

LEGAL ETHICS OPINION 1392

APPEARANCE OF IMPROPRIETY –  
PARTICIPATION IN BOARDS/  
ORGANIZATIONS: ATTORNEY  
SERVING ON MEDICAL  
MALPRACTICE REVIEW PANELS;  
ENGAGED SIMULTANEOUSLY IN  
MEDICAL MALPRACTICE CASE.

You have requested that the Committee opine as to the propriety of attorneys serving on Medical Malpractice Review Panels, constituted under Virginia Code § 8.01-581.1 et seq., and Medical Malpractice Rule 3(g)(3) of the Rules of the Virginia Supreme Court, when those attorneys are engaged in the representation of plaintiffs [presumably in medical malpractice cases], in the defense of such actions either individually, or as staff attorney for an insurance company. You have asked that the Committee assume, for purposes of this opinion, that an attorney engaged in such practice and simultaneously serving on such a panel would avoid individual conflicts of interest, i.e., the insurance staff attorney would automatically withdraw if one of the parties were insured by the attorney's employer, and a defense attorney with a private firm would avoid serving on panels where any party was insured by one of the firm's major clients. Similarly, the Committee will assume that a plaintiff's attorney serving on such a panel would withdraw from consideration of any issue involving any of his clients in order to avoid any per se conflict of interest.

The Committee notes that such avoidance of conflicts is mandated by Virginia Code § 8.01-581.3 which requires that the panel consist of "two impartial attorneys" (emphasis added), as defined in § 8.01-581.1: "an attorney who has not represented (i) the claimant, his family, his partners, co-proprietors or his other business interests; or (ii) the health care provider, his family, his partners, co-proprietors or his other business interests." The Committee notes further that panel members are required, under § 8.01-581.3 to subscribe to an oath of impartiality. In addition, the Committee believes that the panel constitutes a quasi-judicial forum since it receives evidence, hears testimony, and, under § 8.01-581.7, renders an opinion adjudicating the rights of the parties.

Although there is no disciplinary rule directly on point, in similar fact situations, the Committee has previously referred by analogy to DR:9-101(A), which precludes a lawyer from accepting private employment in a matter upon the merits of which he has acted in a judicial capacity.

The Committee has earlier opined that it is not per se improper for an attorney who serves as general counsel for and member of the board of directors of a hospital and nursing home to sit on a medical malpractice panel. LE Op. 484. More recently, the Committee has opined that it is not per se improper for a Commonwealth's attorney or a defense attorney to hold membership on a Community Corrections Resources Board, which provides sentencing alternatives for certain nonviolent offenders, provided that the attorney does not act on recommendations as to individuals with whose prosecution or defense he was involved. LE Op. 1268. See also LE Op. 632 and LE Op. 1195.

Committee Opinion  
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It is the Committee's opinion that it is not per se improper for attorneys who are engaged generally in the representation of plaintiffs or defendants in medical malpractice actions, either as private practitioners or as staff attorney for an insurance company, to serve as members of Medical Malpractice Review Panels, provided that the attorney complies with the requirements of Virginia Code § 8.01-581.1 et seq., as to impartiality and recusal. The Committee observes that neither the legal requirements of the Code nor the mandates of the Disciplinary Rule provide for any client consent to vitiate the appearance of impropriety. Finally, the Committee recognizes the public policy necessity for participation on panels by attorneys knowledgeable in matters related to medical malpractice, and opines that compliance with the legal requirements for impartiality will constitute sufficient avoidance of any appearance of impropriety as articulated in DR:9-101(A).

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