Conference of Superior Court Judges *Thomas L. Fowler, AOC*
Asheville, North Carolina *June 20, 2003*

Court Approval of Minor Settlements

I. The Basic Rule

"In the case of infant parties, the next friend, guardian ad litem, or guardian cannot consent to a judgment or compromise without the investigation and approval by the court." ***In Re Reynolds***, 206 N.C. 276, 288, 173 S.E. 789, 795 (1934)(quoting with approval McIntosh's *N.C. Practice and Procedure in Civil Cases*, at page 721).

"We do not deem it necessary to reiterate at length the familiar doctrine in this State that the courts are vigilant in the protection of the interest of infants. In Oates v. Texas Company, 203 N.C. 474, 166 S.E. 317 (1932), the Supreme Court upheld the validity of a prior judgment in favor of a minor plaintiff specifically on the grounds that '(h)ere the judgment recites an investigation by the trial court and a finding that the settlement was just and reasonable.' There is no such recital or finding in the present case. Due to the absence in the record on appeal of anything to disclose an 'investigation and approval by the court,' the purported judgment in favor of the minor plaintiff, Sandra Ballard, is a nullity ...." ***Ballard v. Hunter***, 12 N.C. App. 613, 619, 184 S.E.2d 423 (1971), *cert. denied*, 280 N.C. 180, 185 S.E.2d 704.

"The settlement of a minor's tort claim becomes effective and binding upon him only upon judicial examination and adjudication." ***Payseur v. Rudisill***, 15 N.C. App. 57, 63, 189 S.E.2d 562, 566, *cert. denied*, 281 N.C. 758, 191 S.E.2d 356 (1972).

"[I]t is well established in North Carolina that a covenant not to sue negotiated for a minor is invalid without investigation and approval by the trial court ..." ***Creech v. Melnick***, 147 N.C. App. 471, 478, 556 S.E.2d 587 (2001), *disc. rev. denied*, 355 N.C. 490, 561 S.E.2d 498 (2002).

"[C]ourts have 'inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. The court looks closely into contracts or settlements materially affecting the rights of infants[.]'" ***Sigmund Sternberger Foundation, Inc. v. Tannenbaum***, 273 N.C. 658, 674, 161 S.E.2d 116, 128 (1968), *as quoted in* ***Creech v. Melnick***, 147 N.C.App. 471, 556 S.E.2d 587 (2001), *disc. rev. denied*, 355 N.C. 490, 561 S.E.2d 498 (2002)..

II. Minors With Tort Claims: Justin Creech and David Cooper

A. The Post-Injury Release

Justin Creech's birth did not go well. Oxygen deprivation left Justin with numerous serious injuries.[1] Eight years after his birth, an attorney for Justin's parents contacted a physician who had been summoned to help with Justin's difficult delivery. Attorney Paul Pulley told Dr. Evelyn H. Melnik that his clients were considering bringing a medical malpractice action against the health care providers involved in Justin's delivery. Pulley stated that he was having difficulty understanding the medical records and wished to retain Dr. Melnick to assist him in interpreting the records. During this initial conversation, Dr. Melnik asked Mr. Pulley whether she was a potential or possible defendant. Apparently, his response assured her that plaintiffs would not sue her. Subsequently, Dr. Melnik met with and provided information to Pulley on several occasions.[2] Two years later, Pulley filed suit against Dr. Melnik on behalf of Justin Creech with Justin's parents serving as his guardians ad litem.

At the trial,[3] Dr. Melnik argued that in exchange for her help and cooperation with their investigation, the plaintiffs, through their attorney, had agreed not to sue her for the injuries Justin had sustained at birth. The jury was convinced and found that plaintiffs had breached their implied contract not to sue Dr. Melnik. But on appeal, plaintiffs argued that neither the parents nor their attorney had authority to enter into a contract on behalf of the minor child--that is, that neither the attorney, the parents nor the properly appointed guardians ad litem had the authority to effectively waive the minor's right to sue Dr. Melnik. The North Carolina Court of Appeals agreed with the plaintiffs, noting the long-standing rule that the attempted settlement of a minor's tort claim becomes effective and binding upon the minor only upon judicial examination and adjudication. Because plaintiffs failed to present proof of any court approval of the agreement the jury had found to exist, the contract not to sue could not be enforced against Justin.

