



ETHICAL CONSIDERATIONS IN REPRESENTING MULTIPLE PARTIES

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In any case where more than one person may have a claim arising from the same incident or injury, there is a potential for a conflict of interest on the part of a plaintiff’s attorney who handles even one of the claims. This is true whether the multiple claims are “direct” claims or “derivative” claims. The classic example, and one which is the subject of a very recent Court of Appeals decision, Gustafson v. City of Seattle, 87 Wn.App. 298 (1997), is the conflict between a passenger and the driver of a vehicle. The non-negligent passenger may have a strong claim against a third-party driver, but there is often the potential for a claim against the driver of the claimant’s vehicle as well. If both the driver and passenger are injured, representing both claimants would present a direct conflict. If they are spouses, and the driver is not injured, there may still be a conflict because the driver-spouse would have a potential loss of consortium claim.

Andy Bergh wrote an excellent article about the Gustafson case for the November issue of Trial News, and I am including his article as Appendix B. Andy ends his article with a statement that is the hair-raising theme of this presentation: “If you don’t meet the requirements of RPC 1.7(a), you might find yourself with no client, no fee and no quantum meruit recovery, and possibly a bar complaint from irate former clients who incurred the expense and hardship of obtaining new counsel.”

The potential conflicts of interest, of course, go far beyond the fairly basic passenger/driver example. Some of the conflict situations are those in which there is an issue of attribution of liability (as in the passenger/driver example) but others involve allocation of damages, e.g., the amount of money going to one claimant may affect the amount going to another claimant. Following are some of the potential injury or death claims in which a plaintiff’s attorney may find himself or herself with conflicts that could jeopardize both the interests of the clients as well as those of the attorney.

1. Passenger and driver, where there is a potential claim that the driver was negligent (Liability Attribution).

Note: RCW 4.22.070(1) is relevant because an allegation of “empty chair” fault may create the need to have the passenger name the driver as a defendant in order to achieve joint and several liability. Query: If the driver is the passenger’s spouse and is judgment proof, is there a “direct” conflict? It may be in the driver’s financial interest to have a joint and several judgment entered against the third-party driver that alleviates financial responsibility for medical or other expenses of the spouse.

2. Parent and child where a child was injured in an incident in which there is a potential claim that the parent was negligent (Liability Attribution).

Note: As with the driver/passenger conflict, RCW 4.22.070(1) “empty chair” issues are relevant, creating a possible need to sue the parent. But, note, also, there may be no “direct” conflict where parent is

judgment proof and would benefit from a joint and several judgment against the third party in favor of the child.

3. Personal representative and statutory beneficiaries where there is a potential claim that the PR was negligent (Liability Attribution).

Note: The personal representative has a fiduciary duty to the beneficiaries, so any potential allegation of fault against the PR would presumably disqualify the PR from serving. If you were initially retained by that person, is there a conflict in representing the beneficiaries

4. Personal representative and statutory beneficiaries, where PR is also a beneficiary, and where there is a finite amount of insurance coverage or where a settlement amount has to be allocated (Damages Allocation).

Note: This situation has both ante facto and post facto potential conflicts. The ante facto conflict exists before an overall settlement is agreed upon, which then creates a finite amount to be divided between the beneficiaries. The post facto conflict occurs after the overall settlement when there may be disagreements about division of the proceeds.

5. Parents and children injured in the same accident, where there is a finite amount of insurance coverage or where a settlement amount has to be allocated (Damages Allocation).

Note: As in the wrongful death situation, this case has both ante facto and post facto potential conflicts. The ante facto conflict exists before an overall settlement is agreed upon, which then creates a finite amount to be divided between the claimants.



The post facto conflict occurs after the overall settlement when there may be disagreements about division of the proceeds.

6. More than one injured adult in the same accident, where there is a finite amount of insurance coverage (Damages Allocation).

7. Representation of both spouses, where one spouse has a potential derivative claim (loss of consortium) arising from the injury to the other spouse (Damages Allocation).

Note: If both spouses meet with you to discuss the injury claim and the injured spouse retains you, what are your ethical responsibilities to the non-injured spouse with regard to the loss of consortium claim? If you feel that asserting the loss of consortium claim might hinder the injured spouse's claim, there is a conflict. But if you aren't retained by the non-injured spouse, is there in fact a conflict?

8. Representation of parent injured in accident where there may be a claim for loss of parental consortium on behalf of children (Damages Allocation).

9. Representation of a parent in a personal injury claim where death is likely to occur from the injuries. The spouse has both a loss of consortium claim for the injuries, and a potential wrongful death claim after death. Any children of the parent also have both a loss of consortium claim as well as a potential wrongful death claim. It is likely that, in any settlement of the personal injury claim, the defendant will want a release of the potential wrongful death claims as well.

Query: Can there be a release of a wrongful death claim before the death occurs? Can the potential statutory beneficiaries of the future wrongful death claim release their future rights in such a claim? If statutory beneficiaries include minors, is court approval required as a "minor settlement?"

Rule of Professional Conduct 7.1

The relevant "law" applicable to these situations is found in RPC 1.7, Conflict of Interest. The full rule is in Appendix C. In essence, it provides that a lawyer may not represent a client if such representation will be directly adverse to another client, or the representation will be materially limited by another client's interests, except under specified conditions.

The conditions that allow such representation are that the lawyer reasonably believes the representation will not adversely affect the relationship with the other client or be adversely affected by another client, and there is consent by the clients "after consultation and a full disclosure of the material facts." The rule adds:

"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."

In practice, most plaintiff's attorneys have dealt with these kinds of conflict situations in a less than rigorous manner. We tend to think that our involvement in a case will benefit all of the claimants, and our initial focus is on liability and overall damages issues. The tendency is to ignore the potential conflict problems because they usually resolve themselves through cooperative effort on the part of the claimants and don't become serious problems. Where potential conflicts involve minors who have claims, we assume that everything will be taken care of in the minor settlement process through appointment of guardians ad litem for the minors.

The potential for serious problems is very real in conflict situations, however, and the proverbial ounce of

prevention could avoid many pounds of pain that is not readily cured and that may result in bar disciplinary proceedings, malpractice lawsuits, or forfeiture of legal fees. Attached as Appendix D are some detailed examples of conflict situations that can arise in personal injury and wrongful death cases. The examples may sound convoluted, but they are from real cases (although the facts have been changed slightly to prevent identification of clients and attorneys involved). If you think over your own cases, I'm sure you will see numerous examples of these types of potential conflict situations.

How can a plaintiff's attorney protect himself or herself – and his or her clients – from the problems that can arise where there are conflicts between claimants arising from the same accident or injury? As difficult and cumbersome as it is, the only means of protection is full compliance with RPC 1.7. That compliance, in turn, requires (1) clear identification of the claimants and the potential conflicts, (2) appointment of guardians ad litem for minor claimants, and (3) detailed and full disclosure of the potential conflicts to everyone involved. Multiple representation can then occur if the attorney "reasonably believes" the conflict(s) will not adversely affect the clients' interests or the relationship with the client(s), and if the claimants consent to such multiple representation. Part of the basis for such a consent would be a consideration of the "advantages and risks involved" in the multiple representation.

To comply with RPC 1.7 in the examples in Appendix D would not be easy. The fear of many attorneys will be that pointing out the conflicts at the



commencement of representation may scare off the client or otherwise raise concerns. However, if pointing out possible conflicts causes concern at that stage, it only highlights the potential for much greater concerns when the case is close to settlement or trial.

In example 1 in Appendix D, concerning the three adult beneficiaries in a wrongful death case, full disclosure would require advising the beneficiaries about the wrongful death and survival statutes, and the fiduciary role of the personal representative. It would include disclosure that each claimant has separate claims, and that they may not be equal. It would point out that each claimant may, if he/she wishes, retain separate counsel, but that there are cost advantages to having one attorney handle the liability part of the claim since it benefits all of the beneficiaries. It would explain that the personal representative has authority to settle the claim, but if there are disagreements as to distribution of the proceeds, the money could be held by the probate court and each beneficiary can present information in a court proceeding as to their claim, and could be represented by their own attorney at that time if they so chose. Finally, it would point out that the plaintiff's attorney would have a conflict when and if that procedure occurred, and could not represent any of the beneficiaries, including the personal representative, other than in setting up the proceeding so a decision could be made by the court.

In example 2 in Appendix D, involving the wrongful death of the father in an automobile accident, compliance with RPC 7.1 would mean full and clear disclosure to the wife and to the mother of the other child as to potential conflicts in allocating any

recovery in the wrongful death claim. An attorney should recommend appointment of separate guardians ad litem for each of the three children, and should advise the mother of her right – and that of the guardian ad litem of her child – to independent legal representation. As in the previous example, it is also appropriate to point out the benefits of having one attorney bring the liability claim because of efficiencies and cost savings. When an overall settlement is proposed, the guardians ad litem would then have the option of agreeing among themselves as to the allocation between the wife and the three children or, if agreement is not reached, a court hearing can be set up under the minor settlement procedures so that a judge can make that determination.

The case of *Guardianship of Lauderdale*, 15 Wn.App. 321, 549 P.2d 42 (1976) presented issues similar to those set out in example 2, and the text of the opinion is included as Appendix E. In that case, an attorney negotiated a gross settlement in a wrongful death case where there were a surviving spouse, two adult children, and two minor children as beneficiaries. The attorney handling the case made a recommendation to the court as to allocation of the settlement amounts, and the guardian ad litem appointed for both minor children disagreed. The Court of Appeals held that there was a conflict of interest once there was any disagreement about allocation of settlement funds, and separate guardians ad litem must be appointed for each minor, and each adult child must be advised of his/her right to independent counsel.

The procedure in the other examples would be along the same lines as in examples 1 and 2. The key is full and fair disclosure of the potential conflicts so that everyone knows what their options are with regard to separate representation. That won't prevent disagreements among multiple claimants, especially when the money is being distributed, but it will minimize accusations of wrongdoing against the attorney and the risk of fee forfeiture, disciplinary actions, or malpractice claims. It is impossible to draft a generic or general disclosure that would apply to all cases, because each case has different potential conflicts and issues that have to be addressed. It is possible, however, to have a general form that explains the wrongful death and survival laws so that this information is provided to claimants when disclosure is made.