
Wisconsin Formal Ethics Opinion E-99-2: Multiple Representation in Vehicle Personal Injury Cases

Multiple representation in vehicular accident cases is not per se prohibited, but attorneys should consider the factors discussed in professional ethics opinion E-99-2 when undertaking such action.

May a lawyer ethically represent both the host driver and guest passenger in a personal injury claim? The opinion of the State Bar Professional Ethics Committee is, "it depends."

Background

This subject was addressed in Wisconsin Ethics Opinion E-75-2 (1975), which in turn relied primarily upon ABA Informal Ethics Opinion 723 (1964). Those ethics opinions are dated and premised upon the Code of Professional Responsibility as it existed in Wisconsin between Jan. 1, 1970 and Jan. 1, 1988.¹ Under those antiquated precedents, E-75-2 concluded that an attorney cannot represent both guest and host driver in any circumstance "where there is any possibility of liability on that driver."

It is the Ethics Committee's opinion that this subject needs to be revisited and updated to reflect adoption of the Rules of Professional Conduct for Attorneys effective Jan. 1, 1988.² Opinion E-75-2 is therefore withdrawn.

The current rule on conflicts is [SCR 20:1.7](#).

SCR 20:1.7 Conflict of interest: general rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
2. each client consents in writing after consultation.

(b) 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 in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Direct Conflict Between Host and Guest

A lawyer cannot represent both the guest and the host if the lawyer intends to or makes a claim against the host or the host's liability insurance carrier on behalf of the guest. Such a claim would be predicated on the host's fault or negligence. Advocating the driver's fault would be advantageous to one client, the guest, while directly adverse to the interests of the other client, the host. "A lawyer cannot reasonably believe that the representation will not be adversely affected when, in the same legal matter, a benefit to the interests of one client will directly result in a detriment to the interests of another client... ." Comment to [SCR 20:1.7](#).

An attorney may not represent both where the guest's claim is to be made exclusively against the host's liability insurance company under the Wisconsin Direct Action statute. This claim likewise would be predicated on advocating the host's fault or negligence. "*There is a sufficient identity of interests between the insurer and the 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.*" [Emphasis supplied] E-75-2. That observation by the Committee in 1975 is valid and controlling today.

Guest Can Only Be Made Whole by Claim Against Host

If a reasonable lawyer concludes, after analysis, that a guest can be made whole for his/her damages *only by making a claim against the host driver, and* there is a legitimate claim for liability against the host, then the lawyer cannot represent both. Under these circumstances, the lawyer's representation of the guest would necessarily be "adversely affected" by the lawyer's duty not to make a claim against his other client, the host. "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities.... The conflict in effect forecloses alternatives that would otherwise be available to the client." Comment to [SCR 20:1.7](#).

Care should be exercised by the attorney when both guest and host first present themselves to the lawyer. Only one should be interviewed initially and adequate information obtained to make an informed judgment *before* the second prospective client is interviewed.

"Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Comment on PREAMBLE [SCR Chapter 20](#).

The penalty for interviewing both prospective clients together may be complete disqualification if a conflict is found to exist. In addition, the lawyer is prohibited from using any confidential information obtained in the interview to the detriment of either prospective client. *See* SCR 1.9.

Guest Can Be Made Whole Without Making Claim Against Host

If a reasonable lawyer concludes that the guest will likely be made whole for his/her damages *without* making a claim against the host (and/or his liability insurer), then the lawyer *can* represent both in making claims against other adverse parties. However, a lawyer must proceed with caution, a reasoned analysis, and the mutual written consent (after full consultation) of both clients before embarking on such a joint representation.

