

ADVISORY OPINION 10-06
(December 21, 2010)

Representation of Spouse in Negotiations with Insurance Company

Issue

May a judge represent a spouse in negotiations with an insurance company?

Answer: No.

Facts

A judge's spouse was injured in an automobile accident, and the judge, a former personal injury attorney, would like to represent the spouse in negotiations with the insurance company.

Discussion

Canon 4G of the 1993 Code of Judicial Conduct allowed a judge to "give legal advice to and draft or review documents for a member of the judge's family." This limited exception to the canon prohibiting the practice of law was further restricted by the following language in the second paragraph of the related commentary:

The code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an *advocate or negotiator* for a member of the judge's family in a legal matter (emphasis added).

Clearly, under the old code a judge could not act as an advocate or negotiator for a family member. The language in Rule 3.10, the corresponding section of the 2009 code, is less explicit:

A judge may represent himself or herself and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as a family member's lawyer in any forum.

The words "advocate or negotiator" no longer appear in the rule or its related comment and the term "forum" is not defined.

In re Fleischman, 188 Ariz. 106, 933 P.2d 563 (1997), speaks definitively to this issue. The case involved a sitting judge serving as an advisor and negotiator for a third party (a non-family member) in a contractual matter. The court stated as follows:

We find the respondent's effort and work for AEI constitute acts that are customarily performed from day to day in the ordinary practice of members of the legal profession. That they also may be performed in part or in whole by non-lawyers from time to time does not exclude them from the practice of law.

We therefore conclude that respondent did engage in the practice of law in violation of both Article 6, Section 28 of the Arizona Constitution and Canon 4G of the Arizona Code of Judicial Conduct. Respondent's arguments to the contrary are entirely without merit.

Fleischman, 188 Ariz. at 111, 933 P.2d at 568.

Under the *Fleischman* standard, representing an individual in negotiations with an insurance carrier would constitute the practice of law. The question then becomes whether the language "in any forum" in Rule 3.1 of the 2009 code limits the reach of the prohibition against representing a family member as articulated in Canon 4G in the 1993 code. "Forum" is not defined in the relevant provisions. *See also* Ariz. Code Jud. Conduct, Scope. The definitions of "forum" vary and some *include* a court or place where disputes are heard.

The Reporters' Notes to the 2009 code provide that the rule is essentially identical to Canon 4G and was merely moved to the black letter portion of the rule. The concern of the ABA Commission remained unchanged.

The Commission believed that the primary concern animating Rule 3.10 was that judges who undertake formally to represent another individual in a forum might appear to have an advantage by virtue of their judicial status.

Geyh and Hodes. *Reporters' Notes to the Model Code of Judicial Conduct*. ABA, 2009, 74.

The Reporters' Notes do indicate that a judge may represent a family member in a more informal setting and cites neighborhood association disputes, purely private and minor commercial matters as examples of allowed conduct. *Id.* at 75.

Had the drafters of the canon and rule intended that "forum" be restricted to a courthouse context, they would have so stated, and the Reporters' Notes would have had no need to engage in the discussion of "informal setting" and the other matters set out therein. The rule would have been a bright line one.

Conclusion

The committee believes that settlement negotiations in a personal injury matter are not sufficiently informal and minor to avoid the danger "of the judge abusing the prestige of office" and an exception to the general prohibition. *Id.* A judge may not represent a family member in negotiations with an insurance carrier.

References

Arizona Code of Judicial Conduct, Scope and Canon 4, Rule 3.10 (2009).

Charles E. Geyh and W. William Hodes. *Reporters' Notes to the Model Code of Judicial Conduct*. American Bar Association, 2009.