

# CLIENT CONFLICTS AND DRIVER/PASSENGER REPRESENTATION IN A PERSONAL INJURY CASE

by *Scott B. Cooper*

**T**wo people who were severely injured in a single-vehicle rollover accident seek to have you represent both of them in a product liability claim against the manufacturer.

One was the driver, and the other was a passenger. You know there is a good chance the manufacturer

will attempt to blame the driver for the loss of control that precipitated the rollover. May you accept them both as clients? Should you?



*Scott B. Cooper*

This article addresses basic rules concerning client

conflicts. Although the article's focus is on auto accident victims, the concepts are applicable to a variety of conflict situations.

## PRIMER ON CALIFORNIA CONFLICT RULES

Our discussion begins with the applicable California Rule of Professional Conduct, rule 3-310. Paragraph (C) of the rule provides in part that “[a] member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients *potentially* conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients *actually* conflict.”

The rule imposes a duty to avoid conflicts that arise at the beginning of the representation

and so is “clearly prophylactic.” (*Matter of Sklar*, 2 Cal. St. Bar Ct. Rptr. 602, 615-16 (1993).) Absent informed written consent, the rule is intended to prevent joint representation in a matter involving multiple clients not only when an actual conflict exists, but also when the conflict is merely potential. A conflict is actual if the lawyer's representation of one client “is rendered less effective” by reason of the shared representation. (*See Miller v. Alagna*, 138 F.Supp.2d 1252, 1256 (C.D. Cal. 2000).) The conflict is deemed potential when “there is a possibility of an actual conflict arising in the future, resulting from developments that have not yet occurred or facts that have not yet become known.” (*Id.* at 1256.)

“[I]nformed written consent” requires the client's “written agreement to the representation following written disclosure.” (rule 3-310(A)(2).) “Disclosure” means “informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client . . .” (rule 3-310(A)(1).) One court has defined the requisite level of disclosure as “whatever is necessary to enable each of [the clients] to make intelligent, informed decisions regarding the subject matter of their joint representation.” (*Spindle v. Chubb/Pacific Indemnity Group*, 89 Cal. App. 3d 706, 713, 152 Cal.Rptr. 776 (1979).)

Although rule 3-310 permits representation of clients with actual conflicts if the lawyer obtains informed written consent, some conflicts are non-waivable, for example, where the lawyer cannot fully “disclose” the reasonably foreseeable adverse consequences because of confidentiality concerns, or where one client lacks capacity to give consent. A lawyer also may not represent two clients “in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another.” (*Klemm v. Superior Court*, 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509 (1977).) Any purported client consent to such a representation “would be neither intelligent nor informed.” (*Id.*) To permit a lawyer to assume a position in litigation where the lawyer could not advocate the interest of one client without adversely injuring those of another would be “unthinkable”. (*Id.*)

## RULES APPLIED TO SIMULTANEOUS REPRESENTATION OF PASSENGER AND DRIVER

The potential conflict in representing both passenger and driver in an auto accident is the possibility the driver was comparatively negligent and therefore partially liable for the passenger's injuries. In 1973, the California Supreme Court struck down as unconstitutional California's guest statute, which precluded social passengers in a car from suing the driver. (*Brown v. Merlo*, 8 Cal. 3d 855, 882, 106 Cal. Rptr. 388 (1973).) Shortly thereafter, California adopted the comparative negligence doctrine. (*Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858 (1975).) These developments created a potential conflict of interest between every driver and passenger involved in an accident.

The first State Bar Court case to recognize this inherent conflict was *Sklar*, 2 Cal. St. Bar Ct. Rptr. at 616. There, the lawyer had, in three different cases, represented driver and passenger without disclosing the potential conflicts or obtaining their written consent. (*Id.* at 614.) The court held that the attorney had violated the rule on conflicts (former Rule 5-102(B)) by failing to disclose the potential conflict and secure the clients' written consent. (*Id.* at 616.) Even though there was no viable negligence claim against the driver and therefore no actual conflict in two of the cases, the court held that fact was "relevant only to the seriousness of the violation of the rule requiring [the attorney] to advise his clients of the *potential* conflict at the outset." (*Id.* (emphasis added).) With these principles in mind, we can proceed to a discussion of some representative situations that arise in this area.

### CASE ONE: DRIVER'S LIABILITY UNDISPUTED

The "easy" case arises where the driver is not at fault, and the other driver or his insurance company has admitted complete liability. According to one Bar Court opinion, this type of case presents no actual or potential conflicts of interest. (*Matter of Respondent Z*, 1999 WL 33224344, \*8 (Cal. St. Bar Ct. 1999).) In that case, once the other driver's claims adjuster had admitted fault, the court held there was no need to obtain written consent as there was no comparative negligence and so no potential conflict. (*Id.*)

This latter case appears at odds with *Sklar's* suggestion that "a potential conflict of interest

exist[s] between every driver and passenger," implying that the lawyer should obtain informed consent in all such cases. (*Sklar*, 2 Cal. State Bar Rptr. at 616.) In fact, notwithstanding *Respondent Z's* conclusion there is no potential conflict when the other driver concedes liability, obtaining written consent is probably the more prudent course to take.

