ADVISORY ETHICS OPINION 97-02

SYNOPSIS:

Where plaintiff's treating physician and medical expert is also an employee of a corporate medical facility defendant, plaintiff's attorney may communicate directly with the physician regarding the physician's treatment of plaintiff and the physician's expert opinion regarding issues raised in the lawsuit. This is so notwithstanding an instruction by the corporate defendant's attorney that plaintiff's attorney not speak with the treating physician. This rule also applies to plaintiff's second treating physician and medical expert who is an employee and vice president of the corporate medical facility defendant.

FACTS:

Requesting attorney, referred to herein as plaintiff's attorney, represents a plaintiff in a medical malpractice action. The defendants in the action include a physician and a corporate medical facility where plaintiff was initially treated for injury or illness. At some point after the alleged medical negligence occurred, plaintiff was treated by two physicians for complications related to the alleged medical negligence. These two physicians are employees of the defendant medical facility where the alleged negligence occurred. One of the physicians is also a vice president of the defendant facility. In addition to being plaintiff's treating physicians, the two physicians have also been retained by plaintiff as expert witnesses in regard to causality and standard of care.

The attorney for the defendant medical facility has written to instruct plaintiff's attorney to have no further discussions with the two treating physicians on grounds that they are employees of the corporate defendant, and, therefore, are within the scope of the corporate attorney's representation of the corporate client.[1]

QUESTION:

Plaintiff's attorney requests our opinion as to whether he may meet with the treating physicians and discuss their findings and opinions with them without the consent of the corporate attorney and without violating DR 7-104(A)(1), which states as follows:

> (A) During the course of his representation of a client a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

DISCUSSION:

At issue here is whether the plaintiff's treating physicians can fairly be deemed "part[ies] . . . represented by a lawyer" within the meaning of DR 7-104(A)(1).

ABA Formal Opinion 95-396, issued July 28, 1995, discusses the scope of the restrictions set forth in DR 7-104)(A)(1) and its Model Rule equivalent, Model Rule 4.2. That opinion notes that:

> When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question. [Emphasis added].

The Opinion also states:

> A lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.

The ABA Opinion further notes that the purpose behind the communication restriction contained in DR 7-104(A)(1) is two-fold: first, to protect the represented party against overreaching by adverse counsel and thereby safeguard the attorney-client

[1]The facility's liability is predicated solely on the theory of **respondeat superior** arising from its employment of the medical personnel who were allegedly negligent.

relationship from interference by adverse counsel; second, to reduce the likelihood that clients will disclose privileged communications or other information that might be harmful to their interests.

Where the "party" is a corporation, the ABA Opinion concludes, after reviewing various court decisions, that:

> [t]he represented party is limited to corporate employees who fall within the 'control group'. Those employees who manage and speak for the corporation."[2]

The Opinion also quotes the comment to Model Rule 4.2.:

> The term represented party refers not only to those with managerial responsibilities but to anyone who may legally bind the organization with respect to the matter in question. Consequently, when the party is an organization, the bar against communication covers not only the control group but, in addition, anyone "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission on the part of the organization." (emphasis added)

ABA Formal Opinion 95-396 at page 16 citing with approval Upjohn Company v. United States, 449 US 383 (1981).

Requesting attorney states that one of the expert witness/treating physicians is a vice president of the defendant corporation. As such, that physician is an officer of the corporation and, under VRE 502, is, by definition, a "representative of the client" for purposes of deciding whether his internal discussions are privileged. However, in the fact situation presented, this physician is serving voluntarily both as an expert and fact (as opposed to an occurrence) witness for a party who has sued the corporation. Under VRE 502(A)(2), as a "representative of" the corporation, that physician is covered by the privilege protections of the rule. Therefore, plaintiff's attorney would be barred from seeking disclosure of any discussions between the physician and defendant's attorney, and/or the other members of the corporate control group, that fall within the protections of VRE 502.

CONCLUSION:

The application of the evidentiary rule of privilege contained in VRE 502 does not, however, resolve the issue presented here, namely, whether the requesting attorney needs permission to discuss with his client's physicians their treatment of his client and their expert opinions regarding his prior care. Under the facts presented, neither physician appears to have any personal knowledge of the particular incident that is the subject of the litigation. The fact that each physician has an employment relationship with the corporate defendant is coincidental. Each physician has independent knowledge of the plaintiff's condition, and each have opinions concerning the cause of that condition based on their relationship to the plaintiff. As treating physicians, therefore, even though both physicians have an employment relationship with the corporate defendant, and one of them is arguably a member of the corporate defendant's "control group" by virtue of being a vice president, neither physician appears to be in a position to bind the corporation or to speak for it, with respect to the subject matter of the instant litigation. Under these circumstances, the requesting attorney does not need to secure consent of the corporation's attorney prior to communicating with plaintiff's treating physicians/expert witnesses. This result does not conflict with the underlying purposes of DR 7-104(A)(1), since it will not intrude upon any lawyer-client relationship between the physicians and the corporation's attorney, nor will it involve communications between either physician and the corporation or members of the corporation's control group that are otherwise privileged under VRE 502 or 12 V.S.A. §1613. Plaintiff's attorney should limit any communications with the treating physicians to matters pertaining to their treatment of plaintiff and their expert opinion regarding the care plaintiff received while under defendant's care, and plaintiff's attorney should refrain from inquiring into any matters that would involve privileged communications within the corporation's control group.

[2] Citing Wright ex rel Wright v. Group Health Hospital, 691 2d 564 (Wa 1984).