Conflicts-of-Interest Disqualification in Medical Malpractice Litigation

George J. Annas
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by George J. Annas, J.D., M.P.H.

Less than two decades ago it was thought sufficient to say, "When a practitioner is in doubt on an ethical question, the best answer is usually No." A more recent commentator has suggested, however, that "[s]uch platitudes have become increasingly inadequate to guide the attorney facing conflicts of interests in the private practice of law." Because of the general vagueness of the American Bar Association's Model Code of Professional Responsibility, and of state codes based on it, courts have begun to fashion a vast "common law" of conflicts of interest. A particularly controversial entry to this body of common law is the opinion of Justice Paul Liacos, sitting as single justice in the Massachusetts case of White v. Kaplan. This article examines the opinion and its theoretical support.

The Facts
Robert and Elaine White filed a malpractice suit against Dr. L. Fredrick Kaplan for his alleged failure to properly diagnose a tracheal tumor. At the September 1979 tribunal, Dr. Kaplan was represented by Attorney Peter C. Knight, and the Whites presented the expert opinion of Dr. Daniel Zoll in support of their suit. In January 1980, in answer to interrogatories, the Whites again identified Dr. Zoll as their expert witness for trial.

In September 1980, Attorney Knight agreed to represent Dr. Zoll as defendant in an unrelated malpractice suit alleging that he negligently treated a foot wound caused by a piece of glass. In February 1982, Dr. Zoll's deposition was taken by the Whites' attorney (by this time Attorney Knight knew that he had undertaken to represent their expert witness in a separate matter). The Whites obtained new counsel for their suit in June 1983, and this attorney moved to disqualify Knight as the lawyer for Defendant Kaplan, on the basis that Knight had a conflict of interest in that he represented the Whites' expert witness in another malpractice matter. The trial judge thought he lacked the jurisdiction to compel defense counsel to withdraw, and the case was taken before Justice Liacos for resolution.

The Opinion
Justice Liacos sought to balance the interests of each party in a manner consistent with "the spirit of Canon 4" and "the perimeters of Canon 9" of the ABA Model Code of Professional Responsibility. When explicit ethical guidance does not exist, a lawyer should determine his conduct in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession [EC 9-2].

... Canon 4 states, "A lawyer should preserve the confidences and secrets of a client" and disciplinary rule 4-101(b) states, "a lawyer shall not knowingly . . . use a confidence or secret of his client to the disadvantage of the client . . . [or] use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure." Justice Liacos also cited Canon 9's injunction that "[a] lawyer should avoid even the appearance of professional impropriety in order to protect the public's interest in the scrupulous administration of justice." He balanced these basic, but vague, principles against the litigant's right to the counsel of his choice.

Justice Liacos concluded that there were two possible ways in which the dual representation at issue might give rise to an unacceptable conflict of interest. Both involved the cross-examination of the client in his role as expert witness in the White case. One of two things might happen: "(a) the attorney may be tempted to use confidential information to impeach the witness; or (b) [the attorney] may fail to conduct a rigorous cross-examination for fear of misusing his confidential information." This argument would have been stronger had there been some indication of what specific confidential information might have been involved, but Justice Liacos was content to note simply, in a footnote, that "while these cases may involve different bases for their respective claims, they both involve medical malpractice. The credibility, reputation and competence of both doctors will be in issue at Dr. Kaplan's trial." Following this line of argument, Justice Liacos concluded that a breach of confidence need not be proven but only presumed, "in order to preserve the spirit of the code." In his words: "It is difficult to see how Mr. Knight could avoid, even unconsciously, the use of information acquired because of the attorney-client relationship..."
with Dr. Zoll to impeach Dr. Zoll's
credibility.11

Two other issues were considered: the defense of consent and the use of
disqualification as a litigation tactic. Justice Liacos dismissed the consent
defense by giving more weight to the
"public trust in the notions of funda-
mental fairness and justice, and in the
integrity of the bar."12 The justice saw
the possibility that Dr. Kaplan would
"gain "an unfair advantage" as es-
pecially troublesome, and viewed dis-
qualification as the appropriate rem-
dy to protect the public's "faith in
justice."13 Likewise, although recog-
nizing the costs to all parties of using
disqualification as an offensive
weapon, Justice Liacos again con-
cluded that protection of the "integ-
rity of our judicial system" was an in-
terest to which "Dr. Kaplan's right to
counsel" must yield.14 In a footnote,
Justice Liacos suggested that Mr. Knight
should have withdrawn immedi-
ately as Dr. Kaplan's counsel upon
learning of the conflict, in order to
enable Dr. Kaplan to find substitute
counsel, or should have "at least in-
formed the Whites so they could de-
cide whether to continue to retain Dr.
Zoll as their expert.15

Was Justice Liacos Right?

