

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinions

Opinion #190 - 5/27/71 (20-71)

Topic: Advertising.

Digest: Guidelines for information
to be included in advertise-
ments in connection with
lawyer authored books.

Code*: DR 2-101 (B) (5).

QUESTION

The New York Bar Journal has asked the Committee to provide guidelines for acceptance by the Journal of advertisements of legal publications written by lawyers.

OPINION

Advertisements of legal publications written by lawyers must be dignified, must not praise the lawyer's ability or skill or describe his specialties, clients or prominence.

In accordance with DR 2-101 (B) (5) and N.Y.State No. 89, the following informational items are acceptable:

1. The author's name.
2. The fact that he is an attorney and the states in which he is admitted to practice.
3. Other legal publications written by the author.
4. The fact that the author has lectured on legal subjects.

Opinion #191 - 5/27/71 (10-71)

Topic: Conflict of Interest.
Multiple Representation.

Digest: Representation of driver and
his passenger (father and
adult daughter) in an action
against third party permissible
if proper consent and waiver is
obtained.

Code*: EC 5-14; 5-15; 5-16; 5-17; 5-19.

QUESTION

In a personal injury suit arising from a two car collision, may a lawyer represent both the driver of one car and his adult daughter-passenger against the driver of the other car, where the daughter is fully informed as to the existence of a possible cause of action against the father but chooses to waive any such claim?

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OPINION

EC 5-15 provides, in pertinent part:

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. 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. 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 5-16 provides:

"In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances."

EC 5-17 provides:

"Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgement of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely."

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See also EC 5-14 and 5-19.

Dual representation of two claimants against a third party would be totally improper where one client may have a cross-claim against the other client, unless there is a voluntary, informed and understanding waiver of the cross-claim. Where there is such a waiver, ethics committees interpreting the former Canons have reached conflicting conclusions. ABA Inf. 723 (1964) indicates a rule which would not permit dual representation even after such a waiver, while N.Y. County 397 (1950) would permit such dual representation provided there is a knowing waiver following full explanation and understanding. Our Committee believes that the ABA rule of absolute disqualification is needlessly severe, and adopts the more liberal New York County view.

N.Y. County 397 (1950) makes clear that a heavy burden rests upon the lawyer before he can undertake to represent two clients where one may have a cross-claim against the other. Thus before he can represent both the driver father and his adult passenger daughter the lawyer must explain fully to the daughter that (a) she may have a legally enforceable claim against her father or his insurer; and (b) as her father's lawyer he cannot give her any advice respecting either the possible merits of such a claim, or whether or not she should assert it. In addition we believe that the lawyer must inform the daughter that he cannot represent her if she is not completely sure whether or not to assert the claim against her father or his insurer. In that event, he should suggest that she consult other counsel to advise her as to that claim and as to whether or not to assert it.

If, after being fully advised as suggested above, the adult daughter confirms that in no event would she want to sue her father no matter how good a cause of action she might have against him, then there would in our opinion be no impropriety in the lawyer thereafter representing both father and daughter in litigation against the driver of the other car.

The situation here presented is distinguishable from cases previously before our Committee involving proposed dual representation of both a parent driver and a minor child passenger. See N.Y. State 74 (1968) and 112 (1969). Both of these opinions involved situations where it was contemplated that the child would sue the parent in addition to another party (the driver of the other car or manufacturer). The conflict in such situations is so inherent, that even the consent of both the parent and a wholly independent guardian ad litem could not validate the dual representation, since the lawyer could not "fairly and adequately protect the interests of [both] clients". EC 5-17.