

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

OPINION

"DR 7-104 Communicating With One of
Adverse Interest

(A) During the course of his representation of a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

This section of the Code is substantially similar to former Canon 9 and has not changed existing opinions except to permit in certain jurisdictions, that which is specifically authorized by law.

A governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual. The attorney for a governmental unit and opposing counsel must abide by the provisions of DR 7-104.

Therefore, once there is an indication that counsel has been designated by a party, whether a governmental unit or otherwise, with regard to a particular matter, all communications concerning that matter must thereafter be made with the designated counsel except as provided by law.

Opinion #161 - 10/9/70 (40-70)

Topic: Conflict of Interest.
Confidences of Client.

Digest: Representation of passengers in action against friend, insured driver, improper after lawyer interviewed and acted in behalf of driver.

Code*: DR 4-101 (B) and (C)
DR 5-105 (A) and (B)
EC 4-5 and 6
EC 5-14 and 15
Canons 4, 5 and 9

QUESTION

An attorney was requested by several persons to represent them in their claim for personal injuries sustained while passengers in an automobile driven by a good friend of theirs. The automobile had skidded from a highway and struck another automobile which was parked on a mall about five feet from the shoulder of the highway, killing the owner of the parked vehicle. At the scene of the accident the driver was served with a summons by a State Trooper for driving with a defective tire. Although desirous of making their claim against the driver, the passengers asked the attorney to do whatever was possible to defend the interests of the driver with whom they are very friendly and they assured the attorney that they would not under any circumstances seek a recovery in excess of the insurance policy limits, which were \$10,000/\$20,000.

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

The attorney interviewed the driver and in her behalf obtained an adjournment of the hearing upon the traffic summons. In his opinion, he received no confidential information in the interview.

The driver and the passengers have been apprised of the foregoing facts and consent to the attorney representing the passengers in their claim for personal injuries. The driver's insurance company has been informed of such possible retainer, and that this inquiry is being made. To date, the insurance company has neither consented nor objected to such representation.

The attorney inquires whether or not he may represent the passengers in an action against the driver: (1) in the circumstances stated, or (2) assuming the driver, who is charged with negligence, obtains other counsel at this stage.

OPINION

Having interviewed the driver and undertaken to represent her in connection with the summons served upon her for driving with a defective tire, the attorney may not thereafter represent a party in an action against her arising from the same accident.

DR 4-101 (B) provides that:

"Except as permitted by DR 4-101 (C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

DR 4-101 (C) provides in part that:

"A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them."

EC 4-5 provides in part that:

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes."

While the attorney may be of the opinion that he was not the recipient of confidential information, others may reasonably conclude that an attorney who interviewed his client in connection with an automobile accident necessarily received information which may fairly be regarded as confidential and the use of which may be to the disadvantage of the client. As stated in Canon 9, "A lawyer should avoid even the appearance of professional impropriety." The fact that the driver is insured is irrelevant; the interests of the parties are nevertheless adverse. N.Y. State 74 (1968), N.Y. City 223 (1932) and 711 (1947).

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

The result is the same notwithstanding that new counsel is retained by the driver.

EC 4-6 provides in part as follows:

"The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

As this Committee is of the opinion that it would be improper for the inquiring attorney to represent the passengers even if the driver were represented by new counsel, a fortiori, he could not represent the passengers while still acting as attorney for the driver in a matter involving the same accident. DR 5-105 (A) and (B); EC 5-14 and 15.

Opinion #162 - 10/9/70 (42-70)

Topic: Dual Representation.

Digest: An attorney may represent both buyer and seller of real property only when there is no actual or potential differing interests and there is complete disclosure to and consent by both clients.

It is not proper for a lawyer to represent a client to whom the lawyer is selling his own property.

Code*: Canon 5
DR 5-105, 104
EC 5-1, 5-14 to 19

QUESTIONS

1. Is it ethically proper for a lawyer to represent both buyer and seller in a real estate transaction where the parties have agreed on the terms of their deal and where a title policy is to be obtained?
2. Is it ethically proper for a lawyer to represent a client who is purchasing a parcel of real property from the lawyer?

OPINION

As to Question 1

Canon 5 provides, "A lawyer should exercise independent professional judgement on behalf of a client."

DR 5-105 provides in part: