

## Handling driver-passenger conflicts

by

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In the case of an automobile accident, may a lawyer represent both the driver and the passenger(s) in a personal injury claim? This question is a frequent one raised in advisory opinion requests to the Director's Office. If you research this issue, the most common answer you'll find is "it depends." [Ftn1](#)

Rule 1.7 of the Minnesota Rules of Professional Conduct (MRPC) prohibits a lawyer from: (a) representing a client whose interests are adverse to another current client's, and (b) from representing a client when a lawyer's ability to represent that client may be materially limited by his obligations to another client.

Either situation may be present when attempting to represent both the driver and passenger as plaintiffs in a personal injury matter. Such conflicts may be waived but only in some situations.

### Conflict discussed

Representing both driver and passenger would violate Rule 1.7(a) if the passenger is pursuing a negligence claim against the driver. Such a conflict of interest could not be waived. Even if an insurance company is providing separate defense counsel for the driver, the lawyer for the passenger could not also represent the driver on claims against a third-party tortfeasor.

If there is absolutely no issue of liability on the driver's part, however, then a lawyer may represent both parties against the other driver with informed consent from both clients and not violate Rule 1.7(b). [Ftn2](#)

Most often the facts are not this straightforward, especially at the commencement of the representation. If a driver and passenger approach the lawyer jointly about representation, the lawyer initially should interview only one of the prospective clients to develop the facts sufficiently to ascertain whether a conflict exists — usually whether there is a potential question as to the driver's negligence.

Some follow-up investigation may be needed before the driver's potential liability can be determined. If an independent counsel would advise the passenger to make a claim against the driver, then joint representation almost never will be possible.

This is true even when the passenger does not wish to pursue such a claim, if it nevertheless is likely that the third party will make a counterclaim against the driver. Passengers often do not wish to make a claim against the driver, since the person may be a family member or friend.

While lawyers may follow their clients' wishes as to the purpose and scope of the representation, they must

inform the clients of the advantages and disadvantages of waiving a potential claim and obtain consent from all clients.<sup>Ftn3</sup>

The clients also should be warned that if a counterclaim against the driver is in fact made, the lawyer may be required to withdraw from representing all of the clients.

Liability issues are not the only aspect to the potential conflict in representing both driver and passenger in personal injury claims. Damages and likelihood of recovery also must be considered; that is, whether the defendant has sufficient assets or insurance coverage to satisfy any judgment(s) obtained.

If there is insufficient insurance coverage to cover all injuries of all clients, then the lawyer can represent joint parties in securing the maximum amount available (i.e., the insurance policy limits), but could not assist in dividing the sum between the joint parties unless that issue has been resolved at the beginning of the representation.

Aggregate settlement offers create a similar conflict situation that should be anticipated before such an offer is made, since the clients' damages will almost never be identical or precisely quantifiable. *See* Rule 1.8(g), MRPC.

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<sup>1</sup> For example, *see*, Wisconsin Ethics Opinion E-99-2: Multiple Representation in Vehicle Personal Injury Cases (1999); Oregon Formal Opinion No. 2000-158: Representing Driver and Passengers in Personal Injury/Property Damage Claims (2000); Professional Ethics Committee of the Florida Bar Opinion 02-3 (2002).

<sup>2</sup> Changes to the MRPC are pending before the Minnesota Supreme Court. If adopted, Rule 1.7 will require informed consent, confirmed in writing.

<sup>3</sup> *See*, Restatement Third, The Law Governing Lawyers sec. 128 Comment d(i) (2000).