



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 with its Comments [23] and [29-33] and 1.9. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 93-9
January 21, 1994

Topic: Conflict of interest; dual representation

Digest: An attorney should not represent both the driver and the passenger of a vehicle in a claim against the driver of the adverse vehicle. The driver and passenger may, in unusual circumstances, consent to dual representation after appropriate disclosure.

Ref.: Illinois Rules of Professional Conduct, Rules 1.7 and 1.9
In re Shaw, 88 N.J. 433, 443 A.2d 670 (1982)
Fugnitto v. Fugnitto, 452 N.Y.S.2d 976 (1982)
Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 135 A.2d 252 (1957)

FACTS

An automobile driven by Alice was involved in an intersection collision with an automobile driven by Dee in which Bea (who was Dee's mother-in law) was a passenger. Each driver claimed the other was at fault. Dee had no liability insurance.

Alice reported Dee's lack of insurance to the Secretary of State, and a hearing was held to consider whether Dee's license should be suspended. Attorney C represented Dee in the hearing at which Bea testified on behalf of Dee that the accident was caused by Alice. At the conclusion of the

hearing, Dee retained her license.

Bea was injured in the collision and brought an action, filed by Attorney C against Alice. Bea did not sue Dee because Dee was then her daughter-in-law and had no insurance and no assets. Alice subsequently joined Dee in a third-party complaint, alleging that Dee was responsible for Bea's injuries and seeking recovery for Alice's own damages. Dee, also represented by Attorney C, denied responsibility for Bea's injuries and the damages to Alice's vehicle and filed a cross-claim against Alice for her own injuries.

Alice's attorney has questioned whether Attorney C can represent both Dee and Bea in the litigation. Dee has attempted to retain other counsel but has been unsuccessful, apparently due to her lack of insurance and assets. Dee and Bea's son were subsequently divorced, but Dee and Bea nevertheless state that they want Attorney C to continue to represent each of them in the litigation and are willing to sign a written "waiver" of any conflict of interest.

QUESTION

The inquiring attorney asks whether representation of Dee and Bea by Attorney C in the litigation constitutes a conflict of interest. If so, the inquirer asks whether Dee and Bea can "waive" the conflict of interest so Attorney C could represent them in the litigation and Dee can avoid going to trial without an attorney.

OPINION

Rule 1.7(a) of the Illinois Rules of Professional Conduct provides that an attorney 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 after disclosure." Rule 1.7(c) provides that when representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Representation of both the driver and the passenger in claims against a driver of the other vehicle in a contested liability collision situation presents a classic conflict of interest. An attorney representing only the passenger would be indifferent as to whether one or the other driver, or both drivers, were found ultimately at fault. An attorney representing only the passenger's driver would seek to avoid any responsibility, even at the risk of defeating a recovery by the passenger.

Courts in at least three states have held that attempts to represent both driver and passenger in a contested collision action constituted an impermissible conflict of interest. The court, in Fugnitto v. Fugnitto, 452 N.Y.S.2d 976 (1982), stated "we emphatically disapprove the representation by counsel of both the driver and the passenger of a vehicle." 452 N.Y.S.2d at 978. The court disciplined the attorney involved in In re Shaw, 88 N.J. 433 443 A.2d 670 (1982), stating "the rule...has long been that where liability is in dispute, a lawyer cannot represent the interests of both the driver of a vehicle and his passenger in claims against the driver of the adverse vehicle. The conflict of interest in such representation is inherent." 443 A.2d at 674. In Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 135 A.2d 255 (1957), the court granted a new trial for the driver who had been represented by the same counsel as his passenger.

Although such circumstances may be rare, the Committee is reluctant to conclude that there can

never be a situation where an attorney may, upon appropriate disclosure and consent, represent both driver and passenger in a contested liability matter. The present case may present such a circumstance. Both Bea and Dee believe that Alice will be found solely responsible for the collision. Dee has no insurance and no assets, and Dee appears indifferent to the prospect of a judgment against her. Bea appears unwilling to enforce any judgment that would result in the enforcement of a judgment against Dee. If, after appropriate disclosure by Attorney C, both Bea and Dee consent to the representation, the Committee believes that Attorney C may undertake the representation of both Bea and Dee in the litigation.

Finally, should Attorney C, Bea and Dee determine that Attorney C should continue to represent only the interests of Bea in the pending action, Attorney C must also obtain the consent of Dee to that continued representation. Rule 1.9 of the Illinois Rules of Professional Conduct requires that an attorney may not undertake a representation adverse to a former client in a substantially related matter without the consent of the former client. Because Attorney C had represented Dee before the Secretary of State and the continued representation of Bea only would be adverse to Dee, Dee's consent is therefore required.

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