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GUEST EDITORIAL

COUNTERSUING THE ATTORNEY TO STOP FRIVOLOUS LAWSUITS

by Leonard Berlin, M.D.*

While lawyers and physicians do not agree on the number and frequency of frivolous or nuisance medical malpractice suits, there is no disagreement that they exist. Until recently a small minority of attorneys have been able to file unwarranted and meritless malpractice suits with relative impunity and with no accountability to their adversary's client. The advent of the successful physician countersuit has changed this picture.

The *Berlin v. Nathan* trial[1] in June, 1976, brought into sharp focus two major issues: what is the extent of the lawyers' obligation to investigate a case before filing suit, and secondly, to whom do attorneys owe this obligation?

What are the lawyers' obligation?

At the trial, some of the most fascinating testimony centered on the duties of lawyers when confronted with facts similar to those in *Berlin v. Nathan*. The two attorney defendants had filed a malpractice suit on behalf of a woman, who had sustained a dislocation of a finger during a tennis game. In a written resumé to her attorneys, the woman stated that two physicians, who were consulted after her initial treatment, had advised her that the original diagnosis and treatment were improper and negligent and that her original x-rays had been misinterpreted. In addition to that resumé, the attorneys had in their possession, prior to the filing of the malpractice lawsuit, a written report from one of the consulting physicians which did not support, and which even in part contradicted, the client's resumé. The attorneys admitted they had made no attempt to contact the physicians for additional information or clarification prior to the filing of the suit.

Expert legal witnesses testified as to the duties of a lawyer, and, obviously, there was a divergence of opinion. The first witness for Dr. Berlin stated an opinion that an attorney is subject to a duty to ascertain whether there is a reasonable basis to believe that a client's claim is valid. Further, that the lawyer has a duty *not* to take the case if he or she feels that the case is being initiated for, or will have the effect of, harassment, imposition of unnecessary expense, or the promotion of a settlement reached only because of the harassment and expense involved in defending the lawsuit. It was suggested by another expert witness for the plaintiff that the attorney is obligated *not* to file a lawsuit unless he or she is reasonably satisfied that the case is not without merit. A duty to the client of not involving him in unnecessary litigation, parallels the lawyers' obligation to consider whether he is inflicting needless harm or expense on the defendant, as well as an obligation not to clog the judicial system with baseless litigation.[2] In his closing statement, the plaintiff's attorney expressed

*Attending radiologist, Skokie Valley Community Hospital, Skokie, Illinois; and Clinical Assistant Professor of Radiology, University of Illinois, Abraham Lincoln School of Medicine, Chicago, Illinois.

ANNOUNCEMENT

The American Society of Law & Medicine proudly announces its new **student membership** category, effective January 1, 1978. Letters announcing the program have been sent to all professional school deans, the directors of medicolegal centers, and student organizations. The Society hopes that by involving more students with the complex issues that interrelate law, medicine and other professions, meaningful and constructive dialogue and understanding will be promoted amongst those who recognize the importance of medicolegal issues.

Student membership in the Society is open to all professional school students interested in medicolegal issues and problems. Student members will be entitled to all the regular benefits of Society membership, including annual subscriptions to MEDICOLEGAL NEWS and the AMERICAN JOURNAL OF LAW & MEDICINE.

The annual student membership fee has been set at $22.00. Contact:

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It's Up to You

American Society of Law & Medicine 1978 Membership Goal

One person can make a difference. One-to-one recruitment by Society members is the best way to expand the Society and its educational programs. Talk to your friends and colleagues about the American Society of Law & Medicine, its unique cross-disciplined approach to medicolegal problems and issues, its two publications and the many benefits of membership. If you provide the names of potential members, the Society will be pleased to send them a sample issue of MEDICOLEGAL NEWS as well as information about the AMERICAN JOURNAL OF LAW & MEDICINE and the Society.

With the re-introduction of the Society's student membership, the personal recruitment efforts of our members, for both regular and student members, is urged as the most effective method to apprise interested persons of the Society. Remember, one person — you — can make a big difference toward our goal of doubling the membership of the American Society of Law & Medicine in 1978.

the view that the lawyer "has a duty to tell his client when that client doesn't have a legitimate lawsuit, and indeed, [that] this is his first and foremost duty."

The expert witnesses produced by the defense, although agreeing that an attorney has an obligation to determine whether or not there is a reasonable basis for presenting a client's case to the courts, felt that the defendants had adequately done so. Verification of the client's resumé was not perceived of as a duty of the attorney, but rather, only something to be done if time permitted. As one expert for the defense testified: "If these lawyers decided to believe this lady and to interpret the doctor's written report to mean verification, they satisfied their responsibilities as lawyers." The defendants clearly believed that their obligation was to afford their client her day in court.[3] Although *Berlin v. Nathan* is currently on appeal, a California decision has held that an attorney has probable cause to represent a client in litigation, when he has an honest belief that the claim is tenable and proper. According to the court, the attorney must subjectively believe that the claim merits litigation, and that belief must satisfy the objective standard of the reasonable and prudent attorney.[4]

To Whom Do Attorneys Owe Duties?

Whatever the duties of attorneys, to whom are they owed, and to whom are attorneys accountable? Let us explore these points. The defendants' counsel and expert legal witnesses took the position that attorneys owe duties only to their clients, that attorneys need only conduct themselves according to their own self-imposed standards, and that attorneys are accountable only to their own consciences and clients. It is certainly true that in our adversarial system of justice, opposing attorneys have traditionally never considered themselves parties in the conflict, nor as owing any responsibility to their adversaries. As the sole interpreters and practitioners of the law, attorneys hold a unique position in our society, and the courts have mandated a standard of conduct which seeks to insure the rights and interests of the opposing party.[5] An individual who contemplates litigation relies on the attorney to determine whether a lawsuit should or should not be filed, and in the process of determining whether the aggrieved individual has a legitimate cause of action, does the attorney have a duty — any duty — to the potential defendant? If the lawyer advises his client to sue in a situation in which no reasonable and prudent lawyer would similarly advise his client, and if it is later shown that the filing of the lawsuit damaged the defendant, should not the defendant have a cause of action against the attorney?

While the answer is a resounding "yes" from the President of the Association of Trial Lawyers of America,[6] various state courts have given their authority to both sides of the question. In states where responsibility has been rejected as contrary to public policy, the rationale used by the courts has centered upon the restraining effect such a policy would have upon an attorney's representation of a client.[7] A California court has upheld the right of a defendant to sue opposing counsel, stating: "Attorneys cannot show a complete disregard for the rights of a prospective defendant. The law is to the contrary. . . . A cause of action for malicious prosecution exists if an attorney prosecutes a claim which a reasonable lawyer would not regard as tenable or proceeds with the action by unreasonably neglecting to investigate the facts and the law."[8] A Wisconsin court has held that the attorney's private duty to his client must yield to his public duty to aid the administration of justice where the two conflict.[9] Support for this viewpoint can also be found in the American Bar Association Code of Professional Responsibility which would have the attorney consider all persons involved in the legal process, avoid the infliction of needless harm, and refuse to file suit when he knows or should know that it would serve merely to harass or maliciously injure another.[10]

The argument has been made that if an attorney were liable in a civil lawsuit brought by an adversary, there would be a "chilling effect" on the right of the lawyer's client to his day in court — that the attorney might be dissuaded from bringing a legitimate claim. Although this argument has merit, are we not constantly balancing the conflicting rights and needs of all individuals? For example, we have the right of free speech but if for no reason we yell "fire" in a crowded theater, the right of others to maintain their safety must take precedence over our right of free speech. Accordingly, the recognition of one individual's rights frequently means the limitation of another's rights. In the same fashion, is it unreasonable to expect that the right of an individual to sue another, be balanced with the right of the other not to be sued without cause? A lawyer must not be required to advocate only cases which he knows will win; but perhaps, he should be expected to advocate only those cases which he, and other reasonable attorneys, believe to be legitimate and meritorious

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Hospital Forum

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right of citizens to file a civil action for injunctive relief against persons violating certain sections of the proposal. This right could be exercised only if judicial or administrative action was not already commenced by the HEW Secretary or the U.S. Attorney General.

Capital Expenditure Limitation

Most of the cost containment bills filed between April and July attempted to limit the expenditure of large sums of capital on medical equipment and construction. The administration bill sought an eighteen month moratorium on such expenses and would have applied the limit not just to hospitals, but to physicians and group practices as well. This obvious attempt to place the same regulatory controls over doctors who purchase sophisticated equipment for their offices was deleted because of heavy opposition from physicians.

Other Cost Containment Bills Filed

The administration package was quickly countered by a series of bills filed by other Congressional leaders. Representative Daniel Rostenkowski proposed a flat nine percent cap on hospital charges and reimbursements (H.R. 8337). All hospitals with less than 4000 admissons in the base year would be exempted making the proposed law applicable to only 45% of the nation's hospitals.

Rep. Paul Rogers, Chairman of the Subcommittee on Health and the Environment, framed his proposal around what he called "incentives for good performance by hospitals" (H.R. 8121). However, the American Hospital Association charged that closure of so-called underutilized facilities would add to the patient load of other institutions, and under revenue control those facilities would be penalized for increasing their patient load.

