

speaking of ethics

By Hope C. Todd

"It is also clear that the harm occasioned to the client can never be adequately rectified."¹

Stories of failed child adoptions leave only the coldest heart unmoved. Common features in these adoption cases often include: (1) a deceived birth parent deprived of due process and of the fundamental liberty interest in parenting his or her child (often, though not always, through the intentional improper actions of the other birth parent); and/or (2) corrupt intermediaries engaged in unlawful conduct against eager prospective adoptive parents who joyfully welcome and care for and love their adopted child. Inevitably in these devastating tales, the day comes when the adoptive parents learn that something has gone terribly wrong. And then the legal battle ensues, a nightmare which begins when the child is perhaps less than a year old and ends three or four years later, when the child is tearfully ripped from the only parents and home that he or she has ever known and is returned to the person (or couple) who has desperately longed for permanent custody and for the opportunity to raise and love his or her child. In these legal matters, there are no victors, only victims, and justice has a hollow ring.

Such heartbreak is all the more unfathomable when it results from a lawyer's failure to act with requisite legal competence or, in the most extreme case, when a lawyer willfully participates in a fraud or crime. For such lawyers, a disciplinary penalty involving a lengthy suspension, or even disbarment, is the consistent, if inadequate, consequence.²

No doubt, the vast majority of adoptions are successfully and legally accomplished through the assistance of competent and compassionate counsel. However, the very nature of private adoption practice gives rise to a number of significant ethical issues, particularly with respect to conflicts of interest, which adoption practitioners must identify and appropriately address lest they violate

Ethical Mandates in Private Adoptions

the D.C. Rules of Professional Conduct and risk grave harm to clients and to the proper administration of justice.

At first blush, one might regard the objectives and interests of birthparents, prospective adoptees, and adoptive parents in every adoption as wholly consistent and aligned toward a common goal: the timely and permanent placement of a child in a loving and proper home. And yet, not every prospective adoption is pursued to completion. Relevant information may come to light about birthparents, prospective adoptees, or prospective adoptive parents that influences whether one or more of the parties wishes to proceed with the adoption, or impacts "whether the adoption will be in the best interest of the

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prospective adoptee," the ultimate question before the court in every adoption.³ Indeed, human hearts and minds may also change for any reason in the course of an adoption proceeding.⁴

In Opinion 366 (*Ethical Issues That Commonly Arise in Private Adoption Matters*), the D.C. Bar Legal Ethics Committee provides a roadmap for adoption practitioners to navigate what are often delicate issues, including: 1) representation of birth parents when legal fees are paid by the prospective adoptive parent(s); 2) ethical implications of reciprocal referral arrangements among private adoption attorneys; 3) representation of more than one birth parent; and 4) representation of a client in an adoption whose interests are adverse to a former client in a previous adoption matter. Not surprisingly, all these situations give rise to conflicts of interest under one or more rules, specifi-

cally D.C. Rules, 1.7, 1.8, and 1.9.

Generally, a lawyer's duties of loyalty and zealousness assume that a client is entitled to a representation free of material limitations, whether those limitations are in the form of the lawyer's obligations to another current or former client, or are due to a lawyer's own personal, financial, or other interests.⁵ The conflict of interest rules identify circumstances in which duties owed to others, or where the lawyer's own self-interest, raise the possibility of affecting a lawyer's "wholehearted and zealous representation" of a client's interest.⁶ The conflicts rules also recognize, however, that in many matters, lawyers are fully capable of acting with absolute fidelity to their clients' interests even in the face of competing interests, and that clients should have the autonomy "to make reasoned judgments about the trade-offs that are at stake."⁷

Opinion 366 examines when and under which circumstances a private adoption practitioner may properly seek and obtain a client's *informed consent*⁸ to take on a representation notwithstanding the existence of a conflict of interest. The committee makes clear that obtaining a client's informed consent in such matters is neither a simple panacea nor a mere formality.

For example, obtaining a birth parent's informed consent to have his or her lawyer's fees paid by the prospective adoptive parent(s)⁹ requires:

'[A] discussion of the client's . . . options and alternatives' and an 'explanation . . . of material advantages and disadvantages of the proposed course of conduct.' . . . An indigent birth parent must be informed that court-appointed counsel is available under D.C. Code § 16-316(a) as an alternative to accepting a lawyer whose fees are paid for by the adoptive parents; although the lawyer is free to fairly state her opinion regarding the advantages of not having a court-



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appointed lawyer, the client must be told that she has a choice and be provided with sufficient information to make that choice intelligently.’

