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Expert Analysis

Ethical Obligations (and Hazards) of Representing Co-Defendants in Medical Malpractice Lawsuits

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It is not unusual for a medical malpractice lawsuit to involve a host of defendants. A quick glance at the med mal docket in just about any venue bears this out. Not uncommonly these cases will include hospitals, physicians, nurses, other health care professionals, and their various practice affiliations. There may be a number of reasons for this phenomenon. Certainly the extent of the damages sought in these cases might be one factor—more defendants typically mean more financial accountability. But strategic considerations may also play a role: the comparative ease of securing discovery from party-defendants as opposed to non-parties, or the potential for exploiting finger-pointing among discordant defendants. Whatever the cause or causes, single-party medical malpractice lawsuits have become rare enough that the very concept almost seems quaint.

Another examination of that docket reveals something else again: common legal representation shared by many of the defendants. The reasons for this are understandable enough. In the first place, there are not many insurance carriers that provide physicians malpractice coverage in New York. Presently only five insurers are authorized to provide the coverage, and of these, three have the lion's share of the market. Some defendants will inevitably find themselves with common insurers, or perhaps have common coverage under a single policy through their employment or practice affiliation. And the insurer, confronted with defense obligations to many parties in one lawsuit, may find the economic and strategic value of a common legal defense to be an appealing option.

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No matter the reasons driving the decision to retain one lawyer for many defendants, the possibility that conflicts of interest may emerge among the clients lurks ominously over the entire arrangement, potentially threatening any prospect of a harmonious defense, and perhaps resulting in an ethical calamity for the attorney. Even in situations where actual or potential conflicts of interest are identified and accepted by the clients, the adequacy of the disclosure and the sufficiency of the consent are two areas that are ripe for second-guessing if the arrangement breaks down. And with informed consent errors responsible for a sizable portion of legal malpractice claims (*Profile of Legal Malpractice Claims 2012-2015,* ABA Standing Committee on Lawyer's Professional Liability (2016)), a lack of attention to the issue may prove hazardous. So at the outset the defense attorney should carefully evaluate any proposed common representation for actual or potential conflicts of interest and, once identified, address them under the framework provided by Rule 1.7 (Conflict of Interest: Current Clients) of the Rules of Professional Conduct. What follows are some of the considerations involved in that exercise.

First Principles: Loyalty and Independent Judgment

Loyalty and independent judgment are essential to the attorney-client

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relationship and these duties form the basis for any conflict of interest analysis. Every client is entitled to his lawyer's undivided loyalty and independent professional judgment, unencumbered by competing allegiances or compromising influences. A conflict of interest is essentially a clash of differing interests that can affect a lawyer's loyalty or judgment. Rule 1.0(f) defines "Differing interests" broadly to include, "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Differing interests invariably exist whenever a lawyer represents two or more distinct parties in the same lawsuit, even if the clients ultimately share the same goal of winning the case. In a medical malpractice action each defendant may have dissimilar liability exposures, clashing views on how to defend the case, or different sensibilities toward settlement, any of which might potentially compromise the attorney's loyalty or judgment.

An attorney that takes on the representation of two or more clients must also maintain impartiality among them. This may prove difficult if the relationship among the clients becomes antagonistic or if, because of their differing degrees of involvement with the patient's care or their different levels of liability exposure, the lawyer feels obliged to focus on one client's defense over the others. Which client might get the better of the lawyer's efforts and energy, or the lesser of the lawyer's skill and judgment? Which might get the lawyer's forbearance where assertiveness is called-for? Or silence where counseling is needed? If any one client has reason to fear that the lawyer will pursue his or her case less effectively out of deference to another client, there is a conflict of interest that needs to be addressed. Especially since all of these concerns are easily eliminated with the simple expedient of separate counsel. So, as an initial starting point, Rule 1.7(a)(1) imposes a blanket restriction against the simultaneous representation of clients with differing interests unless the arrangement satisfies the specific criteria of paragraph (b).

The Rule 1.7(b) exception recognizes that there can be good reasons for a lawyer to represent more than one party to a lawsuit even if the clients' interests differ. Differing interests are not necessarily adverse interests—and even adverse interests can sometimes be reconciled in favor of the benefits to be gained from mutual cooperation. The clients may even *want* the same lawyer. The parties may have a long-standing relationship with the lawyer from earlier representations, and have acquired enough confidence in the lawyer's skill and judgment to overcome any concerns about impartiality. Indeed, a party's right to the lawyer of his choice is an important one that the court is typically reluctant to disregard, and often constrained to respect. *Dominguez v. Community Health Plan of Suffolk*, 284 A.D.2d 294 (2d Dep't 2001).

