

## JAMES SWIGER'S ETHICAL HYPOTHETICALS

### HYPOTHETICAL NO. 1:

Counsel of record in a workers' compensation case composed a typewritten physician's medical record on hospital letterhead. This medical record was emailed back and forth between counsel and the physician. When the physician was contacted, he acknowledged that he had merely signed the medical record and that the attorney, or someone in his office, had prepared it for the physician's signature. Once signed, the attorney then filed it as a written report with the Virginia Workers' Compensation Commission and a copy sent to opposing counsel. Thereafter, a settlement was reached by the Virginia Workers' Compensation Commission.

### **Is this an ethical violation?**

The appropriate and controlling Rules of Professional Conduct relative to this situation are Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflect adversely on a lawyer's fitness to practice law; Rule 3.3 (a) (1) and Rule 4.1(a) which provide, respectively, that a lawyer shall not knowingly make a false statement of fact or law to a tribunal and that in representing a client, a lawyer, in statements to others, shall not knowingly make a false statement of fact or law; Rule 1.2(c) which prohibits a lawyer counseling or assisting his client in conduct that the lawyer knows to be criminal or fraudulent; and Rule 3.4(g), which provides that a lawyer appearing before a tribunal shall not intentionally violate an established rule of procedure or of evidence where such conduct is disruptive of the proceedings.

On the facts presented, it is significant that the medical report had been sent back and forth between the defense counsel and the physician. It can be inferred that, although counsel was the scrivener, the physician reviewed the medical report for accuracy before he signed it as his medical report. Under those circumstances, counsel did not dictate the physician's testimony in the report. There is no suggestion in the facts presented that the physician took exception to the content of the report as an inaccurate or misleading presentation of his own findings or opinions, nor is there any suggestion that the physician did not adopt and voluntarily sign the report as his own.

The fact that counsel composed the report, which the physician reviewed, adopted and signed, is not alone a misrepresentation or dishonest conduct under Rule 8.4(c). However, counsel must take care in his presentation of the medical report. It is one thing to write "I enclose the medical report of Dr. X to be filed." It is something else,

however, to write "I enclose the medical report that Dr. X prepared to be filed." The latter statement would be a misrepresentation with respect to the fact of preparation.

Counsel's writing of the medical report for submission to and review, adoption and signature by the physician does not violate the Rules of Professional Conduct. The applicable ethical constraint is that the content of the lawyer-composed medical report must honestly capture the testimony that the physician wishes to present (as opposed to lawyer-created testimony that the lawyer wishes to present irrespective of the physician's own testimony) and must be reviewed, adopted and signed by the physician voluntarily. In addition, the lawyer must be alert to the Rule 4.3 requirement that, in dealing with an unrepresented person, a lawyer shall not state or imply that he is disinterested and may have to clarify his role in the matter to the physician.

### **HYPOTHETICAL NO.2:**

The claimant was the victim of an alleged aggravated sexual assault by her supervisor on the work premises. The claimant filed a civil action pursuant to Virginia Code § 65.2-301(b) and also filed a claim with the Virginia Worker's Compensation Commission. Another law firm represents the employer and its insurance carrier in both the circuit court and before the Commission. The defendant's law firm has indicated that it plans to defend in the circuit court by arguing the matter is compensable by the exclusive remedy under the Workers' Compensation Act. The firm indicates that it will simultaneously argue before the Commission that the matter is not compensable but should be addressed by the circuit court.

### **May the defendant's law firm present the same factual matter at the same time in two different tribunals arguing diametrically opposed legal conclusions?**

The appropriate and controlling Rule of Professional Conduct in this situation is Rule 3.1 which states that:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Although there is a credibility problem inherent in an attorney's arguing both sides of the same issue in different forums, the duty to diligently represent one's own client outweighs any credibility problem the attorney may have. Thus it is not improper for the attorney to present the same facts at the same time in two different tribunals arguing

opposing legal conclusions so long as he does not violate Rule 3.4(j).<sup>1</sup> The Committee believes that such contradictory argument is analogous to filing pleadings in the alternative, wherein the court is given the opportunity to accept one of the several theories of recovery.

### **HYPOTHETICAL NO.3:**

Counsel's law firm represents, on a continuing basis, a workers' compensation insurance carrier. Counsel accepted representation of an individual who was injured while on the job and who had been paid workers' compensation benefits by the carrier represented by counsel's firm. Counsel has now filed a products liability suit on behalf of the injured individual and the workers' compensation insurance carrier has a lien against any recovery that may result from that law suit. Counsel is also representing the workers' compensation carrier in this matter.