The opinion also provides practical considerations and guidance about whether and how a lawyer may properly obtain the informed consent of each birth parent to simultaneous representation. Although the question of joint representation of birth parents is ostensibly a narrow one, the committee broadly extends its reasoning and the applicability of the opinion, to joint representations generally, not merely to adoption matters.¹⁰ As such, a lawyer contemplating a joint representation of *any kind* would be well served by reading the opinion.¹¹

In addition to addressing conflicts issues, Opinion 366 also provides critical guidance on an adoption practitioner’s permissible communications with an unrepresented party to an adoption (most commonly, an unrepresented birth parent), when the lawyer represents either the prospective adoptive parent/s or the other birth parent. The committee notes that despite the availability of paid or court-appointed counsel, it is not uncommon for a “birth [parent] to decline the opportunity to consult with an attorney before executing the statutory consent form that terminates [his] or her parental rights.”¹²

In obtaining such statutory consent from an unrepresented birth parent, a lawyer must be extremely cautious to ensure that his or her conduct conforms with Rule 4.3,¹³ such that

[T]he lawyer may not advise the unrepresented birth parent on any matter. If the birth parent poses a question that requires other than an objective answer (*e.g.*, what happens next, who is the judge assigned to the matter), the lawyer must limit her response to advising the birth parent that he or she may want to talk with a lawyer and the available options for obtaining one.

Notwithstanding the significant liberty and human interests at issue, private adoption lawyers owe no greater ethical duties to their clients—whether to birth parent(s) or to prospective adoptive parent(s)—than they owe to any other client in any other matter. Yet, as described in Opinion 366, the very nature of private adoption proceedings, the relatively small number of adoption practitioners, and the specific vulnerabilities of

clients and other parties in the proceedings, demand that adoption practitioners exercise particular care to ensure that they comply with the D.C. Rules.

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Notes

1 *In Re Grossman*, 3 Mass. Attorney Disciplinary Reports 89 (Aug. 10, 1983).

2 *See In Re Louis Capozzoli*, M.R. 18371 (Ill. Jan. 2, 2003)(IARDC); *In Re Joyce Sibson Dove*, Nos. SC05-302 & SC05-1157 (Fla. June 12, 2008); *In Re Rochelle J. Thompson*, No. 09-80-GA (State of Michigan Attorney Discipline Board Jan. 17, 2012).

3 D.C. Code § 16-309(b)(3); *see, e.g., In re E.D.R.*, 772 A.2d 1156 (D.C. 2001).

4 In 1987 the ABA Legal Ethics Committee opined that a lawyer could not ethically represent both the adoptive and biological parents in an adoption proceeding, citing the “inherent and irreconcilable conflict[s] in the transference of parental rights, including consent to termination of parental rights and revocation of same. (“An adoption is a highly emotional undertaking for both the adoptive and biological parent. In such situations the lawyer must take particular care that the client fully understands the significance of the legal actions being taken. The lawyer has the obligation not only to advise the client of legal rights and responsibilities, but also to counsel regarding the advisability of the action contemplated.”). ABA Informal Opinion 87-1523 (1987).

5 *See generally* Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* §§ 10.1-3 at 10-1-11 and § 10.4 at 10-13 (3d ed. Supp. 2004).

6 *See* Comment [7] Rule 1.7, *see also* Rules 1.8(a) and Rule 1.9.

7 *See* Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 10.8 at 10-22 (3d ed. Supp. 2004).

8 “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” D.C. Rule 1.0(e).

9 Rule 1.8 (e) which governs when a lawyer may accept third-party payments, provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) The client gives informed consent after consultation; (2) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) Information relating to representation of a client is protected as required by Rule 1.6.”

10 “We take this opportunity to review relevant provisions of the D.C. Rules of Professional Conduct in the context of joint representations to ensure that lawyers’ consultations with their prospective clients address fully “the implications of the common representation” and that clients who consent to joint representation have been adequately informed of the actual and potential consequences of the decision.” D.C. Legal Ethics Opinion 366 (2014).

11 The opinion reminds lawyers that “... a lawyer who is considering undertaking joint representation must keep in mind that “[n]o matter how consistent the apparent interests of clients in a joint representation may appear at the onset ... [joint representation] poses inherent risks of future conflicts of interest.” And that “[a] joint representation in and of itself does not alter the lawyer’s ethical duties to each client, including the duty to protect each client’s confidences.” D.C. Legal Ethics Opinion 366 (2014).

12 “[O]btaining a birth parent’s formal consent is *the* essential step in a proceeding that will result, if the court

grants the adoption petition, in the transfer of parental rights from the unrepresented birth parent to the lawyer’s client(s).” D.C. Legal Ethics Opinion 366 (2014).

13 D.C. Rule 4.3 provides: “(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not: (1) Give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client; or (2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer’s client that the lawyer is disinterested.”

