Ethical Issues in Hiring Experts Previously Represented by the Defense Firm in Medical Malpractice Cases

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Contributor

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In medical malpractice actions, ever since publication of *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 459, (disapproved on other grounds in *People v Freeman* (2010) 47 Cal.4th 993, FN 4), defense attorneys have used their ethical obligations as an excuse to try and disqualify the plaintiff's expert from trial.

Unlike personal injury matters, there are only a small handful of medical malpractice defense firms and even fewer medical malpractice insurance carriers. These medical malpractice defense firms are typically large, consisting of dozens of attorneys. In addition, it is common for attorneys to work at multiple medical malpractice defense firms over their careers. In short, there is a strong possibility that your expert has been represented by the defense firm or one of its attorneys in the past. It is a conflict of interest and a violation of the duty of loyalty for a medical malpractice defense firm to cross-examine an opposing expert it previously represented with any material learned from the prior representation. It is therefore critical that the plaintiff's attorney carefully vet their expert's prior professional litigation history for any potential disqualifying conflicts, as defense firms will use *any* prior representation of an opposing expert in an attempt to disqualify that expert at trial.

This article focuses on being prepared for that possibility as well as tips on how to handle a conflict of interest should it arise.

Pursuant to *Hernandez v. Paicius*, it is Unethical for a Defense Attorney to Cross-Examine an Opposing Expert on Material Learned from Prior Representation

In *Hernandez*, the plaintiff filed a medical malpractice lawsuit against a physician in pain management, alleging that the doctor fell below the standard of care in performing a stellate ganglion block injection procedure. This procedure, performed to manage the plaintiff's severe pain, allegedly caused laryngeal nerve damage, resulting in vocal cord dysfunction or paralysis and abiding hoarseness.

The plaintiff's expert on standard of care was a client of the defense counsel's law firm in other medical malpractice cases and in an ongoing administrative disciplinary proceeding. The trial court denied the plaintiff's motion to disqualify the defendant's firm at trial.

At trial, the defense attorney engaged in rigorous cross-examination of the expert, focusing on his history of malpractice claims and disciplinary actions. She asked pointed questions like, "You've been sued in medical malpractice actions

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before, haven't you?" and, "You've had several [malpractice claims], yes?" The defense counsel further probed, asking, "You have about 21 cases just in L.A. County and in Orange County, right?" The expert was also questioned about his license status, including past suspensions and ongoing accusations of gross negligence and unprofessional conduct.

Despite objections from the plaintiff's counsel, the trial court allowed this line of questioning to continue. The trial court even allowed the defense attorney to read into the record the Attorney General's complaint in a medical board action during cross-examination, even though the defense attorney's firm represented that expert in the medical board action.

The defense counsel's closing argument further demonstrated the conflict of interest, as she spent a substantial portion of her time discrediting the expert. She accused him of lying under oath, stating, "And what bothers me is when someone can come in this courtroom and completely disregard what this is all about, what this system is all about, with our flag, with the seal of the state, the judge sitting on the bench, and can raise their right hand and take that oath to tell the truth, and they look at you and they don't tell the truth, they lie to you."

After a defense verdict, the Court of Appeal reversed and ordered a new trial. The Court of Appeal was so disturbed by what occurred, it reported the defendant's attorney to the California State Bar and ordered the case be assigned to a different judge. The Court of Appeal stated:

> *The spectacle of an attorney skewering her own client on the witness stand in the interest of defending another client demeans the integrity of the legal profession and undermines confidence in the attorney-client relationship. …The court cannot permit, much less preside over, an attorney's attack on his or her own client.*

However, in doing so, the Court of Appeal included the following dicta:

> *A party's right to select counsel of his or her own choosing may trump the opposing party's freedom to choose an expert whose designation creates a conflict.*

Defense Firms Will Aggressively Attempt to Disqualify the Plaintiff's Expert Based on *Any* Prior Representation of the Plaintiff's Expert

Using *Hernandez*, medical malpractice defense firms will aggressively seek to disqualify the plaintiff's expert. Even though, realistically, the defendant's medical malpractice insurance carrier truly selects the defense attorney, defense firms will argue that a party's right to counsel of its choosing trumps the opposing party's right to choose an expert.

A motion to disqualify the defense firm will almost certainly be denied. That is particularly true if the plaintiff waits until after designation and on the eve of trial to file the motion.

The defense firm may attempt to disqualify the plaintiff's expert even if there is no real usable information gleaned from the prior representation. It is common for physicians to be sued as peripheral defendants in medical malpractice cases and then dismissed from the case for no money paid. Yet, the defense firms will use attorney-client privilege as an excuse to avoid divulging any information about the prior representation, even if there is no possible way that prior representation would be relevant or helpful for the defense.

