

You have advised that Counsel's law firm represents, on a continuing basis, a Worker's Compensation insurance carrier. Counsel accepted representation of an individual who was injured while on the job and who had been paid Worker's Compensation benefits by the carrier represented by Counsel's law firm.

You further indicate that Counsel filed a products liability suit on behalf of the injured individual and that the Worker's Compensation insurance carrier has a lien against any recovery that may result from that lawsuit. Counsel is also representing the Worker's Compensation insurance carrier in this matter.

You have asked the committee to opine whether, under the facts of the inquiry, there is a conflict in Counsel's continuing representation of the individual and the Worker's Compensation insurance carrier.

The appropriate and controlling disciplinary rules related to your inquiry are DR:5-105(B) and DR:5-105(C). Disciplinary Rule 5-105(B) states that a lawyer shall not continue employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the representation of another client, except to the extent permitted under DR:5-105(C). Disciplinary Rule 5-105(C) requires that, in the situations covered by DR:5-105(A) and (B), 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 of such representation on the exercise of his independent professional judgment on behalf of each. Of additional import are the requirements of DR:4-101 which define and describe the need for preservation of a client's confidences and secrets.

The Committee believes that the fact situation presented here is analogous to that of an attorney representing an insurance carrier in a personal injury claim filed by the employee/driver under employer's uninsured motorist provision when the attorney had earlier represented the employer/insured in the liability matter, as in LE Op. 1310. The committee, in that instance, opined that the proscriptions of DR:5-105(D) did not apply since the interests of the former client, Defendant/insured, and the present client, Insurance Company, presumably were not differing.

The Committee is of the opinion that Counsel's representation of both the insurer and the employee of the insured would not be per se violative of DR:5-105(B) or (C). It appears that, since the employee has a products liability action against a third party and the insurer simply retains a lien against any proceeds of the action, the interests of the two are not presently in conflict. However, since the interests of the two clients are potentially differing, such as in the division, if any, of the proceeds and the responsibility for costs and attorneys' fees, the requirements of full disclosure and consent to the representation by both clients, as articulated in DR:5-105(C), must be met. Furthermore, should the potential differing interests mature into actual adverse interests, it may then become necessary for Counsel to withdraw from representing both the employee/plaintiff and the insurer or to obtain separate counsel for the issues giving rise to a conflict.

The Committee further cautions that Counsel, in representing clients with potentially differing interests, must be mindful not to reveal any confidences or secrets obtained from the representation of one client to the other client or to use such information for the advantage of the other client, without the clients' explicit consent thereto, pursuant to DR:4-101. (See LE Op. 1142.)

Committee Opinion
April 19, 1991