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Then there are the strategic and economic benefits of a common legal representation, which are both legitimate interests. *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir.1977). Strategically speaking, common representation facilitates the ability to share information and coordinate defense theories—lending cohesiveness to the defense and minimizing inconsistencies that might be exploited by the adversary. And from a financial perspective the savings involved is not trivial; especially when considering that the cost of defending a lawsuit can run into the hundreds of thousands of dollars.

But the fact that the arrangement is acceptable to the clients, and will almost certainly save money for whoever is paying the legal bills, does not make the decision for common representation wise or necessarily ethical. So the criterion laid out in paragraph (b) is meant to assure that any actual conflicts are not severe-enough to fundamentally compromise the lawyer's core obligations to the clients. It also mandates that the clients are fully informed about the arrangement and agreeable to it.

Identifying and Resolving Conflicts of Interest

Identifying and anticipating material conflicts of interests among the clients and assessing whether those conflicts outweigh the benefits of a common legal representation is the first order of business. It is the lawyer's obligation to perform this task whether or not the clients raise the issue. *Felix v. Balkin*, 49 F. Supp. 2d 260 (S.D.N.Y. 1999). The clients, after all, have the right to protect themselves by retaining separate counsel if necessary, and there is certainly no shortage of lawyers for that purpose.

So what might constitute a material conflict among prospective clients? Comment [23] counsels: "A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." It is not enough, however, that the clients' interests merely differ. After all, the delivery of medical care, like most coordinated efforts, involves different actors in diverse roles. The

differences matter where professional judgment and loyalty are affected. Specifically, where the lawyer's ability to think and act independently on behalf of one client comes, or may come, at the expense of another. If one client's best defense cannot be freely advanced because of a competing obligation to another client, the differing interests present a conflict of interest that must be resolved.

Having determined that a material conflict of interest exists—that is, having identified differing interests among the clients that may affect the lawyer's judgment or loyalty—the attorney can only undertake the joint representation if all four requirements of Rule 1.7(b) are met: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation will not involve the assertion of a claim by one client against the other in the lawsuit; and (4) each affected client gives informed consent, confirmed in writing. If any of these elements cannot be satisfied the joint representation is prohibited.

As regards the first element, competence is the required knowledge and skill to undertake the matter, and the thoroughness and preparation needed to handle it. Diligence is the personal commitment to the client's cause. It is the requirement to pursue the client's lawful objectives with vigilance. Both responsibilities are explained in detail in Rules 1.1 and 1.3, respectively.

The second element is rarely a consideration. Few representations are actually prohibited by law. Comment [16] of Rule 1.7 offers some examples—and representing two or more physicians in the same malpractice lawsuit is not one of them.

But the third element—the assertion of adverse claims in the same litigation—presents a trickier issue. Because, while co-defendants may not be prosecuting hostile claims directly against each other, they may have positions vis à vis one another that are or can become antagonistic. The delivery of medical care is a complex activity, involving many individuals and organizations, each with their own roles and responsibilities. At times those roles can be discreet, and assigned to certain individuals or members of a group. At other times they may be shared. The question of who might be responsible for any claimed act or omission is not always clear. And that ambiguity can lead to a significant amount of finger-pointing. What's more, it is not unusual for a malpractice lawsuit to assert that a number of medical errors were committed, complicating the matter further. Depending on what the jury concludes, liability can be apportioned or shared in any variety of ways. So it is incumbent on the lawyer to carefully consider the likely or even plausible ways that the clients' defenses might conflict.

Informed Consent Confirmed in Writing

If the attorney is reasonably confident that she can represent each client competently and diligently, and that the clients' defenses are not materially adverse to each other, the final hurdle is consent confirmed in writing. Comment [4] of Rule 1.7 makes clear that without an informed consent, withdrawal from the representation is required under Rule 1.16(b)(1). Obtaining an informed consent involves fully explaining to each client the risks, benefits and implications of the common representation. Id. Comment [18] of Rule 1.7 advises that the discussion must include the material and reasonably foreseeable ways that a conflict could adversely affect the interests of each client; the possible effects on loyalty, confidentiality, and the attorney-client privilege; and the relative advantages and risks associated with the common representation. The same Comment cautions that there may be circumstances in which it is appropriate for the lawyer to advise the clients to each consult with another disinterested lawyer for advice as to whether to give consent to the conflict. There is no elaboration on what those circumstances might be. But it stands to reason that the greater the risks to the clients, in number or severity, the more it serves both the clients and the lawyer to have the common representation approved by a disinterested lawyer. At the very least the clients should be offered that opportunity.