B. The Pre-Injury Release

David Cooper's practice run down the ski slopes in Aspen, Colorado, did not go well. David, age seventeen and a nine-year member of the Aspen Ski Club, was skiing down a course marked by an Aspen Ski Club coach when David lost control and struck a tree, causing severe injuries including blindness. David and his parents sued the Aspen Skiing Company, the Aspen Ski Club and the coach for his injuries and medical expenses. The defendants sought summary judgment on the basis of an assumption of risk and release document that both David and his mother had signed prior to the date of the injury. The document relieved the defendants from

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[1] Oxygen deprivation caused Justin to suffer brain damage, blindness, quadriplegia, cerebral palsy, profound mental retardation, and microcephaly. Creech v. Melnik, 147 N.C. App. 471, 472, 556 S.E.2d 587 (2001), *disc. rev. denied*, 355 N.C. 490, 561 S.E.2d 498 (2002).

[2] More details of the interactions bewteen Dr. Melnik and Mr. Pulley can be found in Creech v. Melnik, 347 N.C. 520, 522-25, 495 S.E.2d 907 (1998).

[3] Prior to the trial, the case had already been the subject of several appeals. In Creech v. Melnik, 124 N.C. App. 502, 477 S.E.2d 680 (1996), the Court of Appeals upheld the trial court's grant of summary judgment for Dr. Melnik on the grounds of breach of contract and equitable estoppel. The Supreme Court, however, reversed the Court of Appeals and held that there were factual issues on each of the grounds that needed to be resolved by a jury. Creech v. Melnik, 347 N.C. 520, 495 S.E.2d 907 (1998).

> any liability, whether known or unknown, even though that liability may arise out of negligence or carelessness on the part of ... [the defendants]. The undersigned Participant and Parent or Guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known.[4]

The trial court granted summary judgment for defendants holding that David's mother's signature on the release bound her son and thus barred his claims.[5] The Colorado Court of Appeals affirmed, holding that a parent's authority to release her child's claims for possible future injuries arose from the parent's fundamental liberty interest in the care, custody and control of her child.[6] But the Colorado Supreme Court disagreed.[7]

The Supreme Court stated that Colorado law did not allow a parent "the unilateral right to foreclose a child's existing cause of action to recover for torts committed against him," and therefore it logically followed that a parent also lacked authority to release a child's cause of action *prior* to the injury.[8] The Court noted that Colorado law provided for a process by which the court could "ratify the settlement of a minor's claim," and that this conformed to the longstanding "steadfast principle" in Colorado that the courts owe a duty to "exercise a watchful and protecting care over [a minor's] interests, and not permit his rights to be waived, prejudiced or surrendered either by his own acts, or by the admissions of pleadings of those who act for him."

III. General Procedures/Practice: Minor Settlement Questionnaire

Conference of Superior Court Judges ***June 2003***

Minor Settlement Questionnaire: ***Results***

1) If the parties submit a consent judgment, is a hearing necessary?

Always 93% ***Sometimes*** 7% ***Rarely or Never*** 0%

2) Should the hearing be held in open court?

Always 65% ***Sometimes*** 33% ***Rarely or Never*** 2%

3) Should the proceeding be recorded?

Always 67% ***Sometimes*** 33% ***Rarely or Never*** 0%

4) Should the GAL be a parent or relative?

Always 15% ***Sometimes*** 72% ***Rarely or Never*** 13%

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[4] *Cooper v. The Aspen Skiing Company*, 48 P.3d 1229, 1231 (Supreme Court of Colorado, June 24, 2002).

