

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-306
Issued: May 1985

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: If an insurance company has negotiated a settlement with the parents of a minor child for an injury caused by the third party insured, and neither the parents nor the minor child are represented by an attorney, may an attorney paid by the insurance company prepare the petition for the appointment of a guardian and approval of the settlement, and appear in Court with the parents and minor child?

Answer: Qualified yes.

References: DR 5-105; ABA Informal Opinion 918 (1966).

OPINION

After noting that this question “is a difficult one”, the ABA provided guidance on this issue in Informal Opinion 918 based on the principles of Old Canon 6, the present counterpart of which is DR 5-105. The first question addressed by the ABA Committee was:

“Is it a violation of ethics or good practice for an attorney representing an insurance company to also represent a minor who was injured by the company’s assured in a suit in equity to remove the disabilities of non-age of the minor in order that such minor may be in a position to execute a release without the necessity of a friendly suit or other procedure?”

The Committee provided the following guidelines in answer to this question, which we believe provide appropriate guidance under DR 5-105:

... subject to the following conditions:

1. That before he is given permission to act in the matter, the lawyer fully discloses to the minor’s family and guardian that the lawyer’s only client will be the insurance company and that the lawyer does not advise or represent that the settlement is a fair one,
2. That a full disclosure of the lawyer’s true relationship to the insurance company and the minor be made to the court,

3. That the lawyer submits to the courts all of the information which he or his insurance company client have concerning the claim and injuries,
4. That the lawyer does not represent or state to the court, either expressly or impliedly by merely appearing for the guardian, that in his opinion the settlement is fair and proper, and
5. That the court itself examines into the matter and makes sure the parents have been properly advised, and has and reserves the right to require the lawyer for the insurance company to withdraw and to substitute entirely independent counsel if the court desires assistance of such counsel.

We do not believe Canon 6 would be violated by the lawyer for the insurance company appearing for the minor's guardian. However, if any of the above conditions were not present, it is our opinion that Canon 6 would prohibit such representation, regardless of the consent of the minor's guardian and parents. If your procedure, with which we are not familiar, is such that the lawyer for the insurance company would be appearing only for the minor, and not for the minor's parents or guardian, it would be unethical for him to do so, since the minor would be incapable of giving the "express consent" required by canon 6 before the lawyer could represent what are clearly conflicting interests.

An additional question posed by the ABA and the analysis thereof, may also be helpful to the requestor in the present case.

"In the situation where a minor is the injured party and a settlement has been arrived at between the minor, his parents and the insurance company, and the vehicle of a friendly suit is instituted in order to accomplish court approval and an additional counsel is retained to represent the minor in such suit, what are the duties of such counsel;

- (a) is this attorney independent and obligated to represent the minor to the full extent of his abilities, experience and knowledge, or
- (b) is his single purpose to accomplish approval of the settlement, good or bad, regardless of his professional opinion of its sufficiency from the standpoint of the minor?"

Our answer is that clearly the lawyer must be independent and must represent the minor to the best of his abilities, regardless of whether he is selected by the insurance company or its counsel or by whom he is to be compensated for his services.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.