Disciplinary Actions Taken by the Board on Professional Responsibility Hearing Committees on Negotiated Discipline

IN RE STEVEN B. KELBER. Bar No. 358515. December 17, 2013. The Board on Professional Responsibility’s Hearing Committee Number Five recommends that the D.C. Court of Appeals accept Kelber’s petition for negotiated discipline and suspend him for 60 days, stayed in favor of probation for one year on the condition that Kelber is not the subject of a disciplinary complaint that results in a finding that he violated the disciplinary rules of any jurisdiction in which he is licensed to practice during the probationary period, and he promptly notifies Bar Counsel of any ethics complaint filed against him and its disposition; there is no fitness requirement, provided that Kelber successfully completes probation. If he does not, Kelber should be suspended for 60 days and required to demonstrate his fitness to practice as a condition of reinstatement. Kelber violated Rules 8.4(c) and 8.4(d).

IN RE YOSHIHIRO SAITO. Bar No. 351973. December 11, 2013. The Board on Professional Responsibility’s Hearing Committee Number Eight recommends that the D.C. Court of Appeals accept Saito’s petition for negotiated discipline and suspend him for one year for violation of Rule 8.4(c).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE GILBERT BABER. Bar No. 428285. December 30, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Baber for three years, and that he be required to prove fitness and pay restitution as conditions of reinstatement. This matter concerns Baber’s representation of a client in connection with the probate of the estate of the client’s late mother,

who died intestate, and Baber's filing of a lawsuit against the client in connection with that representation. Baber failed to provide competent representation and to represent the client with skill and care; failed to represent the client zealously and diligently and failed to act with reasonable promptness in the representation; failed to keep the client reasonably informed about the status of the probate matter, failed to comply promptly with reasonable requests for information, and failed to explain the probate matter to the client to the extent reasonably necessary to allow the client to make informed decisions regarding the representation; collected or sought to collect an unreasonable fee; revealed confidences or secrets of the client, used confidences or secrets of the client to the client's disadvantage, and used confidences or secrets of the client for Baber's own advantage; failed to take timely steps to the extent reasonably practicable to protect the client's interests, including but not limited to failing to surrender client papers and property; knowingly made a false statement of fact to a tribunal; knowingly made a false statement of fact in connection with a disciplinary matter and/or failed to disclose a fact necessary to correct a misapprehension known by Baber to have arisen in the matter; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaged in conduct that seriously interfered with the administration of justice. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.5(a), 1.6(a)(1), 1.16(a)(2), 1.16(a)(3), 1.16(d), 3.3(a)(1), 8.1(a), 8.4(c), and 8.4(d).

IN RE ANDRE P. BARBER. Bar No. 466138. December 31, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Barber. This matter arises out of Barber's involvement in a series of landlord-tenant disputes. Barber pursued frivolous pro se litigation with his own landlord and engaged in wide-ranging misconduct while representing three tenants, two of whom he eventually sued for fees, in their disputes with another landlord. The board generally adopted the findings of two separate Hearing Committees (with one exception), which found *inter alia* that Barber engaged in frivolous and burdensome litigation tactics, pursued meritless claims for attorney's fees, disobeyed a court order, failed to cooperate with Bar Counsel's investigation, and made false representations in

both judicial and disciplinary proceedings. Rules 1.3(b)(2), 1.4(a), 1.7(b)(4), 3.1, 3.2(a), 3.2(b), 3.3(a), 4.4, 7.1(a), 7.5(a), 7.5(d), 8.1(a), 8.4(c), 8.4(d), and 8.4(g) and D.C. Bar R. XI, § 2(b)(3).

IN RE TAKISHA BROWN. Bar No. 472664. December 30, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Brown. While representing a client in a personal injury matter, Brown violated Rules 1.4(a), 1.4(b), 1.5(c), 1.15(a), former Rule 1.15(b) (now 1.15(c)), and 8.4(c), as well as D.C. Bar R. XI, § 19(f), including the intentional misappropriation of settlement funds Brown was obliged to pay her client's two medical providers.

IN RE LORENZO C. FITZGERALD JR. Bar No. 390603. December 31, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Fitzgerald for one year with fitness. Fitzgerald was originally retained to represent a defendant in a criminal trial. Thereafter, he failed to deliver the client's file to successor appellate counsel in a timely manner, requiring her to file a motion to compel with the court; failed to respond to the court's orders compelling him to produce the file and to show cause why he should not be held in contempt; failed to respond to Bar Counsel's inquiry in a timely manner, requiring Bar Counsel to file a motion with the Board to compel him to respond; and falsely claimed that he had delivered the client file timely to successor counsel, had lost the receipt for the delivery of the file, and had not received Bar Counsel's requests for information relating to the complaint. Rules 1.16(d), 8.1(a), 8.1(b), 8.4(c), and 8.4(d).

