



Committee on Professional Ethics

Opinion #349 - 6/21/74 (6-74)

Topic: Conflict of Interest

Digest: In absence of special circumstances a lawyer should not represent husband-driver and wife-passenger as plaintiffs where defendant may claim over against one of the plaintiffs to recover part of the damages sustained by second plaintiff.

Code: EC 5-15, 5-17
DR 5-105

QUESTION

Where a jurisdiction recognizes the concept of comparative negligence as between joint tortfeasors and indemnification when a third party may be only partly at fault, may an attorney represent both a husband-driver and a wife-passenger in an action against a third party arising from an automobile accident?

OPINION

N.Y. State 74 (1968), where husband, wife and child were in a car in an automobile accident, held that an attorney could not properly represent the wife in an action against a tire manufacturer for property damage and also represent the infant in an action against the tire manufacturer and the parents, owner and driver, for personal injuries, even with consent of the parents. N.Y. State 205 (1971) held an attorney could not properly represent an estate and also represent a son-in-law of the decedent in a claim against the estate for personal injuries. In both cases, the fact that insurance covered the obligations of the proposed defendants was held not to change the essentially adverse interests of the parties.

Ordinarily, a wife-passenger, in this jurisdiction, will not press a claim against a husband-driver, as the husband-driver's automobile liability insurance usually does not insure against liability due to injury sustained by his spouse. Insurance Law Sec. 167(3).

Under the comparative negligence concept and the developing doctrine of contribution under the case of Dole v. Dow Chemical Co., 30 N.Y. 2d 143 (1972), where the wife-passenger brings an action against a third party for injuries arising out of an automobile accident, the third party may make the husband-driver a defendant in that action on the claim that the husband's negligence caused or contributed to the wife's injuries. Thus, an attorney representing both husband-driver and wife-passenger against a third party represents conflicting or potentially conflicting interests.

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"A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests". [EC 5-15].

Accordingly, if it reasonably appears under the practice developing under the Dole case that the husband is likely to be brought in as a defendant on a third party claim that his negligence caused all or a part of the wife's injuries, the lawyer should not in the absence of special circumstances represent both husband and wife in an action against the third party.

"If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients and for this reason it is preferable that he refuse the employment initially". [EC 5-15].

There may be some instances where a flat rule that a lawyer should not take a case of husband and wife would not be appropriate (for example, a husband and wife sitting in a properly parked automobile hit by a third party). However, for the reasons stated in EC 5-15 quoted above, it is equally inappropriate to say that in every case a lawyer may wait until the husband is actually brought in as a party defendant before withdrawing. In the meantime he may have received confidential information which would require him not only to withdraw from representation of one of the parties but to withdraw from the case entirely so as not to be in the position of using against a former client confidential information received from that client. N.Y. State 112 (1969).

In each doubtful case the lawyer must weigh the prospect of the spouse's being brought in as a defendant, the likelihood of his receiving confidential information if he initially represents both, and the obligations of the client to co-operate with his insurance company under his policy. Whether the lawyer can initially represent both clients in such case depends on analysis of each case [EC 5-17], and he should resolve all doubts against the propriety of the original dual representation. EC 5-15, DR 5-105.