[5] The trial court's ruling also barred David's parents' claim for David's medical expenses, and this ruling was not appealed by David's parents.

[6] *Cooper v. Aspen Skiing Co*., 32 P.3d 502 (Court of Appeals of Colorado, Division Three, August 17, 2000).

[7] In footnote 11, the Supreme Court stated that "[a] parental release of liability on behalf of his child is not a decision that implicates [the] fundamental parental right[]" to make decisions regarding the care, custody and control of his child. *Cooper v. The Aspen Skiing Company*, 48 P.3d 1229, 1235 (Supreme Court of Colorado, June 24, 2002).

[8] The *Cooper* Court noted its agreement in this regard with the Supreme Courts of Utah and Washington, citing *Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001) and *Scott v. Pac. W. Mountain Resort*, 119 Wash. 2d 484, 834 P.2d 6, 11-12 (Wash. 1992). *Cooper v. The Aspen Skiing Company*, 48 P.3d 1229, 1233 (Supreme Court of Colorado, June 24, 2002).

5) Should the child be present?
Always 49% ***Sometimes*** 47% ***Rarely or Never*** 4%

6) Should the child testify or be heard?
Always 18% ***Sometimes*** 61% ***Rarely or Never*** 21%

7) Should parties present a final medical report?
Always 63% ***Sometimes*** 33% ***Rarely or Never*** 4%

8) Should judge question the amount of the settlement to which all parties have agreed?
Always 63% ***Sometimes*** 37% ***Rarely or Never*** 0%

9) Should judge ask about insurance coverage limits and defendant's ability to pay more?
Always 54% ***Sometimes*** 41% ***Rarely or Never*** 5%

10) Should minor's medical expenses be deducted from the settlement amount?
Always 7% ***Sometimes*** 61% ***Rarely or Never*** 32%

11) Should judge inquire about the parties' settlement of the parents' claim for the minor's medical expenses and the impact on insurance limits and attorney fees?
Always 67% ***Sometimes*** 28% ***Rarely or Never*** 5%

12) Should judge allow a portion of minor's recovery to be used by the parents to pay for some specified benefit for the minor?
Always 0% ***Sometimes*** 64% ***Rarely or Never*** 36%

13) Should evidence of the present value of the structured settlement be required?
Always 76% ***Sometimes*** 24% ***Rarely or Never*** 0%

14) Should evidence of the financial condition of the company that will administer and pay the structured settlement be required?
Always 65% ***Sometimes*** 35% ***Rarely or Never*** 0%

15) In approving attorney fees, should judge consider the actual attorney fee contract or the actual hours expended?
Always 64% ***Sometimes*** 31% ***Rarely or Never*** 5%

16) Should judge base the attorney fee on a fixed percentage of the settlement amount?
Always 9% ***Sometimes*** 89% ***Rarely or Never*** 2%
If so, should that percentage be: ***20*****:** 2% ***25*****:** 43% ***33 1/3*****:** 7%
other**:** 48% (*i.e.*, percentage may vary depending on the facts of each case)

17) What percentage of the proposed minor settlements that you have heard have you declined to approve? ***0*****:** 14% ***0-5*****:** 35% ***5-10*****:** 21% ***10-20*****:** 14% ***>20*****:** 16%

18) What are the most common grounds for refusing to approve a proposed minor settlement?
Insufficient medical evidence of minor's injuries: 31%; *Insufficient amount of settlement*: 30%; *Technical/procedural defect*: 15%; *Inadequate investigation by or other problems with GAL*: 11%; *Settlement improperly provides for payment of minor's medical expenses*: 9%; *Excessive attorney's fees sought*: 4%.

