

**Too Little Money, Too Many Claims:
Ethical Issues with Multiple Claimants**

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PROFESSIONAL EXPERIENCE

Attorney, 1977 – present – practices in Austin and surrounding areas. Practice limited to the area of civil litigation with primary emphasis in personal injury and insurance disputes. B.A. in Psychology with honors from University of Texas in 1974 and JD from University of Texas School of Law in 1976. Board Certified in Personal Injury Trial Law since 1991 and is admitted to practice law before the Fifth Circuit Court of Appeals, the Western & Eastern Federal District Courts of Texas.

PROFESSIONAL ASSOCIATIONS AND AWARDS

State Bar of Texas, Austin Bar Association, Capital Area Trial Lawyers Association, Texas Trial Lawyers Association, sustaining member and director, American Association for Justice, American Board of Trial Advocates, associate member, Texas Super Lawyers 2011, 2012, John Howie Award for mentorship-Texas Trial Lawyers Association 2011, Scott Ozmun Trial Lawyer of the Year-Capital Area Trial Lawyers Association 2012

SEMINARS AND PUBLICATIONS

Texas Auto Policies, University of Texas School of Law, Car Wreck Seminar-June, 2007, August, 2008, & August, 2009

Interpreting Auto Policies, Texas Trial Lawyers Association, Car Wreck Seminar-November, 2007

Recent Developments in Insurance Law, Capital Area Trial Lawyers Association Luncheon- March, 2008

Pleading Damages Within Insurance Coverage, State Bar of Texas, Strategies for Damages and Attorney's Fees Seminar- February, 2010; Damages in Civil Litigation-February, 2011 & February, 2012

Summary of UM Benefits and Actions, Texas Trial Lawyers Association, Car Wrecks Seminar, June, 2010

Auto Insurance Coverage and Summary of UM Benefits and Actions, University of Texas School of Law, The Car Crash Seminar- August 2010, August 2012

Texas Auto Policies, Texas Trial Lawyers Association, Car Wrecks Seminar- September, 2010

Helping Clients with their Expectations, University of Texas School of Law, 2011 Car Crash Seminar-August, 2011

Texas Auto Coverage in a Nutshell, 11:2 J. Tex. Ins. L. 20 (Summer 2011)

Stowers-A Modest Proposal, 11:3 J. Tex. Ins. L. 8 (Winter 2011)

Deposing the Insurance Adjuster, State Bar of Texas, Advanced Insurance Law Course, April 2012; and University of Texas School of Law, 2012 Insurance Law Conference- October, 2012

Auto Coverage for the Paralegal, Texas Trial Lawyers Assn., TTLA Annual Conference, June 2012

Uninsured Motorist Coverage, Texas Trial Lawyers Association, Road Rules Dallas: A Crash Course-October, 2012

Damages Under the Insurance Code, State Bar of Texas, Damages In Civil Litigation, March, 2013

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TOO LITTLE MONEY, TOO MANY CLAIMS: ETHICAL ISSUES WITH MULTIPLE CLAIMANTS

Here's the scenario. A drunk driver with minimum limits runs into the back of a car hurting several people all of whom are close friends. One of them tells the others, "I know a great lawyer." They all end up in your office. After talking to them, looking at the police report and staring into your crystal ball you strongly suspect that there will not be enough money to go around. What are your options?ⁱ

Option 1.

Take the safe route. Represent your old client (the one who knew a great lawyer) and send the others to seek other counsel. Do this over the phone if you can, before any confidential information is given you by the other occupants. Under this option you have a free reign to do what we do best. Zealously represent your client with only the narrowest concern for the other folks. Gather your evidence of damages quickly and get to the front of the line.ⁱⁱ

Option 2.

Your client insists that all of the other folks are good friends, they want everyone treated fairly and they want you to be *the lawyer*, not one of many. Tread carefully here. It can be done and in fact there are advantages to a united front, but there are mines buried in this field. First, explain the conflicts, actual and potential in detail. Since there will be limited funds to pay, these folks may be competing for the same dollars. An agreement between them in advance of settlement might be advisable.

Here's another common scenario. A mother and daughter are in a bad wreck. Both are injured significantly. There is not enough liability insurance to cover the full damages for both folks. Naturally, the mom will be making decisions both for herself and for her minor daughter. Likely, daughter's settlement will be structured. Where does the money go? Does mom get the bulk of it so the family has immediate

access to the funds? Does most of it go to the daughter's structured funds so there are college funds available when she turns 18?ⁱⁱⁱ

Option 1.