Justice Liacos' opinion has been criti-
cized on a number of grounds. The
most important are that it is unprece-
dented; that it disregards the consent
of Mr. Knight's clients to dual re-
presentation; that it takes little account
of the client's right to choose his or her
own lawyer; and that as a matter of
efficiency, it would have been easier
for the plaintiffs to obtain a new ex-
pert witness than for the defendant to
obtain a new lawyer. The latter rem-
edy, the critics contend, should have
been pursued to discourage plaintiffs' 
attorneys from using disqualification
as a tactic.

The Precedents

The basic model for conflicts of inter-
ests involves representing clients with
conflicting interests, either in the
same case or in different cases. Thus
an attorney cannot represent both par-
ties (P1 and D1) in lawsuit A, or rep-
resent one party in lawsuit A (P1) and
the adverse party in lawsuit B (D1) in
lawsuit B, or switch clients in law-
suit A.

This traditional model was not, of
course, at issue in White. Rather, here
an attorney represented a party in

The aim of disqualification is not the retrospective san-
tioning of the attorney or the
granting of a new trial
but the prospective protec-
tion of the integrity of the
legal process itself.

lawsuit A (D1) and a completely dif-
ferent party in an unrelated lawsuit B
(D2), who also happened to be an
adverse witness to D1 in lawsuit A.
The generic question is: How close is
this "adverse witness model" to the
traditionally forbidden one? The an-
swer depends on the ways in which
the attorney could use his relation-
ship with D2 to the advantage of D1
and, thus, to the unfair disadvantage
of P1. Hypothetically, the attorney
could use some confidential informa-
tion gained from D2 in cross-examin-
ing D2 in lawsuit 1, to the advantage of
D1 and the disadvantage of P1.
Such use of confidential information
would be unfair to P1 and would taint
the adversarial process. Likewise, fail-
ure to conduct as vigorous a cross-
examination of D2 as possible in law-
suit 1 would disadvantage D1, and
would evidence a "split of loyalties,"
again tainting the trial:

Conflicts of interest threaten to
taint a trial in two ways, each of
which upsets the adversarial bal-
ance. First, an attorney may turn
confidences acquired in the rep-
resentation of his present adver-
sary to unfair advantage for his
client. Such conduct too closely
parallels the proscribed direct
contact between the attorney
and his client's adversary. Sec-
ond, conflicts of interest mar the
adversarial process by leading to
split loyalties which in turn re-
sult in the inadequate representa-
tion of one or more parties.16

In short, it was only a matter of
time before this particular potential
conflict came before the courts, and it
should not be surprising that Justice
Liacos treated it more like the tradi-
tional conflict model than like a non-
conflict situation. Indeed, he could
have made an even stronger argument
by discussing the Code's similar rule
against an attorney directly contacting
a client of opposing counsel.17

If White had been a disciplinary
action or a motion for a new trial in a
criminal case, one could reasonably
insist on evidence of actual prejudice
or unfairness to the client. In a dis-
qualification decision, however, the
potential for such prejudice or unfair-
ness is sufficient to justify judicial ac-
tion, because the aim is not the retro-
spective sanctioning of the attorney or
the granting of a new trial but the
prospective protection of the integrity
of the legal process itself.18 Thus it is
not a fatal flaw in the opinion that no
specific evidence of misconduct or
prejudice was presented.

Consent as a Defense

The ABA's code of professional re-
ponsibility provides a basic excep-
tion to forbidden dual representa-
tions. If it is "obvious" that the attor-
ney can adequately represent the in-
terests of both, and if each client con-
sects after "full disclosure," the attor-
nay may engage in dual representa-
tion.19 The August 1983 ABA Model
Rules restate the application of the
consent exception to dual representa-
tion. A lawyer cannot represent two
different clients unless:

1) The lawyer reasonably be-
lieves the representation will
not adversely affect the rela-
tionship with the other client; and

2) Each client consents after
consultation.20

The commentary to the new model
rule explains that its wording is de-
signed to clarify the consent and "ob-
vious" requirements by allowing dual
representation with consent if "the
representation reasonably appears
not to be adversely affected by the
lawyer's other interests."21 The
drafters believed they were simply restating the current requirement.

