

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 96-2

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Withdrawn by Adv.Op. 2023-05

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: When a minor and the minor's parents are unrepresented by counsel during negotiation and settlement of the minor's injury claim, the attorney retained by the tort-feasor's insurer may prepare the application for guardianship appointment and the application for approval of settlement of the minor's claim and may appear before the court for final approval of the settlement, provided that: the attorney informs the minor and the minor's parents that the attorney is retained by the insurer and does not represent the minor; the attorney informs the minor and the minor's parents that the attorney prepared the documents and that they may secure counsel to review the documents; and the attorney makes these disclosures to the court. Throughout these interactions the attorney must not give legal advice to the unrepresented minor and the minor's parents.

OPINION: This opinion responds to a question regarding a lawyer's interactions with an opposing party unrepresented by counsel.

When a minor and the minor's parents are unrepresented by counsel during negotiation and settlement of the minor's injury claim, is it proper for the attorney retained by the tort-feasor's insurer to prepare the application for guardianship appointment and the application for approval of settlement of a minor's claim and to appear before the court for final approval of the settlement?

When an opposing party chooses self-representation, it can create a trap for unwary counsel. The unrepresented party may look to the attorney for advice. The unrepresented party may believe that the attorney is an advocate for both parties. The unrepresented party may need to sign documents. Attorneys must exercise an abundance of caution with opposing parties who are unrepresented by counsel. Attorneys must guard against inadvertently becoming de facto counsel for unrepresented parties.

Under DR 7-104(A)(2) of the Ohio Code of Professional Responsibility, a lawyer may not give legal advice to an unrepresented person whose interests may conflict with the

interests of the attorney's clients. There is one narrow exception. The attorney is permitted to give advice to an unrepresented person to secure counsel.

DR 7-104(A) During the course of his [her] representation of a client a lawyer shall not: (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his [her] client.

Ethical Consideration 7-18 mirrors the rule by stating that “[i]f one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself [herself], except that he [she] may advise him [her] to obtain a lawyer.”

Obviously, there will be interaction between a lawyer and an unrepresented person. To move a matter forward, a lawyer must be able to discuss the subject matter of representation with the unrepresented person. But, the lawyer must do so without giving legal advice and without creating a false impression that he or she represents the unrepresented person's interests.

False impressions may be avoided by the attorney disclosing to the unrepresented party the identity of the client the attorney represents and by stating that the attorney does not represent the minor or the minor's parents. It may be more difficult for the attorney to avoid inadvertently giving legal advice to the unrepresented party. What constitutes legal advice? Is the preparation of documents the giving of legal advice?

Does an attorney give legal advice to an unrepresented party by preparing the application for guardianship appointment and the application for approval of settlement of a minor's claim which will be submitted to the court for approval? In Ohio, these are necessary documents that must be completed and submitted to the probate court for its advice, approval, and consent when a minor is injured and the settlement exceeds a certain amount. See Ohio Rev. Code Ann. § 2111.18 (Baldwin 1994).

The question has been raised in other states. An ethics committee of the Kentucky Bar Association in Opinion E-306 (1985) advised that a lawyer for an insurance company who negotiated a settlement with the parents of a minor for an injury caused by a third-

party insured may petition the court for the appointment of a guardian and approval of settlement and appear in court with the minor's parents, provided that: the lawyer discloses to the minor's parents and guardian that he represents the insurance company and does not represent to them that the settlement is fair; the court is apprised of the lawyer's relationship to the insurance company and the minor; all information is submitted to the court; the lawyer does not represent to the court that the settlement is fair and proper; the court ensures that the parents are properly advised and reserves the right to require the insurance company's lawyer to withdraw and to substitute entirely independent counsel. See Kentucky Bar Ass'n, Op E-306 (1985).

An ethics committee of the State Bar of South Dakota in Opinion 93-1 advised that a lawyer for an insurance company who negotiated a settlement for a policyholder with the unrepresented parents of an injured minor may not represent both the insurer and the claimant in the guardian ad litem appointment and settlement hearing. However, that advice applies to in-house counsel according to a supplement to Opinion 93-1 wherein the committee advises that an insurance company may hire an outside lawyer to represent the claimant in a guardian ad litem appointment and settlement approval. See State Bar of South Dakota, Op. 93-1(1993) and Op.93-1(Supplement) (undated).

In this Board's view, when there is a settlement involving an unrepresented minor, the preparation of the documents for the court to appoint a guardian and to approve the guardian's settlement of a minor's claim does not constitute the giving of legal advice to an unrepresented party. The documents facilitate settlement and are required by law. The documents record the agreement arrived at from the settlement negotiations. The documents are prepared at the request of the attorney's client and are not undertaken as a representation of the minor.

Obviously, an attorney for the tortfeasor's insurer can not represent the injured minor in the matter. Such representation would create a conflict of interest. To avoid creating this impression, the attorney must clearly inform the minor and the minor's parents that he or she is retained by the tortfeasor's insurer and does not represent the minor or the minor's parents, that the documents have been prepared at the insurer's request, and that they may secure counsel to review the documents. This disclosure should also be made to the court.

In conclusion, this Board advises that when a minor and the minor's parents are unrepresented by counsel during negotiation and settlement of the minor's injury claim, the attorney retained by the tort-feasor's insurer may prepare the application for guardianship appointment and the application for approval of settlement of the minor's claim and may appear before the court for final approval of the settlement, provided that: the attorney informs the minor and the minor's parents that the attorney is retained by the insurer and does not represent the minor; the attorney informs the minor and the minor's parents that the attorney prepared the documents and that they may secure counsel to review the documents; and the attorney makes these disclosures to the court. Throughout these interactions the attorney must not give legal advice to the unrepresented minor and the minor's parents.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.