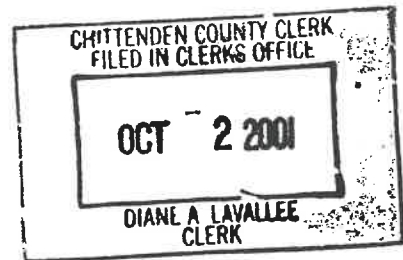


STATE OF VERMONT  
CHITTENDEN COUNTY, SS.



JAN CROWLEY AND JOAN LAVALLEE )  
CO-ADMINISTRATRICES OF THE ESTATE )  
OF ELIZABETH A. SCHMALDIENST AND )  
JOSEPH SCHMALDIENST )

v. )

FLETCHER ALLEN HEALTH CARE, INC. )  
AND NEWEVE M. JOHNSON-LIVELY R.N. )

Chittenden Superior Court  
Docket No. S1144-00 CnC

**MEMORANDUM OF DECISION**

This matter is before the court on Plaintiffs' Motion to Disqualify filed May 31, 2001. A hearing on the motion occurred on September 24, 2001. Plaintiffs are represented by Alan F. Sylvester, Esq. Defendant Fletcher Allen Health Care, Inc. is represented by S. Crocker Bennett, II, Esq., and Defendant Neweve M. Johnson-Lively is represented by Ritchie E. Berger, Esq.

In this case, Plaintiff moves to disqualify Ritchie E. Berger, Esq. as the attorney for Defendant Neweve M. Johnson-Lively. Plaintiffs argue that because Mr. Berger has represented Fletcher Allen Health Care (FAHC) in "medical malpractice cases throughout his entire legal career" and is currently representing FAHC in the unrelated case of Joseph Schmaldienst v. FAHC, his representation of Defendant Johnson-Lively constitutes a conflict of interest. Plaintiffs claim that such conduct violates Rule 1.7 and Rule 1.8(f) of the Vermont Rules of Professional Conduct, and they ask the court to intervene and disqualify Attorney Berger in the interests of "the efficient administration of justice." Defendant Johnson-Lively responds that Plaintiffs do not have standing to challenge Mr. Berger's representation since any conflict issues that would exist, exist between the two defendants and their attorneys. She further responds that in any event, Rule 1.7 is not applicable to this case. She also points out that both defendants consent to Mr. Berger's representation of her with full knowledge of all the circumstances. Defendant FAHC has no objection to Mr. Berger's representation of Ms. Johnson-Lively.

The primary forum for addressing claims of attorney professional misconduct is through the Professional Responsibility Board. See V.R.P.C. 8.3(a); Administrative Order 9, Rule 10 (Rules governing the establishment and operation of the Professional Responsibility Program). A trial court is not a professional disciplinary forum, and will only address such issues as they relate to the parties' opportunity to obtain a fair trial of their substantive claims and defenses. See e.g. State v. Crepeault, 167 Vt. 209, 218 (1997) (pre-trial disclosure of potential conflict of interest necessary to allow trial court to explore conflict and determine whether disqualification or other steps may be necessary to ensure a fair and impartial trial).

At a superficial level, the facts suggest the possibility that the two defendants in this case

might have adverse interests and this situation might trigger Rule 1.7 of the Vermont Rule of Professional Conduct, which prohibits the representation of a client if that representation would be potentially adverse to another client. V.R.P.C. 1.7. It is possible to postulate a scenario wherein the interests of FAHC and Neweve Johnson-Lively might be adverse if each were claiming the other to be solely responsible for damages to Plaintiffs. If an attorney had loyalties to two defendants pursuing adverse goals, then fair trial issues might be implicated. Plaintiffs in this case, however, concede that there is no negative impact on their ability to obtain a fair trial; they simply ask the court to exercise disciplinary control over what Plaintiffs perceive to be adverse interests between the Defendants.

A review of the Defendants' respective interests in this case does not reveal a need for the court to intervene in order to preserve the parties' opportunity for a fair trial. Liability is conceded by both Defendants; the issue is the extent to which the Defendants' negligence caused damages to the Plaintiffs. Even if Rule 1.7 were applicable,<sup>1</sup> the elements necessary to satisfy concerns over a possible conflict of interest have both been met. Under Rule 1.7, a lawyer may still represent clients with potentially adverse interests if "1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." V.R.P.C. 1.7(a)(1)-(2). Mr. Berger believes that his long-term representation of FAHC will not adversely his ability to represent Ms. Johnson-Lively vigorously and zealously, nor will his alliance with her affect his duty to FAHC in other cases. Defendants' interests are aligned as FAHC has committed to pay any damages found by the jury, regardless of which Defendant the jury determines caused them. This is a valid reason for Mr. Berger to conclude that the Defendants' interests are not adverse. In addition, both clients, FAHC and Ms. Johnson-Lively, have consented to the representation by Mr. Berger. Thus, Defendants have sorted out the issues between themselves in a manner such that both of them find no cause to raise fair trial concerns with the court.

Plaintiffs also argue that disqualification is proper under Rule 1.8(f). Plaintiffs assert that because FAHC is paying for the legal representation of Ms. Johnson-Lively, Mr. Berger has a conflict of interest. Rule 1.8(f) prohibits an attorney from accepting compensation from someone other than the client unless: 1) the client consents after consultation; 2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and 3) information related to the representation is protected by Rule 1.6 (Confidentiality of Information). V.R.P.C 1.8(f)(1)-(3). The issue has been aired fully in the context of this motion, if it had not been done before, and both Defendants consent. For reasons parallel to those pertaining to the Rule 1.7 review, the Plaintiffs have not shown that the nature of Mr. Berger's representation prejudices the ability of any party to obtain a fair trial.

Plaintiffs readily concede that Mr. Berger's representation will have little impact on their right to obtain a fair trial. However, Plaintiffs argue that given Ms. Johnson-Lively's youth and inexperience, the court should intervene on her behalf to protect her from her attorney's conflict. That argument is not persuasive. Where professional conduct standards have not been violated in a manner such as to compromise any party's right to a fair trial, the suggestion that justice will

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<sup>1</sup> The court takes no position on this point as it is unnecessary to do so.

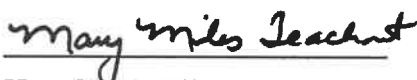
be served only by removing Mr. Berger is without foundation. Not only do the Rules caution against such procedural tactics,<sup>2</sup> but Ms. Johnson-Lively has previously been represented by a different attorney in another forum (concerning medical professional responsibility) over issues of relative responsibility for the conduct underlying Plaintiffs' claim. She is thus aware of the possibility of working with a different attorney to pursue a different approach to the relationship between her interests and those of FAHC. Under these circumstances, the court will not presume any lack of capacity on her part to evaluate potential for attorney conflict of interest, nor will the court substitute its judgment for hers with respect to her analysis of her own interests and her choice of an attorney.

Because neither Plaintiffs nor Defendants nor the court can identify more than a theoretical possibility of impact on any party's ability to obtain a fair trial, Plaintiffs have not shown a basis for the court to grant their motion.

ORDER

For the foregoing reasons,  
The Motion to Disqualify is *denied*.

Date at Burlington, Vermont this 2 day of October, 2001.

  
Hon. Mary Miles Teachout  
Superior Court Judge

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<sup>2</sup> The Scope of the Vermont Rules of Professional Conduct reads in part:

The purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.

V.R.P.C. Scope, at 620. Furthermore, the Comment to Rule 1.7 reads in part:

*Conflict Charged by an Opposing Party*

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. . . . Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.