The conflict analysis should necessarily involve consideration of at least the following factors:

- the existence and strength of any evidence of negligence or fault on the part of the host;
- the joint and several liability rule (Wis. Stat. [§ 895.045\(1\)](#)) as applied to the fault situation and apportionment of responsibility for damages;
- the adequacy of insurance or other assets of the opposing driver(s);
- the likely recoverable damages sustained by the guest;
- the likely recoverable damages sustained by the host;
- whether the prospective clients will be competing against each other for a limited fund of insurance;
- availability of underinsurance or uninsurance coverage;
- any discrepancy in likely testimony by guest and host;
- compatibility of proof and arguments on damages as between guest and host;
- whether joint representation will result in savings of attorney fees or costs;
- whether joint representation would provide a tactical or jury advantage by avoiding suits within families or foreclosing defensive divide-and-conquer;
- the attitude of the guest about making a claim against the host;
- whether the guest or host have derivative claims for the injury to the other;
- whether both prospective clients are able to understand and grasp the implications of a waiver;
- the disruption of both claims if the attorney has to withdraw at a later date; and
- the likely devaluation of both claims if the parties fight each other with separate counsel.

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosing courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved. [Emphasis supplied] Comment to [SCR 20:1.7](#).

It is recognized that in some instances the guest is adamant against a claim being made against the host (for example, husband-wife, parent-child, siblings, "significant others"). The attorney must abide by the instructions and wishes of the client as to the objectives of the representation. See [SCR 20:1.2\(a\)](#). However, that does not relieve the *lawyer* from performing the analysis necessary to determine if a lawyer can ethically accept joint representation. The prospective guest's absolute prohibition of a claim against the host does not take the lawyer off the hook and allow joint representation. The lawyer still has to determine if such representation "will adversely affect the relationship" or whether the lawyer's "representation of that client may be materially limited by the lawyer's responsibilities to another client." If the analysis does not pass muster, then independent counsel should represent the guest in examining the validity of the

guest's prohibition, unburdened by loyalty and responsibility to the driver. "[W]hen a disinterested lawyer would conclude that the client *should not agree* to the representation under the circumstances, the lawyer cannot properly ask for such agreement or provide representation on the basis of the client's consent." Comment to [SCR 20:1.7](#).

Written Consent After Consultation

The Ethics Committee was asked if a standard form waiver could be drafted. No such form would be useful because of the unique character of each case and set of facts. There is a better practice and a minimum practice.

It is the better practice to provide the prospective clients with a comprehensive disclosure letter addressing the factors set forth in 3) above (and others as they bear), and examining the implications, advantages, and risks of joint representation. Finally, the lawyer should cite all factors in support of his or her conclusion that the joint representation likely will not adversely affect either client's interests. Beware of revealing confidential information from one prospective client to the other without consent. "[T]here may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent." Comment to [SCR 20:1.7](#).

The disclosure letter should be discussed face-to-face with each affected prospective client alone. If the client consents, it should be by a signed acceptance statement on the disclosure letter, with duplicate originals to lawyer and both clients.

At a minimum, there has to be a consultation between lawyer and client which discusses the "implications of the common representation and the advantages and risks involved." A final signed consent to the common representation has to be obtained.

When one of the prospective clients is a minor or incompetent, no common representation should be undertaken without the required consultation and consent being furnished by a guardian ad litem independent of the lawyer or his firm.

Withdrawal After Initial Joint Representation

SCR 20:1.7 calls upon the lawyer to make a detailed analysis of the situation at the outset in order to justify multiple representation. At intake information is sketchy, at best. A misstep could result in total disqualification from the case. As more information and evidence are gathered the implications of joint representation may change. If any new information changes the implications, advantages, or risks of the joint representation, the lawyer must keep the clients fully informed. If the information is significant enough to raise a conflict, then the lawyer must notify the clients and withdraw from the representation. "If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. ... When more than one client is involved and the lawyer withdraws because of a conflict arising

after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." Comment to SCR 1.7.

Endnotes

¹ See 43 Wis. 2d vii (1969), order adopting the Code, and 139 Wis. 2d xii (1987), repealing the Code.

² See 139 Wis. 2d xii (1987).