

OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2013-4

July 14, 2013

OFFICIAL OPINION 2013-4

The Honorable Phyllis Pond
Indiana House of Representatives
200 W. Washington St.
Indianapolis, IN 46204

RE: Indiana's Power of Attorney Statute (Ind. Code § 30-5-5-11)

Dear Representative Pond:

You requested a legal opinion on the following issue:

Does the appointment by a principal, pursuant to Indiana Code § 30-5-5-11, of an attorney-in-fact with general authority with respect to claim and litigation authorize the attorney-in-fact to appear in court for the principal, as if the principal were appearing *pro se*, or would the attorney-in-fact who appears for the principal be engaging in the unauthorized practice of law?

The situation described in your request involves an individual who lives out of state and has appointed her son as attorney-in-fact to handle legal matters related to property she owns in Indiana.

BRIEF ANSWER

An attorney-in-fact may conduct litigation on behalf of the principal, but he or she may not do so *pro se*. While an individual may appear in court on his or her own behalf, only persons admitted to practice law may appear on behalf of others. A power of attorney does not allow an attorney-in-fact to represent the principal in court, unless the attorney-in-fact is admitted to practice law.

ANALYSIS

Indiana Code Art. 30-5 outlines the powers, duties, liabilities, and related provisions that apply to powers of attorney created after June 30, 1991.¹ "Power of attorney" is defined in Ind. Code § 50-5-2-7 as:

a writing or other record that grants authority to an attorney in fact or agent to act in place of a principal, whether the term "power of attorney" is used. The term refers to all types of powers of attorney, including durable powers of attorney, except for the following:

- (1) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a credit in connection with a credit transaction.
- (2) A proxy or other delegation to exercise voting rights or management rights with respect to an entity.
- (3) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

Ind. Code § 30-5-5-11 allows a principal to authorize an attorney-in-fact to sue on behalf of the principal and to engage in other activities to assert and defend the principal's legal interests. That section authorizes the attorney-in-fact to employ attorneys or other experts as needed, but it is silent as to whether the attorney-in-fact may appear *pro se* on behalf of the principal. The full text of section 11 provides the following:

IC 30-5-5-11

Claims and litigation

Sec. 11. (a) Language conferring general authority with respect to claims and litigation means the principal authorizes the attorney in fact to do the following:

- (1) **Assert and prosecute before a court, an administrative board, a department, a commissioner, or other tribunal, a cause of action, a claim, a counterclaim, an offset, or a defense that the principal has or claims to have** against an individual, a partnership, an association, a government, a person, or an instrumentality, **including the power to sue** for the following:
 - (A) The recovery of land or a thing of value.

- (B) The recovery of damages sustained by the principal in any manner.
 - (C) The elimination or modification of tax liability.
 - (D) An injunction.
 - (E) Specific performance.
 - (F) Any other relief.
- (2) Bring an action of interpleader or other action to determine adverse claims, intervene or interplead in an action or proceeding, and act in litigation as *amicus curiae*.
- (3) In connection with an action, a proceeding, or a controversy at law or otherwise, apply for and, if possible, procure a libel, an attachment, a garnishment, an order of arrest, or other preliminary, provisional, or intermediate relief and resort to and use in all ways permitted by law an available procedure to satisfy a judgment, an order, or a decree.
- (4) In connection with an action or a proceeding at law, or otherwise, perform an act the principal might perform, including an acceptance of tender, an offer of judgment, an admission of facts, a submission of controversy on an agreed statement of facts, a consent to examination before trial, and the general binding of the principal in the conduct of litigation or controversy as the attorney in fact considers desirable.
- (5) Submit to arbitration, settle, and propose or accept a compromise with respect to a claim existing in favor of or against the principal or litigation to which the principal is, may become, or may be designated a party.
- (6) Waive the issuance and service of a summons, citation, or other process upon the principal, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, appeal to appellate tribunals, procure and give surety and indemnity bonds at the times and to the extent the attorney in fact considers desirable or necessary, contract and pay for the preparation and printing of records and briefs, receive and execute and file or deliver a consent, a waiver, a release, a confession of judgment, a satisfaction of judgment, a notice, an agreement, or other instrument the attorney in fact considers desirable or necessary in connection with the prosecution, settlement, or defense of a claim by or against the principal or of litigation to which the principal is, may become, or may be designated a party.
- (7) Appear for, represent, and act for the principal with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, whether of the principal or another person, with respect to a reorganization proceeding, a receivership, or an application for the appointment of a receiver or trustee that affects an interest of the principal in real property, a bond, a share, a commodity interest, tangible personal property, or other thing of value.
- (8) **Hire, discharge, and compensate an attorney**, accountant, expert witness, or other assistant **when the attorney in fact considers the action to be desirable for the execution of a power permitted under this section**.
- (9) Pay, from the control of the attorney in fact or the account of the principal, a judgment against the principal or a settlement that may be made in connection with a transaction permitted under this section, receive and conserve money or other things of value paid in settlement of or as proceeds of a transaction permitted under this section, and receive, endorse, and deposit checks.
- (10) Perform other acts in connection with a claim by or against the principal or litigation to which the principal is, may become, or may be designated a party.
- (b) The powers described in this section are exercisable equally with respect to a claim or litigation existing at the time of the giving of the power of attorney or arising after that time, whether located in Indiana or in another jurisdiction. (Emphasis supplied.)²

