

L.E.I. 2004-01
SUMMARY PROCEEDINGS

This opinion responds to an inquiry from Judge Richard Facemire as follows:

I have noted a substantial increase in the preparation and filing of summary petitions on behalf of parents and guardians of minors injured in automobile accidents or personal injury incidents where the petition and pleadings are prepared by the defendant's insurance attorney. These occur where the petitioner, who is the guardian or parent of the injured infant, is not represented by legal counsel and the defendant's attorney retained by an insurance company, prepares the petition and pleadings for the summary proceedings on behalf of the plaintiff/petitioner. I am aware that it is an ethical violation for an attorney representing a plaintiff in a domestic relations matter to prepare an answer for an unrepresented defendant/spouse. As such I had questions as to whether a defendant's attorney, retained by the insurance company, could prepare the petition or pleadings on behalf of the plaintiff/petitioner. Would it be your opinion that it would be a violation of the ethics code for a defendant's attorney to prepare a petition for the plaintiff/petitioner in a summary proceeding? Would it be an ethical violation for the defendant's insurance company to pay the cost of the plaintiff's/petitioner's legal fees so long as the defendant's attorney did not select the attorney to represent the plaintiff?

Subsequent to Judge Facemire's inquiry, WV Code §44-10-14, which governs the procedure for settling claims of minors where an action has not been instituted, was substantially amended on February 20, 2002, which changes became effective on May 20, 2002. The amended statute does not address under what circumstances an attorney employed by an insurance company can prepare the petition required by §44-10-14, and merely states *inter alia*, "the parent, next friend or guardian of the minor shall file a verified petition in the Circuit Court of the County in which the minor resides or in which an action for damages may be filed. . ." WV Code §44-10-14 also provides that the Court shall appoint a guardian

ad litem to protect the minor's interests and to answer the petition on behalf of the minor child.

Attorneys hired by a tortfeasor's insurance carrier preparing petitions for minors' guardians to sign—like all attorneys—are plainly required to ensure their actions do not violate Rule 1.7 of the *West Virginia Rules of Professional Conduct*, which provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consent after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When the representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Lawyer Disciplinary Board has not been able to reach a consensus on whether or not a lawyer retained by an insurance company to prepare the petition required by WV Code §44-10-14 to initiate the summary proceeding, which is then signed by the minor's representative, has an inherent conflict under Rule 1.7. Some members have concluded that the lawyer is inherently placed in a position where his/her interactions will run afoul of the dictates of Rule 1.7. His representation, on behalf of the insurance company, requires him

to speak and interact with individuals whose interests are different from those of his client and who are not represented by counsel.¹

While some suggest that the appointment of a guardian *ad litem* by the court alleviates any concern about Rule 1.7, others have concluded that this argument misses the point. In the view of this latter group, while the guardian *ad litem* may provide an independent evaluation of the reasonableness of the proposed settlement,² this does not change the fact that the insurance company attorney is in an inherent conflict when meeting and speaking with the unrepresented parents or guardians of the minor and preparing a petition for them in a case where their interests are adverse to those of the attorney's insurance company client.

If, indeed, Rule 1.7 is triggered, it might theoretically be possible for the insurance company attorney to comply with Rule 1.7 by obtaining waivers from the parent or guardian of the minor. However, such an approach seems fraught with problems and the potential for misunderstanding. Many lay persons are unsophisticated in the roles played by attorneys in

¹ In response to the request for comments on this issue, some attorneys suggested that the interest of the attorney for the insurance company is not adverse to the interest of the minor and the minor's parent or guardian because all parties have the same interest in consummating the settlement. Certainly, all parties have a common interest in getting court approval of a fair and reasonable settlement. The Board, however, feels that the parties remain in an adversarial relationship as to what amount constitutes a fair and reasonable settlement. Presumably, the minor and the minor's parent or guardian should want to maximize the settlement figure and the insurance company to minimize it. If the attorney retained by the insurance company concludes that the settlement is not fair and reasonable to the minor, that attorney would be ethically able to bring his or her concerns to the insurance company, but not to the minor and the minor's parent or guardian. The difference of opinion on the Board is not over whether the insurance company and its retained attorney, on the one hand, and the minor and the minor's parent or guardian, on the other, have differing interests. Rather, it is whether or not the interests of the minor and the minor's parent or guardian are adequately protected by proper disclosures, the participation of the guardian *ad litem* and the requisite court approval of the settlement.

