Should Clients Be Told of Better Representation Elsewhere?

Lawrence K. Hellman, Oklahoma City University School of Law

Available at: https://works.bepress.com/lawrence_hellman/5/
Should Clients Be Told of Better Representation Elsewhere?

By Lawrence K. Hellman ©
Dean and Professor of Law
Oklahoma City University

This month’s topic was suggested by an article by Denise Grady that appeared in the January 6, 2009, edition of The New York Times: “Should Patients Be Told of Better Care Elsewhere?” After a very thoughtful discussion, Ms. Grady concluded that the “question of what the doctor’s obligation is remains unresolved.” While her article was addressed to doctors, it is worth considering whether the issue applies to lawyers, too. Should a lawyer be required to inform a potential client that better services are available elsewhere?

For doctors, the question was framed as an aspect of the duty to obtain informed consent from a patient before providing medical treatment to a patient in the following situation: A patient in a relatively small community needed a serious operation for a particular kind of cancer. She consulted with the general surgeon at the local hospital, who was licensed and qualified to do the surgery. The surgeon told the patient that he was optimistic about being able to remove her tumor, but the likely outcome of the surgery would leave her with a life-long inconvenient and unpleasant, though non-life-threatening, condition. On her own, the patient did some research and concluded that the odds of success – and without the adverse after-effects – were materially better at a more distant cancer center where there were surgeons who specialized in this particular operation. She chose to go to the specialist and, fortunately, had a good outcome: the tumor was removed and there were no after-effects.

The informed consent doctrine was originally developed by courts of law to be applicable to medical professionals. The legal profession has been slow to acknowledge that the informed consent doctrine has a role to play in client/lawyer relationships. Indeed, unless you are a fairly recent law school graduate, you may never have encountered the phrase “informed consent” in your legal ethics course, because it appeared in neither the Code of Professional Responsibility nor the Rules of Professional Conduct that have governed lawyers in Oklahoma for the last three decades. That’s, until January 1, 2009. That’s when the Oklahoma Supreme Court’s latest revisions of the Oklahoma Rules of Professional Conduct went into effect. These revisions, following the recommendations of the American Bar Association, introduced the concept of informed consent into several provisions of the Rules. There’s even a definition of informed consent: “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of reasonably available alternatives to the proposed course of conduct.”

Do the revised rules require lawyers to go through the informed consent process when they know that better results are likely to be obtained with another lawyer who is reasonably available to provide the services? As a matter of ethics, we have no pre-requisite for the lawyer to do this. Rule 1.1 requires every lawyer to provide “competent” legal services. But Rule 1.1 views “competent” to mean “adequate,” not the “best possible.” Comment [2] to Rule 1.1 states, “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”

This is not to say that the standard of care, for purposes of malpractice liability, is “mere adequacy.” Lawyers are required to “exercise the competence and diligence normally exercised by lawyers in similar circumstances.” One can find cases holding lawyers to the standard of care that would be exercised by a specialist when the lawyer should have realized that the matter required a specialist.

Perhaps Comment [5] to Rule 2.1 in the rules of Professional Conduct offers guidance that lawyers should consider when deciding whether to bring to a client’s attention that better services are available elsewhere. “In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client . . . . may require that the lawyer offer advice if the client’s course of conduct is related to the representation.”

3 Id. at Rule 1.0(e).
4 Id. at Rule 1.1.