

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 91-3**

**Propriety of Representing Both Parents
and Child When Interests Differ**

The Committee has been asked to consider whether a conflict of interest exists when a law firm represents both parents and child as plaintiffs in personal injury litigation arising from injuries to the child, and the parents are later sued as third-party defendants. The specific issue we are asked to address is whether the law firm may continue to represent both the parents and the child when the third-party complaint alleges that the parents are comparatively responsible for the child's injuries. The Committee has concluded that, because a conflict or potential for conflict exists, the law firm should seek the appointment of separate counsel to evaluate the child's interests. Appointed counsel should then present to the court the child's independent position on whether a true conflict exists and, if so, obtain independent counsel for child in ongoing litigation.

"Differing interests" is defined in the Code of Professional Responsibility to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." In the case presented, the interests of the parents and child may differ because it may be in the parents' interest to minimize their own liability, yet may be in the child's interest to maximize it. An attorney attempting to represent both their respective interests potentially faces divided loyalties, in contravention of his duty to exercise independent professional judgment on behalf of each client. Professional Canon 5.

Courts have consistently recognized that a parent and child may not share the same interests in litigation involving the child. See, e.g., White v. Osborne, 110 S.E.2d 449 (N.C. 1959); United States v. E.I. Du Pont De Nemours & Co., 13 F.R.D. 98 (N.D. Ill. 1952). In White, a father who had sued for his son's injuries waived the son's right to recover separately from the defendant and obtained a judgment that gave him priority over the son in recovering the damages award. On appeal, the court reversed the judgment because the son's interests had not been separately represented and the pecuniary interests of the father and son were in "sharp and irreconcilable conflict." White, supra, at 452. Similarly, in Du Pont, the court required separate representation of minor defendants in a complex anti-trust case in which their relatives were named as co-defendants. The court stated:

The Court has no doubt that these defendants are estimable persons and, as relatives, would to the extent possible under the circumstances present the defense of the minors and protect their interests. Because of the nature and scope of this litigation, the court is concerned that conflict in interests will develop and that adequate defense and the best interests of the minor defendants require that they have independent representation.

Du Pont, *supra*, at 105.

Differing interests would not automatically preclude the law firm from representing both parents and child. For example, a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment. DR 5-105(C). In those instances when a lawyer is justified in representing two or more clients who may have 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. EC 5-16.

When minor children are involved, problems arise in implementing the above protections. Minors do not have the same legal capacity as adults. Accordingly, they cannot be expected to adequately evaluate the full disclosure that is made by the attorney. In addition, minor children do not have the legal capacity to knowingly consent. They may also feel undue pressures from their parents or the parents' attorney.

Recognizing the potential for child-parent conflict, Alaska statutes have provided for the appointment of attorneys for minors in legal proceedings involving a minor's welfare. AS 25.24.310(a); AS 47.10.050(a). When the court determines that representation of a minor's best interests, "as distinguished from his preferences," would promote a minor's welfare, a guardian ad litem may also be appointed. AS 25.24.310(c); AS 47.10.050(a). The Alaska Supreme Court has recognized that a guardian ad litem "is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability." Veazey v. Veazey, 487 P.2d 27, 387 (Alaska 1977). Whether the court appoints an attorney or a guardian ad litem, it is clear that minors are entitled to an independent voice in legal proceedings.

Based on the above provisions, the Committee is of the opinion that the circumstances presented warrant appointment of an attorney to evaluate the minor child's interests. The law firm should ensure that the minor is afforded independent counsel as soon as it becomes apparent that the parents' and the minor's interests differ and that its loyalties to the minor might be compromised by its loyalties to the parents. The law firm should immediately move for appointment of counsel for the minor, but should not endeavor to select the attorney for the minor under the circumstances. See, e.g., Wagstaff v. Superior Court, Family Court Division, 535 P.2d 1220 (Alaska 1975).

The appointed attorney must discuss the matter independently with the minor, evaluate whether a true conflict exists, present to the court

recommendations on the minor's behalf about whether separate counsel for the minor is necessary, and, if appropriate, obtain separate counsel for the minor. The committee wishes to stress that, to warrant ongoing separate counsel, the conflict of interest between the parents and child must be a real conflict of interest that would be contrary to the welfare of the child. Because there is no basis to distinguish adult and minor clients with regard to a lawyer's duty of zealous representation, any attorney appointed for the minor must assert the minor's interest and objectives even if these conflict with those of minor's parents.

This case raises the final question of whether the law firm can continue to represent the parents, given its past representation of both the parents and child. Whether the law firm must withdraw from representing the parents will depend on the extent to which it can continue its representation without running afoul of its duty to preserve the confidences and secrets of the child pursuant to Professional Canon 4. The law firm should fully disclose to the minor's attorney of any potentially privileged information or confidential communications made during the course of its representation of the child to permit the minor to assert an informed position on whether a complete withdrawal should occur.

Counsel with this potential problem may need to consider taking this action prior to the filing of the lawsuit.

Approved by the Alaska Bar Association Ethics Committee on April 4, 1991.

Adopted by the Board of Governors on June 5, 1991.

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