Senator Herman Talmadge, Chairman of the Senate Finance Health Subcommittee, entitled his bill the "Medicare-Medicaid Administrative and Reimbursement Reform Act of 1977" (S. 1470). Under this proposal, all hospitals would be classified by size, type and other criteria, and would come under a uniform system of accounting and cost reporting. Talmadge revised the revenue limitation formula so that hospitals experiencing a decrease in admissions between 90% to 100% of the prior year would not ex-

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Guest Editorial

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Surely, citizens must always have the right to bring a lawsuit for a reasonable and legitimate grievance, and attorneys must always be available for representation. But should anyone, lay person or attorney, have the right to file a lawsuit, without regard to its reasonableness or legitimacy with impunity? Should not the penalty for acting negligently, which the common law invokes on all other individuals, be applied to attorneys as well? Does not the fourteenth amendment of the U.S. Constitution, which guarantees everyone equal *protection* under the law, also make us equally *liable* under the law?

Many attorneys would suggest that the sanctions denied by freedom from lawsuit are adequately controlled and imposed by the code of professional responsibility and bar association review. Yet, others have posited that it is utter hypocrisy for the legal profession to claim the special privilege of self-discipline while rejecting the medical professions' claim that it can be self-policing: "The trial bar relies upon the judicial mechanism to resolve the myriad of disputes arising from all walks of life. We cannot exempt ourselves from that injury redressing system and still maintain our professional integrity."[11] Indeed, an American Bar Association special committee on evaluation of disciplinary enforcement, chaired by retired U.S. Supreme Court Justice Tom Clark, reported in 1970, that the prevailing attitude of attorneys toward enforcement of the code of professional responsibility ranged from apathy to outright hostility. Lawyers failed to report violations of the code, and rather than cooperate with grievance committees, they exerted their influence to stymie committee action.[12]

Further, defendants who are victimized by attorneys who file frivolous lawsuits suffer mental anguish, injury to professional reputation, shock and outrage. These same injuries, if resulting from sex discrimination or the invasion of one's mail are compensable through the court system.[13] Such injuries must also be the responsibility of the attorney should they file unwarranted litigation.

Attorneys are not the only class held immune to legal process, but as the bell tolls for these other groups, it must also toll for the lawyer. The words of the New York courts with regard to the immunity of charitable institutions seem to apply equally to the immunity of attorneys: "The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded."[14] Immunity tends to foster neglect and irresponsibility, and frustrates a basic cornerstone of our system of jurisprudence, that is, that liability encourages the exercise of due care.[15] Thus, in a sobering report on the medical profession, it was concluded that physicians were the last bastion of rugged individualism, but that in this age of public responsibility, even rugged individualists must acknowledge they are answerable to more than their own consciences.[16] Lawyers, too, must be answerable to more than their own consciences; they must be answerable, in a court of law, to a countersuit.

References

1. Berlin v. Nathan, No. 75 M2-542 (consolidated with 75 L 16838)(Cir. Ct., Cook County, Ill. June 1, 1976). The original malpractice action was withdrawn prior to trial.

2. This expert witness went further to explain the attorneys' obligation to uphold the truth. Under cross-examination by defense attorney, the following exchange occurred:

Q: Is it correct that an attorney owes an obligation to his client to believe that client?

A: I don't think he has an obligation to believe his client to the exclusion of the objective facts. He has an obligation to tell the client that he has an apparently unwinnable case, and if the client insists on proceeding, that client should proceed without the attorney.

Q: You don't believe a lawyer has an obligation to protect his client's right to her day in court?

A: Only if he believes that client has a colorable case.

3. At trial, the plaintiff explored the defendant attorneys' responses to questions about situations where other evidence is inconsistent with that provided by their client.

Q: Wouldn't the fact that the doctor's version of what they had said to the client was different from what she had related to you, have made a difference in your mind as to how you would proceed?

A: That would be an issue only a jury would decide.

Q: Are you saying that if you had called the doctors and they said to you, I never told her any such thing, that that would not have changed your position?

A: That is correct, sir. I must believe my client if I consider her to be credible.

The defense, in its closing argument, affirmed this view: "A lawyer has an obligation to believe his client. If he can't do that, he is guilty of malpractice, and he has no business practicing law."

4. Tool Research & Engineering Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291, 297 (1975).

5. Heyer v. Flaig, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P. 2d 161 (1969) (public policy requires attorney to exercise his or her position of trust and superior knowledge reasonably, so as not to affect adversely persons whose rights and interests are certain and foreseable).

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Conference Report

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the Medicaid program, has not fulfilled that obligation. Medicaid payments for service rendered are notoriously late and substandard, and providers are sentenced to involvement in a bureaucratic nightmare. In conclusion, Dr. Welch expressed his concern as to what the physician is to do when society has rejected or ignored its responsibility to pay for medical care to the indigent.

