

# The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE

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## OPINION 2014-3

Issued August 8, 2014

### Confession of Judgment Pursuant to Warrant of Attorney in a Cognovit Note

#### SYLLABUS:

It is proper under the Ohio Rules of Professional Conduct for an attorney to sign an answer confessing judgment against a debtor pursuant to a warrant of attorney in a cognovit note when requested to do so by a creditor's attorney, provided that the confession of judgment does not violate applicable law. Advisory Opinion 93-3 is superseded and withdrawn.

#### QUESTION PRESENTED:

Is Advisory Opinion 93-3 valid following the change from the Ohio Code of Professional Responsibility to the Ohio Rules of Professional Conduct, or does a conflict of interest arise under Prof.Cond.R. 1.7(c) when a lawyer executes a confession of judgment for a cognovit note?

#### APPLICABLE RULE:

Rule 1.7 of the Ohio Rules of Professional Conduct

#### OPINION:

A lawyer seeks the Board's guidance on whether a conflict of interest arises when a lawyer executes a confession of judgment for a cognovit note under Prof.Cond.R. 1.7(c). Advisory Opinion 93-3 holds that it is proper under the former Ohio Code of Professional Responsibility for an attorney to sign an answer confessing judgment against a debtor pursuant to a warrant of attorney in a cognovit note. Advisory

Opinion 93-3 further states that it is improper under the former Code of Professional Responsibility for a creditor's attorney to confess judgment pursuant to warrant of attorney in a cognovit note, unless the warrant of attorney contains an express waiver of conflict of interest or specifies that the creditor's attorney may confess judgment.

The Board reaffirms the advice contained in Advisory Opinion 93-3, but acknowledges that the opinion must be updated to reflect the current Rules of Professional Conduct and the recent case law.

As background, Ohio Revised Code Section 2323.13 authorizes an attorney to confess judgment against a debtor, if the attorney has a valid warrant to do so. By signing the cognovit note that contains a warrant of attorney to confess judgment, a debtor consents in advance to a creditor obtaining a judgment against the debtor without notice or hearing. R.C. 2323.13(A)-(D).

Under R.C. 2323.13, an attorney who confesses judgment is required to produce the warrant of attorney at the time of judgment for the court in order to make the confession. R.C. 2323.13(A). Without the warrant of attorney, courts lack authority to render judgment on the note. R.C. 2323.13(D). The warrant must include a warning as to the rights being relinquished:

Warning – By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his party to comply with the agreement, or any other cause. R.C. 2323.13(D).

The United States Supreme Court has determined that Ohio's cognovit note statute is constitutional. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). In *Overmyer*, the Supreme Court held that the debtor, in the execution and delivery to the creditor of the cognovit note, "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to pre-judgment notice and hearing, and that it did so with full awareness of the legal consequences." *Id.* at 187. Ohio courts continue to recognize the validity of cognovit notes in commercial transactions when executed in accordance with the statute. See, *First Nat'l Bank of*

*Findlay v. Trout*, 58 Ohio St. 347, 353, 51 N.E. 27 (1898); *Union Sav. Ass'n v. Home Owners Aid, Inc.*, 18 Ohio App.2d 97, 247 N.E.2d 335 (8<sup>th</sup> Dist. 1969); *DiBenedetto v. Miller*, 180 Ohio App.3d 69, 72, 2008-Ohio-6506, 904 N.E.2d 554 (1<sup>st</sup> Dist.); *Huntington Nat'l. Bank v. Burda*, 10<sup>th</sup> Dist. No. 08AP-658, 2009-Ohio-1752; *Orange City Golf Club, L.L.C. v. MCGC Gold, L.L.C.*, 2<sup>nd</sup> Dist. No. 24865, 2012-Ohio-2415; *K One Ltd. Partnership v. Kahn*, 10<sup>th</sup> Dist. No. 13AP-830, 2014-Ohio-2079.

Here, the requester is concerned that the change from the Code of Professional Responsibility to the Rules of Professional Conduct may alter the validity of Advisory Opinion 93-3. Specifically, the requester's concern is that under the current rules a conflict of interest may arise under Rule 1.7(c) that prevents an attorney from confessing judgment under a warrant of attorney contained in a cognovit note. The Board acknowledges the uniqueness of the act of confessing judgment pursuant to a warrant of attorney in a cognovit note, but does not find such an act to be a violation of the Rules of Professional Conduct.

Prof.Cond.R. 1.7 governs conflicts of interest, and provides a conflict analysis to determine whether a conflict of interest exists under the rule. However, a conflict analysis under Prof.Cond.R. 1.7 is not necessary with regard to confession of judgment under a cognovit note.

When an attorney confesses judgment against a debtor in favor of a creditor under a cognovit provision of a contract that attorney represents only the creditor, and not the debtor, as that attorney is only acting as authorized under both contract and the statute. *DiBenedetto v. Miller*, 180 Ohio App.3d 69, 72, 2008-Ohio-6506, 904 N.E.2d 554 ¶ 15 (1<sup>st</sup> Dist.). As a result, a creditor's attorney does not have an attorney-client relationship with the debtor in such a proceeding. *Id.* at ¶ 16.

In the case of a cognovit note, the confessing attorney's client is the creditor, not the debtor. Therefore, there can be no conflict of interest under Prof.Cond.R. 1.7(c) because an attorney-client relationship does not exist between the confessing attorney and the debtor. Further, an attorney is specifically authorized by law under R.C. 2323.13 to confess judgment pursuant to a warrant of attorney in a cognovit note, provided the warrant of attorney contains a provision that the creditor's attorney may confess judgment or contains an express waiver of conflict of interest, and otherwise complies with the law.

Therefore, the Board reaffirms that it is proper under the Ohio Rules of Professional Conduct and the current case law for an attorney to sign an answer confessing judgment against a debtor pursuant to a warrant of attorney in a cognovit note when requested to do so by a creditor, provided that the confession of judgment complies with applicable law.

Upon issuance of this opinion, the Board withdraws Advisory Opinion 93-3.

**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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.**