IN RE CHARLES MALALAH. Bar No. 978801. December 31, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Malalah. As a condition of reinstatement, Malalah should be required to return to the client the \$33,333.33 plus interest at the legal rate of 6 percent calculated from the date he withdrew the funds from his IOLTA account. While representing the client in connection with an automobile accident case, Malalah failed to keep his client reasonably informed about the status of the matter and failed to comply with the client's requests for information; failed to provide his client with a writing showing the remittance to the client and the method

of its determination; engaged in reckless and/or intentional misappropriation of entrusted funds; failed to place entrusted funds in an escrow account, instead placing them in his operating account and thereby commingling client funds with his own funds; failed to place entrusted funds in a separate account containing the words "trust account" or "escrow account;" and engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation. Rules 1.4(a), 1.5(c), 1.15(a), 8.4(c), and former Rule 1.19(a) (relevant provisions moved to Rule 1.15 and section 20 of Rule XI of the Rules Governing the District of Columbia Bar).

IN RE WILLIAM N. ROGERS. Bar No. 73221. December 31, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Rogers for 90 days with fitness. Rogers violated Rules 4.2(a) (contact with a represented party) and 8.4(c) (dishonesty) when he met with an elderly woman without the consent of her counsel and when he prepared testamentary documents for her that benefitted his client. Rules 4.2(a) and 8.4(c).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE J. SCOTT BROWN. Bar No. 958256. December 12, 2013. The D.C. Court of Appeals disbarred Brown. Brown pleaded guilty and was convicted in the U.S. District Court for the Eastern District of Missouri on a single count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371, a crime involving moral turpitude *per se* for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

IN RE VIRGINIA R. FLING. Bar No. 375547. December 18, 2013. The D.C. Court of Appeals granted Bar Counsel's motion to revoke Fling's probation, as she violated the conditions of her probation, and suspended her for an additional 30 days with fitness and the requirement that she complete 12 hours of CLE courses in immigration law to be approved by Bar Counsel and pay restitution to three clients. The court had previously accepted Fling's petition for negotiated discipline for two consolidated matters and imposed the following sanctions: (1) 120-day suspension with 90 days served and 30 days stayed; (2) 12 hours of CLE courses in immigration law

to be approved by Bar Counsel; (3) restitution to three clients; (4) one-year unsupervised probation; and (5) no fitness requirement, provided that Fling successfully completes probation. Fling agreed that the court should suspend her for the remaining 30 days of the original suspension and impose fitness if she failed to meet all of the conditions set forth within a year of her reinstatement.

In one matter, Fling mishandled her representation of a client when she incorrectly assured him that he could leave the country without prejudicing his pending permanent residency application. As a result, the client lost his eligibility for permanent residency and was faced with a 10-year bar against reentering the country. When the client retained new counsel, Fling failed to promptly forward his files to the new attorney.

In the second matter, Fling mishandled her representation of a client and his employee when she incorrectly filed the employee's application for a work visa extension, which was denied as a result. Fling subsequently misinformed the client and his employee regarding the extension, causing the employee to be present in the country without authorization. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), and 1.4(b).

Reciprocal Matters

IN RE FRANK B. CEGELSKI. Bar No. 414766. December 26, 2013. In a reciprocal matter from New York, the D.C. Court of Appeals imposed functionally identical reciprocal discipline and suspended Cegelski for five years with fitness, including payment of restitution imposed by the state of New York. Cegelski resigned from the practice of law in New York and admitted that he had misappropriated client funds.

IN RE ROSEMARY FOSTER. Bar No. 207332. December 19, 2013. In a reciprocal matter from Oregon, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Foster for 30 days, *nunc pro tunc* to October 5, 2013, with reinstatement contingent on her taking the Multistate Professional Responsibility Exam and earning a scaled score of 85 or greater. In Oregon, Foster was found to have engaged in the unauthorized practice of law while administratively suspended, and violated rules relating to forming a partnership with a nonlawyer.

IN RE GARLAND H. STILLWELL. Bar No. 473063. December 26, 2013. In a reciprocal matter from Maryland, the

D.C. Court of Appeals suspended Stillwell for 60 days with fitness. In Maryland, Stillwell was found to have failed to safeguard an unearned fee in trust, failed to keep his client apprised of developments in her case, and neglected his client's matter.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.

OPINION 366

To see a full version of D.C. Bar Legal Ethics Committee Opinion 366, *Ethical Issues That Commonly Arise in Private Adoption Matters*, visit the Bar's Web site at www.dcb.org, click on the "Bar Resources" tab, and look for "Legal Ethics."

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