

## OPINION 511

January 1995

### Question Presented

May a law firm represent two children in a civil action concerning an auto accident in which the children's mother was killed and the children's father was involved and is a possible defendant if: (1) the law firm represents the father with respect to the mother's estate and had previously represented the father with respect to criminal charges arising from the auto accident, and (2) the father, but not the children's guardian, has waived any conflict of interest with respect to the law firm's representation of the children?

The wife sued her husband for divorce, seeking custody of their two children. The husband was represented in the divorce by the M & M Law Firm. While the divorce was pending, the wife was killed in an auto accident. The husband was driving his wife's car and she was his passenger when they ran into a truck. The husband alleges that the truck driver violated the law. The husband survived the accident, was found to be intoxicated, and was charged with DWI and manslaughter.

The M & M Law Firm represents the husband against the criminal charges and he is not billed by the grand jury as to the manslaughter charge. M & M files pleadings for the husband in the probate court to make the husband administrator of his wife's estate.

The wife's mother files pleadings in probate court contesting the husband's right to be administrator, citing conflict of interest. The wife's mother, individually and as next friend of the wife's two children, files a lawsuit in district court against the trucking company and against the husband. An answer is filed for the husband by another law firm hired by the husband's insurance company.

The probate court appoints a neutral third party to be guardian of the estates of the two children. The guardian seeks court permission to sign a contingent fee contract with the BBB Law Firm to represent the two children with the intention to sue the trucking company and the husband. The M & M Law Firm files its own motion to represent the children, citing an earlier contract signed by their father. M & M withdraws as the husband's attorney regarding any civil claim arising from the auto accident. M & M continues to represent the husband regarding the estate and the guardianship of the persons of the children. The husband announces that he waives any conflict of interest regarding his children's claims and his representation by M & M.

If M & M represents the two children, it will have to sue the husband, its current client, or decide not to sue the husband and proceed only against the trucking company.

M & M contends that the husband's intoxication was not a cause of the wreck and points out that the husband has minimal insurance coverage and the trucking company has more than adequate insurance coverage. The neutral guardian appointed to manage the estates of the children believes the husband should be named as a defendant. M & M states it will sue the husband if necessary.

### Discussion

This situation must be evaluated according to [DR 1.06](#) which prohibits the representation of opposing parties in the same litigation or a substantially related matter if the interests involved are materially and directly adverse. An exception to this rule is made if the lawyer reasonably believes that the dual representation will not materially affect any interest, and the lawyer obtains the informed consent of the

represented parties.

Initially, section (a) of DR 1.06 must be analyzed. Taking a very narrow view of the phrase "the same litigation," the children and the husband are not opposing parties to the same litigation. If M & M represents the children in the civil action for the death of their mother, M & M would not be representing opposing parties in that particular litigation, because it has withdrawn as the husband's lawyer in such civil action.

The civil action is substantially related to the probate matter. In the probate matter, the issue of the husband's fault in his wife's death might be raised by an insurance company who was asked to pay him proceeds of any insurance policies. M & M was representing the husband in a divorce against his wife at the time of her death. Even if the husband is not sued, his children's relationship with their deceased mother will play an important role in determining the amount of their recovery with a potentially conflicting version of the similar issues in the divorce. M & M represented the husband regarding criminal charges arising from the accident and has received information from the husband in the confidential context of the attorney-client relationship.

Are the children's interests "materially and directly adverse to the interests" of their father? Interests are said to be "directly adverse" if the lawyer's independent judgment would be affected by such dual representation or if the lawyer would have to take adverse positions on behalf of each client. (See [Rule 1.06](#). *Comment 6*.)

M & M's decision whether or not to sue the husband, who was driving while intoxicated, could be affected by its former representation of him and by its current representation of him. Even if M & M does not sue the husband, the trucking company's attorney could point out to the jury that M & M "used to be the husband's lawyers and conveniently decided not to sue him." M & M has taken the position with the district attorney and the grand jury that the husband's intoxication did not cause the wife's death. In a civil suit against the husband, M & M would be forced to reverse its position and argue that the husband's negligence did cause his wife's death. There is also a strong possibility that the trucking company, upon being served as a defendant, would promptly name the husband as a necessary party.

Could the representation of the children be adversely limited by M & M Law Firm's responsibilities to the husband? (See [Rule 1.06](#). *Comment 4*.) The guardian of the children's estates believes M & M's legal actions will be affected by its representation of the husband. Considering the stated facts, it would seem that such representation in this situation would be adversely limited.

Since it has been established that the actions could be considered substantially related, directly adverse and the representation of the husband could adversely limit representation of the children, the main issue in this factual situation becomes the requirements of DR 1.06(c). That is, M & M must believe the representation of each client will not be materially affected, and all clients must consent to the representation after full disclosure of the consequences of the common representation and the advantages involved.

M & M asserts its representation of the husband will not affect its representation of the children. However, the interests of the children and husband are so intertwined and so adverse, that a disinterested attorney would probably not advise consenting to this dual representation. (See [Rule 1.06](#). *Comment 7*.) This can be assumed in part from the fact that at least one disinterested third party familiar with the facts of the case (the guardian appointed by the court to look after the interests of the children) refuses to consent to waive such conflict.

If it could be shown that M & M Law Firm as well as a disinterested lawyer would reasonably believe that the representation of each client would not be materially affected, then consent becomes the issue. In a similar opinion, the committee found it would be unethical for an attorney to represent both the legal guardian of a minor's estate and the minor's father in a damage suit for personal injuries suffered by the minor and for the father's loss of the minor's services without the consent of both the guardian and father. ([Opinion 314](#), *Baylor Law Review*, 827-898 (1972).) Under DR 1.06, whether or not M & M Law Firm may represent the children depends upon whether there is consent from all parties. The husband has consented to M & M's representation of the children, but the children, being minors, cannot give consent and their guardian refuses to give consent.

## **Conclusion**

In this fact situation, the actions could be considered substantially related, directly adverse, and the representation of the husband could adversely limit representation of the children, therefore there is indeed a conflict of interest. In this situation such conflict cannot be waived for two reasons: (1) a disinterested lawyer would not even ask for consent, and (2) the guardian of the children, a neutral party, refuses to give consent. Representation under these circumstances would constitute a violation of the Texas Disciplinary Rules.