BOSTON UNIVERSITY

PUBLIC INTEREST LAW JOURNAL

Volume 12 SPRING/SUMMER 2003 Number 2-3

THE LAWYER IS IN: WHY SOME DOCTORS ARE PRESCRIBING LEGAL REMEDIES FOR THEIR PATIENTS, AND HOW THE LEGAL PROFESSION CAN SUPPORT THIS EFFORT

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COMMENTARY

THE LAWYER IS IN: WHY SOME DOCTORS ARE PRESCRIBING LEGAL REMEDIES FOR THEIR PATIENTS, AND HOW THE LEGAL PROFESSION CAN SUPPORT THIS EFFORT

I. INTRODUCTION

This Commentary describes a thriving multidisciplinary law firm at work within a Boston, Massachusetts, hospital, and explores several logistical and ethical challenges that a true multidisciplinary practice must confront.

Boston Medical Center ("BMC") pediatricians are frequently confronted with the reality that their patient-families' basic needs for housing, nutrition, safety, and healthcare are routinely not met, resulting in poor child health and well-being. At BMC, New England's largest safety-net hospital, healthcare providers serve a racially and ethnically diverse, low-income population. Over fifty percent of the patient population has income below the poverty level. In BMC's Department of Pediatrics, that means that the majority of the children served live in poverty. Research clearly demonstrates that children living in poverty are more often exposed to health and developmental risks than their wealthier counterparts.[1]

Frustration at watching children experience avoidable hardships led the chairman of the Pediatrics Department to take the highly unusual step of incorporating lawyers into the clinical treatment team, founding the Family Advocacy Program ("FAP"). Since 1993, lawyers have helped pediatricians at BMC and affiliated community health centers prevent illness, injury, and malnutrition.[2] Although laws to prevent harm or poor health exist, bureaucratic obstacles and lack of compliance by government agencies, landlords, and others

[1] *See* Steven Parker, M.D. et al., *Double Jeopardy: The Impact of Poverty on Early Child Development*, 35 THE PEDIATRIC CLINICS OF NORTH AMERICA 1227 (1988).

[2] *See* Barry Zuckerman & Ellen Lawton, *A Partnership for Kids' Health*, BOSTON GLOBE, July 25, 2001, at A11.

II. MULTIDISCIPLINARY PRACTICE SHOULD BE EMBRACED, NOT FEARED

A. MDP Embraces Core Professional Values

Multidisciplinary practice is consistent with the legal profession's core value of public service. By creating new and innovative legal service delivery systems, legal and law-related services are made more available to people most in need of assistance. Commentators have noted that:

> [A] number of surveys have shown that not only poor people, but also many people of moderate means do not have access to or utilize lawyers when they have legal problems. If the establishment of multidisciplinary practices helps to serve these unmet legal needs, then the profession should support such efforts. To fight these creative delivery systems, far from representing responsible professional behavior, smacks of trade unionism, medieval guilds, and downright greed.[14]

A medical-legal collaborative, like FAP, is just one example of how multidisciplinary practice can and does work in the public interest. By providing legal assistance in concert with medical and social services, FAP helps low-income families meet their basic needs, thus increasing the likelihood of family stability and child health.

We begin with a defense of this multidisciplinary model because some prominent segments of the legal profession remain skeptical of the MDP movement. The best known source of such opposition is the American Bar Association ("ABA"). In 1998, the ABA established a commission to study MDP and its implications for the professionalism and economic interests of American lawyers.[15] In 1999, that commission issued a report concluding that MDP was not such a dangerous or worrisome concept.[16] At the ABA's annual meeting in 1999, the House of Delegates rejected the report and its conclusions. Despite the careful study and the reasoned analysis of the commission, the rank and file members of the ABA feared the prospect of greater multidisciplinary activity by lawyers and non-lawyers working together.[17]

We should note, though, that the objections from lawyers within the ABA stem from concerns that are not present in a public interest practice such as FAP.

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[14] *See* Gary A. Munneke *A Multidisciplinary Practice in Your Future?*, *in* MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE 1, 6 (Gary A. Munneke & Ann L. MacNaughton eds., 2001).

[15] *See* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 273 (2000); Charles W. Wolfram, *Comparative Multidisciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 971 (2002).