Justice Liacos’ opinion can be approached from either of two roads, which converge at the same destination. The first interpretation is that he simply found that the representation in this case “reasonably appeared” to affect the lawyer’s other interests adversely, and thus concluded that client consent was insufficient to permit the conduct. The second interpretation, traveling a somewhat longer road, is that Justice Liacos specifically adopted the fiduciary model (by which professionals have independent obligations to clients), as opposed to the contract model (by which the parties deal with each other on an equal basis at “arm’s length”), in interpreting the ABA’s canons. Under the fiduciary model it is impermissible for an attorney even to ask a client to consent to certain things. Consent to this type of arrangement may be seen as one, forbidden as against public policy.

There is an analogy to this view of consent in medicine. We permit patients to consent to therapeutic modalities that are accepted medical practice; but although necessary, the patient’s consent is not sufficient in human experimentation. In order to protect patients in general, and the integrity of the research enterprise in particular, we also require that the experiment itself be “reasonable” and, often, that it be independently reviewed and approved by an institutional review board (IRB). We add these requirements to consent to permit human experimentation (rather than simply outlaw it) because we believe that experimentation is essential to medical progress, and because medical progress is highly valued by society.

In the adversary system, on the other hand, it is not essential that a particular person be represented by a particular attorney if that attorney has a potential conflict of interest. Thus we can protect both the client and the system’s integrity by forbidding certain dual representations outright. “Because the attorney owes fiduciary duties to his client,” one commentator notes, “the profession can and should place limits on the power of the client to waive his rights beyond a minimum level of effective assistance and attorney loyalty.” We can question the point at which Justice Liacos drew this imaginary line of impropriety, but the appropriateness of drawing the line itself is not at issue. The crux of the matter turns on the weight we attach to the interest of the client in choosing his or her own lawyer.

Choice of Counsel

The client’s right to choice of counsel is an important value and, in a strict contract model of lawyer-client relationships, would determine the outcome. In a fiduciary model, however, choice of counsel must be limited to counsel without conflicts of interest, to prevent taints to the system. In the specific area under consideration—defense counsel in medical malpractice suits—the issue of counsel selection is actually of only minor relevance. As noted Boston defense lawyer Douglas Danner comments in his *Medical Malpractice: A Primer for Physicians*, written for physicians who are being sued for malpractice:

The typical malpractice insurance policy gives the insurance company the right to select counsel and control the defense. It will select attorneys it knows to have experience and expertise in problems of medical malpractice defense. You should trust your defense counsel’s advice... In a very real sense, regard yourself as the “patient” and allow your lawyer to assume the role you usually take. Try to conduct yourself as you would have any patient do—give your lawyer your respect and trust, listen well, provide all needed information, follow his protocol and don’t try to do his job or “treat” yourself.

Two points deserve emphasis. Since the insurance company, not the physician, has the right to select counsel, the individual’s right to select his or her own counsel does not even come into play. To the extent that the insurance company can be seen as having a right to choose a particular lawyer for a particular case, this expectation should be outweighed by the necessity of protecting the system’s integrity. Second, if it is typical of defense counsel to ask their clients to act like “patients” and “trust” them to do what is right, it can reasonably be argued that medical malpractice defense lawyers should have an even higher fiduciary duty to avoid potential conflicts of interest than do other lawyers. Indeed, their fiduciary responsibilities should be similar to those of physicians, the trust relationship with their clients should impose high obligations related to full disclosure and actions consistent with protecting the integrity of the legal system itself.

Remedies

There is no question that allegations of conflict of interest violations have become “common tools of litigation” and that such allegations are capable of “creating delay, harassment, additional expense, and perhaps even [of] resulting in the withdrawal of a dangerously competent counsel.” The application of Justice Liacos’ opinion will likely serve to add fuel to this already brightly burning fire. Removal of an attorney from a case is, of course, unjustified when the conflict of interest issue is raised for purely tactical reasons. On the other hand, where the issue goes to the integrity of the trial itself, as Justice Liacos believed it did in *White* removal is appropriate: “A trial exemplifies ‘procedural justice’: The legitimacy of the result in large part inheres in the process by which that result is achieved. When a conflict of interest threatens to taint the process, the legitimacy of the trial is potentially undermined, a consideration that weighs heavily in favor of disqualification.”

