

LEGAL ETHICS OPINION 1762

REPRESENTATION FOR CHILD'S PERSONAL  
INJURY CLAIM WHERE ATTORNEY  
PREVIOUSLY REPRESENTED THE MOTHER

You have presented a hypothetical situation in which an unemployed Mother and her infant child were involved in an automobile accident with an uninsured vehicle that was owned by Mother. At the time of the accident and until settlement of her personal injury case, Mother was without assets. Child's father cannot be located and lives outside of the United States. Child has no other relatives in the United States who have expressed any interest in her.

The mother was operating her car with Passenger in the front seat, who was holding Child in her lap. An accident occurred injuring Mother, Passenger, and Child. Mother retained Lawyer to represent her, suit was filed and Lawyer obtained a substantial settlement for Mother for her injuries before the trial date. Now that Mother has settled her case against Tortfeasor, Mother has requested Lawyer to present Mother's claim on behalf of and for the benefit of Child to Tortfeasor's insurer. She wants Lawyer to file suit for her on Child's behalf if necessary.

Under the facts you have presented, you have asked the committee to opine as to whether a Lawyer may ethically accept employment by Mother to recover funds for Child's personal injury claim against Tortfeasor.

The appropriate and controlling disciplinary rules relative to your inquiry are 1.2(a) and (b), 1.9(a), 3.1, and 5.4(c):

**RULE 1.2** Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

**RULE 1.9** Conflict of Interest: Former Client

(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 both the present and former client consent after consultation.

**RULE 3.1** Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

#### RULE 5.4 Professional Independence Of A Lawyer

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The fundamental question raised by your hypothetical is whether it would be a conflict of interest for the attorney to represent the child in this matter, and if so, is there a way to cure that conflict.

Regarding the existence of a possible conflict of interest, three roles of the mother in this situation need review: her role as third party payor for the child's legal expenses, as next friend in the child's case, and her role as former client of the attorney.

In considering her role as third party payor, the attorney must be sure to follow the requirements of Rule 5.4(c) for an attorney paid by someone other than the actual client. In applying those requirements to a mother serving as next friend for her child who is paying the attorney's legal fee, this committee noted in a prior opinion that the lawyer needs to pursue the objectives and interests of the child, not those of the mother. LEO#1557. The lawyer should not allow this mother to "direct or regulate the lawyer's professional judgment in rendering such legal services." Rule 5.4(c).

In considering her role as next friend, this attorney, again, needs to be distinguish between the interests of the mother and those of the child. As explained in LEO #1559, an attorney dealing with a mother as next friend for a child does not represent the mother; she is not in an attorney/client relationship with the attorney due solely to her status as next friend. Accordingly, in determining whether a conflict of interest arises for this attorney in representing the child in this matter, Rule 1.7 regarding conflicts between the interests of *current* clients is not applicable. Only the child would be a current client; not the mother.

In considering the mother's role as former client, the attorney must review the matter in light of Rule 1.9, regarding conflicts between the interests of former and current clients. That rule specifies that an attorney, in representation of a current client, may not be adverse to a former client in a substantially related matter, unless the former client and the new client consent to that new representation. As the child's case involves a personal injury suit stemming from the same accident as the mother's personal injury suit, the committee opines that the two matters are substantially related. The mother is a former client from a substantially related matter, but is the child's matter adverse to the mother? The facts of the hypothetical suggest that the child's interest in the matter may include an action against the mother as driver of the car. If there is

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actually no claim that could be filed against the mother that would not be frivolous, then as the attorney would be precluded from filing such an action under Rule 3.1, the child's representation, involving an action exclusively against the other driver, would not be adverse to the mother. Under such facts, there would be no conflict under Rule 1.9. However, should there be a nonfrivolous claim that could be filed against the mother, even if weak, the child's representation would be adverse to the mother. Under facts of that sort, the attorney would have a conflict under Rule 1.9 were he to accept representation of the child in this matter. The committee notes that a determination of the existence and/or merits of the child's claim against the mother is a fact-specific matter outside the purview of this committee. Under this analysis regarding Rule 1.9, should the attorney in fact have a conflict due to the child's representation being adverse to the mother, the only way to "cure" the conflict under that rule would be if the attorney could obtain consent from the mother and the child regarding the representation.

The committee notes that your hypothetical suggests the possibility that the attorney may want to accept the child's case, that it may include a strong action against the other driver and a weak action against the mother, and that the attorney would like not to pursue the action against the mother for strategic reasons. In representing the child, should the attorney decide not to pursue the claim against the mother, the committee cautions that the attorney must follow the dictates of Rule 1.2, regarding the scope of representation. That rule contemplates that certain major decisions can not be made by the attorney alone; the attorney must abide by the client's preference in such matters. The rule does contemplate that there may be times when the representation of a client may be properly limited; specifically, the rule requires that a "lawyer may limit the objectives of the representation if the client consents after consultation." Thus, in the present instance, if in fact there is a colorable claim to be made against the mother, the attorney could only limit the representation to an action against the other driver with the client's consent after consultation.

An additional wrinkle for the attorney in this hypothetical regards his ability to obtain client consent, should he in fact need it under either Rule 1.9 or Rule 1.2, as outlined above. The client in this hypothetical is a minor. This committee has consistently opined that a minor cannot provide the consent required by provisions of the Rules of Professional Conduct. *See*, LEOs##786, 957, 786, 1304, &1725. Thus, this attorney may not obtain any required consent from the child.

The hypothetical raises the possibility of the attorney trying to obtain the child's consent, not directly from the child but from the mother, as next friend. Whether a next friend, either this particular next friend, who also happens to be the potential defendant, or any other substituted next friend, such as a court-appointed guardian ad litem, can provide valid consent on behalf of the child is a legal question outside the purview of this committee.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.