[16] *See* COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATIONS (1999), *available at* http://www.abanet.org/cpr/mdprecommendation.html.

[17] *See* Daly, *supra* note 15, at 221-24, 279-80; Wolfram, *supra* note 15, at 970-74.

These include worries about competition from large accounting firms and multinational financial services offices. There is much reason to believe that the same lawyers who rejected the ABA report would support innovative public interest endeavors like FAP.[18]

B. The FAP Model Breeds a Culture of Advocacy in Healthcare

As noted in the Part I, since 1993, FAP has incorporated at least one lawyer into the Pediatrics Department of BMC with the goal of providing legal assistance to families whose health outcomes are contingent on social changes that medical interventions alone may not address. The inclusion of a lawyer into a world of doctors, nurses, and social workers was simply an acknowledgment of the shared roles that professionals must play in a complex modern society. The creation of FAP adopted and transformed for the public interest sector a principle of legal practice regularly employed by private law firms in multinational corporate transactions: effective problem resolution often requires the collaboration of multiple service providers with complementary backgrounds and training.

Initially, FAP offered training and case consultation to healthcare providers and direct legal assistance to families in three legal practice areas: public benefits, housing, and health insurance access. As the program evolved, the lawyers and the healthcare providers learned each other's professional jargon, culture, and customs. FAP staff began attending residency education forums and department, division, and faculty meetings to ensure that providers knew about FAP services, and when and how to make referrals. These meetings provided opportunities for FAP staff to gather feedback on service delivery. In addition, they enabled staff to integrate advocacy services better in the healthcare setting and to deepen their understanding of the complex psychosocial needs of poor families and how these services relate to health outcomes.

FAP also realized that limiting service to three legal areas was impractical. Patient-families are often challenged by many issues that require a wide range of legal experience and support in a one-stop shopping model. In response, FAP expanded its staff and expertise to include three lawyers versed in multiple practice areas including family, education, and immigration law. FAP developed a network of advocacy resources to fill gaps in FAP experience and service and to refer matters to other organizations to leverage its service capacity. FAP began collaborating with pediatricians on systemic reform efforts related to recurrent problems faced by patient-families.

Essential elements of this successful multidisciplinary model include: weekly walk-in legal clinics at outpatient sites; FAP staff participation in departmental meetings; meaningful ongoing collaboration on individual family matters and systemic reform; the addition of a medical director to the FAP team; and the

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[18] *See* Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV 787, 792 (2002).

communicated to her colleagues that she represents Sally Davidson. We have already concluded that she may not do this without permission. This concern is fairly negligible for two reasons. First, if her colleagues infer from Karen's abstention that she probably represents some member of the family, it is hard to claim that Karen has impermissibly disclosed confidential client information, particularly since the fact of representation is unlikely, in any real sense, to be a deep secret which Sally would want kept under wraps. Second, as noted above, Karen may easily obtain from Sally permission to reveal at least the fact of representation, which eliminates this concern entirely.

3. The Lawyer's Obligation to Share Team Discussions with the Client

The discussion thus far has left one important question unanswered. Regardless of her chosen or required role in the team proceedings when her client's issues arise, does Karen have any obligation, or permission, to share with her client whatever information she has learned by sitting in on the meeting?

Of course, if the team has no objection to sharing information, then Karen may disclose whatever she would otherwise choose to share with a client. Conversely, if (as seems likely) the team prefers confidentiality about its discussions, Karen is bound by that contractual (and moral) commitment. But if the team insists on confidentiality and Karen learns something important about her client's *ongoing* case, should she cease representation of the client?

Let us make this concrete with an example. Suppose that the team raises a serious concern about the hazardous and overcrowded condition of Family D's apartment. It turns out that Karen represents Sally Davidson in a housing matter, the focus of which is whether Sally will accept a public housing unit in an area far from her current home. Sally thus far has resisted accepting the new apartment, against Karen's considered judgment.[47] In the team meeting, Karen hears that a hospital social worker may refer the matter to DSS if "Ms. D" does not act more responsibly about her children's housing safety concerns. If Karen does not disclose what she has learned about DSS to Sally, does her possession of that information affect her work with Sally so materially that she must cease her representation of Sally?

