

PERSONAL INJURY – CONFLICT OF INTERESTS – FORMER CLIENT: REPRESENTATION OF CHILD-PASSENGER IN MOTOR VEHICLE ACCIDENT AFTER DISCUSSING THE POLICE REPORT WITH MOTHER-DRIVER.

You have asked the Committee to consider the propriety of an attorney being associated as co-counsel with a law firm to represent the interest of a child in a personal injury claim against his mother, the driver of the vehicle. Specifically, the facts of the inquiry as you have stated them indicate that a three-year-old child who, while a passenger in his mother's motor vehicle, was injured as a result of his mother's negligent operation of the vehicle. You also stated that the law firm subsequently dealt only with the child's grandparents after discussing the aspects of the police report with the mother and entering in negotiations with her insurance company on behalf of her child. Since the law firm was unable to elicit a satisfactory settlement offer, the matter was referred to co-counsel for litigation in order to have the value decided by a jury. You further indicate that co-counsel has met with the law firm to discuss the merits of the child's case only and has never met with the mother or the child.

You wish to know whether under the facts of the inquiry, the attorney may represent the child's interests in a claim against the mother, and, if not, would the full disclosure to and the consent of the mother cure any potential conflict. You have also asked whether, if the law firm cannot participate in the litigation, can co-counsel's firm take over representation and request the court appoint a guardian to act as next best friend for purposes of filing and litigating the suit.

The appropriate and controlling Disciplinary Rule relative to your inquiry is DR:5-105(D) which provides that a lawyer who has represented a person in a matter shall not thereafter represent another in the same or substantially related matter if the interest of that person is adverse in any material respect to the interests of the former client unless the former client consents after disclosure.

The Committee directs your attention to LE Op. 1033 in which the Committee formerly opined that an attorney may represent the passenger/twin sister who was seriously injured in an automobile accident in a civil claim against the sister/driver of the vehicle involved in the accident, when the attorney previously represented the client/driver on a related charge of drunk driving. The Committee stated that, although the two matters were substantially related and the passenger/sister's interests were adverse to the former client, driver/sister, the representation of the passenger/sister is permissible since disclosure has been made to and the former client/sister consented to the representation. (See also LE Op. 357, LE Op. 520, LE Op. 566 and LE Op. 620)

Therefore, under the facts of the inquiry, this Committee believes that the child's personal injury claim against the mother may be pursued by co-counsel and the law firm provided disclosure of the adverse representation and possible effect such representation will have on the attorney's independent judgment on behalf of each, and consent from the mother/former client is obtained. Likewise, both co-counsel and the former law firm may participate in the child's representation provided that the law firm does not violate the preservation of the former client's confidences and secrets as provided in DR:4-101(B) by using a confidence or secret of the mother to her own disadvantage or to the attorney's own advantage or the advantage of the child without the consent of the mother, former client.

Committee Opinion
April 20, 1990