

LEGAL ETHICS OPINION 1344

COMMUNICATION WITH  
UNREPRESENTED PARTY-WRONGFUL  
DEATH ACTION: DEFENSE COUNSEL  
PREPARING A PETITION FOR THE  
COURT'S APPROVAL OF A  
SETTLEMENT ON BEHALF OF THE  
UNREPRESENTED PERSONAL  
REPRESENTATIVE.

You indicate that your firm frequently serves as defense counsel. In addition, you indicate that you currently have two open files in which the insurance company has settled the case directly with the decedent's personal representative and forwarded the file to defense counsel for the purpose of preparing the necessary documentation to secure court approval pursuant to Virginia Code § 8.01-55. Furthermore, you have advised that the Code provides that approval of a wrongful death action can be secured on a petition of the personal representative. In the cases you describe, the decedent's personal representative is unrepresented by counsel.

You have asked the Committee to consider the propriety of a defense lawyer preparing a petition for the court's approval of such a settlement and an order granting approval, under the circumstances you describe where the personal representative is not represented by counsel.

The appropriate and controlling disciplinary rules to the issue you have raised are DR:7-103(A)(2) which prohibits a lawyer from giving advice to a person unrepresented by counsel, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client; and DR:7-103(B) which mandates that, when dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested, and shall make reasonable efforts to correct any misunderstandings as to that role on the part of the unrepresented person.

Further guidance is available in Ethical Consideration 7-15 [ EC:7-15] which states that, if an adverse party "is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer." (emphasis added)

The Committee has repeatedly opined that in certain circumstances it is not improper for an attorney to prepare particular documents for use by an adverse party so long as such preparation is limited to an administrative function. In the area of domestic relations, for example, it is not improper for an attorney representing one spouse to prepare acceptance of service of process, with or without waiver of notice, for signature by an unrepresented defendant spouse. (See LE Op. 644, LE Op. 689, LE Op. 1112, Virginia Code § 20-99.1:1) In addition, it is not improper for an attorney to obtain the endorsement of a consent order by an unrepresented defendant in a divorce matter or to

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draft and forward a separation agreement to an out of state unrepresented spouse. (See LE Op. 890 and LE Op. 876) In each of those circumstances, however, it is imperative that the attorney providing those documents (a) refrain from offering any advice to the unrepresented spouse except the advice to consult with counsel, and (b) inform the unrepresented spouse that the attorney represents the interest of his client which may be adverse to those of the unrepresented spouse.

The Committee recognizes that the definition of "advice," particularly in the context of dealing with an unrepresented party, may be a fluid concept. In the circumstances you describe, the Committee is of the belief generally that "the acts of drafting documents and presenting them for execution [by the personal representative], without more, do not amount to 'advice,' and are proper as long as the attorney does not engage in misrepresentation or overreaching." (Dolan v. Hickey, 431 N.E.2d 229, 231 (Mass. 1982)) Specifically, the Committee opines that in a case where a settlement must be approved by the court, and where defense counsel has assiduously refrained from advising or misleading the unrepresented party about the law or the facts, it would not be improper for defense counsel to prepare a settlement agreement for execution by the opposing party provided that the court is informed of such preparation and assuming that the court may make its own inquiry into the unrepresented party's agreement. The Committee recommends that appropriate indications of the nature of the representation or lack thereof, as well as indications that you have advised the unrepresented party to seek counsel, be reduced to writing and incorporated into the agreement documents. (ABA Formal Opinion No. 102. See also ABA Informal Opinion No. 1269; In re Bauer, 581 P.2d 511, 515 (Ore. 1978))

To the extent that this opinion is inconsistent with prior LE Op. 1019, the earlier opinion is overruled.

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