

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

OPINION

In the opinion of this Committee, the change in the law effected by the Court of Appeals decision creates a clear conflict of interest between the parent and the child and it would be improper for one lawyer to represent both. When a lawyer is approached by a parent in such a case he should advise the parent at the outset of the conflict and let the parent decide which party the lawyer is to represent. The other party should then be represented by independent counsel.

The situation is more difficult where the lawyer already represented both parties when the law was changed. In such a case the lawyer will have received information from the parent on behalf of both the parent and the child. If any of this information would give an advantage or disadvantage to one party over the other, there is no way in which the lawyer can resolve the conflict and he should withdraw from the case entirely. If he does not, he will be in the position of representing a litigant suing a former client on the basis of information he received from or on behalf of such client.

On the other hand, where the information was received in the early stages of the attorney client relationship and is of a non-confidential nature which clearly gives rise to no advantage or disadvantage as between the parent and the child, the lawyer may continue in the case on the side selected by the parent.

The question is similar to that raised in Opinion 74 of this Committee dated March 28, 1968 which held that an attorney who represented the parents in an automobile accident case could not, even with the parents' consent, bring suit on behalf of the child against the parents and the manufacturer of an allegedly defective tire on the automobile.

Opinion #113-9/18/69 (20-69)

Topic: Attorney's mailing of a proposed summons to proposed defendant in subrogation tort cases; attached notice requests forwarding to defendant's insurance company.

Digest: Improper for attorney to purposefully mail document which can create the impression that judicial proceedings have been commenced.

Canons: *Former Canons 9, 29*

QUESTION

May an attorney mail a proposed summons to the proposed defendant in subrogation tort cases?

The attorney represents insurance companies for tort subrogation purposes. In these tort subrogation cases, the attorney attempts to ascertain the responsible party's liability carrier and reach a settlement as quickly as possible. The attorney has found that liability carriers tend not to settle until a summons is received. Upon receipt of a summons, liability carriers reach a settlement in 70% of the cases.

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In order to avoid professional process servers who sometimes fail to effect proper service and to avoid unnecessary embarrassment to those served, the attorney proposes, in subrogation tort cases, to mail, by ordinary mail, a copy of the proposed summons to the proposed defendant with the following notice stapled on the outside of the summons:

" I M P O R T A N T N O T I C E "

THE ATTACHED SUMMONS IS BEING MAILED TO YOU TO NOTIFY YOU OF THE CLAIM AND TO ASK THAT YOU FORWARD IT IMMEDIATELY TO THE INSURANCE COMPANY WHO INSURED YOU FOR THIS LOSS. BY TAKING SUCH ACTION YOU WILL AVOID THE EMBARRASSMENT OF HAVING A PROCESS SERVER SERVING YOU AT YOUR HOME."

or by mailing the following letter enclosed with the summons and complaint:

Dear Sir:

Enclosed please find summons and complaint in connection with the above matter.

These papers are being served upon you by Certified Mail, Return Receipt Requested, in order to avoid any possible inconvenience of embarrassment which may result from such alternate service by means of a professional process server.

It is suggested that you immediately forward the summons and complaint to your insurance company.

OPINION

The document being delivered in this situation is acknowledged to be only a "proposed" summons as it is not served as required by law. However, the proposed summons would inevitably give most laymen the impression that a legal action has been commenced.

It is the opinion of this Committee that the proposal would be unethical, as violative of Canon 9, which provides, in part, that:

"It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Formal Opinion 178 of the ABA holds that it was improper for a creditor's attorney to send papers to debtors which, unless carefully read, would create the false impression that suit had been instituted. While the instant case does not involve an intention to misrepresent the nature of the demand for payment, nevertheless, the procedure would necessarily mislead. In addition, the implied threat that failure to forward the "proposed" summons as requested would result in the recipient's embarrassment from service by a professional process server is inconsistent with the dignity of the profession and the requirements of Canon 29.