

CONFLICT OF INTEREST – MULTIPLE REPRESENTATION – PERSONAL INJURY: REPRESENTING PASSENGERS IN A CLAIM AGAINST DRIVER WHEN THE ATTORNEY HAD EARLIER DISCUSSED MATTER WITH DRIVER AND PASSENGERS.

You have asked the Committee to consider the propriety of a lawyer continuing to represent the interests of two passengers who were injured in an automobile accident in a claim against the driver of the vehicle in which the clients were passengers. You advise that the driver and both passengers orally consented to the representation, but the driver subsequently refused to sign a written consent. The following is a summary of the pertinent facts, as stated in your inquiry, upon which the Committee will base its opinion.

An attorney received a phone call from a former client and an appointment was arranged for the former client and his girlfriend to discuss, at the attorney's office, the injuries they received as a result of an automobile accident in which both were passengers in a vehicle driven by former client's mother. Upon arrival at the attorney's office, former client and girlfriend were unexpectedly accompanied by former client's mother.

During the discussion with all three concerning the circumstances surrounding the accident, all three parties indicated that he or she believed that former client's mother/driver was not at fault and that no one ever saw the other car. After mother/driver asked whether attorney would represent her in a claim for injuries against the other driver, the attorney learned that mother had been cited for failure to yield. Attorney suspended interview and advised former client/passenger, girlfriend/passenger and mother/driver that mother did not have a viable case and that the two passengers' best chance of recovery would be by filing a claim against mother/driver and possibly against the driver of the second vehicle depending on the results of the investigation.

Attorney then advised all three that, because the three came to him together and had spoken with him openly about the collision, he could not, as previously requested, represent the two passengers in a claim against mother/driver without the mother's consent. After the attorney advised the mother of the potential adverse consequences of his representation of her son and girlfriend in a claim against her, the mother orally consented to the representation. Thus, the attorney informed all three that he would require the execution of a written consent by all three in order to avoid any misunderstanding. Both the former client and girlfriend signed the consent; however, the mother subsequently refused to sign.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:5-105(C) which provides that a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect on the exercise of the attorney's independent professional judgment on behalf of each; and DR:5-105(D) which provides that a lawyer shall not thereafter represent a client in a matter that is the same or substantially related to the representation of a former client if the interest of that person is adverse in any material respect to the interest of the former client, unless the former client consents after disclosure. (See also LE Op. 566, LE Op. 1134, LE Op. 1334) Furthermore, DR:4-101(B) provides that a lawyer shall not knowingly reveal a confidence or secret of his client, or use a client's confidence or secret to the disadvantage of the client or for the advantage of himself or a third person, unless the client consents after full disclosure.

The Committee will assume, for the purposes of this inquiry, that both former client and girlfriend are in agreement with the facts surrounding the collision and are not in dispute as to the facts establishing liability so that it would be obvious that the attorney would be able to adequately represent the interests of each if, after full disclosure, each consented to the simultaneous representation pursuant to DR:5-105(C). (See also LE Op. 357 and LE Op. 1223)

The Disciplinary Rules are silent as to the proper way in which to obtain consent; hence, the Committee believes that consent in either oral or written form is permissible under the Disciplinary Rules. However, because the mother, who formerly consented to the representation of her son and his girlfriend by attorney, has refused to sign the consent permitting the personal injury representation against her, the Committee opines that there is strong evidence that the mother is opposed to the lawyer's representation of the two passengers against her. How the mother/driver reached that conclusion is immaterial since it is the Committee's opinion that consent may be withdrawn by a former client at any time.

Therefore, since the mother has refused to ratify her oral consent following the attorney's meeting with her, as potential defendant, and the two passengers/potential plaintiffs, the Committee opines that the attorney's continued representation of the passengers would be improper. The Committee cautions that the attorney should be aware that, while the mother was participating in the interview and discussing the case, she may have divulged confidential or secret information. Nevertheless, should a finder of fact determine that no such confidential or secret information was learned by the attorney in that initial interview, representation then would be proper even without her consent. Such a factual determination, however, is beyond the purview of the Committee.

Committee Opinion
May 24, 1990