluntary termination of parental rights to have his attorney's fees paid by the prospective adoptive parents on what is intended to be a private adoption?

Additionally, you are concerned about a possible conflict of interest and possible violation of SDCL 25-64.2.

OPINION

The majority of the Committee believes it appropriate for an attorney handling a voluntary termination of parental rights to have his fees paid by the prospective adoptive parents. The Committee, however, does not believe the same attorney should handle the termination and the adoption proceeding. As such, while the attorney's fees might be paid by the prospective adoptive parents, the natural mother should have counsel separate and apart from the attorney representing the adoptive parents.

The propriety of this procedure is based upon:

1) The attorney handling the voluntary termination must be sensitive to the matter and assure that the source of pay will in no way affect the obligation to exercise professional judgment solely on behalf of the client, and
2) The client must be fully informed and consent to the arrangement.

While there appear no canons directly on point, we would refer you to EC 5-21, 5-22 and 5-23, and DR 5-107(A)(1).

As regards SDCL 25-6-4.2, it is our opinion that the fee for advice in the termination of parental rights, or preparation of documents, notices, attendance at hearings or other attorney services regarding that, is not an unauthorized consideration within the meaning of SDCL 25-6-4.2. There is a requirement that such fee not be excessive (DR 2-106(A)), the same as the fee for any other legal service. It would be suggested, however, to rebut any claim of impropriety, that the attorney keep careful records of the legal services performed. We also draw your attention to the fact that it is merely our opinion regarding the interpretation appropriately given to SDCL 25-6-4.2, and we cannot appropriately predict how a Court would view it.

Robert C. Riter, Jr.
Chair, Ethics Committee