

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2017-F-162

The Board of Professional Responsibility has been requested by the State of Tennessee Bureau of Workers' Compensation Department of Labor and Workforce Development to issue a Formal Ethics Opinion regarding the extent to which an ombudsman attorney may provide "limited legal advice" within the meaning of Tenn. Code Ann. Section 50-6-216(e)(3) which provides that "[a]n ombudsman who is not a licensed attorney shall not provide legal advice however, an ombudsman who is a licensed attorney may provide limited legal advice however, an ombudsman who is a licensed attorney may provide limited legal advice but shall not represent any party as the party's attorney. No ombudsman shall make attorney referrals."

OPINION

An ombudsman attorney employed by the State of Tennessee Bureau of Worker's Compensation Department of Labor and Workforce Development may give limited legal advice to pro se litigants based on the guidelines set out herein without the creation of an attorney-client relationship and its protections between the ombudsman attorney and the pro se litigant with the informed written consent of the pro se litigant.

DISCUSSION

The Worker's Compensation Reform Act of 2013 created the court of workers' compensation claims to resolve all contested claims for workers' compensation benefits for injuries occurring after July 1, 2014. The Administrator of the Bureau of Workers' Compensation was charged with creating an ombudsman program to assist, in part, unrepresented parties to workers' compensation actions. The General Assembly recently amended Tenn. Code Ann. Section 50-6-216 to permit an ombudsman attorney to provide limited legal advice without representing any party. 2016 Pub. Ch. 1056.

ISSUES

1. If an ombudsman attorney provides "limited legal advice" pursuant to TCA 50-6-216(e)(3), is an attorney/client relationship created between the ombudsman attorney and party to whom advice is given?

2. If the answer to question 1 is yes, is it possible for an ombudsman attorney to provide “limited legal advice” pursuant to TCA 50-6-216(e)(3) to a self-represented litigant and still provide effective representation as required by the Tennessee Rules of Professional Conduct?
3. Are conversations between the ombudsman attorney and the self-represented litigant confidential within the meaning of the Tennessee Rules of Professional Conduct and, if so, would documenting those conversations electronically within the Bureau’s computer system violate ethical standards?
4. Are the following proposed guidelines consistent with providing “limited legal advice” within the meaning of section 50-6-216(e)(3) and the ethical guidelines of the Tennessee Rules of Professional Conduct:

The State of Tennessee Bureau of Workers’ Compensation Department of Labor and Workforce Development proposed the guidelines set forth hereinafter. As discussed more thoroughly below, the Board of Professional Responsibility concludes that ombudsman attorneys may, in their professional discretion, do the following:

- Explain basic legal principles, such as causation, notice, statute of limitations, etc.
- Explain procedures, such as what a party can expect in an expedited hearing or the procedure for appealing an adverse decision (i.e. how long to file the notice of appeal, how to obtain a transcript, etc.)
- Explain the standard of proof required to prevail (preponderance of the evidence)
- Explain the elements of the employee’s cause of action (i.e. “primarily arising out of” and “in the course and scope” of employment)
- Explain any affirmative defenses raised by the employer, what the employer must show to establish the defense and what information the employee may need to provide when faced with such a defense
- Explain what medical proof may be needed and suggest avenues to obtain that information
- While refraining from advising a party or potential party regarding whether they should settle their claim; explain the methodology for calculating a compensation rate and an award of permanent disability benefits
- Address legal questions from other ombudsman and/or mediators
- Refer parties or potential parties to forms, templates, examples of motions, and other sources of information, such as UT-Trace (for trial court/appeals board opinions), Medical Impairment Registry, Medical Fee Schedule, etc.
- Stress the importance of submitting relevant documents and other information to the courts
- Provide contact information, such as for the clerks of the trial court, appeals board, or Supreme Court
- Provide applicable rules, statutes, and case law as they apply to general principles of workers’ compensation
- Evaluate the claim and explain the strengths and weaknesses of the case to the pro se litigant

- Generally explain the purpose of a deposition, routine deposition questions, the proper method of asking questions and introducing documents, and common objections.
- Explain what constitutes admissible evidence and process for admitting evidence during and hearing or trial.

