

**Representing both driver, passenger
(An analysis under Rule 1.7, MRPC)**

by

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A common question asked in advisory opinion requests is whether an attorney can represent both the driver and the passenger(s) in a motor vehicle accident. This issue has also resulted in occasional discipline for attorneys. Situations can vary, and most often the answer to whether an attorney can represent both the driver and the passenger(s) is "it depends." However, there needs to be a review of Rule 1.7, Minnesota Rules of Professional Conduct, in every possible representation.

Rule 1.7(a), MRPC, prohibits a lawyer from representing a client if there is a concurrent conflict of interest." A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client, or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." Rule 1.7(a), MRPC. Any time a passenger may pursue a claim against the driver, representing both the driver and the passenger would be prohibited.

Oftentimes, it can be difficult to determine at the outset of the representation if the passenger will be pursuing a claim against the driver. It would be prudent for an attorney initially to interview only one of the prospective clients to develop the facts to determine whether a conflict exists. If an independent counsel would advise the passenger to make a claim against the driver, then joint representation is almost never possible (also, please note that even if the passenger, who may be related to the driver, may not want to pursue a claim against the driver, a third party may initiate a claim against the driver). Most often, there is a "significant risk" that the representation of the passenger may materially limit the lawyer's responsibilities to the driver when the attorney chooses to represent both the driver and the passenger. The rules do allow for a waiver to be obtained from both clients. The waiver may allow the attorney to represent both the driver and the passenger, if all the factors of Rule 1.7(b), MRPC, can be met.

Rule 1.7(b), MRPC, states that even if a conflict of interest exists under Rule 1.7(a), MRPC, a lawyer may represent both clients if: "(1) the lawyer reasonably believes that

the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." If an attorney determines that the first three factors can be met, then the attorney can attempt to obtain informed consent from both the driver and the passenger.

Informed consent needs to provide the client with adequate information and explanation about the possible risks involved in proceeding where a conflict of interest may exist. Informed consent needs to be obtained at the beginning of the representation. One possible risk that the clients need to be aware of is if a claim or counterclaim against the driver is in fact made, the lawyer may be required to withdraw from representing all of the clients, thus meaning that all the clients would have to find new representation in the middle of the representation.

It is important to note that liability issues are not the only aspect of the possible conflict in representing both the driver and the passenger. Damages and the likelihood of recovery are important to consider. For example, if there is insufficient insurance coverage to cover all injuries of all the lawyer's 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.

Lastly, in cases where the driver is a parent of the minor child passenger, representation of both the driver/parent and the minor child/passenger by one attorney may not be allowed under the rules. A valid informed consent waiver may not be able to be obtained since the parent/driver is not in a position to waive the minor child/passenger's rights since the parent/driver would be waiving the minor child's right to sue him or herself.