If you find yourself in the unfortunate position of being named as a defendant in a medical professional liability lawsuit, one of the first issues to address with your insurer is the retention of an attorney to defend you. Doctors insured through a hospital or medical group that is also named in the suit may be asked by the insurer to waive any potential conflicts of interest to facilitate a cooperative and efficient joint defense. Or if you are employed by a hospital or medical group, you may have been asked to sign a contract that includes an agreement to waive any conflicts that may arise in medical negligence lawsuits, ostensibly for reasons of cost and in the interest of advancing a unified defense.

TO WAIVE OR NOT TO WAIVE

If you agree to waive the conflict, whether in response to a request by defense counsel assigned to represent you by an insurance company, or via contract or specifically at the urging of the insurance company, you and the hospital or medical group will be defended by a single attorney. Unfortunately, a joint defense can, and often does, cause problems for physicians when their interests diverge from those of the hospital, medical group or other physicians within the same practice. For this reason, it is important to understand the rights you are being asked to waive and the potential implications...
this can have for your defense.

A request to waive conflicts of interest may look something like this:

Dear Dr.,

Our law firm recently was retained by your insurer to defend you and [Hospital/Medical Group] in the lawsuit filed against you by [Plaintiff]. This letter constitutes a conflict waiver and serves to formally advise you of potential conflicts with regard to our representation of all defendants in this matter and to obtain your written consent to allow us to proceed.

Based upon our initial review of [Plaintiff’s] allegations, we perceive no actual conflicts of interest. There is a possibility, however, that a disagreement could arise with respect to certain defense issues, such as how the [Plaintiff’s] injuries allegedly were sustained and which party is responsible for [Plaintiff’s] alleged damages.

We encourage you to seek the advice of independent counsel regarding this request for a conflict waiver, and we welcome any discussion regarding potential conflicts of interest. If you consent to our representation of you and [Hospital/Medical Group], please sign below and return this letter to me by facsimile or mail.

Sincerely,

[Lawyer]

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**CONFLICTS BETWEEN DOCTORS AND HOSPITALS—THE BLAME GAME**

Potential and actual conflicts between doctors and hospitals in medical professional liability lawsuits are common. Frequently, however, the conflicts are not initially apparent, but arise later in a case, after independent physician experts have evaluated the care provided by the hospital or medical group and the doctor; this is especially true when settlement decisions are being made. While you can revoke your waiver of conflict at that time, you should be aware that the communications you made with the shared defense counsel will not be subject to the attorney-client privilege. Further, due in part to terms favoring hospitals and medical groups in professional liability insurance policies written through the hospital or medical group, it may be difficult for your personal counsel to position the case more favorably for you after the conflict has arisen and the defenses already are well underway and conveyed to the plaintiff and the court.

The most common type of conflict arises when a defendant, rightly or wrongly, seeks to deflect blame to one or all of the codefendants. While one would like to believe that the quality of one’s professional services will stand on its own merit, the reality can diverge dramatically from the ideal. In reality, if you are being sued because someone else was negligent, it likely will benefit your defense to be able to point that out. However, if you have waived conflicts and share an attorney with the negligent party, your attorney will have a duty to protect the negligent party from a finding of negligence and, consequently, will not be able to advance this defense on your behalf.

When a lawsuit contains allegations against both you and the hospital or medical group, the blame game becomes more complicated. For example, medical negligence lawsuits can be brought against hospitals on three general theories:

1. The hospital was negligent (e.g., failed to provide appropriate facilities, staffing or procedures).
2. Hospital employees were negligent (that is, employed
Medical and staff workers provided substandard care to patients, including failing to inform the doctor of critical information.

3 – Independent physicians, who were reasonably mistaken for hospital employees, were negligent in their duties. The last theory, that of apparent authority (otherwise known as apparent or ostensible agency), is unusual outside the hospital context.3

SHIFTING INDEMNITY

In response to the added liability hospitals face under the apparent authority doctrine, many have sought contractual protection from the doctors to whom they grant privileges. Frequently, the terms of hospital contracts with medical groups or independent physicians contain indemnity clauses requiring the physician to defend and repay the hospital for any loss caused by the physician’s negligence and vice versa. However, even in the absence of a contractual indemnity provision, the hospital may still seek to recover under the common-law doctrine of indemnity—an equitable doctrine that allows a court to shift the cost from a less culpable party to the more culpable party to prevent a result that the court regards as unjust or unsatisfactory.4 These indemnity rights can create conflicts of interest between physicians and the hospital because these rights incentivize the hospital to shift blame to the doctors rather than admit negligence by hospital staff or the hospital itself.