An answer that called for Karen to withdraw from representing Sally because of this tension would seem gravely unacceptable, even if some professional responsibility doctrine might point in that direction. In a world of private practice, with a wide range of attorney choices, Sally would be better off with a different lawyer. An unfettered and truly independent lawyer could talk to Sally about his fear that DSS might intervene if Sally did not accept the transfer to a safer apartment. Karen, however, must avoid relying on the protected, team-

[47] Of course, Karen's disagreement with Sally's chosen stance does not diminish her obligation to pursue Sally's preferred strategy, absent some incapacity on Sally's part or some serious moral difficulty created by Sally's instructions. *See* DAVID BINDER et al., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 16-19 (1990).

generated insights.[48] Some might say that this hindrance precludes Karen from continuing to work with Sally.

In the world of subsidized legal services, however, that answer is simply not realistic. Sally cannot obtain another attorney, as there is little market for free poverty lawyers.[49] The reasoning that might disqualify Karen in a private world simply cannot apply here. While no authority expressly makes this kind of distinction between private counsel and legal services lawyers, it is safe to say that Karen would not breach any duties to Sally by staying on as her lawyer. There is little doubt that Sally is better off with Karen as her (perhaps slightly hobbled) lawyer than she is with no lawyer at all.

One possible way to preempt this problem is for FAP to advise its clients, at the beginning of the relationship, that FAP attorneys meet regularly with hospital staff and social workers, and that whatever the lawyers learn in those meetings cannot necessarily be shared with the clients. Each client could then be asked to sign a waiver as to any resulting limitations that might arise, so long as the lawyer reasonably believed that the ongoing representation would not be impaired.[50] Experience indicates that poor clients would accept this waiver, and it would ordinarily be in their best interest to do so.[51]

4. Prohibition Against a Lawyer's Sharing Client Information with Hospital Staff

The multidisciplinary quality of FAP's work—the very attribute that makes the FAP model so dynamic and innovative—creates intriguing questions about how

[48] If possessing some confidential information leads a lawyer to limit what she would otherwise pursue on behalf of a client's case, the resulting impairment of representation might constitute a disqualifying conflict of interest, especially if the lawyer cannot disclose that impairment to the current client and obtain consent to the impaired representation. *See* RESTATEMENT, *supra* note 25, § 132, cmt. g(ii), illus. 7 (limitation on sharing information previously learned "may preclude effective representation of [a client] in the pending case"). *See also* Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 825 (1992) ("*A resulting impairment* approach conveys the message that the boundary between permissible and impermissible conduct is the point at which the attorney's functioning is either actually impaired or certain to be impaired." (emphasis in original)).

[49] *See* Paul R. Tremblay, *Acting "A Very Moral Type of God:" Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2479-82 (1999) (discussing the scarcity of subsidized lawyers for the poor).

[50] *See* Boston Bar Association Ethics Committee 2001-B, *available at* http//www.bostonbar.org/ethics/opitalics01_B.htm (proposing a similar solution involving unexpected conflicts arising out of volunteer lawyer-for-the-day programs in probate and housing courts) (last visited Apr. 11, 2003).

[51] The Massachusetts Office of Bar Counsel frowns on advance waivers. *See id.* Notwithstanding that expressed policy, it is unlikely that any thoughtful reviewer of the practice suggested here would find it troublesome. *See id.*, n. 2.

midst of a steady, ongoing collaboration between legal and medical staff, a client asks to share a confidential fact with her lawyer, a fact which is important to the medical as well as the legal team. If the usual rules apply, then the lawyer will honor the client's request and not share information with the hospital. But doing so has important and disruptive consequences since the hospital presumably will rely on the expectation that information will be shared readily, and, obviously, the lawyer will not have permission to alert her hospital colleagues that she is no longer sharing all of the information as she was before. Thus, the usual rules will be insufficient in this unusual circumstance.

