

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1993-94/22
Conflict of Interest: Multiple Representation in Personal Injury Cases
November 17, 1994

RULE REFERENCES:

- *Rule 1.3
- *Rule 1.4
- *Rule 1.7
- *Rule 1.14
- *Rule 1.16

SUBJECTS:

- *Adverse Representation
- *Client Communications
- *Consent
- *Multiple Representation
- *Termination/Withdrawal of Attorney/Client Relationship

ANNOTATION:

QUESTION:

Under what circumstances may an attorney represent multiple family members in personal injury litigation where one of the family members was the driver and one or more additional members of the family were passengers in the same motor vehicle?

FACTS:

The inquiring attorney has encountered several personal injury cases in which the negligence of the opposing driver is so apparent and the potential liability of the family-member driver is so remote that, for practical purposes, it is a straightforward liability action against the opposing driver and family members, including driver and passengers, wanted to bring a consolidated action against the opposing motor vehicle driver.

The family members were very clear in their intentions regarding their family driver--he or she was, in their view, not at fault for causing the accident; but, even if he or she could have been partly legally at fault, they had no desire to bring a law suit against their family- member by reason of their relationship to the driver.

The inquiring attorney has also encountered situations in which it was necessary to advise a motor vehicle passenger client to bring suit against his or her family-member driver, because the evidence of potential legal liability on the part of the family- member driver was significant enough to warrant such a suit. In such situations, notwithstanding the inquiring attorney's advice that the failure to bring such a claim against the family-member driver would be likely to result in a reduction in the amount of compensation they could ultimately receive because of the liability likely to be imputed to the family-member driver by a jury, the passenger client was strongly opposed to bringing suit against his or her family-member driver.

RESPONSE:

Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents, after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.4(b) provides that a lawyer shall explain the legal and practical aspects of the matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation. When representing minors, the lawyer should also be mindful of the requirements of Rule 1.14. Even if the client consents with the full understanding of the implications of the common representation, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. Boyle's Case, 136 NE 21 (1992). Under certain circumstances, a potential conflict may be so clearly fundamental to a disinterested lawyer that undertaking the joint representation would be per se unreasonable. Kelley's Case, 137 NH 314 (1993).

In the first factual situation, where the lawyer reasonably believes the representation will not be adversely affected because the possibility of liability on the part of the family-member driver is extremely remote, the lawyer must contemplate whether a disinterested lawyer would conclude that the client should agree to the representation. If the answer is in the affirmative, and the client consents after consultation and with knowledge of the consequences, including the implications of the common representation and the advantages and risks involved, then such representation is permissible.

In those situations in which the lawyer believes there to be significant evidence of liability on the part of the family-member driver, the lawyer should not undertake to represent both the family-member driver and the family passengers, regardless of consent by the parties. In such circumstances, the lawyer could not reasonably believe that the representation of the family member driver would not adversely affect the relationship with the family passenger. A disinterested lawyer would not conclude that either the driver or the passenger should agree to the representation if it was known that there was significant evidence of liability on the part of the family-member driver.

Rule 1.3(b)(2) requires a lawyer to provide representation with no avoidable harm to the client's interests nor to the lawyer/client relationship. Representation of a family driver believed to be significantly liable constitutes an avoidable harm to the passenger's interest. Similarly, representation of a family passenger constitutes an avoidable harm to a family driver believed to be significantly liable.

Under such circumstances, the lawyer must refuse to represent both the driver and passenger, as representation of both would result in violation of the Rules of Professional Conduct pursuant to Rule 1.16.

Although the New Hampshire Supreme Court has not addressed this issue, other Courts have. In re Thornton, 421 A.2d 1 (D.C. 1980) (lawyer improperly represented driver and passengers in suit against other driver involved in auto collision); In re Shaw, 88 N.J. 433, 443 A.2d 670 (1982) (where liability was in

dispute, improper for lawyer to represent driver and passengers in auto collision case); In re Morris, 72 N.J. 135, 367 A.2d 1172 (1977) (lawyer improperly represented both driver and widow of fatally injured passenger involved in automobile accident against owner and operator of other vehicle involved); Weinberg v. Underwood, N.J. Super. 448, 244 A.2d 538 (1968) (counterclaim for contribution by defendant against co-plaintiff-driver created impermissible conflict with co-plaintiff-passenger, both represented by same lawyer, as passenger could benefit if liability against driver were established); Fuanitto v. Fuqnitto, 113 Misc. 2d 666, 452 N.Y.S. 2d 976 (1982) (“We emphatically disapprove the representation by counsel of both driver and passenger in a vehicle.”); North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986) (improper to undertake representation of two wrongful death claimants in obtaining settlement from limited fund; any apportionment would benefit one client to other's detriment); Jebwabny v. Philadelphia Trans. Co. 390 Pa. 231, 135 A.2d 252 (1957) (lawyer improperly represented driver and passengers of damaged automobile as plaintiffs against bus company charged with responsibility for collision; under Pennsylvania law, bus company could realign automobile driver as involuntary defendant), cert. denied, 355 U.S. 966 (1958).

However, if the lawyer has consulted with both the driver and passenger, the lawyer may not represent either. It is, therefore, advisable to meet with one or the other prior to accepting representation to determine the potential liability of the driver. Facts discovered in the future may require the lawyer to revisit the issue of liability and may require withdrawal from representation of both the driver and passenger.

As the question was raised in the consent form proposed by the inquiring attorney, it should go without saying (but apparently must not) that it would constitute a violation of Rule 1.7(a) to represent the passenger in an action against the driver or his insurance carrier, if the driver is also represented by the same lawyer. The exception to this rule would be a claim against the driver's uninsured motorist provision of his policy.

Although the third full paragraph of page two of your letter requires client's consent to foregoing bringing suit against the driver, your consent form does not so provide. The third paragraph of your consent form provides consent to your making a claim or filing suit against the driver or his insurance company to collect the extent of any insurance coverage which the driver may have available. Considering that the immediately previous sentence acknowledged the passenger's desire to forego asserting such a claim, this provision is misleading, inappropriate, and contrary to the conclusions above expressed. If your intent is to limit claims against the driver to uninsured motorist provision claims, the form should clearly and unequivocally so state. The proposed form falls far short of this goal.

The final paragraph of your form suffers from the same malady when it states, “...and I wish to make a claim against that person (other driver), her insurance company, or my drivers insurance company, or both to receive compensation for our injuries...”

In conclusion, although the form provides for acknowledgment of a desire to forego bringing an action against the driver, it also provides for consent to do the opposite. Such conflict and confusion can be remedied by a more concise statement that any claim against driver's insurance company will be limited to a claim under the uninsured motorist provision thereof.