Indemnity rights also impact settlement decisions, another area where conflicts frequently arise. Reasonable doctors, on one hand, and hospitals and medical groups, on the other hand, frequently disagree about whether a case should be settled, how much should be paid in settlement and how the settlement should be allocated for purposes of reporting to the National Practitioner Data Bank (NPDB) and the New Jersey Division of Consumer Affairs. As the primary insured, hospitals and medical groups frequently have substantially more control over how settlements are effected and allocated than individual physicians.

In Webb v. Witt, an attending obstetrician was sued for alleged birth injuries along with the hospital, the attending intern and the chief resident. All defendant physicians were covered as “other insureds” under the hospital’s policy and agreed to waive conflicts to allow for a joint defense with a single lawyer. After evaluating the evidence, the hospital decided it was in all defendants’ interest to enter into a joint settlement that did not apportion responsibility among the three physicians. The attending obstetrician objected to the settlement on her behalf and retained independent counsel. Her lawyer argued that an unallocated settlement did not reflect the obstetrician’s minimal involvement in the care of the injured baby and would have a negative impact on the obstetrician’s practice and ability to obtain professional liability insurance in the future. On appeal, the Appellate Division of the Superior Court of New Jersey held that in the absence of a provision in the hospital’s insurance allowing control of the settlement by the obstetrician, the obstetrician had no contractual, statutory or equitable right to oppose the settlement or demand apportionment of responsibility for reporting to the NPDB or the New Jersey Division of Consumer Affairs.5

BEENEFITS OF HAVING YOUR OWN DEFENSE COUNSEL

The Webb decision clearly demonstrates the importance to a defendant physician of having his or her own defense counsel involved before a potential conflict becomes an active conflict. Even in the absence of direct control over settlement decisions, an independent defense counsel would have been able to consider the obstetrician’s interests in conjunction with those of the hospital and other doctors. Independent counsel would then have been able to establish the obstetrician’s limited responsibility prior to settlement discussions. Thus, counsel would likely have been able to achieve a dismissal of the obstetrician or at least a settlement that properly allocated an amount to the obstetrician more closely commensurate with her degree of responsibility for the child’s injuries.

HOW TO PROTECT YOURSELF

In view of the conflicts that can arise between doctors and hospitals, how can a doctor protect him- or herself?
First and foremost, before signing a contract with a hospital or medical group, check insurance and indemnification clauses to ascertain whether you are waiving any important rights that can affect your ability to protect your interests in the event of a lawsuit naming both you and the hospital or medical group.

Second, if you are sued along with the hospital or medical group in a lawsuit that involves substantial damages, be aware that the hospital or medical group may wish to keep you in the lawsuit in order to access your policy limit rather than face the potential need to contribute any amount in excess of the policy limit award from personal assets. Therefore, before waiving any personal rights at the request of your assigned defense counsel discuss with the defense counsel assigned to you the specifics of any and all potential conflicts of interest between your codefendants and you. Make certain defense counsel is aware of your interest in protecting yourself from being saddled with liability more properly allocated to your codefendants. Make certain your defense counsel will seek to dismiss you from the litigation if your involvement is minimal.

Third, if you have any hesitation about the quality or scope of advice conveyed to you by the assigned defense counsel, consider consulting an independent attorney regarding the potential conflicts that may arise and your rights under your insurance policy. If you receive a reservation of rights letter or the insurers warn you of the prospect of an excess of policy limit award, it is advisable to seek advice from your personal lawyer.

Finally, if you agree to waive conflicts, be vigilant on your own behalf as to the assertion of any rights or defenses you may have against your codefendants. Be prepared to revoke your conflict waiver agreement if it becomes necessary to protect your interests by asserting those defenses.

CONCLUSION

While there are legitimate reasons for insurers to assign a single lawyer to represent codefendants, including the strategic advantage of advancing a unified defense and cost savings, physicians must be vigilant about waiving potential conflicts. As detailed above, it appears that when conflicts arise, they often are resolved in manners that are not always in the physician’s best interests. Before waiving conflicts and agreeing to representation of multiple defendants by a single lawyer, physicians are well advised to discuss potential conflicts at length with defense counsel and, if necessary, with separate personal counsel, at the outset of litigation. It may well be necessary for physicians sued along with hospitals and/or medical groups to decline to waive conflicts and, instead, insist on sole representation by defense counsel experienced in medical negligence defense.

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