ISBA Professional Conduct Advisory Opinion

Opinion No. 22-01
May 2022

Subject: Former Client

Digest: Under Rule 1.9(a), a lawyer who had previously represented a medical group in defending against medical malpractice claims may not subsequently represent a client in asserting a medical malpractice claim against a physician who is a member of the medical group if the matters are the same or substantially related, unless the former client provides informed consent. Even if there is no conflict under Rule 1.9, the lawyer should not use or reveal confidential information relating to the former representation except as otherwise permitted under IRPC 1.9(c).

References: Illinois Rules of Professional Conduct 1.6, 1.7, 1.9 and 1.13
Restatement (Third) of the Law Governing Lawyers, §96
ISBA Advisory Op. No. 05-01
ABA Formal Op. No. 479
ABA Formal Op. No. 497
Schwartz v. Cortelloni, 177 Ill. 2d 166 (1997)
In re Estate of Klehm, 363 Ill. App. 3d 373 (1st Dist. 2006)
Watkins v. Trans Union, LLC, 869 F.3d 514 (7th Cir. 2017)

FACTS

Attorney formerly represented a health care medical group in defending against claims of medical malpractice. Two years after leaving his firm, Attorney represented a plaintiff in asserting malpractice claims against an individual physician who was employed by the medical group. Attorney had not previously represented the defendant physician in any matter. The malpractice claims against the defendant physician are not based on the same occurrences as the claims that the Attorney had previously defended on behalf of the medical group. Attorney had not sued the medical group and, when the Attorney filed the lawsuit, the Attorney was not aware that the defendant physician was a member of the medical group. However, for purposes of this opinion, we have assumed that the Attorney will add the medical group as an additional defendant and/or that the medical group would be financially responsible to the extent the defendant physician is found to have been negligent. The medical group contends that the

Attorney has a conflict of interest that bars the Attorney from representing any person in a matter adverse to any member of the medical group, including the defendant physician.

QUESTION

Does a lawyer have a conflict of interest if the lawyer, who previously represented a medical group in defending against medical malpractice claims, files a medical malpractice claim on behalf of a client against a physician who is part of that medical group even though the claims are factually distinct?

DISCUSSION

1. Identify the Clients.

As in any conflicts analysis, it is important at the outset to identify the client(s) that present the potential conflict and to determine whether the potential conflict arises out of a current representation, in which case Rule 1.7 of the Illinois Rules of Professional Conduct ("IRPC") would govern, or a former representation, in which case IRPC 1.9 would govern.

Here, there are two potential sources of conflict – the defendant physician, who is an adverse party in litigation brought by the Attorney, and the medical group.

The defendant physician does not appear to have been a client of the Attorney. Although the Attorney previously represented the medical group, that fact does not necessarily confer client (or former client) status on the physicians who are members of the medical group. To the contrary, the presumption is that a lawyer who represents an organization does not also represent its constituents, unless the parties agree otherwise. That is made clear by IRPC 1.13, which permits, but does not require, that a lawyer representing an organization also represent its constituent members. That Rule provides in relevant part as follows:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
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> (g) A lawyer representing an organization *may* also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

IRPC 1.13(a), (g) (emphasis added). *See also* Restatement (Third) of the Law Governing Lawyers, §96, Comment [b] (a lawyer retained to represent an entity "does not thereby also form a client-

lawyer relationship with all or any individuals employed by it ... or who have an ownership or other beneficial ownership interest in it ….").

Under the facts presented here, it does not appear that the Attorney formed an attorney-client relationship with the physician. The Attorney was not even aware that the physician was a member of the medical group and had not previously agreed to represent the physician individually. (It is not clear from the facts presented whether the physician was even a member of the medical group at the time the Attorney represented that group.) Absent such an express agreement or facts from which to infer such an agreement, there should be no attorney-client relationship between the Attorney and the physician.

That the Attorney did not represent the physician does not, however, end the conflicts analysis. As noted above, the Attorney had formerly represented the medical group. The medical group will likely become a party to the litigation, adverse to the Attorney's current client, or, at the very least, presumably has interests in that litigation that are adverse to the Attorney's current client, such as financial obligations to defend, indemnify or insure the defendant physician.

We next address whether the former client relationship with the medical group creates a conflict.

2. Conflicts Involving a Lawyer's Former Client: IRPC 1.9(a)

Because the medical group is a former client of the Attorney, IRPC 1.9 controls the conflicts analysis. That Rule provides in relevant part as follows:[1]

> (a) 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.
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> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
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> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit

[1] IRPC 1.9(b) addresses an issue not relevant here – that is, the circumstances under which a lawyer may be barred from being adverse to a client of his/her former firm even where the lawyer may not have directly represented the former client. In contrast, IRPC 1.9(a) applies where, as here, the lawyer actually represented the former client.

> or require with respect to a client, or when the information has become generally known; or
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> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

IRPC 1.9(a) applies only if the Attorney is representing a client in a matter that is the same or "substantially related" to a matter in which the Attorney had previously represented the medical group. If the matters are substantially related and the interests of the current client are materially adverse to the former clients, the Attorney may not represent the current client absent informed consent of the former client (the medical group). Here, the interests of the Attorney's current client and the medical group are clearly materially adverse.[2] The relevant issue, therefore, is whether the matters are "substantially related" so that the informed consent of the medical group would be required.

Matters are substantially related if they "involve the same transaction or legal dispute or if there is otherwise a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." IRPC 1.9, Comment [3]. The fact that the lawyer "recurrently handled" similar claims for a former client does not make the matters "substantially related" where the claims are factually distinct. IRPC 1.9, Comment [2]. Instead, "the underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as changing sides in the matter in question." *Id.*

The Supreme Court has adopted a three-part test to determine whether matters are substantially related:

> [T]he court first must make a factual reconstruction of the scope of the former representation. Then, it must determine whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, the court must consider whether the information is relevant to the issues raised in the litigation pending against the former client.

