

Nebraska Ethics Advisory Opinion for Lawyers
No. 10-05

A LAWYER MAY REPRESENT THE DRIVER AND A PASSENGER IN A PERSONAL INJURY CLAIM ONLY IF THE PASSENGER DOES NOT MAKE OR DOES NOT INTEND TO MAKE A CLAIM AGAINST THE DRIVER OR THE DRIVER'S LIABILITY INSURANCE CARRIER. EVEN IF THE LAWYER DOES NOT INTEND TO MAKE A CLAIM AGAINST THE DRIVER, THE LAWYER MUST MAKE INQUIRY TO DETERMINE IF A CONFLICT EXISTS, OR COULD ARISE IN THE FUTURE.

TO DETERMINE THE APPROPRIATENESS OF CONCURRENT REPRESENTATION, THE LAWYER SHOULD CONDUCT AN INITIAL INTERVIEW WITH ONLY ONE CLIENT IN ORDER TO OBTAIN ADEQUATE INFORMATION TO MAKE AN INFORMED JUDGMENT BEFORE THE SECOND PROSPECTIVE CLIENT IS INTERVIEWED. IF THE INITIAL INTERVIEW IS CONDUCTED WITH BOTH PROSPECTIVE CLIENTS AND A CONFLICT IS FOUND TO EXIST, THE LAWYER MAY BE SUBJECT TO COMPLETE DISQUALIFICATION FROM BOTH CASES.

QUESTIONS PRESENTED:

WHETHER OR NOT THERE IS A CONFLICT OF INTEREST IN REPRESENTING BOTH THE DRIVER AND THE PASSENGER IN A REAR END AUTOMOBILE ACCIDENT?

IF THE PLAINTIFF DRIVER IS FOUND TO BE NOT CONTRIBUTORILY NEGLIGENT, WOULD THAT ELIMINATE ANY CONFLICT (APPARENTLY ASSUMING TIME FOR APPEAL HAS RUN)?

IF THE PLAINTIFF DRIVER IS FOUND TO BE CONTRIBUTORILY NEGLIGENT, WOULD THAT NECESSITATE REMOVAL FROM THE FIRST AND/OR SECOND CASE?

STATEMENT OF FACTS

The plaintiff was rear-ended while riding in an electric personal assistive mobility device, as defined in the Nebraska Rules of the Road. He was pulling a tandem cart with a passenger when he was rear-ended. A first lawsuit was filed on behalf of the driver soon after the accident, as his damages were not as extensive as the passenger's damages. A second lawsuit was later filed on behalf of the passenger by the same law firm several months after the driver's lawsuit. It appears that the two lawsuits will not be joined, and that the lawsuit on behalf of the driver will go to trial before the lawsuit involving the passenger.

After the passenger's lawsuit was filed, the defendant claimed that the driver was comparatively negligent, and brought him into the passenger's lawsuit as a third-party defendant. The requesters take the position that there is not a significant risk of conflict of interest nor breach of client confidentiality, and that their representation of both clients will be appropriately limited

for the first lawsuit. If the plaintiff is found to not be comparatively negligent, then the passenger's lawsuit will already have that issue determined and may be considered *res judicata*, if no timely appeal is taken. If the driver in the first suit was found to be comparatively negligent, requesters indicate that they understand the need to remove themselves from the second case.

APPLICABLE RULES OF PROFESSIONAL CONDUCT:

§ 3-501.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...

(2) to secure legal advice about the lawyer's compliance with these Rules.

§ 3-501.7. Conflict of interest; current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client:

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

DISCUSSION

- I. A LAWYER MAY REPRESENT THE DRIVER AND A PASSENGER IN A PERSONAL INJURY CLAIM ONLY IF THE LAWYER DOES NOT MAKE OR DOES NOT INTEND TO MAKE A CLAIM AGAINST THE DRIVER OR THE DRIVER'S LIABILITY INSURANCE CARRIER ON BEHALF OF THE PASSENGER. EVEN IF THE LAWYER DOES NOT INTEND TO MAKE A CLAIM AGAINST THE DRIVER, THE LAWYER MUST MAKE INQUIRY TO DETERMINE THAT NO UNETHICAL OR IMPROPER CONFLICT EXISTS.

A lawyer may not represent a driver and a passenger in a personal injury claim if the lawyer intends to make a claim against the driver or the driver's liability insurance company on behalf of the passenger. However, as seen below in the second section, the analysis does not stop there, for there is a serious question of client confidentiality that must be addressed. A suggested procedure would be to meet with one client first to determine if a potential conflict exists before dealing with a second client. The availability of liability insurance will be addressed below in Section II of this opinion.

It is possible to represent both the driver and a passenger, if no claim will ever be made against the driver or the driver's insurance company. Requesters suggest to resolve the issues of any kind of contributory negligence in a first lawsuit by the driver, so that there is no absolute disqualification by representing both sides in a lawsuit. Perhaps a better way would be to have the first lawsuit involving the driver resolved (including time for appeal), before the second one would be filed. If there is any question of statute of limitations or timing of the lawsuits, then representation of either the driver or the passenger would be best conducted by two separate law firms. Otherwise, there could be a directly adverse conflict when a lawyer would be required to cross-examine the driver in the passenger's lawsuit. Similarly, even after the driver's lawsuit was over, under 3-501.9, there is a duty of confidentiality to former clients, and consent must be received, in this case from the driver, before the passenger's lawsuit should proceed.

