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Routine Ethical Issues for the Car Crash Trial Lawyer

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I. Introduction

The preamble to the Texas Disciplinary Rules of Professional Conduct reminds us that

> [a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

Tex. Disciplinary Rules of Professional Conduct, Art. X §9. Para 1. Regarding the scope of the Texas Disciplinary Rules, the preamble suggests that

> [t] he Texas Disciplinary Rules of Professional Conduct are rules of reason. [They]…define proper conduct for purposes of professional discipline. They are imperatives, cast in the terms shall or shall not. The Comments are cast often in the terms of may or should and are permissive, defining areas in which the lawyer has professional discretion.

Id. at Para 10.

No doubt lawyers practicing in specialized areas become familiar with certain ethical issues, both imperatives and discretionary, that arise in the day-to-day practice in that area. While this paper will not address all of the typical issues that confront the personal injury trial lawyer handling car wreck cases, it will address a few of the most common ethical issues in the area.

II. Resolving Conflicts of Interest – Driver and Passenger Representation

This portion of the paper follows Opinion No. 500, August 1994, of the Professional Ethics Committee appointed by the Supreme Court of Texas. Opinions of the Committee are available through the Texas Center for Legal Ethics, an independent, non-profit corporation promoting the values contained in the Texas Lawyers' Creed of Professionalism. According to its website, the Center "endeavors to be a storehouse of knowledge and resources for ethics and professionalism…"

Consider this familiar scenario: A driver and her passenger, both injured in a car wreck, contact you about representation. While experience teaches that you will need more information about the wreck, the relationship between the driver and passenger, and the potential defendant before making a decision about representation, the natural inclination is for the plaintiff's lawyer to take both cases under the notion that if one case is good then two must be better.

In part, Texas Disciplinary Rule 1.06 (the general rule regarding conflicts of interest) provides that

> (a) A lawyer shall not represent opposing parties to the same litigation.
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> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which the person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interest.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosures of the existence, nature implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Id., Rule 1.06

On its face, without any additional facts about the case, Rule 1.06 does not seem to preclude representation of both the driver and the passenger as they do not appear to be adverse to each other directly. However, additional facts may suggest that the potential for adversity between the driver and passenger may exist. For instance, the driver's fault my have contributed to cause the wreck. If the driver and passenger are related or of the opinion that they wish to proceed with the same lawyer even in light of the potential conflict, the lawyer can go forward with representation so long as he complies with Rule 1.06(c) in that he does not reasonably believe the representation of the driver or the passenger would be materially affected and he discloses to them the potential conflict before obtaining their informed consent to the representation.

Of course, there are instances that arise in which a potential conflict grows into an actual conflict. Comments to Rule 1.06 provide that

> [a] n impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

Id., Rule 1.06 Cmt 3. If an impermissible conflict arises, the rule requires that "the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation…" *Id*., Rule 1.06 (e).

Thus, the first question the lawyer should ask herself in deciding whether to accept representation of both the driver and the passenger is whether there is fault on the driver. As a practical matter, if the passenger alone came into your office and you would advise her that she should make a claim against her driver, then representation of both the driver and the passenger

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