

LEGAL ETHICS OPINION 1559

CONFIDENCES AND SECRETS:  
REPRESENTING CHILD IN PERSONAL  
INJURY CLAIM AND NAMING  
MOTHER AS THIRD PARTY  
DEFENDANT AFTER MOTHER HAS  
SERVED AS NEXT FRIEND.

You have presented a hypothetical situation in which an infant was severely injured in a motor vehicle accident. Law Firm A was retained by the infant's mother to pursue a personal injury claim on the infant's behalf. Law Firm A filed a motion for judgment against the driver of the other automobile involved in the accident in the name of the infant, by the infant's "mother and next friend". The defendant's insurance carrier retained counsel, who filed a third-party action against the infant's mother, father, and the manufacturer of the carseat in which the infant was riding at the time of the accident. Subsequently, Law Firm A filed a separate motion for judgment against the carseat manufacturer in the name of the infant, also by his "mother and next friend".

You further indicate that Law Firm B represents the individual defendant in the first suit; Law Firm C represents the individual defendants (parents in the third-party action in the first suit); and Law Firm D represents the manufacturer defendant in both suits.

Law Firm A is in possession of the carseat involved in the accident and Law Firm D has made a request for production of the carseat for inspection, which motion Law Firm A has resisted. Counsel are interested in deposing the various parties. Law Firm A would propose to take the deposition of the mother. Law Firm A has also advised other counsel of its intention to name the mother and father as parties defendant, either by amendment to the existing actions or by filing a third motion for judgment.

Finally, you indicate that an attorney has been appointed as guardian ad litem by the court to represent the interests of the infant. You state that it is expected that the attorney will also be substituted, by order of the court, as the infant's next friend.

You have asked the committee to opine, under the facts of the inquiry, whether Law Firm A can continue as counsel for the infant, given its stated intention to name the infant's mother and current "next friend" as a party defendant.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101(B) which requires a lawyer's preservation of client confidences and secrets; and DR:4-101(C)(1) which states that a lawyer can reveal confidences and secrets with the consent of the client or clients affected, but only after full disclosure to them. The committee is of the view that the mother's status as next friend does not create an attorney-client relationship. Thus, the Disciplinary Rules dealing with multiple representation are not relevant here.

The committee has previously opined that, in certain circumstances, where no attorney-client relationship has arisen in other respects, a potential client's initial interview creates

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an expectation of confidentiality which must be protected by the attorney. See LE Op. 1453. Thus, under the facts you present, the committee is concerned that, while discussing the infant's case, the mother may have divulged confidential or secret information which may present an advantage to Law Firm A's representation of the infant and a disadvantage to the mother as a party defendant. Therefore, the committee is of the opinion that Law Firm A may continue representation of the infant after full disclosure to, and consent by, the mother/next friend.

Representation of the infant would be proper even without the mother's consent if a finder of fact should determine that no confidential information was learned by Law Firm A. See LE Op. 637, LE Op. 1354.

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