There are many implications to a common representation, but perhaps the most significant relates to confidentiality and the attorney-client privilege. Both are waived as between the co-clients, at least with respect to the subject matter of the representation. The Court of Appeals has ruled that where the same lawyer jointly represents two clients in the same matter, the clients have no right to expect that anything they say to their attorney concerning the matter will remain secret from the other client; and if the clients should later become adversaries, those communications will not be protected by the attorney-client privilege. *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 651 N.Y.S.2d 954 (1996). And so Comment [31] of Rule 1.7 advises that "[a] t the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."

The clients' informed consent to the common representation must be confirmed in writing. Rule 1.0(e) explains the term "Confirmed in writing" to

denote (1) a writing from the person to the lawyer confirming that the person has given consent, (2) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (3) a statement by the person made on the record of any proceeding before a tribunal. Here the purpose is to confirm that consent has been given and not to document the basis on which that decision was made, so it is not necessary that the writing include all of the information communicated to the clients in obtaining the consent. In the first instance, the requirement of a writing is not meant to take the place of a candid and reasonably thorough discussion with the clients of the relative risks, benefits and implications of the common representation. Instead, Comment [20] states that it is meant primarily to impress upon the clients the seriousness of the decision that they are being asked to make and to avoid disputes or ambiguities that might occur later on in the absence of a writing. Second, depending on the circumstances, it may not be practical to fully assess the differing interests among the clients or to anticipate all of the circumstances or developments that might later arise and affect the representation.

Withdrawal and Disqualification

The hazards of a joint representation run both ways: the clients obviously risk compromised legal advocacy, but the lawyer risks revocation of consent by one or more of the clients, leading to the attorney's discharge, and possibly to his disqualification from the continued representation of the remaining client(s). A client can revoke consent to a conflict at any time and (assuming the decision is the client's and not the client's insurer) discharge the lawyer. And here is where the scope of the informed consent is important, because Comment [29A] warns that without the informed consent of all clients the lawyer will be forced to withdraw from representing everyone in the matter—not just the objecting party. The Comment mirrors the lawyer's duties to former clients under Rule 1.9(a), which states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

But even with a thorough consent, withdrawal from the entire matter may still be necessary depending on the circumstances. Comment [21] states that "[w]hether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result."

To some extent an informed written waiver anticipating just such an event might solve the problem. But this is by no means a given. Ultimately it is for the court to decide if circumstances and the nature of the conflict warrant disqualification, with or without a prior written waiver; but at least in one respect, disqualification is all but assured. If the attorney's continued representation of the remaining client(s) requires the attorney to press a claim or defense directly adverse to the former-client, the attorney must withdraw. The duty of loyalty to the former client does not end with the representation (*T. C. Theatre v. Warner Bros. Pictures*, 113 F. Supp. 265, 267 (S.D.N.Y. 1953)), and it precludes the lawyer from turning on the former client for the benefit of those that remain. Certainly the now former client, in buying into the initial advantages of a joint representation and accepting the tradeoffs that came with it, most likely did not envision the prospect of a vigorous cross-examination by his former trusted-lawyer—who now has the advantage of knowledge and information obtained from the former client under the assumed protections of the attorney-client relationship. As one court has stated: "the spectacle of a cross-examination by counsel of a client formerly represented by that counsel, on a matter touching on that very representation, offends accepted standards of professional obligations of loyalty to a former client." *Felix v. Balkin*, 49 F. Supp. 2d 260 (S.D.N.Y. 1999).

Conclusion

Of course the ethical obligations—and hazards—of representing co-defendants to the same lawsuit are by no means exclusive to medical malpractice actions. In fact, the same principles apply to any common representation of multiple clients in the same or a substantially related matter. But the exigencies that seem to be making shared legal representation a common feature of medical malpractice litigation show no signs of abating. So lawyers who regularly assume these arrangements should be at least as familiar with their professional obligations under Rule 1.7 as they are with the medical standards of care that they are called on to defend.