² This, of course, presumes that the guardian *ad litem* exercises independent judgment and does not view his or her duty as simply to "rubber stamp" the decision of the settling parties.

these proceedings and are unlikely to appreciate the fact that the person preparing the documents on their behalf has no duty to advise them regarding the fairness or unfairness of the settlement. Moreover, the lay person may not understand that their statements to the attorney who is helping them prepare the petition may be used against them if the settlement is not approved and the case proceeds to litigation. Notably, in an admittedly different area, the West Virginia Supreme Court of Appeals concluded that an attorney representing one party to a divorce cannot prepare an answer for the other party. Syllabus Point 5, *Walden v. Hoke*, 189 W. Va. 222, 429 S.E.2d 504 (1993); Syllabus Point 2, *Lawyer Disciplinary Board v. Frame*, 198 W. Va. 166, 479 S.E.2d 676 (1996). See also Legal Ethics Inquiry 77-7, Representing Both Spouses in "Irreconcilable Differences Divorce." While divorces differ from civil actions for damages, both involve the danger of unrepresented parties relying on attorneys who cannot and do not represent them. The danger of misunderstanding with regard to the role of the attorney even where a waiver is obtained is significant and real.

Those who have concluded that the present approach violates Rule 1.7 note two obvious solutions. First, the insurance company could, as discussed in a Supplement to the State of South Dakota Ethics Opinion 93-1, pay for the parent or guardian to obtain an attorney of their own choosing.³ Second, the legislature could amend West Virginia Code

³ In Ethics Opinion 93-1, the South Dakota Ethics Committee, opined that an insurer's legal counsel could not ethically represent both the insurer and the claimant in a guardian *ad litem* proceeding to approve a settlement. In a Supplement to the Opinion, responding to an inquiry from in-house counsel for an insurance company, the Committee opined that it was acceptable for the insurance company to hire outside counsel to represent the insured in such proceedings so long as the attorney represented the claimant, not the insurance company.

§44-10-14 to permit the insurance company to file the petition on behalf of the insured. Either solution would cure concerns about the application of Rule 1.7.

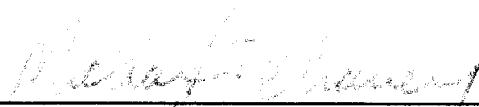
Other members of the Lawyer Disciplinary Board have concluded that this issue is properly analyzed under Rule 4.3 rather than Rule 1.7. This group relies upon the commentary to the American Bar Association Model Rule of Professional Conduct 4.3, from which West Virginia's Rule 4.3 is derived and the *Restatement of the Law, Third, the Law Governing Lawyers* § 103 (2000). The commentaries to the Model Rule and the *Restatement* both recognize that it is permissible for an attorney to draft documents to be signed by an unrepresented party. Indeed *Restatement* §103, comment (d), illustration 1, provides the example of an attorney retained by an insurance company to draft documents for an unrepresented personal representative to sign for the purpose of obtaining required court approval of a wrongful death claim. These members of the Lawyer Disciplinary Board view this as analogous to a summary proceeding. They also rely on the opinions of attorneys practicing in the field to the effect that the guardian *ad litem* and requisite court approval of the settlement adequately protects the minor, parent or guardian and that the potential for any violation of Rule 1.7 is prevented by adequate disclosures and by securing a clear and knowing waiver of Rule 1.7 from the minor and the minor's parent and/or guardian. In reaching this conclusion they are supported by ABA Informal Opinion 918 (1966) and Opinion 96-2 of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (1996).

In response, those who conclude that the situation presents a true conflict under Rule 1.7, conclude that Rule 4.3 and the *Restatement of the Law, Third, the Law Governing Lawyers* § 103 (2000) were not designed to address the West Virginia situation where the insurance company attorney must prepare a petition that will be filed in the name of the minor and his parent or guardian. They conclude that Rule 4.3 and the *Restatement* only apply where the attorney is preparing agreements, releases or similar documents that are to be signed by the parent or guardian. They believe that the conflict inherent in preparing pleadings to be filed by an adverse party cannot be resolved by any set of disclosures.

In order to protect themselves as much as possible until there is a clear resolution of this issue, attorneys retained by insurance companies to prepare the petition on behalf of the minor, parent or guardian should take steps to ensure that: (1) the attorney clearly informs the minor and the minor's parent, next friend or guardian that he or she is retained by the tortfeasor's insurance company, does not represent the minor or the minor's parents and that disclosures made to the attorney are not confidential and can be used against them if the settlement falls through and litigation is pursued; (2) the attorney clearly informs the minor and the minor's parent, next friend or guardian that the settlement documents were prepared at the request of the tortfeasor's insurance company and that the attorney makes no representations about the reasonableness or fairness of the settlement; (3) the minor and the minor's parent, next friend or guardian are advised that they have a right to secure counsel to consult with about the settlement and to review the settlement documents; (4) the minor and the minor's parent, next friend or guardian are provided with the phone number of the

West Virginia State Bar Referral Service; (5) the attorney does not represent to a minor, guardian, parents or next friend that the settlement is fair and proper or encourage the minor, guardian, parents or next friend to believe the settlement is in their best interests; (6) the attorney does not represent to the court that the settlement is in the best interests of the parties; and (7) the attorney provides this information in a written statement, in plain English, to be signed by the guardian, parents or next friend of the minor.

ISSUED on the 4th day of June, 2004.



Michael T. Chaney, Chairperson
Lawyer Disciplinary Board