### **Is there a conflict with counsel's continuing representation of the individual and the workers' compensation insurance carrier?**

Rule 1.7 of the Rules of Professional Conduct is the appropriate and controlling rule related to this situation. Rule 1.7(a) states:

- **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
  - **(1) the representation of one client will be directly adverse to another client; or**
  - **(2) there is significant risk that the representation of one or more clients 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.**

Rule 1.7(b) allows that consent may cure a conflict if certain conditions are met:

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<sup>1</sup> A lawyer shall not: ...

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

- **(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:**
  - **(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 does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and**
  - **(4) the consent from the client is memorialized in writing.**

A lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. See Comments 29-33 to Rule 1.7.<sup>2</sup> Of additional import

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<sup>2</sup> ***Special Considerations in Common Representation***

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, 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. In limited circumstances, it may be appropriate for

are the requirements of Rule 1.6(a) which define and describe the need for preservation of a client's confidences and secrets.

Counsel's representation of both the insurer and the employee of the insured in this scenario would not violate Rule 1.7, per se. It appears that, since the employee has a products liability action against a third party and the insurer simply retains a lien against any proceeds of the action, the interests of the two clients are *potentially* differing, such as in the division, if any, of the proceeds and the responsibility for costs and attorney's fees, but, at least at the outset, the interests are aligned. To the extent there could be a diversion of interests, the requirements of full disclosure and consent to the representation by both clients, as articulated in Rule 1.7(a)(2) and Comments 29-33 must be met. Should the potential differing interests mature into actual adverse interests, it would be necessary for Counsel to withdraw from representing both the employee/plaintiff and the insurer, who would need to then obtain separate counsel.

#### **HYPOTHETICAL NO.4:**

Counsel represents a claimant in a contested workers' compensation matter. As a result of the attorney's successful representation, the attorney is entitled to a pro rata contribution to his attorney's fee from each treating physician whose medical bill will now be paid by the Virginia workers' compensation insurance carrier under Virginia Code § 65.2-714. The attorney submits all bills along with a fee request as required by the Virginia Workers' Compensation Commission and notifies all treating physicians of his intent to collect a portion of his attorney's fee from the sums due them for treating his client. One of the physicians contacts the attorney to negotiate the percentage of the attorney's fees to be paid out of the medical bills directly with the attorney. An amount is agreed upon for both the medical and legal fees and paid by the workers' compensation carrier in full. Later, the client advises the attorney that he believes that the physician

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the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(b).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

with whom the attorney's fees were directly negotiated may have negligently treated his injuries and instructs the attorney to proceed with a malpractice action. The issue of the physician's alleged malpractice was never raised during the fee negotiation.

**Is it a conflict of interest for the attorney to pursue a medical malpractice action on behalf of the client against the physician if the attorney also submitted this physician's medical bills to the Commission for payment and negotiated directly with the physician to receive a percentage of his attorney's fee from the amount collected for the physician?**

Rule 1.9(a) of the Rules of Professional Conduct is instructive in this situation. A lawyer who has represented a client in a matter shall not represent another person in the same, or a substantially related matter, if the interests of the new person are adverse in any material respect to the interests of the former client, unless the former client consents after full disclosure.

The question in this case is whether the physician ever was a "client." The conversation between the attorney and the client's treating physician merely complied with the statutory law's directive to resolve the issue of a pro-rata contribution by all medical providers to the attorney's fee award. Assuming that the issue of alleged malpractice was not discussed with the physician, the attorney never allowed his representation of his client's interest to waiver.

The mere process of fee negotiation did not give rise to the expectation that the discussion would be held in confidence. Moreover, the fee negotiation did not subject the attorney to any impermissible influence of the physician which might affect the attorney's representation of his client in the future malpractice action. One assumes that the client consented to the payment of some portion of his legal fees by the workers' compensation carrier as negotiated out of fees owed to his physician in accordance with § 65.2-714 of the Code of Virginia of 1950, as amended, which is self-explanatory and states:

If a contested claim is held to be compensable under this title and, after a hearing on the claim on its merits or after abandonment of a defense by the employer or insurance carrier, benefits for medical services are awarded and inure to the benefit of a third party insurance carrier or health care provider, the Commission shall award to the employee's attorney a reasonable fee and other reasonable pro rata costs as are appropriate....The fee shall be paid from the sum which benefits the third party insurance carrier or health care provider.

Under the facts presented, simply because the attorney received an attorneys fee from the physician, *pursuant to Section 65.2-714*, an attorney-client relationship was not necessarily thereby created. Importantly, upon the facts presented, the only matters discussed with the physician were relative to the amount of the so-called 714 fee.

The committee is of the opinion that no conflict exists which would prohibit the attorney from pursuing the client's malpractice claim under the circumstances presented, since no attorney-client relationship was established with the treating physician (see LEOs 1384, 1536, and 1457) or in derogation of existing law (see Va. Code §65.2-714 (B)). An attorney-client relationship must be created by mutual consent and not involuntarily thrust upon either party.