See also section from ***Superior Court Judges' Benchbook***

IV. Minor Settlement Scenarios

I. ***Basic Procedure/Depth of Investigation***: Attorneys have called to schedule a time for the judge to approve a minor settlement. Injuries to parents and child arose out of automobile accident. Insurance proceeds will cover parents' injuries, child's medical

expenses, and child's injuries All parties are in agreement on all aspects of settlement. GAL is a local, new attorney and insurance company will pay him $300 for serving as GAL. ***(a)*** Should this be filed as a friendly civil suit or a special proceeding?[9] District or Superior Court? ***(b)*** Must it be heard in county or district where action was filed? ***(c)*** Should it be heard in open court or in chambers? Recorded or not? ***(d)*** Should parents be present? Should child be present? ***(e)*** Should judge rely on parties' summary of the evidence/injuries? The GAL's summary? The documentary evidence? Should judge hear testimony? Statements of parents or child? ***(f)*** When is the agreement or acquiescence of parties not enough for approval?

II. ***Role of Guardian ad Litem***: Who should the GAL be[10]--or who should the GAL *not* be?[11] A parent?[12] A family member? An inexperienced attorney? Should GAL conduct an independent investigation?[13] Should judge ever direct the GAL to do more?[14] What should happen when parties all agree that there are no permanent injuries and that a small settlement is adequate but when the judge asks the child how he is doing the child responds: "Pretty good but I still get these headaches from time to time."

III. ***Reasonableness of Settlement Offer***: What if proposed minor settlement is for $25,000 but the facts are that the child spent three weeks in the hospital, had medical bills of $25,000, has a permanent injury to his knee, scarring and indeterminate future medical expenses for his knee and scars. ***(a)*** Is the settlement enough? Is it reasonable and in child's best interests? **(*b*)** What if additional facts are that the insurance coverage limit is $50,000 total, and the parties agreed for the insurance to pay $25,000 to parents for child's medical bills, and $25,000 to child for injuries? Should child's share be greater? Does it matter if parents had other insurance to cover the child's medical bills? Should the judge inquire? Are there other assets (other than the insurance proceeds) that could be used to fund a larger settlement? Should the judge inquire? **(*c*)** Should judge reject the minor settlement? Inquire into consequences of such rejection? Can the parties then approach another judge seeking judicial approval of the identical minor settlement proposal? Can or should the second judge consider the proposal? ***(d)*** What if settlement

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[9] A special proceeding is an appropriate option. *See* G.S. 1-400, 1-402, *Gillikin v. Gillikin*, 252 N.C. 1, 113 S.E.2d 38 (1960).

[10] "In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons ..., they must appear by general or testamentary guardian, ... or by guardian ad litem ...." G.S. 1A-1, Rule 17(b), Rules of Civil Procedure.

[11] Case law appears to indicate that a judgment entered while the minor was represented by a guardian ad litem who had a conflict of interest, is voidable. *See Butler v. Winston*, 223 N.C. 421, 27 S.E.2d 124 (1943); *White v. Osborne*, 251 N.C. 56, 110 S.E.2d 449 (1959).

[12] See ethics opinion of N.C. State Bar, **RPC 163** (1994)(attorney may seek the apppointment of an independent GAL when the guardian/parent has an obvious conflict of interest).

[13] The guardian ad litem may be liable for breach of her duties to the minor. *Franklin County v. Jones*, 245 N.C. 272, 95 S.E.2d 863 (1957).

[14] The guardian ad litem is subject to judicial supervision, *Lovett v. Stone*, 239 N.C. 206, 79 S.E.2d 479 (1954), and may be removed and replaced at any time. G.S. 7A-103 ("The clerk of superior court is authorized to : ... (14) appoint and remove guardians and trustees, as provided by law."); *Abbott v. Hancock*, 123 N.C. 99, 31 S.E.2d 268 (1898).

agreement provides that the plaintiffs' attorney receive a contingent fee of 1/3 of the total recovery of $50,000 (i.e., $16,666.67) and that this amount is to be paid from the child's share of the recovery? ***(e)*** So long as the child is represented by a GAL, can the same attorney represent both the parents and the child?[15]

IV. ***Investment of Minor's Funds Pending Distribution***: What are options? ***(a)*** settlement proceeds to clerk; ***(b)*** settlement proceeds to parents;[16] ***(c)*** settlement proceeds to a guardian of the estate?[17] What if the proposed minor settlement involves the purchase of an annuity or other type of structured settlement? What are proper inquiries by the judge?[18] Quality of the company involved?[19] Estimates of present value of the structured settlement? Motives of parties in seeking such structured settlement?