The comments provide:

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is

undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client...

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(c) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances, it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases, the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

§ 3-501.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in which another lawyer or firm with which the support person formerly was associated had previously represented a client:

(1) whose interests are materially adverse to the current client; and

(2) about whom the support person has acquired confidential information that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(e) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under Rule 1.9(d), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:

(1) the former client gives informed consent, confirmed in writing, or

(2) the support person is screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the support person and the firm have a legal duty to protect.

(f) For purposes of Rules 1.9(d) and (e), a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers and other support personnel employed by the law firm. Whether one is a support person is to be determined by the status of the person at the time of the participation in the representation of the client.

II. TO DETERMINE THE APPROPRIATENESS OF CONCURRENT REPRESENTATION, THE LAWYER SHOULD CONDUCT AN INITIAL INTERVIEW WITH ONLY ONE PROSPECTIVE CLIENT IN ORDER TO OBTAIN ADEQUATE INFORMATION TO MAKE AN INFORMED JUDGMENT BEFORE THE SECOND PROSPECTIVE CLIENT IS INTERVIEWED. IF THE INITIAL INTERVIEW IS CONDUCTED WITH BOTH PROSPECTIVE CLIENTS AND A CONFLICT IS FOUND TO EXIST, THE LAWYER MAY BE SUBJECT TO COMPLETE DISQUALIFICATION FROM BOTH CASES.

The procedure that the Committee suggests is that the initial interview should be conducted with only one prospective client in order to obtain adequate information to make an informed judgment before the second prospective client would be interviewed. That way, if a potential conflict is identified, then one client could still be represented. If the initial interview is conducted with both prospective clients, and a conflict is found to exist, then the lawyer may be subject to complete disqualification from both cases. A searching analysis of the above situation was performed by the Wisconsin Committee on Professional Ethics.

As noted in Opinion E-99-2 issued by the Committee on Professional Ethics of the State Bar of Wisconsin:

The conflict analysis should include consideration of the following factors: the existence and strength of evidence of fault on the part of the driver, the joint and several liability rule as applied to the issues of fault and apportionment damages; the adequacy of the assets of the adverse party; the likely recoverable damages sustained by the driver and passenger; whether the prospective clients will be competing for a limited fund of insurance; the availability of uninsured or underinsured motorist coverage; possible discrepancies in the likely testimony of the driver and passenger; the compatibility of proof and arguments on damages between the passenger and driver; whether joint representation will result in a savings of attorney fees or costs or will provide some tactical advantage; the attitude of the passenger in making a claim against the driver; whether the passenger and driver have derivative claims for the injury to the other; whether the prospective clients can understand the implications of a waiver; the disruption of the claims if the lawyer must withdraw at a later date; and the likely devaluation of both claims if the parties oppose each other with separate counsel. If the lawyer believes that the joint representation would not adversely affect either potential client, the lawyer should provide each of them with a disclosure letter addressing the above factors, examining the risks and advantages of joint representation and citing all factors in support of the lawyer's conclusion, taking care not to reveal confidential information of one client to another without client consent. The disclosure letter should be discussed separately with each prospective client. If a prospective client is a minor or incompetent, the lawyer should obtain the informed consent of a guardian ad litem independent of the lawyer or the lawyer's firm. Although a lawyer must abide by the instructions of a client who is adamant against a claim being made against another party, such as a passenger who does not want to initiate a claim against a spouse/driver, this does not relieve the lawyer of the responsibility to determine whether it is ethical to undertake the joint representation. After the representation is undertaken the lawyer must keep the clients informed if new information alters the relative risks and advantages of joint representation. If the changed circumstances rise to the level of a conflict, the lawyer must notify the clients and withdraw from the representation.

This Committee recommends that the lawyers follow the procedures as set out in the Wisconsin Opinion above.

The lawyer also has a duty to advise the passenger that he or she has a right to make a claim at any time against the driver of the car that passenger rode in for negligence, and even if the passenger does not make such a claim, the other driver may make a claim for negligence under a Third Party Complaint. After the filing of the Third Party Complaint, the passenger may learn additional facts or become aware of different theories of recovery, which could result in a revisiting of the conflict.

CONCLUSION

A lawyer may represent the driver and a passenger in a personal injury claim, only if the passenger does not make or intend to make a claim against the driver or the driver's liability insurance carrier on behalf of the passenger. The lawyer must make a searching inquiry to determine if a conflict exists and disclose any potential conflicts in writing. The better procedure would be to secure the written consent of both of the prospective clients to the above. The better procedure to do this would be an initial interview with only one client to determine if a potential conflict exists. If a counter-claim has been filed in the driver's lawsuit, the lawyer should not proceed with a second suit by a passenger without full disclosure, and the better procedure would be to resolve the driver's lawsuit as requesters suggest, or not represent the driver and a passenger. If a potentially meritorious Third Party Claim may be filed, to avoid withdrawal in both cases, the lawyer should represent only one client until that possibility is extinguished. Once a third party claim has been filed listing the driver as a third party defendant, the lawyer should not represent both the third party defendant driver and the plaintiff passenger, and may be required to withdraw from representation of both.