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 settlement 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 § 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.
DISCUSSION

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

The Code of Professional Responsibility recognizes several forms of disability of a client, including illiteracy, low intelligence, lack of experience, and incompetence. Code of Professional Responsibility (July 1, 1988) (“Code”), Ethical Consideration (“EC”) 7-11. The attorney’s responsibilities vary according to the mental condition of the client. Where the mentally incompetent or disabled client has no legally appointed representative during a lawsuit, the lawyer may be compelled to make decisions on behalf of the client, eliciting all possible aid from the client in areas where the client is able. EC 7-7. However, the lawyer cannot perform any act or make any decision required of the client by law. EC 7-11; EC 7-12.

The authority to make all decisions on the merits of his claims is exclusively that of the client. Code of Professional Responsibility (July 1, 1988), Disciplinary Rule (“DR”) 7-101(A) (1); EC 7-7. Expressly included in EC 7-7 is the example that the client must decide whether he will accept an offer of settlement of his claim. Thus, where the law requires the client to make the decision whether to enter a settlement agreement, the attorney, unless he is the legally appointed representative of the client, is ethically prohibited from making the decision for the client. Therefore, the attorney may not settle the lawsuit where his client is unable to make a reasoned judgment.

There are several courses of action among which the attorney must choose, exercising the degree of responsibility toward the disabled client required under the Code DR 7-101; EC 7-11, 7-12. The attorney may seek to have the client submit to medical treatment in order to correct the disability. He may seek appointment of a legal representative to make decisions on behalf of the client. He may withdraw from representing the client. He may reject the settlement and try the case in the absence of a legal representative.

In deciding which course to take, the attorney may want to seek medical evaluation of the client to aid him in deciding to what degree the client’s judgment is impaired. New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion No. 625. Once he discerns, in his own judgment, that the client is not merely uncooperative, but is disabled, the attorney has the ethical obligation to weigh the effect of his chosen course of action on the best interests of the client.

Submitting the client to treatment in order to correct his disability is an alternative available to the attorney. This is the most preferable among all approaches, unless the client resists, unless the required passage of time will prejudice the client’s claim, or unless the medical expert is unsuccessful. Assisting the client in curing his inability to make reasoned judgments solves the myriad dilemmas otherwise encountered by the attorney.

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1 A conflict could readily arise if the attorney of record were appointed guardian ad litem, and same is ill-advised. New York City Bar Association, Opinion No. 81-32.
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?

The dilemma created because the disabled client cannot consent to a settlement can likely be cured if a legal representative is appointed by the court. New York City Bar Association Opinion No. 1987-7; Virginia State Bar Association Opinion No. 570; New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion No. 625. The attorney might consider a guardian ad litem appointed only for purposes of the tort action, or a legal guardian appointed through probate proceedings against the client. However, where the attorney seeks, through judicial proceedings in the probate court, to have a guardian appointed for his client, he may be creating a conflict of interest by placing himself in an adversarial position to his client. DR 5-101; Los Angeles County Bar Association Opinion No. 450. Section 2111.02, O.R.C. requires a judicial determination of incompetence for the appointment of a guardian in probate court. The disabled client, being unable to stipulate to such an appointment, would necessarily be in an adversarial position relative to the petitioning party on the issue of competency. Therefore, the attorney representing the disabled client in the tort action must avoid placing himself in the position of petitioning party. Even if he were to elicit a friend or relative to file the petition, the initiation could be interpreted as adversarial to his client.

Moreover, the burden of proving incompetence for probate appointment of a guardian is greater than the showing necessary for appointment of a guardian ad litem during litigation. Section 2111.01(D) defines an incompetent person as follows:

   “Incompetent” means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property, or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this statute.

Section 5122.01 defines mental illness as follows:

   “Mental illness” means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.

It is not likely that in most instances the client will meet the test of incompetence for probate purposes.
In contrast, the appointment of a guardian ad litem does not require a judicial determination of incompetence, and there is authority for such an appointment for the limited purposes of a lawsuit. Civ. R. 17(B) reads as follows:

Minors or incompetent persons. Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.

Thus, when a minor or incompetent client enters a lawsuit without a legal representative, the court shall appoint a guardian ad litem or in some other way protect the client.

Civ. R. 17(B) is a rule of procedure. Ritzier v. Eckleberry (1958), 167 Ohio St. 439. There is no substantive law requiring a judicial finding of incompetency to support the appointment of a guardian ad litem. The appointment depends upon the court’s discretionary determination of whether the party is incapacitated, disabled or in some way in need of protection. Dailey v. Dailey, 11 Ohio App. 3d 121 (Cuyahoga County, 1983). Moreover, in moving for appointment of a guardian ad litem the attorney requests very limited and narrow relief, not necessarily requiring that he place himself in an adversarial position to his client, as he might in petitioning the probate court for appointment of a guardian.

Authority for such an appointment is found in Robinson v. Gatch, 85 Ohio App. 484 (Hamilton County, 1949), where the court states that, so long as the settlement of an incompetent client’s case by his guardian ad litem is approved by the court after examination of the facts and is then sanctioned by judgment entry, the settlement is binding upon the incompetent. The guardian ad litem exists by virtue of his court appointment, and his acts, in order to bind, must be approved by the court. The guardian ad litem’s acts thereby become the action of the court. Peoples National Bank v. Rogers, (1950) 61 S.E.2d 391; Metzner v. Newman, (1923) 194 N.W. 1008; Charles v. White, (1908) 112 S.W. 545.