V. ***Can Settlement Proceeds Be Used "For The Benefit" of the Minor During His Minority?*** Same facts as in Scenario III, but with additional facts that defendant has no additional property with which to fund a settlement and that the parents have few additional funds with which to take special care of the child during his minority. Parents request release of a portion of the minor's recovery directly to the parents and authorization for the parents to use the money to purchase a minivan that will make it easier to transport the child and/or to add a ground level bedroom to their home for use by the child. Can/should the judge authorize such use of the funds by the parents for the benefit of the child?[20]

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[15] See ethics opinion of N.C. State Bar, **RPC 109** (1992): A lawyer may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claim after having received a joint settlement offer which is insufficient to fully satisfy all claims. Compare ethics opinion of N.C. State Bar, **RPC 167** (1994): A lawyer may accept compensation from a potentially adverse insurance carrier for reprsenting a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minior's interests without regard to who is actually paying for his services. *See also* **RPC 123** and **RPC 252**, attached hereto.

[16] Two causes of action arise when an unemancipated minor is injured through negligence, one in behalf of the parent for earnings of the child during its minority and expenses incurred for necessary medical treatment, and the other in behalf of the child to recover damages for pain and suffering, for permanent injury, and for impairment of earning capacity after attaining majority. Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955). Thus the parent and not the minor is liable for the medical treatment of the child, although the child may be liable under the necessaries doctrine. *See* North Carolina Baptist Hospitals v. Franklin, 103 N.C.App. 446, 405 S.E.2d 814 (1991).

[17] *See* G.S. 35A-1220, et seq., for procedures and provisions for appointing a guardian of the minor's estate. *See also* G.S. 35A-1252 (Guardian's powers in administering minor ward's estate); G.S. 35A-1253 (Specific duties of guardian of estate).

[18] To be tax-free, settlement should be structured pursuant to Internal Revenue Code requirements, as listed in *Judges' Bench Book*, Chapter 13, Section II, B.

[19] For instance Standard & Poors provides ratings for insurance companies that provide annuity contracts. *See* **http://www2.standardandpoors.com/**

[20] Compare to authority of clerk to make disbursements from minor's property as provided in G.S. 7A-111: "The clerk is authorized ... to disburse the monies ... at such time ... as in his judgment is in the best interest of the child, except that the clerk must first determine that the parents ... are financially unable to provide the necessities for such child ...."

VI. ***Contents of Final Judgment/Approval of Attorney Fees***: Judge is willing to approve the minor settlement. Parties hand judge a proposed judgment that contains only a brief summary of the injuries, settlement and the conclusory statements that the settlement is reasonable and in the child's best interests. Is such a judgment sufficient?[21] Can it be subject to challenge by the child when the age of majority is reached? The judgment also provides that the child's attorney shall receive one-third of the recovery pursuant to the employment agreement. Does the judge have authority to modify this fee?[22] Should the judge modify this fee?

VII. *Closing The Settlement Hearing And Sealing The Records*

In a products liability case involving significant injury to a minor, the properly represented parties have reached a substantial settlement agreement which they all consider fair. They seek to present the settlement to the court for its review and approval but they also ask the court to close the settlement hearing or hear the matter in chambers, and to seal the consent judgment. The reason for this request is that the defendant is facing litigation with other parties on the same products liability issue and knowledge of this settlement would prejudice defendant's litigation efforts in those cases. ***(a)*** Does the court have the authority to close the hearing and to seal the records? ***(b)*** Should the court close the hearing and seal the records, i.e., are the offered grounds sufficient and compelling? ***(c)*** What if the settlement offer is conditioned on the court sealing the record? ***(d)*** What if the local newspaper seeks to intervene and unseal the record pursuant to G.S. 1-72.1?[23]

