

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2005-03 Request No. 894
Issued April 14, 2005

Facts:

Insurance Company assigned the inquiring attorney to represent Physician A in a medical malpractice lawsuit that names Physician A and Physician B as defendants. During the course of the litigation, Physician A was dismissed from the lawsuit. Subsequently, Physician B subpoenaed a nonparty physician who also treated the plaintiff (hereinafter Physician C) to testify at a deposition.

Physician C has concerns that his/her testimony may involve either expert opinions that he/she is not willing to provide, or statements that might lead the plaintiff or Physician B to add Physician C as a defendant or third-party defendant in the lawsuit. Therefore, Physician C who is also insured by Insurance Company, has requested the Insurance Company to assign counsel under the terms of his/her insurance policy. Insurance Company has assigned the inquiring attorney to represent Physician C at the deposition.

The inquiring attorney states that Physician A was originally named in the lawsuit by the plaintiff because Physician A and Physician B were assistant surgeon and surgeon in the plaintiff's operation. During the course of discovery, the plaintiff became satisfied that he/she had no viable claim against Physician A.

The inquiring attorney further states that all claims against Physician A were dismissed with prejudice and that the dismissal stipulation would be executed by all parties to the action. The inquiring attorney also states that there is no real potential that Physician A would be sued by Physician C.

Issue Presented:

The inquiring attorney asks if he/she may represent Physician C at the deposition of Physician C after having represented Physician A, a co-defendant in the same lawsuit, who was dismissed from the suit.

Opinion:

The inquiring attorney must determine whether the interests of Physician C and his/her former client, Physician A, are adverse. If they are, the inquiring attorney may represent Physician C at the deposition provided Physician A consents after consultation.

Reasoning:

Physician A is a former client of the inquiring attorney. Therefore Rule 1.9 applies. The Rule states:

Rule 1.9. Conflict of Interest: Former Client. - A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

The inquiring attorney seeks to represent Physician C in the same matter in which he/she represented Physician A. Thus, the existence of a conflict of interest depends on whether the testimony of Physician C will be materially adverse to the interests of Physician A, or whether the interests of Physician C are otherwise adverse to Physician A. The Panel received insufficient information to make that determination. The inquiring attorney must determine if the two interests are materially adverse. If after consulting with Physician C the inquiring attorney determines that there are interests of Physician A that are in fact adverse to the interests of Physician C, then the inquiring attorney must obtain the informed consent of Physician A after meaningful consultation before he/she is permitted to represent Physician C at the deposition.

The Panel's guidance is restricted to the interpretation of the Rules of Professional Conduct, and does not extend to issues under any other rules, regulations, or laws, including G.L. §5-37.3-1 et seq., that may have bearing on the issues raised by this inquiry.