### CASE TWO: THE OPPOSING DRIVER ALLEGES COMPARATIVE NEGLIGENCE

The issue is naturally more complicated when the opposing party alleges the driver was at fault, thus rendering the driver potentially liable to the passenger. If there is no objective evidence of the driver's fault, the lawyer may represent both driver and passenger with the appropriate informed written consent. Even with proper consent, however, there are risks inherent in taking this approach.

First, unless the client retains separate counsel to advise her (an option the attorney should usually recommend), she will most likely rely on the lawyer for an assessment of the driver's fault and the merits of her suit against the driver. Because the driver is also the lawyer's client, there is a danger the lawyer might give less than candid advice. That does not mean the lawyer would intentionally favor one client over another. Rather, a well-meaning lawyer with torn loyalties might unintentionally favor one over the other. After all, California courts have long recognized that the rule "is designed not only to prevent the dishonest lawyer from fraudulent conduct, but also to prevent the honest lawyer from having to choose between conflicting duties, rather than to enforce to their full extent the legal rights of each client." (*Miller*, 138 F.Supp.2d at 1255-56; *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788 (1930).)

Second, if later-discovered evidence indicates the driver was at fault, then an actual conflict would exist. Although rule 3-310(C)(2) permits joint representation despite an actual conflict so long as informed written consent is obtained, the comparatively-negligent driver situation appears to be the "non-waivable conflict" described in *Klemm*. Ultimately, if the case proceeds to trial or arbitration, there will likely be "an actual, present, existing conflict" and the discharge of duty to one client [would] conflict[] with the duty to another." (*Klemm*, 75 Cal. App. 3d at 898.)

The passenger might, for a number of rea-

sons, choose not to pursue a claim against the driver, thereby eliminating the conflict. However, the passenger could later change her mind and choose to pursue the claim against the driver, leaving the attorney with no choice but to withdraw from representing both driver and passenger. Indeed, the conflicts inherent in this situation have led some jurisdictions to preclude dual representation of a driver and passenger except when liability is undisputed. (*See, e.g., In re Shaw*, 88 N.J. 433, 443 A.2d 670 (1982).)

Assuming the conflict is waivable, the written disclosure must set forth the reasonably foreseeable risks from the joint representation. These risks include the fact that both parties may be sharing confidences that could prove detrimental to their respective cases should the conflicts arise and the risk of delay should the attorney ultimately need to withdraw from representation of one or both clients. The disclosure must enable the clients "to make intelligent, informed decisions regarding the subject matter of their joint representation." (*Spindle*, 89 Cal. App. 3d at 713.)

### CASE THREE: THE CLOSELY-RELATED AND JUDGMENT PROOF DRIVER

A common twist on the second scenario arises when the driver and passenger are members of the same family and the driver is uninsured for the loss (perhaps due to a common policy exclusion for members of the same household) or otherwise judgment proof. Under these circumstances, the potential for an actual conflict is minimal. An independent attorney evaluating such a case would in all likelihood conclude that it was not worthwhile to pursue the case against the driver because there is no legal or economic basis for such a claim. (*See, e.g., Florida Bar Ethics Opinion 02-3.*) Assuming the decision not to pursue a claim is "made voluntarily and without influence arising from the obligations to the driver, there is no actual conflict between the clients." (Oregon Ethics Opinion 2000-158.) Regardless, the attorney must still obtain the written informed consent required by rule 3-310.

### CLIENT INTAKE

To avoid a conflict and ensuing disqualification from representing either driver or passenger, a lawyer should interview just one of the prospective clients (usually the passenger) outside the presence of the other. By so doing, the

lawyer avoids incurring a duty of confidentiality to both clients before determining whether conflicts exist. (See, e.g., Cal. State Bar Formal Ethics Op. 2003-161.) If the attorney then decides to represent only one party (the one she consulted with), she can do so without any conflicts.

### SETTLEMENT ISSUES

Representation of multiple occupants in an auto accident may also implicate rule 3-310(D), which provides that a lawyer “who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.” When faced with liability on multiple claims, the defendant often prefers to negotiate a lump sum, or aggregate, settlement amount, leaving the division of those funds up to the plaintiffs. Partitioning a finite amount of money naturally creates potential conflicts among the plaintiffs, and if they are represented by a single lawyer, that lawyer must, as with the other provisions of rule 3-310 discussed above, obtain the clients’ informed written consent. In larger cases, however, even if a lawyer has obtained the clients’ consent, it may be advisable to bring in a neutral arbitrator or mediator to assist in dividing the proceeds (again, with all of the clients’ consent).

### CONCLUSION

The question of whether an attorney can represent both a driver and a passenger in an auto accident case ends with an answer all too familiar to lawyers: it depends. The best approach is for the lawyer to obtain informed written consent in every case, regardless of whether the attorney believes there will be a conflict or not. At the very least, the lawyer must recognize and address these issues at the beginning of the representation to avoid any unforeseen conflicts that cause her to have to withdraw from representing both clients.



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