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Conflict of Interest: Doctors Deserve to Know

The Rules of Professional Conduct should provide the necessary clarity in guiding attorneys in matters of full and fair disclosure and representation of the doctor in a medical malpractice matter.

By Eric Poe

Conflict of interest—a phrase that is taken seriously in the legal field. In fact, the first step after an initial consultation with any attorney is the process of doing a "conflict check" within the law firm to make sure there are no existing clients in direct conflict with the representation of the new client. It is this special relationship that I address here: guidance for attorneys and clients from the Rules of Professional Conduct (RPC), specifically in the context of medical malpractice. The RPC's act to support the public policy that clients should receive legal counsel without a conflict of interest on the part of the attorney. In fact, it is this sacred bedrock principle that clients rely on so they can freely divulge their deepest vulnerabilities in exchange for the proper legal advice. To that end, the importance of requiring attorneys to fully disclose any current or prior relationships that may interfere with representation is paramount and a well-accepted requirement under the Rules.

The issue that has troubled me for almost two decades has been the more complex "tri-partite" relationship in medical malpractice litigation between the attorneys, the doctor-policyholder and the insurance carrier. In such cases, doctors are assigned attorneys by the insurance carrier, creating a triangular relationship among the three parties. But, a fundamental cloud is created when the current RPC fails to define "client" as the insurance company in this relationship. The assumption being made is that the doctor understands the nuances of this relationship. To me, it is clear that they do not. This is made more monumental by the emotional and financial nature of such lawsuits.

Due to the various other professionals and/or entities involved in

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a medical malpractice lawsuit, I strongly believe many doctors assume that their defense attorney must disclose when there is a co-defendant adversary—another doctor or provider that is pointing the finger at them for liability—that is also insured by a current insurance company that pays their attorney or law firm hundreds of thousands of dollars in annual revenue in other cases. This assumption is surprisingly false. While it is true that attorneys are required to reveal any connections with the other "named parties" in the matter (the other

doctors, nurses or hospitals), this does not extend to the *insurance carriers* currently insuring the other parties to the lawsuit.

As a direct derivative of this bizarre exemption from disclosure requirements in the RPC ethics, doctors could be compelled to monitor the legal strategy of their case. Specifically, it would fall on them to ensure that there are no other potential parties responsible for the injury that weren't named, potentially because they are insured by an insurance company that generates revenue for their assigned attorney. This is only one example, but it illustrates how the lack of disclosure is important in lawsuits with multiple physician-defendants, each insured by a different carrier.

A Deeper Look

When a physician is accused of negligence by a patient, it is highly personal, and the doctor becomes immersed in an overwhelming complex legal process. To compound the matter, oftentimes multiple parties are involved in the litigation—other doctors, nursing staff, hospitals, laboratories and care centers—raising questions of common interests, prior relationships and other such potential conflicts.

Like many outside the legal and insurance professions, most doctors assume they are the only,

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and certainly the most important, client in the relationship with their lawyer. They must be able to trust their assigned attorney to defend the claim to the fullest extent possible and have confidence in their attorney's evaluation, assessment and plan for the case.

Consider those instances where an assigned attorney does a significant volume of work for another insurance carrier, who also happens to be the insurer of a co-defendant physician. While attorneys are expected to work solely in their clients' best interests, might that lawyer consider the impact to the other insurance carrier as they prepare their client's defense? Is there a conflict of interest from a practical perspective, even if it does not meet the strict RPC legal definition? Is there a potential impact on either or both representations? I think so.

It may be easier to see the potential for conflicts in a detailed example;

Surgeon 1 performed a surgery on a patient. A week later the patient presented at a hospital with abdominal pain and a CT scan was ordered to ascertain the cause. Due to a scheduling error and poor protocols, the patient was forced to wait over 10 hours and her condition worsened.

The on-call surgeon, Surgeon 2, who never previously treated the patient, read the CT scan, determined she had a postoperative leak and performed revision surgery. While the surgery appeared successful, the patient coded and died within minutes while still in the operating room.

During that procedure, the patient had persistent tachycardia, absent urine output, decreased oxygenation, and was unstable. The

anesthesiologist made the decision to extubate the patient within two minutes after surgery in the face of instability. This rush to extubate the patient could have contributed greatly to the patient's death.

After her death, the patient's estate filed suit against both surgeons and the hospital—each covered by a different insurance carrier. Notably, due to an oversight by the plaintiff attorney, the anesthesiologist was not named as a defendant.

A closer look shows how the potential conflict can impact the case: Surgeon 1 is insured by Insurance Co. X and is assigned Attorney Cage. Unbeknownst to Surgeon 1, Attorney Cage also receives 50% of his legal work and revenue from Insurance Co. Y, the insurance company that insures both the hospital and the anesthesiologist.

Is it fair to question why Surgeon 1's attorney has not brought a third-party lawsuit alleging the responsibility to the anesthesiologist? Would Surgeon 1 want to know that the anesthesiologist is insured with an insurance company that provided 50% of the income to his own assigned attorney's law firm last year? Is it legitimate for the doctor to ask why his own attorney's cross-examination of the hospital executives for their negligence during the trial was so harmless? Would the doctor want to know that the hospital is covered by the insurance company that provides 50% of the income to his assigned attorney's law firm? I will let you decide, but I think any possibility of impropriety or undue influence under these circumstances deserves an extra layer of protection for the doctor in terms of mere disclosure.

The Current Law

New Jersey law requires attorneys to make certain disclosures to their client. More specifically, the Rules of Professional Conduct prohibit a lawyer from representing a client if that client's representation is subject to "a significant risk that the representation [...] will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." (RPC 1.7(a)(2).)

I believe strongly that it is relevant to know whether an attorney's current or past relationship with a particular insurance carrier may influence the present representation. So, I took action and respectfully suggested that the New Jersey Supreme Court consider expanding upon RPC 1.7: Conflict of Interest: Current Clients and the Client-Lawyer Relationship. Specifically, I recommended that the Rules of Professional Conduct in New Jersey address the inequities that arise from any non-disclosure of an attorney's prior history or current connection to an insurance carrier.

Protecting The Physician, Attorney and Carrier

When it comes to medical malpractice litigation cases, one point is clear: it should not be left up to doctor to know all the "right" questions to ask when faced with one of the most difficult and distressing experiences in their medical career. The Rules of Professional Conduct should provide the necessary clarity in guiding attorneys in matters of full and fair disclosure and representation of the doctor.

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