VIII. *Minor Settlement in Wrongful Death Case*

A lawsuit is filed by mother, individually and as administratrix of the estate of her daughter, seeking damages for the wrongful death[24] of the daughter and for negligent infliction of emotional distress upon mother, who witnessed her daughter's gruesome death. The defendants are the City and the Landlord. A fire started in plaintiff's home, which lacked smoke detectors. Upon waking to the smell of smoke, mother rushed her children out of the burning house. As they reached the door, the youngest child, age 3, ran back inside to save her kittens. But the flames had grown too intense for the mother

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[21] The answer is not clear, but in *Oates v. Texas Co*., 203 N.C. 474, 478, 166 S.E. 317 (1932), a minor settlement case, the Court apparently held that where the judgment recites an investigation by the court and a finding that the compromise reached by the parties was just and reasonable, such finding is conclusive in the absence of fraud.

[22] Court has authority to scrutinize and modify any attorney fee agreement, as any attorney fee contract with infant is void or voidable. *See* John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 1-25, 1-26 (2001).

[23] G.S. 1-72.1 (Procedure to assert right of access): "Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access. ...."

[24] The case is before the court pursuant to the provisions of G.S. 28A-13-3(23), which provides in part: "Unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) [an action for wrongful death] are competent adults and have consented in writing, any such settlement shall be subject to the approval of a judge of the court or tribunal exercising jurisdiction over the action…"

or other bystanders to enter the burning house to save the child. Calls were placed to 911, but the 911 dispatcher routed the call to the local police department and not the fire department. Police officers responded immediately, but were unable to get into the burning house. Mother stood outside the house and heard the cries of her child as she begged for help. By the time the fire department arrived, the child had died.[25]

The City filed an offer of judgment for $440,000, specifically reciting that $85,000 was for the wrongful death claim and $355,000 for the emotional distress claim of the mother. At the hearing to determine if the settlement should be approved, an attorney appears for the father of the deceased child, objecting to the proposed wrongful death settlement, claiming that the settlement is skewed in favor of the mother in an effort to deprive him of his fair share of the settlement proceeds. Attorneys for the mother contend that the father has no standing, because the child was illegitimate, father never married the mother and he never legitimated the child under Chapter 49 of the General Statutes, even though he was found to be the biological father and ordered to pay child support under an order entered in a proceeding brought by the local DSS office pursuant to Chapter 110.

(a) Does this wrongful death settlement require court approval? Does settlement of the emotional distress claim require court approval? ***(b)*** In considering the wrongful death settlement, should the judge take into account the amount of the emotional distress settlement? ***(c)*** Does the father of the illegitimate child have standing to object to the wrongful death settlement? ***(d)*** Does the presiding judge have any authority to re-allocate the amounts of the proposed settlements?

Attachments

RPC 123
January 17, 1992
Representation of Parents and Child
Opinion rules that a lawyer may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.
Inquiry:
A child is injured due to the apparent malpractice of a physician. Incident to the injury there accrues to the parents of the child a claim against the physician for negligent infliction of emotional distress. Under what circumstances, if any, may the same attorney represent the interests of the parents and the child?
Opinion:

[25] This case is Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (2000), reversing 133 N.C. App. 408, 515 S.E.2d 722 (1999). *See also* Lovelace v. City of Shelby, __ N.C. App. __, 570 S.E.2d 136 (2002).

Note: This opinion is intended to address in a broader way the issues raised in RPC 109. It is offered for the general guidance of the bar and is not intended to contradict the advice given in response to the specific facts recited in RPC 109.

