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Professional Ethics Opinion 89-3, Attorney Responsibility to Disabled or Dysfunctional Client

David F. Forte

Cleveland-Marshall College of Law, Cleveland State University, d.forte@csuohio.edu

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TEXT OF OPINION NO. 89-3



David F. Forte
Chair, Professional
Ethics Committee

Following is the headnote and partial text of Opinion 89-3 as submitted by the Professional Ethics Committee and approved by the Board of Trustees on Sept. 29, 1989:

Headnote

Where an attorney has reasonable cause to believe that his client is mentally disabled, dysfunctional, impaired or incompetent, the attorney is charged with greater responsibility to the client than to an able client. The attorney must choose a course of action on behalf of the client which is in the client's best interest.

He should first evaluate the potential for medical treatment to correct the dysfunction. He may not compromise claims on behalf of his client when he reasonably believes the client's condition makes it legally impossible for him to obtain the client's consent to do so. The attorney should avoid placing himself in an adversarial position to the client by simultaneously representing the client and petitioning the probate court to appoint a guardian. He may, however, move for the appointment of a *guardian ad litem* to represent his client during the subject proceedings, provided that he institutes maximum safeguards to protect against prejudice to the client and to avoid unnecessary revealing of secrets and confidences of the client. Any settlement or compromise entered by the *guardian ad litem* should be approved by the court through its journals. The attorney should not take the law suit to trial or withdraw from the case, unless, in the attorney's considered judgment, it is not contrary to the client's best interest to do so.

Statement of Facts

The attorney is retained by the client to represent him in a legal malpractice action. He files suit. The attorney derives a reasonable belief that the client is incompetent by a series of irrational acts during the representation, including explosive behavior, paranoid behavior, incoherence and exaggerated and incredible statements of the client. The attorney assesses that the client will make a very poor witness, although his testimony is critical to the case.

During trial, before plaintiff is called to testify, a settlement offer is made which exceeds the likely verdict as assessed by the attorney. The attorney recommends set-

tlement on the basis of that offer. The client refuses to accept, demanding an amount exorbitantly in excess of the recommended amount.

Questions Presented

1. May the attorney settle the lawsuit, without the consent of his client, where he reasonably believes the client is not competent to make a considered judgment?

2. May the attorney move for the appointment of a *guardian ad litem* to represent the client during litigation or can he institute guardianship proceedings in probate court?

a. Does the attorney's motion for *guardian ad litem* or application for appointment of guardian create a conflict of interest between the attorney and the client?

b. May the attorney reveal the secrets or confidences of the client in order to secure the appointment of a guardian or *guardian ad litem*, where the client cannot consent?

3. May the attorney withdraw from representing the disabled client, where the attorney believes that the client's decision to reject the settlement offer is not in his best interest, and where the attorney believes that the disability of the client will adversely affect the outcome of the trial?

4. May the attorney try the law suit without a representative for the disabled client, where the attorney believes that the client's decision to reject the settlement offer is not in his best interest, and where the attorney believes that the disability of the client will adversely affect the outcome of the trial?

Conclusions

1. The attorney may not settle the lawsuit without the consent of his client when he reasonably believes the client is not competent to make considered judgments and the client does not have a court appointed representative.

2. The courses of action available to the attorney, if not prejudicial to the client, include seeking corrective medical treatment for the client's impairment; obtaining the appointment of a legal representative for the client; withdrawing from representation after introducing sufficient safeguards; rejecting the settlement and trying the case without a legal representative.

Treatment of the client by an expert to cure his disability is the preferable course available to the attorney, if time and cost allow and the client submits.

The attorney should not petition the probate court for the appointment of a guardian under Sec. 2111.01, O.R.C. for to do so would place him in an adversarial position in relation to his client and creates a conflict of interest. However, seeking the appointment of a *guardian ad litem*

is generally an appropriate course of action.

Because the disabled client cannot consent to the revelation of those secrets and confidences which is necessary to the appointment of a *guardian ad litem*, the attorney may reveal only those secrets and confidences that are strictly necessary to the client's protection and he should institute maximum safeguards against unnecessary disclosure.

3. The attorney may withdraw only if he determines that no foreseeable prejudice will befall his client as a result.

4. The attorney may try the case if he makes a considered judgment that it is not contrary to the client's best interests to do so.

Members who wish a copy of the complete opinion, including the Discussion which is not reproduced here, may obtain a copy at the office of the Bar Association.

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