However, ombudsmen attorneys shall refrain from each of the following:

- Court appearances with or on behalf of any person or entity
- Settlement conference appearances with or on behalf of any person or entity
- Deposition appearances with or on behalf of any person or entity
- Filing documents in the trial court or on appeal for or on behalf of any party or their representatives
- Drafting documents or correspondence, including emails, for or on behalf of any party or potential party
- Review or critique written materials or oral presentations prior to the submission for mediation or court proceedings
- Perform legal research on the behalf of the pro se litigant
- Communicating, orally or in writing, with the opposing party or their representatives, including legal counsel
- Communicating, orally or in writing, with health care providers or any other person or entity, including insurance companies and their representatives, about the claim or potential claim
- Communicating orally or in writing, with any judge of the Court of Workers' Compensation Claims or Appeals Board for or on behalf of a party or potential party
- Testify or otherwise disclose confidential information
- Make attorney referrals
- Advise a party or potential party regarding the value of the claim
- Advise a party regarding what issues to raise on appeal.

1. If an ombudsman attorney provides “limited legal advice” pursuant to TCA 50-6-216(e)(3), is an attorney/client relationship created between the ombudsman attorney and party to whom advice is given?

Rule 1.2 Scope of the Representation and the Allocation of Authority between the Lawyer and Client

- (c) A lawyer may limit the scope of a client’s representation if the limitation is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.¹

Comments

Agreements Limiting the Scope of the Representation

¹ Tennessee Rules of Professional Conduct, Rule 1.2 (c).

- [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.²
- [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.³

In this matter the terms under which the lawyer's services are made available without charge to the pro se litigant are set forth in the amendment to the statute⁴ which permits an ombudsman attorney to give limited legal advice, but does not allow the ombudsman attorney to represent a party. When considered with the provisions of RPC 1.2 (c) for limitation of a lawyer's services, it appears reasonable that an ombudsman attorney could limit his/her services to those matters set forth herein. The ombudsman attorney should have the pro se litigant sign an agreement that makes it clear to the pro se litigant that the lawyer's services are limited to guidance as set forth hereinabove for a pro se litigant, do not create an attorney-client relationship between the pro se litigant and the ombudsman attorney, and that the protections of an attorney client relationship do not exist.

2. If the answer to question 1 is yes, is it possible for an ombudsman attorney to provide "limited legal advice" pursuant to TCA 50-6-216(e)(3) to a self-represented litigant and still provide effective representation as required by the Tennessee Rules of Professional Conduct?

Because the answer to question 1 is no, there is no need to further address question 2.

² Tennessee Rules of Professional Conduct, Rule 1.2 comment 6.

³ Tennessee Rules of Professional Conduct, Rule 1.2 comment 7.

⁴ Tenn. Code Ann. Section 50-6-216. Pub. Ch. 1056.

3. Are conversations between the ombudsman attorney and the self-represented litigant confidential within the meaning of the Tennessee Rules of Professional Conduct and, if so, would documenting those conversations electronically within the Bureau's computer system violate ethical standards?

Because there is no attorney-client relationship created by the ombudsman attorney giving the limited legal advice to a pro se litigant, the conversations between the ombudsman attorney and the self-represented litigant are therefore not confidential and can be documented electronically within the Bureau's computer system without violating ethical standards.

4. Are the proposed guidelines consistent with providing "limited legal advice" within the meaning of section 50-6-216(e)(3) and the ethical guidelines of the Tennessee Rules of Professional Conduct?

"Limited legal advice" is not a defined term in Tenn. Code Ann. Section 50-6-216(e)(3) nor is it a defined term in the Tennessee Rules of Professional Conduct. However, the wording of the statute is clear that the ombudsman attorney shall not represent any party. Because, pursuant to RPC 1.2 (c) the ombudsman attorney has obtained the informed written consent of the pro se litigant to limit his/her services to those set forth in guidelines proposed herein and that the pro se litigant's informed written consent that the provision of those services do not create an attorney-client relationship between the ombudsman attorney and the pro se litigant, they are consistent with the ethical guidelines of the Tennessee Rules of Professional Conduct.

CONCLUSION

An ombudsman attorney employed by the State of Tennessee Bureau of Worker's Compensation Department of Labor and Workforce Development may give limited legal advice to pro se litigants, based on the guidelines set out herein, without the creation of an attorney-client relationship and its protections between the ombudsman attorney and the pro se litigant with the informed written consent of the pro se litigant. The pro se litigant should be fully advised of the limitations on the services provided by the ombudsman attorney and give his/her informed written consent to such limitations as well as the fact that there is no attorney-client relationship or its protections created by the provision of the limited legal advice.

This 10th day of March, 2017.

ETHICS COMMITTEE:

John Kitch

Dana Dye

Joe Looney

APPROVED AND ADOPTED BY THE BOARD