



Recent Decision Highlights Risk of Conflicts in Multi-Defendant Cases

Whenever more than one healthcare provider employed by the same entity is sued in a medical malpractice case, the question arises whether they can all be represented by the same defense attorney. The promotion of a unified defense and the reduction of defense costs are two of the more significant factors which often lead to the retention of one attorney to represent multiple defendants. However, a recent opinion from the United States District Court for the Eastern District of Virginia serves as a powerful reminder to defense counsel and those who retain them that they should thoroughly investigate and identify potential conflicts of interest that may preclude the representation of multiple defendants.

In *Sanford v. Commonwealth of Virginia*, Civil Action No. 3-08 CV835, the plaintiff's decedent had been hospitalized for the removal of a kidney. The decedent suffered from a rare genetic disorder which caused cerebellar damage and severe loss of muscular coordination. Two days after the surgery, the patient was found by his brother in the hallway outside his room delirious and hallucinating. Although the police were summoned to help restrain the patient, his brother was successful in convincing him to return to his bed. The next day, a different family member found the patient delirious and hallucinating on the floor of his hospital room. His brother requested a psychiatric consult because the patient did not have a prior history of delirium or hallucinations. The next day, the patient again became delirious, allegedly as a consequence of medications he had been prescribed by his physicians. Nurses

[Richmond](#) • [Blacksburg](#) • [Fredericksburg](#) • [Research Triangle](#) • [McLean](#)

Copyright Sands Anderson Marks & Miller, PC.

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.

summoned the police and a security guard to the scene. They arrived shortly thereafter, and one officer and the security guard allegedly seized the patient, wrestled him to the ground, handcuffed him behind his back and held him in a prone position. While he was restrained, a nurse injected him with Haldol, a sedative. After approximately 30 minutes, the police officers and nursing staff turned the patient over and discovered he was dead. The patient's family sued the police officers and the security guard alleging that they had used excessive force and violated his constitutional rights under the fourth and fourteenth amendments. Three nurses employed by the hospital were also sued based on allegations that they had violated the patient's constitutional rights. Two of the nurses were charged with gross negligence in the application of restraints and failure to monitor the patient appropriately while he was restrained. Several other counts were asserted against the nurses, including battery, false imprisonment, and intentional infliction of emotional distress. Four physicians who were employed at the hospital and involved in the patient's care at various times were also sued for medical malpractice. The allegations of malpractice included improper prescription of medications and failure to diagnose and treat the patient's delirium.

The same defense attorney was retained to represent each of the defendants employed by the hospital, including all four physicians, three staff nurses, the hospital's Chief Nursing Officer (who was accused of failing to train the nurses properly) and the security guard. At the outset of the litigation, a single attorney employed by the Virginia Attorney General's office represented each of the police officers involved in the case. However, as the case progressed that attorney withdrew from the representation in favor of a single attorney in private practice.

After the conclusion of substantial discovery, including the designations of expert witnesses and over 50 depositions, the plaintiff moved to disqualify the attorney for the medical defendants and the attorney for the police officers based on a conflict of interest. In a 38 page opinion published on December 2, 2009, Senior United States District Judge Robert E. Payne granted the motion.

[Richmond](#) • [Blacksburg](#) • [Fredericksburg](#) • [Research Triangle](#) • [McLean](#)

Copyright Sands Anderson Marks & Miller, PC.

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.

The motion was based on Virginia State Bar Rule of Professional Conduct 1.7 which provides in relevant part that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” That rule goes on to provide that a concurrent conflict of interest exists when “there is significant risk that the representation of one or more clients will be materially limited by the lawyers’ responsibilities to another client, a former client, or a third person, or by personal interest of the lawyer.” Judge Payne noted in his opinion that the Court had raised the possibility of a conflict of interest at both the initial pretrial conference in March of 2009 and at a status conference in September of 2009. Counsel for both sets of defendants represented to the court that after those conferences, they met with their clients and obtained their consent to the joint representation. However, the plaintiff contended that two notes to the conflict of interest rule prohibited the joint representation.

The first note provides that consent to joint representation cannot be given “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.” The second note identifies situations which may result in an impermissible conflict, including “substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement.”

With respect to the medical defendants, the discrepancies in testimony and incompatible positions included:

- Defense expert opinion which supported the conclusion that one of the physicians misdiagnosed the patient.
- The fact that one physician made a note that Haldol should be avoided for the patient. However, he did not put that note in the hospital’s electronic records system, and another physician prescribed and two nurses administered the drug.
- There was a conflict between the testimony of the CNO and one of the nurses about the extent of the training provided regarding patient restraint.

[Richmond](#) • [Blacksburg](#) • [Fredericksburg](#) • [Research Triangle](#) • [McLean](#)

Copyright Sands Anderson Marks & Miller, PC.

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.

- The defense of one of the physicians was based on the fact that he was on vacation at the time of the patient's death and had turned all responsibility for his care over to a different physician represented by the same attorney.
- The physician who prescribed the Haldol while the patient was restrained did so based on information provided by one of the nurses over the telephone; however, there was significant evidence that the information which the nurse provided was inaccurate.

After discussing several cases interpreting the rules of professional conduct with regard to conflicts, Judge Payne concluded that "the conflicts that are presented here are real conflicts. They exist now and they have existed throughout the course of the case." He further concluded that the conflicts "raise the serious prospect that the trial could fall into disarray." Judge Payne concluded that while counsel for the medical defendants had staked out defensive positions that they thought were best for the defense of the case considered as a whole, counsel had not considered how the assertion of those positions would affect the ability of each defendant to mount his or her best possible defense as an individual. He noted that "each defendant is entitled to use the record to exonerate himself or herself even if to do so inculpates another defendant in the same category of defendants." Finally, Judge Payne found the consent to joint representation purportedly obtained from each defendant to be ineffective as a matter of law because neither the attorney for the police defendants nor the attorney for the medical defendants "reasonably could have believed that, under the circumstances of this case, they could represent all of the defendants whom they undertook to represent."

For more information on the *Sanford* case or to request a copy of the opinion, please contact Randy Wimbish at 804-783-7257 or rwimbish@sandsanderson.com.

[Richmond](#) • [Blacksburg](#) • [Fredericksburg](#) • [Research Triangle](#) • [McLean](#)

Copyright Sands Anderson Marks & Miller, PC.

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.