

ILLINOIS STATE BAR ASSOCIATION  
ISBA Advisory Opinion on Professional Conduct

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**Opinion No. 09-02  
January 2009**

Topic: Conflict of Interest, Dual Representation

Digest: In a medical malpractice lawsuit where a physician and hospital are individual defendants with directly adverse positions, it is a conflict of interest for an attorney to represent the physician if the attorney's law firm also represents the same hospital in other unrelated medical malpractice lawsuits unless the attorney reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after disclosure. It is also a conflict of interest for an attorney to represent a physician in a medical malpractice lawsuit when the attorney also represents another physician in a unrelated medical malpractice lawsuit who will most likely be a witness against the first physician.

References: Illinois Rules of Professional Conduct Rules 1.7(a), 1.7(b), 1.10(a)  
Illinois State Bar Association Advisory Opinions 90-05, 95-15, 96-05, 98-03,  
99-01, 04-01, 05-01

**FACTS**

Patient, individually and as administrator of the estate of her deceased newborn, brought a wrongful death lawsuit ("the lawsuit") against Physician, Physician's employer (who was not the Hospital), and the Hospital. The lawsuit alleges that Physician and the Hospital committed separate acts of negligence which, in turn, caused the death of the child. Physician's insurer sought the prospective engagement of Attorney and his law firm to defend Physician against claims brought in the lawsuit.

Attorney's law firm already represents the Hospital in at least two other unrelated medical malpractice lawsuits. In addition, Attorney represents another physician (3rd Party Physician) who will most likely be a witness against the first physician in a third unrelated medical malpractice lawsuit.

Prior to his engagement, Attorney was advised that Physician's position in the lawsuit is directly adverse to the Hospital. Physician believed that she acted within the standard of care and that the death was caused by difficulties, in part, with hospital equipment. Additionally, the 3<sup>rd</sup> Party Physician whom the lawyer currently represents in another matter<sup>3</sup>, while not a named defendant in the present lawsuit, took an adversarial position against Physician in the matter shortly after the alleged negligence by reportedly informing the Hospital staff members that, had he been called earlier, he could have safely undertaken the procedure.

### **PRESENTED**

1. Is it a violation of the Rules of Professional Conduct for Attorney to represent Physician in a medical malpractice lawsuit when Attorney's law firm also represents the co-defendant Hospital in other unrelated medical malpractice lawsuits and Physician and Hospital have directly adverse positions in the lawsuit?
2. Is it a violation of the Rules of Professional Conduct for Attorney to represent Physician in a medical malpractice lawsuit when Attorney also represents another physician in an unrelated medical malpractice lawsuit who will most likely be called as a witness against Physician?

### **OPINION**

Both questions require the interpretation and application of Illinois Rules of Professional Conduct, Rule 1.7, which provides:

#### Rule 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after disclosure.

(c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.10(a) imputes upon Attorney the same potential disqualifications that would apply to any other member of Attorney's law firm. For that reason, Attorney and Attorney's law firm are treated as one and the same for the purpose of analyzing a potential conflict of interest. See ISBA Opinion No. 90-05 (November 1990). The co-defendant Hospital is a current client of Attorney's law firm and therefore Rule 1.7 provides the standard for the conflict of interest

analysis presented in Question 1. Additionally, the 3rd Party Physician is Attorney's current client and therefore Rule 1.7(b) provides the initial standard for the conflict of interest analysis presented in Question 2.

In analyzing Question 1, Attorney must first determine whether Physician and the Hospital's positions in the litigation are directly adverse. If their positions are not directly adverse, there is no conflict under Rule 1.7(a). However, if there was a substantial likelihood that the representation of either client would materially limit the other client, there would still be a conflict under Rule 1.7(b) that would prevent representation. Only if there were no direct conflict and no substantial likelihood of a material limitation would the representation be appropriate without a waiver. Here, Attorney is advised that Physician's position in the lawsuit is directly adverse to the Hospital's position because Physician believes that the injury was caused by an unforeseen difficulty with equipment provided by the Hospital.