Make the best distribution you can, considering the circumstances of the family. Perhaps give most of the money to Mom. If she is a good parent, she will be looking after her daughter first and foremost anyway. Mom can pay the daughter's medical expenses out of her funds, and see to her daughter's immediate needs as well. Or if the family is well off, structuring the funds for the child may be preferable. Even in this situation, the conflict needs to be examined, explained, and ideally waived. Finally, of course, you will need to convince the ad litem and the court that this is the best outcome.

Option 2.

Send the family to another attorney for the daughter. Frankly, most families will balk at this idea. Not many parents see themselves in competition with their children, and in most families this is not the dynamic. In some cases it may be necessary, but for most, Option 1 will be the choice.

Let's look at one more less common, but with this crowd entirely possible, scenario. You have successfully obtained an excess judgment against an insured defendant. The insured defendant pays the excess portion of the judgment and then, seeing the great job you did at trial, hires you to go after his insurance company. Can you take the case? Like the preceding scenarios, there is a State Bar ethics opinion on this one.^{iv} And, like the other scenarios, there is no one correct answer. If you are a potential witness, then the disqualification is almost automatic.^v

These basic scenarios come in a lot of varieties. As plaintiff's counsel we are often asked to help people as a group whose individuals have potential

conflicts between them. Our Texas Disciplinary Rules of Professional Conduct give some guidance and create some confusion. First, there is tension between the duty of confidentiality and the duty of disclosure when we represent a group^{vi}. Second, there is often a conflict as to the best outcome of the case. What may work well for one, may work against another. In the insurance context, limited funds will always create a win/lose situation. Every dollar paid comes off the “per occurrence” limit.

What Creates the Conflict?

There is a pretty clear definition of conflict that exists when a client’s “interests are materially and directly adverse to the interest of another client” or the “lawyer’s ...own interest.”^{vii} This definition is reinforced by the first comment to R. 1.06, “Loyalty is an essential element in the lawyer’s relationship to a client.” In the insurance context there are a myriad of ways two or more client’s interest may be “adverse.” We have discussed the most obvious – money, but there are others. With a separation of insured’s clause, there may be a policy defense against one that will not apply to another.^{viii} While this may not truly put the two in conflict it would be difficult to explain why you can help one guy and not the next.

The two sections of the Texas Disciplinary Rules of Professional Conduct that come in to play most prominently in these cases are R. 1.06 and R. 1.07. R. 1.06 deals with conflicts of interest in general. R. 1.07 deals with the attorney’s role as an “intermediary.” Here’s the difference between the two rules. If we have only our clients’ varied interest to deal with then only R. 1.06 applies. If, however, we have to deal with potential disputes between our clients, R. 1.07 comes in to play as well. It is hard to imagine a case where multiple clients are competing for limit insurance benefits where the attorney will not have to address their clients’ competition with each other – even if that competition is friendly. (If it’s not friendly, we’d better bail.).

Factors to Consider

Our own professional judgment is the threshold question. We must “reasonably believe” that we can effectively represent each client. Can we see ourselves effectively representing everyone?^{ix} For instance, if one of the group is a driver and there is a

potential negligence claim against that driver, the conflict is likely insurmountable. Even if his friends do not want to sue him, the other side will likely bring him as a responsible third party.^x Then do we take the chance the jury will decide the wreck was his fault? Shouldn’t his own carrier be involved at that point?

How well do these folks know each other, and how smooth is their relationship? Our crystal balls will likely fail us from time to time, but this is still a factor to consider at the beginning of the case. We may not find this information out until things have progressed a long ways into the case. All of us who have been in the practice for a while have stories of even spouses falling out of favor with each other before their cases conclude.

Finally, we should consider the disparities of the various claims. If one person is substantially more harmed than the others, balancing the claims may be more difficult. Conversely, if there are other sources of compensation available for one that may make things easier. For example, if one person has health insurance, PIP or UIM coverage, we may be able to make that work to everyone’s advantage.

Confidentiality vs. Keeping Client Informed

Holding our client’s information confidential is ingrained into our souls. Lawyers have risked jail to protect this privilege.^{xi} What happens to that privilege when we represent several folks in the same lawsuit? The short answer is that the privilege gets diluted. The reason for this dilution is the competing obligation to keep clients informed.^{xii} If we represent several clients in the same claim, one rule will from time to time have to give way to the other. As an example, once the medical records are collected and we make our analysis of each client’s injury claim, we start to think about a fair allocation of the proceeds. How can we share this analysis with our multiple clients without letting them know something of the other client’s injuries?

Disclosure

In our disciplinary rules, disclosure covers a multitude of sins. If the folks in our office are fully informed, they can do what they want. In fact, within

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