Although the interests of the parents and the child are potentially in conflict, an attorney may represent the parents and through them the child in negotiating with the physician or his insurer prior to the initiation of litigation. Once a lawsuit is commenced, the attorney should insist upon the appointment of an independent guardian ad litem for the child. If it appears that the interests of the parents and the child will not necessarily conflict, the attorney may undertake to represent both with the intelligent consent of the parents and the child's independent guardian ad litem. Since the interests of the child and the parents would be inextricably linked in the establishment of the physician's liability for negligence, it is unlikely that any actual conflict between the attorney's two clients would arise prior to the receipt of a settlement offer. Should the defendant make a joint offer requiring the plaintiffs to divide the proceeds, the potential conflict of interest would become actual. Given the fact that the attorney's clients are bound by family ties and would have economic interests which would not be necessarily antagonistic, the conflict of interest would not automatically disqualify the attorney from continuing the joint representation. In some instances it may also be appropriate for an attorney to attempt to assist his clients in evaluating their respective claims and in amicably agreeing to an equitable and appropriate division which could then be presented to the court for its approval. Under no circumstances may the attorney, while representing both clients, assume a role of advocacy for one as opposed to the other.

Should it become apparent to the attorney that his clients' conflicting interests cannot be mediated, the attorney will generally be required to withdraw from the representation of both. It is conceivable that the attorney may continue to represent one or the other with the consent of the former client whose case he relinquishes. Rule 5.1(d).

RPC 251

July 18, 1997

Representation of Multiple Claimants

Opinion rules that a lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative gives informed consent to the representation, and the lawyer does not advocate against the interests of any client in the division of the insurance proceeds.

Inquiry #2:

Attorney A represents six minor children and two adults on their claims for personal injuries which occurred when the school bus in which they were riding was involved in an accident. It is assumed Attorney A also reprsents the parents of the minor claimants on their separate claims for the medical expenses incurred by their children. After receiving inadequate settlement offers, Attorney A filed suit. It then became apparent that the available insurance proceeds are insufficient to compensate all claimants fully. May Attorney A represent the eight injured claimants?

Opinion #2:

Yes, provided there are no crossclaims between the claimants and, at the beginning of the representation, each claimant, or claimant's legal guardian, gives informed consent to the multiple representation. ... Before a lawsuit is filed, the parents or legal guardian of each minor may give such consent. **RPC 123**. After litigation is commenced, even if it is for the sole purpose of obtaining court approval of the settlements of the minors' claims, independent guardians ad litem must be appointed for the minors and the guardians ad litem must give informed consent to the multiple representation. To be independent, a guardian ad litem should have no separate claim of his or her own to pursue, including a claim for medical expenses for a dependent child. *See* **RPC 109** and **RPC 123**. The disclosure at the beginning of the representation, and to the guardians ad litem, must include an explanation of the consequences of limited insurance funds and the possibility of a dispute among the claimants as to the division of the insurance proceeds. Rule 5.1(b).

See opinion #1 with regard to the lawyer's role upon receipt of an offer to settle the multiple claims. (Opinion #1: "... If an offer of settlement is made, the lawyer may facilitate mediation among the claimants to determine how the offer will be divided. *See* **RPC 123**. Alternatively, the claimants may agree to accept the recommendation of the lawyer with regard to an equitable division of the settlement offer. The lawyer may make such a recommendation only if the lawyer can do so impartially. *See* **RPC 123**. The lawyer must withdraw from the representation of all of the claimants if the lawyer is placed in the role of advocate for one or more of the claimants against the other claimants. The lawyer must also withdraw from the representation if one or more of the claimants do not agree to accept the settlement offer. Rule 5.7. If the lawyer must withdraw, the lawyer may continue to represent one or more of the claimants only with the consent of the claimants whose cases the lawyer relinquishes. Rule 5.1(d) and RPC 123.")

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Inquiry #4:

May Attorney A represent the parents of one of the minor claimants on the parents' claim for medical expenses and also represent the minor child through an independent guardian ad litem?

Opinion #4:

Yes. *See* opinion #2 and **RPC 123**.