Where the attorney does move for the appointment of a guardian ad litem for the limited representation of his client during suit, he may be unable to do so without revealing certain secrets and confidences of his client. He is, however, clearly charged with preserving those secrets and confidences. DR 4-101; New York City Bar Association Opinion No. 81-32. Disciplinary Rule 4-101(C) allows an attorney to reveal secrets and confidences only with the consent of his client after full disclosure, among other circumstances. However, the underlying difficulty is that the impaired client is unable to comprehend fully the disclosure that the attorney offers and is unable to make a reasoned judgment upon the facts disclosed.

The attorney is then faced with the dilemma that the client cannot make a decision; that the attorney cannot decide on his behalf; and that the attorney cannot, without the consent
of his client, reveal the facts necessary to appoint a legal representative. This is an absurd result, obviously not intended under the Code New York City Bar Association Opinion No. 1987-7. The attorney must, therefore, reveal certain facts, but only those confidences and secrets which are strictly necessary to protect the client’s best interests. The attorney should request that the motion for guardian ad litem be heard before a judge who will not hear the trial on the merits. He should request that all disclosure of secrets and confidences be heard in camera and subsequently sealed from the public records. He should carefully insulate himself from pressures of relatives and others who may seek to influence him due to the client’s incapacity. DR 5-107, New York City Bar Association Opinions Nos. 81-32, 1987-7. He should then be bound by the guardian ad litem’s decisions [subject to the provisions of DR 7-101(B) (1) and EC 7-7, 7-8] in the absence of any fraud or dereliction of duty in the guardian’s representation of the client.

Thus, it is unlikely that the attorney can petition the probate court for a guardian for the client without creating a conflict of interest. He is well advised to move for a guardian ad litem however, he must institute maximum safeguards of the client’s secrets and confidences in the course of doing so.

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?

Disciplinary Rule 2-110 (B) (4) provides that an attorney’s withdrawal from representation of a client is mandatory where the attorney is discharged. However, be the client is impaired, he is not able competently to form the reasoned judgment to discharge his attorney. Thus, the mandatory withdrawal provision under the Disciplinary Rules cannot be invoked. American Bar Association Model Rule 1.16. It follows that the attorney may refuse to withdraw if discharged. Michigan State Bar Association Opinion No. CI-1055.

Withdrawal is permissive where the client’s conduct “renders it unreasonably difficult for the lawyer to carry out his employment effectively.” DR 2-110 (C) (1) (d) . In the event he is permitted to withdraw, DR 2-110 (A) (1) mandates that the attorney take reasonable steps to avoid foreseeable prejudice to the client.

The disabled client may render it unreasonably difficult for the attorney to carry out his employment effectively. The attorney may be handicapped in representing the client zealously in accord with DR 7-101(A) (1). Notwithstanding, the attorney should not make his decision to withdraw upon the same criteria that he would when representing an able, competent client. The lawyer is charged with much greater responsibility to his disabled client, who is not willfully uncooperative. DR 7-101; EC 7-11, 7-12. Therefore, before he requests permission to withdraw, the attorney must first determine whether it is in the client’s best interests for him to remain on the case, to have a legal representative appointed, or for him to take additional or alternative steps to avoid foreseeable prejudice to the client. Virginia State Bar Association Opinion No. 757; Michigan State Bar Association Opinion No. CI-1055; New York City Bar Association Opinion No. 81-32; New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 625. If the attorney’s withdrawal would leave the client in no better position under the
representation of a successor attorney, then the expense and inconvenience, the potential anxiety to the client and the impediment to the successor attorney of his lack of familiarity with the client and the case may be sufficiently prejudicial to the client to prohibit the original attorney’s withdrawal. However, it the attorney determines that another lawyer could better represent this client for specific and supportable reasons, his withdrawal may be permitted under DR 2-110 (C) (1) (d).

In the situation where the client is incompetent as defined in § 2111.01(D), O.R.C., and where the attorney judges that the probate appointment of a guardian would not be against the client’s best interest in areas of his life not related to the litigation, where delay and cost are not prejudicial, the attorney might seek the appointment of a guardian through probate court and, upon the basis of the resultant conflict, he might be granted permission to withdraw from representing the client in the subject litigation. This action would, as all other actions above discussed, be subject to the test of whether the best interests of the client are served.

Thus, the attorney may be permitted to withdraw if he can demonstrate that it is in the best interest of his disabled client that he do so.

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?

As previously set forth herein, a lawyer is charged with much greater responsibility to a disabled client than to an able, competent client. DR 7-101; EC 7-11, 7-12. Therefore, in making the decision to try the client’s case in the absence of a representative, the attorney must not ignore his own assessment of the relative benefit or detriment to the client of trying or settling the case. He must not simply try the case in order to place the responsibility for the outcome in the hands of the judge or jury. To do so, particularly where the attorney believes that the client’s disability will adversely affect the outcome of the case, is to make the affirmative decision to jeopardize the client’s rights at trial.

Rejecting a highly favorable settlement compounds the prejudice to the client. The ethical prohibition against settlement without the client’s knowing consent is equally pronounced in regard to trying the case without the client’s knowing consent.

Thus, unless the attorney makes the considered judgment that it is not in the client’s best interest to settle, he should not opt to try the case without having undertaken the previously described efforts.

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2 See, however, the prohibitions set forth in Los Angeles Bar Association Opinion No. 450.