

2006 FORMAL ETHICS OPINION 9

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PURSUING FRIVOLOUS CLAIM AT THE DIRECTION OF GAL FOR PLAINTIFF

Adopted: July 21, 2006

Opinion rules that if the lawyer concludes that pursuit of a lawsuit filed against a defendant is frivolous, but the GAL for the minor client insists on continuing the litigation, the lawyer must either move to withdraw from the representation or seek to have the GAL removed.

Inquiry #1:

Lawyer was hired by the mother of a minor (Minor) to file a personal injury action. The mother (GAL) is the appointed guardian ad litem for Minor. Minor was a passenger in a car driven by his maternal grandmother (Grandmother) when he was severely injured as a result of a collision between a truck and Grandmother's car. Based upon the limited information that was initially available, Lawyer brought an action against the driver of the truck but not against Grandmother. Subsequent scientific investigation by Lawyer's expert has led the expert to conclude that Grandmother was negligent and the truck driver was not negligent. Grandmother has substantial assets.

Lawyer and GAL disagree about the conduct of the litigation. Based upon the expert's analysis, Lawyer believes that the action against the truck driver is not warranted by the facts and should be dismissed. He also believes that the interests of Minor can only be protected if a personal injury lawsuit is initiated against Grandmother. GAL does not want a lawsuit filed against her mother.

Does Lawyer owe a duty of confidentiality to GAL?

Opinion #1:

Yes, in her representative capacity as GAL for Minor.

Minor and GAL, in her representative capacity, are both clients of Lawyer. 2002 FEO 8 provides:

Rule 17(a) and (b) of the North Carolina Rules of Civil Procedure require an action to be brought by the "real party in interest" and, in the case of a minor, by a general guardian or, if there is none, by an appointed guardian ad litem. As a party, the guardian ad litem may choose to be represented by legal counsel and permit legal counsel to make decisions about the strategy for the litigation. See Rule of Professional Conduct 1.2, cmt. [1] ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues....").

Therefore, Lawyer's primary duty is to represent the interests of Minor, who is the real party in interest. See RPC 163.

Lawyer owes the duty of confidentiality to Minor and to GAL acting in her official capacity. See e.g., RPC 195. To the extent GAL acts outside of her official capacity as the legal representative for Minor, the information learned by Lawyer may be disclosed, even over the objections of GAL, if necessary to represent Minor.

Inquiry #2:

If GAL insists that Lawyer continue to prosecute the lawsuit against the truck driver, what should Lawyer do?

Opinion #2:

Rule 3.1 states in pertinent part,

[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law...

If, based upon his expert's analysis, Lawyer believes that Minor does not have a claim against the truck driver and the litigation against the truck driver is, therefore, frivolous, Lawyer must file a motion to withdraw. See Rule 1.16(b)(8). As an alternative to withdrawal, if Lawyer believes GAL is failing to fulfill her fiduciary duties, Lawyer may seek to have GAL removed and replaced by an independent guardian ad litem who can evaluate the action against the truck driver and the claim against Grandmother objectively and make an unbiased decision about the conduct of the litigation. See e.g., Rule 1.14(b); see also RPC 163 and 2002 FEO 8.

Inquiry #3:

What communication should Lawyer have with his clients prior to filing a motion to withdraw?

Opinion #3:

Prior to filing a motion to withdraw, Lawyer must inform GAL and Minor of the status of the case, explain the reason he is moving to withdraw, and provide appropriate legal advice. Rule 1.2 and Rule 1.4.

Inquiry #4:

What information may Lawyer disclose about the dispute with GAL in either a motion to withdraw or a motion to remove GAL?

Opinion #4:

Lawyer may only disclose confidential client information if he is allowed to do so by Rules of Professional Conduct. Rule 1.6(b)(1) permits disclosure of confidential information to comply with the Rules, the law, or a court order. (The other exceptions to the duty of confidentiality that are found in Rule 1.6 are not relevant.) Lawyer's motion to withdraw may, therefore, disclose only that Lawyer believes that his withdrawal is required by Rule 1.16(a)(1) (representation will result in violation of the Rules of Professional Conduct), Rule 1.16(b)(2) (client insists on action that is contrary to the advice and judgment of the lawyer), and/or Rule 1.16(b)(8) (client insists upon presenting a claim or defense that is not warranted under existing law). To further protect the confidences of Minor, Lawyer may ask that the court consider the motion in camera.

A motion to remove and replace GAL should, similarly, avoid the disclosure of confidential information unless the disclosure is allowed by law or court order, or disclosure is impliedly authorized to carry out the representation. Rule 1.6(a). For example, Lawyer may disclose information about GAL relative to actions that violate her fiduciary duties to Minor.

Inquiry #5:

GAL is also named in her individual capacity as a plaintiff in the lawsuit against Grandmother in order to pursue her personal claim for reimbursement of medical expenditures made on behalf of Minor. Lawyer also represents her in this capacity. Does the dual representation of GAL in her personal and official capacities alter the responses set forth above?

Opinion #5:

Yes. Lawyer may not file a motion to remove GAL while GAL is represented by Lawyer in her personal capacity because this action would be directly adverse to GAL. Rule 1.7(a). Even if Lawyer withdraws from the representation of GAL in her personal capacity only (and continues to represent Minor and GAL in her official capacity as representative for Minor), Lawyer may not file a motion to remove and replace GAL because Rule 1.9(a) prohibits a lawyer from representing a person whose interests are materially adverse to those of former client in the same or a substantially related matter. Therefore, the only course of action available to Lawyer is to move to withdraw from the representation of all of the plaintiffs if he believes that the action against the truck driver is frivolous.