E-75-2 Multiple representation in automobile accident cases

The committee was requested to consider the ethical propriety of the proposed conduct of two attorneys who sought to represent multiple personal injury claimants as set forth in the hypothetical facts below.

The host driver-owner and three guest passengers in one automobile were injured in a two-auto collision. Thereafter all four potential claimants contacted Attorney A to discuss his representing them. He had approximately six conferences with the parties during which the accident was discussed in detail and the host driver-owner gave confidential information. During several of these meetings, Attorney B sat in at the request of Attorney A and the approval of the clients and joined the discussions.

Attorney A pursued a personal injury claim for the host-driver against the other driver and his insurer, and negotiated a sizeable settlement in his behalf. Thereafter, Attorney A commenced suit in behalf of a minor passenger in the host-driver's car, as his guardian ad litem, against the host-driver's insurer and the other car's insurer. Simultaneously, Attorney B commenced suit against the host-driver's insurer in behalf of the two adult guest passengers in the host-driver's car. The host-driver-owner was not named as a party in any of the above actions, only his insurer.

The question concerns whether Attorneys A and B can ethically pursue these several claims in behalf of the guest passengers against the host-driver-owner and his insurer, or against his insurer alone, after having consulted with and given legal advice to the host-driver, and Attorney A even negotiated settlement of his claim.

Although one cannot lay down the hard rule that a lawyer or his associates may never represent the multiple interests of a host-driver-owner and his guest passengers in pursuing their claims arising from a vehicle collision, the circumstances under which multiple representation may be undertaken are infrequent.

ABA Informal Ethics Opinion 723 states that a lawyer representing a guest passenger and asserting claims against the insurer of both vehicles involved in a collision may not also represent the host-driver of a car in which the guest

passenger was riding, where there is any possibility of liability on the part of that driver. The role would prevail *even though the guest might be willing to waive any claim which he might assert against the host-driver* (emphasis added). The basis for an opinion holding such conduct improper is DR 5-105(A), if the exercise of his independent professional judgment in behalf of the one client is or is likely to be adversely affected by acceptance of proffered employment of another client, except in certain narrow situations enumerated, then such multiple employment should not be undertaken. If an attorney undertakes multiple employment and then finds that the exercise of his independent judgment in behalf of one party will be or is likely to be impaired because of the other representation, he must discontinue such multiple representation.

In ABA Informal Opinion 885, the committee held that there was more to be considered than whether the attorney would or might be using confidential information in the multiple representation. The rule that an attorney who has represented one party in a transaction may not thereafter represent the other party in an action against his client, which action arises out of or is closely related to the transaction, does not always depend on the decision as to whether confidential information derived from the former client might be employed. The lawyer must avoid representation of a client in a suit against a former client arising from the same transaction if there may be the appearance of a conflict of interests or a possible violation of confidences even though such may not be true in fact.

In ABA Informal Opinion 1016 (1968), the committee concluded that if two attorneys had involvement in consultation with one of several parties in a legal matter, they should not represent other parties with possible conflicting interests arising out of the same litigation. Even though such attorneys are not partners, if their relationship is so close and they have consulted with the parties, they cannot take on opposing parties.

Previous informal opinions of this committee, including those issued on June 11, 1970 and December 12, 1975, have been in accord with the principles expressed in ABA Informal Opinions 723 and 885 above.

One might argue the point that actions by the guest passengers against the insurer, which exclude the host-driver-owner as a party, might deserve a different construction. But there is a sufficient identity of interest between the insurer and insured and often there is a requirement that the insured cooperate with his insurer in conjunction with the defense of a claim in the case. Under ordinary

circumstances an attorney who has represented the host-driver-owner in an auto collision, should not represent the interests of a guest passenger if there is a possibility of liability on the part of the host-driver to such passengers, even though the host-driver to such passengers, even though the host-driver is not named a party defendant in such litigation.