
**E-85-3 Conflict of interest: Multiple
representation of clients in medical
malpractice actions**

Facts

Chapter 619 of the Wisconsin Statutes (1981-82) provides for the establishment of mandatory risk sharing plans for health care providers under which such persons carry \$200,000 in primary medical malpractice insurance. The Patients Compensation Fund, created by Wis. Stat. sec. 655.27(1) (1981-82), pays that portion of medical malpractice awards above \$200,000. *See generally State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1977). Malpractice claimants alleging damages in excess of \$200,000 must name the fund as a defendant, and the fund may appear and defend against the action. Wis. Stat. sec. 655.27(5)(a) (1981-82). Section 655.27(5)(b) provides that it is the responsibility of the insurer of a health care provider who is also covered by the fund to provide an adequate defense on any claim filed that may potentially affect the fund. Finally, the insurer is required to act in a fiduciary relationship with respect to any claim affecting the fund. *Id.*

Questions

A physician and a hospital are insured by the same primary carrier when a lawsuit against both is instituted. One lawyer appears on behalf of both defendants, and also accepts retention for the Wisconsin Patients Compensation Fund. (1) May a lawyer retained in such a situation represent both primary defendants? (2) Assuming in the situation above that damages shall exceed the coverage of the primary carrier, would the lawyer's attempts to exculpate a defendant conflict with the lawyer's obligations to minimize the exposure of the fund?

Opinion

1. The Wisconsin Code of Professional Responsibility, codified in Chapter 20 of the Wisconsin Supreme Court Rules, states that maintaining the independence of professional judgment required of a lawyer precludes his or her acceptance or continuation of employment that will adversely affect his or her

judgment on behalf of or dilute his or her loyalty to a client. SCR 20.23(3)(a). This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. *Id.*; see Formal Opinion E-80-17, 57 Wis. Bar Bull. 69 (June 1984); Formal Opinion E-75-2, 57 Wis. Bar Bull. 49 (June 1984); see also Formal Opinion E-75-18, 57 Wis. Bar Bull. 51 (June 1984); Memorandum Opinion 6/70E, 57 Wis. Bar Bull. 97 (June 1984); cf. ABA Model Rules of Professional Conduct, Rule 1.7 (general conflict of interest rule).

If a lawyer is requested to undertake representation of multiple medical malpractice defendants having potentially differing interests, he or she must weigh carefully the possibility that his or her judgment may be impaired or his or her loyalty divided if he or she accepts the employment. SCR 20.23(3)(b). He or she should resolve all doubts against the propriety of representation. *Id.* A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he or she would be justified in representing multiple clients with potentially differing interests. *Id.*

In those instances in which a lawyer is justified in representing two or more malpractice defendants having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his or her need for representation free of any potential conflict and to obtain another lawyer if he or she desires. SCR 20.23(3)(c). Thus, before a lawyer may represent multiple clients, he or she should explain fully to each client the implications of the common representation and should accept employment only if the clients consent. *Id.*; SCR 20.28(3). If circumstances are present that might cause any of the defendants to question the undivided loyalty of the lawyer, he or she should advise all of the clients of those circumstances. SCR 20.23(3)(c).

Whether a lawyer can fairly and adequately protect the interests of multiple malpractice defendants depends upon an analysis of the particular facts of each case. SCR 20.23(3)(d); Formal Opinion E-84-19, 58 Wis. Bar Bull. 41 (February 1985). In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his or her judgment is not unlikely. *Id.* Regardless of the belief of a lawyer that he or she may properly represent multiple clients, however, he or she must defer to a client who holds the contrary belief and withdraw from representation of that client. SCR 20.23(3)(f).

2. Wisconsin Stat. sec. 655.27(5)(b) (1981-82) states that the primary insurer, defending a claim that may potentially affect the fund, shall act in a fiduciary relationship with respect to any claim affecting the fund. The fund is held in trust for the benefit of insured health care providers and malpractice victims. Wis. Stat. sec. 655.27(6) (1981-82); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d at 518. Assuming that the primary insurer's legal duties as fiduciary include minimizing exposure of the fund to liability, it appears at first glance that the dual roles are inconsistent.

The situation, however, appears similar to the matter addressed in Formal Opinion E-84-19, *supra*, where the committee discussed a lawyer's representation of an insurer and insured when a claim of punitive damages is asserted against the insured. Conflict of interest questions arise in such a situation because the insured must bear personal liability for punitive damages. In the present situation, the fund is similar to the insured in Formal Opinion E-84-19; if malpractice liability exceeds the primary carrier's coverage, the fund is liable for the excess.

In Formal Opinion E-84-19, the committee stated, as similarly stated earlier in this opinion, that

[w]hether a lawyer can fairly and adequately protect the interests of the insurer and the insured depends upon an analysis of each case. SCR 20.23(3)(d). In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his or her judgment is not unlikely.

Concluding, the committee cited *Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co.*, 724 F.2d 1343 (9th Cir. 1983), for the proposition that a punitive damage claim against an insured does not create as a matter of law a conflict of interest between the insured and his or her insurer. Applying the reasoning of Formal Opinion E-84-19 to the present situation, it appears that it is not a *per se* conflict of interest for a lawyer to simultaneously represent medical malpractice defendants while carrying out his or her fiduciary duties to the fund; rather, an analysis must be made of the particular facts on a case-by-case basis.

Finally, it should be noted that if a conflict of interest develops in the representation of multiple malpractice defendants, the lawyer may be required to withdraw from representation of all clients in the matter.