In analyzing Question 2, Attorney must first determine whether representation of Physician may be materially limited by Attorney's responsibilities to the 3<sup>rd</sup> Party Physician. In ISBA Opinion No. 04-01 (November 2004), the Committee found that there was a conflict of interest under Rule 1.7(b) in a case involving two clients with differing and antagonistic interests in the same subject property. Here, 3rd Party Physician, who presumably will provide his opinions and input relative to the Hospital's defense, has taken a position that is directly adverse to Physician in the same subject matter creating a conflict under Rule 1.7(b). Attorney's ability to effectively cross-examine the 3rd Party Physician and attack his opinions and credibility may materially limit his responsibilities to Physician because his two clients have polar opposite opinions on what went wrong with the procedure in question.

In addition to the Rule 1.7(b) conflict raised in Question 2, the facts presented also provide a strong likelihood of a Rule 1.7(a) conflict as well. In ISBA Opinion No. 05-01 (January 2006), the Committee adopted the standard that when a lawyer attempts to cross-examine a current client who has testified adversely to another client, the lawyer's litigation client should be considered directly adverse to the witness client pursuant to Rule 1.7(a) if the examination is likely to result in some "concrete disadvantage" to the witness. Here, the 3<sup>rd</sup> Party Physician is represented by Attorney in an unrelated medical malpractice lawsuit which, absent additional facts, presumably would give Attorney information that will be useful in discrediting the 3rd Party Physician testimony and putting the 3rd Party Physician at a "concrete disadvantage" as a witness thus resulting in a Rule 1.7(a) conflict with the 3rd Party Physician.

Given that Physician's position is directly adverse to that of the Hospital and the 3rd Party Physician, the next step in the inquiry under Rule 1.7(a) is whether Attorney reasonably believes the representation of Physician will not adversely affect the law firm's relationship with the Hospital or the 3rd Party Physician. Furthermore, given that the representation of Physician may be materially limited by Attorney's representation of the 3rd Party Physician, the next step in the inquiry under Rule 1.7(b) is whether Attorney reasonably believes the representation of Physician will not be adversely affected by the representation of the 3rd Party Physician.

Under both Rule 1.7(a) and Rule 1.7(b), reasonable belief is an objective standard predicated on what a disinterested lawyer would conclude as to whether the adverse clients

would agree to the dual representation. See ISBA Opinion Nos. 96-05 (October 1996), 98-03 (January 1999), and 99-01 (September 1999).

Although Attorney and the law firm are not representing the Hospital in this litigation, the fact that they currently represent the Hospital in other unrelated medical malpractice lawsuits leads to the objective conclusion that when Physician's defense places the blame on the Hospital and its equipment, Attorney's relationship with the Hospital will be adversely affected. Thus, the Rule 1.7(a) conflict with the Hospital remains.

As for the conflict with the 3rd Party Physician, any attempt by Attorney to discredit the testimony of the 3rd Party Physician will certainly lead to the objective conclusion that Attorney's relationship with the 3rd Party Physician will be adversely affected. Additionally, a disinterested lawyer would undoubtedly conclude that Physician's defense will be adversely affected if Attorney is unable or unwilling to effectively cross-examine the 3rd Party Physician by challenging his opinion, credibility, motive, and bias when, ultimately, such cross examination could adversely affect the 3rd Party Physician's defense in his own medical malpractice lawsuit. Thus, the Rule 1.7(a) and 1.7(b) conflicts with the 3rd Party Physician remain as well.

Finally, it is important to note that the issue of client consent after disclosure is possible only when the reasonable conclusion is that the representation will not adversely affect either the relationship with the current client or the representation of the potential client.

Clearly, in this case, it would be a violation of the Rules of Professional Conduct for Attorney to represent Physician due to a conflict of interest with both the Hospital and the 3rd Party Physician. Further, the facts are such that it is unnecessary to examine the issue of client consent after disclosure as provided for in Rule 1.7(a)(2) and 1.7(b)(2). Consent is irrelevant when it is unreasonable to conclude that Physician's representation will not adversely affect Attorney and the law firm's relationship with the Hospital or the 3rd Party Physician. Consent is also irrelevant when it is unreasonable to conclude that Physician's representation will not be adversely affected by Attorney's representation of the 3rd Party Physician. The affirmative answer to Questions 1 and 2 precludes Attorney from representing Physician.

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