



Should You Have Your Own Lawyer? The Ethical Obligations of Representing Co-defendants in MPL Lawsuits

By Ralph A. Catalano, Esq.

It is not unusual for medical professional liability (MPL) lawsuits to involve multiple medical professionals as defendants. And very often, some or all of these defendants are assigned common legal representation. This may be because the medical defendants share common liability insurance coverage, or perhaps because they are affiliated with the same medical practice, clinic, or hospital. When this occurs the insurer or health facility, confronted with defense obligations to many parties in one lawsuit, may find the economic and strategic value of a common legal defense an appealing option. And the practitioners involved may accept this decision without much

thought or concern for how the common representation might impact the lawyer's advocacy on behalf of each client. The danger in this arrangement, however, is that each client's interests or strategies in defending the case may differ, and even conflict. And a conflict, if severe enough, has the potential to threaten a harmonious defense and create an ethical dilemma for the attorney. So, at the outset all parties, but most especially the lawyer, should carefully evaluate any proposed common representation for actual or potential conflicts of interest.

From the lawyer's perspective, the answer can be found in the rules of pro-

fessional ethics. Most states follow the American Bar Association Rules of Professional Conduct. And Rule 1.7 of the rules (Conflict of Interest: Current Clients) addresses a lawyer's obligations to the clients that he represents in the same lawsuit. What follows are some of the issues that the lawyer must address and the corresponding rights of the respective clients.

Will loyalty and independent judgment be compromised?

Loyalty and independent judgment are essential to the attorney-client 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. Inevitably, there are differing interests 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 an MPL action, the several defendants may have dissimilar liability exposures, clashing views on how to defend the case, or different sensibilities toward settlement. Any of these may potentially compromise the attorney's loyalty or judgment.

An attorney that takes on the representation of two or more clients needs to maintain impartiality among them. This may prove difficult if the relationship among the clients becomes antagonistic; or if, because of their differing extent 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 more than that of the others. If any one client has reason to fear that the lawyer will pursue his case less effectively, in 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. Strategically speaking, common representation makes it easier to share information and coordinate the theories for the defense—thereby 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.

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But the mere 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 ensure that any actual conflicts are not sufficiently severe that the lawyer's core obligations of loyalty and independent judgment are fundamentally compromised. It also requires that the clients be fully informed about the arrangement and agreeable to it. So, from the clients' perspectives, the healthcare providers need to ask themselves: Foremost, do I need to be concerned that my lawyer's loyalty may be compromised, or that the attorney's judgment may be impaired because of his representation of other healthcare providers? Second, have I been fully informed of the ramifications and potential consequences of joint representation? These are the essential questions that must be addressed with the lawyer. And even if the providers are

not alert to the issue, it is nonetheless the lawyer's responsibility to identify, and anticipate, conflicts of interest and address them with the clients.

Identifying and anticipating conflicts of interest

But what might constitute a material conflict among prospective clients? The commentary to Rule 1.7, specifically Comment [23], advises that, “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 when professional judgment and loyalty are affected—specifically, if 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, either by declining the common representation at the outset or by securing the informed consent of the clients.

Having determined that there is material conflict of interest—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 he 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, joint representation is prohibited.

For the first element, competence is the required knowledge and skill to undertake the matter, along with the thoroughness and preparation needed to handle it. The concept of diligence mandates a personal commitment to the client's cause. It entails the requirement to pursue the client's lawful objectives with vigilance.

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 healthcare providers in the same MPL lawsuit is not one of them.

But the third element—the assertion of adverse claims in the context of 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 his own roles and responsibilities. At times those roles can be discreet, and assigned to specific individuals or members of a group. At other times, they may be shared. The answer to the question of who is 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 an MPL lawsuit to assert that a number of medical errors were committed, further complicating the matter. 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 he can represent each client competently and diligently, and that the clients' defenses are not materially adverse to each other, the final requirement is consent confirmed in writing.

Obtaining an informed consent involves fully explaining to each client the risks, benefits and implications of the common representation.

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There are many implications to a common representation, but perhaps the most significant relates to confidentiality and attorney-client privilege. Both are generally waived as between the co-clients, at least with respect to the subject matter of the representation. 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 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 rather than documenting the basis on which that decision was made. So it is not necessary that the written text include all of the information communicated to the clients in the course of obtaining his consent. In the first instance, the requirement of a written document 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 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. What is important is that the attorney have a full and frank discussion concerning the existence and ramifications of actual or potential conflicts of interest and obtain the clients' consent to the joint representation in writing if that is how they choose to proceed. Just as importantly, the clients should understand that they have the right to withdraw prior to consent to a conflict at any time.

Conclusion

Representation of multiple healthcare providers in the same lawsuit has become a common occurrence. But it is a situation that has the potential for conflict among the clients; and when that occurs, the ramifications can be harmful. It is the lawyer's responsibility to recognize and address this potentiality. But the healthcare provider should be just as vigilant in ensuring that the lawyer fulfils the responsibilities that are owed to each client. **MPL**

Ralph A. Catalano, Esq., is a Partner of *Catalano Gallardo & Petropoulos, LLP*. For related information, see www.cgpllp.com.