



Ohio Board of Professional Conduct

OPINION 2023-09

Issued October 6, 2023

Withdraws Adv. Op. 1996-02

Opposing Counsel's Preparation of Application to Settle a Minor's Claim

SYLLABUS: A lawyer representing a tortfeasor may prepare the application to settle a minor's claim in probate court when the plaintiff minor and the minor's parents/guardians are unrepresented by counsel. The lawyer should inform the minor and the minor's parents in writing that the lawyer is retained by the tortfeasor¹, that the lawyer does not represent the minor or parents/guardians, that the lawyer prepared the requisite court forms, and that the minor and parent/guardian have the right to secure their own independent counsel. The lawyer must make the same disclosures when appearing before the probate court. A lawyer representing a tortfeasor may not give legal advice to an unrepresented plaintiff minor or the minor's parents.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.bpc.ohio.gov

HON. D. CHRIS COOK

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RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

KRISTI R. McANAU

COUNSEL

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APPLICABLE RULES: Prof.Cond.R. 1.7, 4.3

QUESTION PRESENTED: When a minor and the minor's parents/guardians are unrepresented by counsel during negotiation and settlement of the minor's personal injury claim, may the lawyer retained by the tortfeasor prepare the application to settle a minor's claim and appear before the probate court for final approval of the settlement?

ANALYSIS: When a personal injury claim involving a minor is settled, the guardian of the estate of the ward is permitted to settle all claims with the advice, approval, and

¹ References throughout the opinion to "tortfeasor's lawyer" also encompass situations where a lawyer is retained by the tortfeasor's insurer.

consent of the probate court. R.C. 2111.18. The approval of the probate court requires the filing of an application to settle a minor's claim signed by the minor's parents/guardians. It is not uncommon, especially in situations where the minor and his or her parents/guardians are unrepresented in the matter, for the tortfeasor's lawyer to prepare the application. The lawyer's preparation of the necessary applications allows the minor and parents to avoid incurring legal expenses and expedites the resolution of the matter. The preparation of other court forms or filings may be required by the Rules of Superintendence or local rule, including but not limited to, an entry approving the application, waivers and consents, and a report and distribution of the minor's claim.

Dealing with Unrepresented Parties

Prof.Cond.R. 4.3 prohibits a lawyer, in dealing on behalf of a client, from giving legal advice to an unrepresented person whether or not the interests of the person are adverse to the lawyer's client. The only advice a lawyer is permitted to give to an unrepresented person is to secure counsel. Prof.Cond.R. 4.3; *Warren Cty. Bar Assn. v. Vardiman*, 146 Ohio St.3d 23, 2016-Ohio-352. Although a lawyer must be able to discuss the subject matter of the representation with an unrepresented person during the lawyer's representation of the opposing party, a lawyer should exercise caution in his or her dealings with the unrepresented party to avoid any misunderstanding about the lawyer's role in the matter. In some circumstances an unrepresented party may look to the lawyer for advice or incorrectly believe the lawyer is representing his or her interests. The lawyer must avoid creating the impression that he or she represents the unrepresented person's interests by disclosing to an unrepresented party, at the outset of the matter, the identity of the client the lawyer represents and the inability of the lawyer to give the unrepresented party legal advice.

Preparation of Probate Forms Does Not Constitute Legal Advice

While the interests of the tortfeasor and minor are adverse in the underlying matter, the filing of the application in probate court is an uncontested filing and is a necessary step to secure probate court approval of the settlement and discharge all past and future claims against the tortfeasor. It is in the interest of both parties to the negotiated settlement that the requisite application is filed and approved by the probate court.

In the Board's view, when the parties seek probate court approval of an application for a minor settlement, the preparation of the requisite court forms by the tortfeasor's counsel does not constitute the giving of legal advice to an unrepresented party. A lawyer may prepare the probate forms for the signature of minor's parents or guardians and appear at the subsequent hearing. Prof.Cond.R. 4.3, cmt.[2] (an opposing lawyer may prepare documents that require the unrepresented person's signature.) The preparation of the application facilitates settlement and final resolution of the matter, is governed by court rule and statute, and documents the underlying agreement that was the product of settlement negotiations. The lawyer may explain to the minor and the minor's parents/guardians the purpose of the forms being filed with the probate court and the underlying process and procedure to formalize the settlement. *Id.*

No Conflict of Interest

A conflict of interest involves the representation of a client that is directly adverse to another client. Prof.Cond.R. 1.7(a)(1). "Lawyers must avoid all actual and potential conflicts of interest so as not to dilute their independent loyalty to each client." *Disciplinary Counsel v. Jacobs*, 109 Ohio St.3d 252, 2006-Ohio-2292, ¶8. Here, the preparation of the forms by the tortfeasor's counsel is typically completed at the request of the insurer in order to discharge all past and future claims against the tortfeasor. The tortfeasor's lawyer is not the minor's representative, does not sign the probate forms as the applicant's lawyer, and does not make a formal appearance in court on behalf of the minor. Thus, the legal services provided by the lawyer in preparing the application does not constitute a legal representation of the minor nor give rise to an impermissible conflict of interest. *See e.g., Vardiman* at ¶3 (preparation and filing of shared parenting plan by lawyer when opposing party is unrepresented).

In order to remove any conflict of interest or appearance thereof, the lawyer should inform the minor and the minor's parents/guardians in writing that the lawyer is retained by the tortfeasor or the tortfeasor's insurer and does not represent the minor; explain that while the lawyer prepared the forms, that the minor/guardian may secure their own independent counsel to review the filings, and make these same disclosures to the probate court during the hearing. *See Toledo Bar Assn. v. Rehkopf*, 154 Ohio St.3d 235, 2018-Ohio-3907 (parties stipulated to a violation of Prof.Cond.R. 1.7(a)(1) based on an appearance or actual conflict of interest.) Lastly, while the tortfeasor's lawyer may

represent to the probate court his or her client's view of the fairness of the terms underlying the underlying settlement, the lawyer should not speak on behalf of the minor or the minor's parents/guardians on the issue at hearing.