Schwartz v. Cortelloni, 177 Ill. 2d 166, 178, 180 (1997)*; In re Estate of Klehm,* 363 Ill. App. 3d 373 (1st Dist. 2006) (applying three-part test under *Schwartz*). In determining whether a conflict bars a representation against the former client, the Court urged caution, noting: "Attorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing. . . . . Thus, caution must be exercised to guard against motions to disqualify being used as tools for harassment."

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[2] For a recent discussion on the issue of material adversity, see ABA Formal Op. No. 497 (Feb. 10, 2021).

Schwartz, 177 Ill. 2d at 178 (citations omitted). *See also Watkins v. Trans Union, LLC,* 869 F.3d 514 (7th Cir. 2017) (same).

Determining whether matters are substantially related involves a fact-intensive inquiry. Even if the prior representation and the current matter here appear to be "factually distinct" – because they involve different physicians and arise out of different occurrences and different injuries – that does not end the inquiry. The matters may still be deemed "substantially related" if the Attorney acquired "confidential information" in connection with the prior representation that "would materially advance" the current client's position against the former client.

Notably, not all "confidential information" will be sufficient to create a conflict. For example, information that concerns an organization's general policies, or has become generally known, or has become obsolete over time will not preclude a subsequent representation. *See* IRPC 1.9, Comment [3]. *See also* Section 3 below (regarding information that is "generally known"). On the other hand, "knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude the representation." A lawyer may be assumed to have gained such knowledge "based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." *Id.*

Whether information the Attorney acquired from representing the medical group constitutes "confidential information" that would create a conflict under Rule 1.9(a) depends on facts beyond the knowledge of this Committee.[3] In assessing whether a conflict exists, relevant considerations include, for example, the extent to which (i) both matters involve the same institutional witnesses and documents, (ii) the Attorney, by representing the medical group, learned the medical group's "litigation philosophy and its methods and procedures for defending claims" (*i.e*., its defense playbook) that is relevant to the current representation, (iii) the Attorney's involvement in representing the former client was so substantial that the Attorney would be viewed as having "chang[ed] sides." *See* IRPC 1.9, Comment [2]. If consideration of the relevant facts leads to the conclusion that the matters are substantially related, the Attorney would need to obtain informed consent from the former client (the medical group) in order to continue with the representation under IRPC 1.9(a).

3. Limitations on Use/Disclosure of Confidential Information of Former Clients: IRPC 1.9(c)

Even where there is no conflict that would prohibit the subsequent representation, IRPC 1.9(c) imposes restrictions that limit the ability of a lawyer to "use" or "reveal" information

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[3] Determining whether matters are substantially related and whether there is, therefore, a conflict of interest under IRPC 1.9 is not only fact-intensive, reasonable minds may reach very different conclusions based on the very same set of facts. *Compare Watkins,* 869 F.3d at 520-25 (majority opinion) (finding no substantial relationship and no conflict under Rule 1.9) (applying Indiana rule) *with id.*at 527-31 (Sykes, J., dissent) (finding substantial relationship and conflict).

"relating to the representation" of a former client. This is true even where the former client is not an adverse party in the subsequent representation.

Specifically, a lawyer may not "use" information relating to the representation "to the disadvantage of the former client" except as the lawyer would be otherwise be permitted to do so with respect to current client under the IRPC or to the extent the information has become generally known. IRPC 1.9(c)(1). (IRPC 1.6 generally governs confidentiality of information relating the representation of a client and is the subject of other opinions of this Committee.) Although "generally known" is not defined in the Rules, its meaning is fairly narrow and the exception "limited." ABA Formal Op. No. 479. Its meaning is limited to information that is of "'common knowledge in the community.'" ISBA Advisory Op. No. 05-01. Addressing identical language under ABA Model Rule 1.9(c)(1), the ABA concluded that "[i]nformation that is publicly available is not necessarily generally known." ABA Formal Op. No. 479, at 5. Rather, information is "generally known" only if "(a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession or trade." *Id.* Information may become "widely recognized and thus generally known" under category (a) – that is recognized *by members of the public* – "as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media." Information under category (b) – that is, recognized *in the former client's* industry, profession or trade – would be treated as "generally known" "if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field," even though that information is not widely recognized by the public. *Id.* at 5. Unless the information falls within one of these two categories, the fact that the information may be available in court records, public libraries or other public repositories, or discussed in open court does not, alone, mean that the information is "generally known" for purposes of Rule 1.9(c)(1).

A lawyer also may not "reveal" or disclose information (regardless of "use") relating to the former representation except as would otherwise be permitted with respect to a client under the IRPC. *See* IRPC 1.9(c)(2), Comments [7-8]. Notably, the prohibition on "reveal[ing]" information relating to the representation of a former client is broader than the prohibition on the use of such information. Whereas a lawyer may not "use" information only where such use is to the disadvantage of the former client, a lawyer may not "reveal" or disclose such information, regardless of whether such disclosure would disadvantage the former client and regardless of whether such information has become "generally known."

CONCLUSION

A lawyer who previously represented a medical group in defending against medical malpractice claims may represent a person in pursuing a malpractice claim against a member of that group without consent of the former client *only if* the matters are not substantially related.

Even if the Attorney does not have a conflict under IRPC 1.9(c), the Attorney should not use or reveal information relating to the Attorney's representation of the medical group except as permitted under IRPC 1.9(c) and IRPC 1.6.