How should the FAP lawyer proceed? This is the sort of thing that the lawyer ought to negotiate with her clients in advance of the collaboration; if she has not done so, she may find herself in an irremediable position, unable to guarantee confidentiality. If a client were to blurt out a secret and *then* ask that the revelation not be shared, a lawyer who had not negotiated an arrangement might find herself in an uncomfortable predicament, similar to the lawyer in "the case of the unwanted will" (referring to a famous story reported by Professor Tom Shaffer of Notre Dame Law School[42]). Here's why: if Sally Davidson were to ask Karen if she could share something private with her at a time when Karen was working productively with the medical and social work team on the Davidson matters, Karen would have to offer the following caveat to Sally:

> As your lawyer, I have a professional duty to keep what you tell me secret, unless you direct me otherwise. You have previously signed a paper allowing me to talk about your case with the hospital team, but that paper can be withdrawn at any time, as you

lawyer has no such stark obligation to the other party, and so the result is different.

[42] *See* Thomas L. Shaffer, *The Ethics of Radical Individualism*, 65 TEXAS L. REV. 963, 968-72 (1987). In this story, a lawyer drafts reciprocal wills for a husband and wife together as joint clients, each leaving all assets to the other. After the wife has signed her will, the husband tells the lawyer in confidence that he wants his will rewritten to leave a bulk of his estate not to his wife, but to his paramour. Because the lawyer has not adequately counseled the clients about the obligation to share all information with both spouses, the lawyer is in a tragic, existential dilemma. If he tells the wife of her husband's plans (as he must), he has committed a serious breach of his implied duty to the husband of confidentiality. If he respects the husband's confidence (even if he does not redraft the will), he has breached the duty owed to the wife to inform her of important developments related to the representation. Shaffer, who (as his article's title implies) is a deep critic of secular individualism and autonomy, argues that the lawyer represents "the family" as an indivisible moral unit, and the lawyer must confront explicitly the chasm that has developed in his clients' relationship. Few legal ethics scholars share Shaffer's perspective, tending instead to analyze the problem through the lens of competing rights and professional compromises. *See, e.g.*, DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 481 (3d ed. 2000); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1125 (1992); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1283-85 (1994).

> know. So the answer to your question is "yes," but I need to warn you that once I know something that I cannot share with the team, I may not be able to continue to work with the team. Indeed, I will have to tell them that I will no longer be part of your team, and they will suspect that something is amiss. So it's not as simple as we might first think.
>
> Why don't we talk about some things before you confide in me? Let's talk in very general terms about the risks that you see in the team's knowing about your affairs, as well as how things would look if I were to stop being part of the team. Maybe then you can decide whether to confide in me, or to tell me knowing that I might feel the need to share things with the medical and social work team.

If this conversation seems like the appropriate caution to a FAP client, then it makes sense for the FAP lawyer to have a similar conversation with each client at the beginning of any representation that will include hospital collaboration (which, given FAP's multidisciplinary mission, presumably covers most FAP clients). The early warning helps the client understand the professional roles, and, for what it's worth, "covers" FAP should a client blurt out something later, expecting it to be confidential.[43]

D. *Scenario #3: Current Representation by a Different FAP Lawyer*

Now let us assume the following: Karen attends a team meeting at which patients and families are discussed anonymously. At this particular meeting, the team discusses "Family D." Karen later learns that her colleague, a lawyer named Ben, represents Sally Davidson. The central question in this scenario is whether the fact that the FAP representation is by a lawyer other than Karen alters any of the suggestions offered in the first two scenarios.

In general, the answer to that question is "no." Because a lawyer working in a law firm is treated as representing all of the clients of the law firm,[44] we cannot ascribe different responsibilities to Karen when the family is Ben's client and not Karen's. There is, though, one intriguing twist to this scenario, and it concerns Karen's sharing information with Ben that Ben must then keep secret from his client.

Ordinarily, information known by one member of a law firm is deemed to be known by all members of the law firm.[45] This principle applies with special force to small, close-knit legal organizations, where fire walls and cones of silence are impractical.[46] Thus, in the context of professional responsibility, what Karen knows, Ben is deemed to know as well.

[43] By "cover," I refer to the need to protect FAP from a claim of breach of duty, thus avoiding the situation that the lawyer in the unwanted will story found himself in when he failed to give early warnings to his joint clients. *See supra* note 62.

[44] *See* ROTUNDA, *supra* note 36, at 331, § 11-2.2.

[45] *See* ANNOTATED MODEL RULES, *supra* note 37, at 165; RESTATEMENT, *supra* note 25, § 123.

[46] *See* ANNOTATED MODEL RULES, *supra* note 37, at 174-75.