Ind. Code § 34-9-1-1(a) provides that "a civil action may be prosecuted or defended by a party (1) in person, or (2) represented by an attorney." In other words, a natural person may appear *pro se* or by counsel, but may not be represented by a non-lawyer. In *Simmons v. Carter*, 576 N.E.2d 1278 (Ind. Ct. App. 1991), an attorney-in-fact filed a small claims action on behalf of his principal. The Court held that the resulting judgment was a nullity because the plaintiff (the principal) did not appear in person or by counsel. "[W]hile any natural person may appear in court on his or her own behalf, only persons duly admitted to practice law may appear on behalf of other persons."³ Furthermore, Indiana Trial Procedure Rule 11(A), relating to signing and verification of pleadings in civil actions, only authorizes parties appearing *pro se* and licensed attorneys at law to sign pleadings.⁴

The prohibition on a non-attorney representing another is not unique to Indiana courts.⁵ An attorney in fact is not authorized to appear for a principal in federal court,⁶ nor are other representative parties. "Normally, representative parties such as next friends may not conduct litigation *pro se*; pleadings may be brought before the court only by parties or their attorney. See 28 U.S.C. § 1654 (providing that 'parties may plead and conduct their own cases personally or by counsel')."⁷

Ind. Code § 30-5-5-11(a)(8) authorizes the attorney-in-fact to "hire, discharge, and compensate an attorney,

accountant, expert witness, or other assistant when the attorney in fact considers the action to be desirable for the execution of a power permitted under this section."⁸ This language may seem to suggest that the attorney-in-fact may have the discretion *not* to employ an attorney when acting on behalf of the principal and more specifically in relation to appearing in court on behalf of the principal to assert legal claims. However, while the attorney-in-fact could take many of the actions listed in that section without the assistance of an attorney, the attorney-in-fact would need to hire an attorney to bring a claim in court. In other words, the attorney-in-fact is authorized to manage or conduct litigation for the principal by taking any of the various steps outlined in section 11, but to carry out some of those functions for the principal the attorney-in-fact would need to enlist the services of an attorney at law.

CONCLUSION

An individual may represent himself or herself in court only if he or she appears personally. The right to appear *pro se* does not extend to others who are acting on an individual's behalf. A representative acting under a power of attorney may not appear in court on behalf of a principal unless the representative is admitted to practice law.

Sincerely,

Gregory F. Zoeller
Attorney General

Donna Stolz Sembroski
Deputy Attorney General

¹ See Ind. Code § 30-5-1-1. See also Ind. Code § 30-5-1-2 for a description of the limited circumstances under which the article applies to powers of attorneys created before July 1, 1991.

² Ind. Code § 30-5-5-2 includes similar provisions in relation to general authority for the attorney in fact with respect to real property transactions.

³ *Id.* at 1279.

⁴ "Every pleading or motion of a party represented by an attorney shall be signed by at least one [1] attorney of records in his individual name, whose address, telephone number, and attorney number shall be stated. . . . A party who is not represented by an attorney shall sign his pleading and state his address. . . ." Indiana Trial Procedure Rule 11(A). We would also note that Indiana Small Claims Rule 8(C) confirms this basic rule with respect to natural persons (representation only *pro se* or by counsel) while recognizing an exception to the rule for certain circumstances involving sole proprietorships, partnerships, corporations, limited liability companies, and limited liability partnerships (permitting representation by a designated full-time employee).

⁵ Additionally, the prohibition is applicable in the criminal context as well. See *Fair v. Givan*, 509 F. Supp. 1086, 1090 (N.D. Ind. 1981) ("[I]t is well established that a criminal defendant has no constitutional right to have an unlicensed attorney or layman represent him. In particular, the Sixth Amendment does not create a right to be represented by a non-attorney lay person.")

⁶ See, e.g. *Johns v. Cty. of San Diego*, 114 F.3d 874, 876 (9th Cir.1997).

⁷ *Elustra v. Mineo*, 595 F.3d 699, 704 (7th Cir. 2010).

⁸ See also Ind. Code § 30-5-6-4.5: "An attorney in fact has the authority to employ persons, including: (1) attorneys; (2) accountants; (3) investment advisors; and (4) agents; to assist the attorney in fact in the performance of the attorney in fact's fiduciary duties."

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