The alternative of requiring the plaintiff to obtain another expert is no alternative at all. It is not the plaintiff’s lawyer who has engaged in the challenged practice, and it is not ap-
propriate to penalize the plaintiff for the defense counsel’s conflict of interest.

Conclusion

The result of White v. Kaplan is sound, although Justice Liacos could have articulated his rationale more precisely and convincingly. It is likely that the Massachusetts Supreme Judicial Court will follow this opinion and expand upon it, should a similar case reach its docket. The case does present a problem for medical malpractice defense lawyers, but it is hardly an insurmountable one. Since lawyers are usually chosen by insurers, those insurers can designate another counsel with little prejudice as long as their lawyers keep adequate records of their representation of physicians in other relevant matters.

Disqualification can be harsh, but it is much less harsh than disciplinary action. Thus one can consistently conclude that even though no disciplinary action was warranted in White, disqualification was appropriate to protect the integrity of the bar and of the judicial system. White v. Kaplan can be seen as an impressionistic barometer measuring the bench and bar view of the appropriateness of ethical regulation, and its responsiveness to reasonable, if debatable, judicial regulation. A positive response is called for lest “the profession’s efforts at regulating itself ... be seen as hollow doubletalk, creating safeguards that protect clients in theory only.”

References

1. J. P. Frank, The Legal Ethics of Louis D. Brandeis, STANFORD LAW REVIEW 17:683, 709 (1965), quoted in Note, Developments in the Law: Conflicts of Interest in the Legal Profession, HARVARD LAW REVIEW 94(6):1244, 1284 (April 1981) (hereinafter cited as Conflicts). The author wishes to acknowledge his heavy reliance on the analysis set forth in the Conflicts article in preparing this article. It is highly recommended reading for those who wish to explore this topic in more depth.


3. Conflicts, supra note 1, at 1284.


5. Id. at 5.

6. Id.

7. ABA MODEL CODE OF PROFESSIONAL CONDUCT (hereinafter cited as Model Code), Canon 9.


9. Id. at 5.

10. Id. at 7.

11. Id.

12. Id.

13. Id. at 8.

14. See id.

15. Id.

16. Conflicts, supra note 1 at 1476 (emphasis added). The procedural device of permitting the disqualification of an attorney on conflict of interest grounds only if this issue is raised by a former or present client has been severely criticized as a "binary standard" that is "inappropriate" and an "unfortunate rubric," because it fails to take into account that inadequate advocacy must be eliminated to preserve the integrity of the trial as a lawmaking process, and "ignores the court’s role in policing egregious misconduct on the part of attorneys practicing before it." Id. at 1480. See Estates Theatres, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93, 98 (S.D. N.Y. 1972): "When the propriety of professional conduct is questioned, any member of the Bar who is aware of the facts which give rise to the issue is duty bound to present the matter to the proper forum."

17. Model Code, supra note 7, at DR7-104(A)(1).

18. Justice Liacos relied primarily on two cases for his Canon 9 analysis: Emile Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (lawyer who had previously represented Burlington Industries disqualified when he attempted to represent Emile, a Burlington subsidiary, in litigation against Patentex, the matters at issue in the two suits were deemed to be "substantially related" and the court found the invocation of Canon 9 "particularly appropriate"); Hull v. Celanese Corp., 513 F.2d 568 (9th Cir. 1975) (in-house counsel for Celanese switched sides to become a plaintiff—rather than an attorney—for the other side in the same litigation; the court held that Canon 9 prohibited the switch even though there was no evidence that any confidential information had been transmitted, because such information might be transmitted and "the breach of confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code"). Even though the drafters of the Model Rules rejected the Canon 9 goal of avoiding "the appearance of impropriety" as a disciplinary standard, the courts will likely continue to consider it as a factor in determining whether an attorney ought to be disqualified. Courts have the power to disqualify lawyers (even absent proof of an ethical violation) in order to protect the parties or to maintain the integrity of the bar and the judicial system. N.J. Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, TEXAS LAW REVIEW 61(2):211, 228–29, n. 93 (Oct. 1982).

19. Model Code, supra note 7, at DR 5-105(C).

20. ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 17(a).


25. Conflicts, supra note 1 at 1285.


27. Conflicts, supra note 1 at 1285.

28. Id. at 1472.