Since prior representation is imputed to every member of the firm, this is not an uncommon issue in medical malpractice matters. Indeed, medical malpractice defense firms will even send out firm-wide emails asking if any other member of that firm has represented the opposing party's expert in an attempt to seek disqualification of that expert.

The disqualification of the plaintiff's expert in a medical malpractice case is devastating. California's expert designation procedure under Code of Civil Procedure §2034.2230 requires disclosure only 50 days before trial. Having an expert disqualified on the eve of trial in the midst of expert depositions can be deadly. It may be difficult to find a replacement expert in a field where experts are very hesitant to testify against their colleagues. Even if the plaintiff's attorney does find a suitable replacement expert, it will be expensive to pay for the new expert to get caught up to speed.

For the Plaintiff-Side Attorney, the Only Way to Address the Conflict is to Have the Expert Sign an Unqualified Waiver

In *Montgomery v. Superior Court* (2010) 186 Cal.App.4th 1051, 1054, the defendant plastic surgeon botched a liposuction procedure. Following expert designation, the defendant filed a motion to disqualify the plaintiff's expert plastic surgeon. The defendant doctor's counsel had represented the expert in a previous malpractice case filed against the expert in 1999.

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The plaintiffs opposed the defendant doctor's motion to preclude the expert from serving as their witness, arguing there was no evidence that the defendant doctor's counsel had acquired any confidential information from the expert that would create an actual conflict of interest. The expert submitted a declaration waiving the privilege as it applied to any relevant information in the matter. Despite this, relying on *Hernandez*, the trial court granted the motion to disqualify the expert, emphasizing the defendant doctor's right to "vigorous representation" and noting the expert's failure to disclose the prior representation before expert designation. On a petition for writ of mandate, the Court of Appeal reversed. The court discussed former Professional Rule of Conduct 3-310 (current Professional Rule of Conduct, rule 1.7), which states that a member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client. The court also referenced Business and Professions Code §6068, which outlines an attorney's duty to maintain client confidentiality.

However, the Court of Appeal agreed with the plaintiffs, stating that a former client could waive a conflict of interest by executing an informed written consent. That being said, the Court of Appeal made it clear that the waiver had to be unqualified without any restrictions. The appellate court explained that this is required so that the defense attorney can engage in "vigorous representation, … free to conduct a thorough and comprehensive cross-examination of [the expert] without trying to steer clear of the danger zone of confidentiality."

Advice for the Plaintiff Attorney on How to Deal with this Conflict

It is crucial that the plaintiff attorney confront the expert at the beginning of the case, perhaps even prior to filing any prior medical malpractice or medical board actions. Even if a different defense firm is selected as counsel from the one that represented the expert previously, there is a real risk of imputed conflict from another member of that firm. Therefore, the plaintiff attorney should secure a commitment from the expert to sign an unqualified waiver should the need arise. Of course, even if the expert is willing to sign such a waiver, the plaintiff attorney should carefully vet the prior malpractice matter to determine if would be damaging to either the plaintiff's case or to the expert himself.

If the expert is not willing to sign an unqualified waiver, the plaintiff attorney should seriously consider retaining a new expert. Waiting until expert designation to determine if there is an actual conflict can be expensive, stressful, and difficult.

Here is the language our firm uses for experts to sign a consent form as to the unqualified waiver of the attorney-client privilege:

> *I understand that I was previously represented by defendant law firm in the matter of Smith v. Jones.*
>
> *I was retained to review the above matter on or around [insert date.] This was prior to the filing date and the appearance of Defendants through defense counsel in this matter.*
>
> *I understand that it is the intent of Plaintiffs in this action to elicit my opinions in this case, which are that the actions of Defendants fell below the applicable standard of care and that that negligence caused harm.*
>
> *I hereby waive any conflict of interest under Professional Rule of Conduct, rule 1.7 (former rule 3-310). I understand that this waiver is unqualified and that defendant law firm may decide to use attorney-client privileged information obtained in the Smith v. Jones matter during his examination of me at deposition or trial. (See Montgomery v. Superior Court (2010) 186 Cal.App.4th 1051, 1056.) I understand that I had the opportunity to consult with independent counsel before signing this consent.*

Conclusion

In all cases, medical malpractice or otherwise, it is critical to know about your expert's history. You must know about the expert's disciplinary history, malpractice lawsuit history, and history with the defense firm. In medical malpractice cases it is more of a concern due to the real possibility the defense firm may have previously represented the expert. The risk is that you have spent thousands of dollars and still have to scramble to hire a new expert at the last minute.

The problem can be addressed by due diligence before hiring the expert, and by having the expert sign a conflicts waiver. **TBN**