Gordon F. Lupien, M.D., President of the Massachusetts Federation of Physicians and Dentists, a group which advocates collective bargaining by physicians, addressed his comments mainly to the Medicaid program. Dr. Lupien stated that the Medicaid program has failed entirely in its objective of providing access for indigent persons to medical care by providing a financial incentive to providers of such care to make it available to those who needed it. Medicaid, at least in Massachusetts, Dr. Lupien stated, undergoes a financial crisis each year wherein the program runs out of money and properly submitted claims cannot be paid. Further, the rates that are paid are generally years old and thus, not compatible to current physician costs. According to Dr. Lupien, the basis for a requirement such as the "essential care rule" being legally imposed is not a failure on the part of physicians to honor their duty to the sick, but rather, it is evidence of failure of a governmental program. The promise of Medicaid has been broken, and now the burden is being shifted to the medical profession. He argued that the solution to the problem requires that the medical profession engage in collective bargaining to assure that good medicine reaches all people who need it at a reasonable price.

A. Edward Doudera

Countersuing the Attorney to Stop Frivolous Lawsuits

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6. In an article entitled *Lawyer's Malpractice*, TRIAL MAGAZINE 13(6):2, 9 (June 1977), Robert G. Began wrote:

> It is necessary for maintenance of a system of individual justice that everyone be held fully accountable for his own actions. This is especially true of professionals. Anyone suffering loss deserves full compensation. An erring lawyer should be subject to the same remedial action which is available against any other malpractitioner and that includes lawsuits. No-fault lawyering is unacceptable.

7. *See* W.D.G., Inc. v. Mutual Manufacturing & Supply Co., No. 76AP-366 (Ohio Ct. of Appeals, Franklin County, November 4, 1976) (attorney must remain immune to litigation brought by anyone other than his client, for if opposite were permitted, attorney might feel restrained in his or her representation of the client); *Pantone v. Demos*, No. 76L-12425 (Illinois Cir. Ct., Cook County, December 3, 1976) (such restraint upon attorney would be "intolerable"); Drago v. Buonagurio, No. 15 (New York Super, Ct., Schenectady County) (contrary to public policy to hold attorney responsible for instituting frivolous action on behalf of client for to do so "would operate to discourage free resort to the courts for the resolution of controversies").

8. Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237, 242 (1975).

9. Langen v. Borkowski, 188 Wis. 277, 206 N.W. 181, 190 (1925).

10. ABA Code of Professional Responsibility, DR-102-A-1 and EC7-10.

11. Zelle L, Stanhope WH, *Lawyer Malpractice: The Boomerang Principle*, TRIAL MAGAZINE 13 (6): 16-19, 19 (June 1977).

12. Kisner P, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?* 26 CASE WESTERN RESERVE LAW REVIEW 653 (Spring 1976).

13. *See* Bournewood Hospital, Inc. v. Massachusetts Comm'n Against Discrimination, 358 N.E. 2d 235 (Mass. 1976); *Professor Wins $1000 in CIA Lawsuit*, THE AMHERST STUDENT, p. 1 (August 18, 1977).

14. Bing v. Thunig, 2 N.Y. 2d 3 (1957).

15. Brown v. Anderson County Hospital Ass'n, 234 S.E. 2d 873, 877 (So. Car. 1977).

16. *Physician, Heal Thyself or Else!*, FORBES MAGAZINE, p. 46 (October 1, 1977).

News From the Society

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or suggestions on these and other possible conference topics.

The AMERICAN JOURNAL OF LAW & MEDICINE continues to generate new developments of great import in the medicolegal field. The soon to be distributed third issue of volume 3, the first volume published in conjunction with the MIT Press, highlights five articles ranging from the legal considerations for genetically defective children to health care cost containment, and, from the *Medicolegal Reference Library*, a comprehensive, and practically useful *Attorney's Guide to Medical Literature* appears.

The Society is also proud to announce a unique venture in which a Consortium has been established between the American Society of Law & Medicine, the AMERICAN JOURNAL OF LAW & MEDICINE, Boston College Law School and Boston University School of Law. Effective with volume 3, number 4, the JOURNAL will begin publication of a special student prepared and edited section. Selected students from the two participating law schools are to form a Student Board of Editors with their own student Editor-in-Chief, and student Managing Editor. The student editors will operate under the overall supervision of John A. Norris, J.D., M.B.A., JOURNAL Editor-in-Chief, and Jim McMahon, J.D., Managing Editor of the JOURNAL. Professors Charles Baron, J.D. and Frances H. Miller, J.D. of Boston College and Boston University respectively will serve as Law School Faculty Advisers.

Elliot L. Sagall, M.D.
President

Washington Report

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contribute to air pollution and endanger public health. The agency was given two years to make the same determination with regard to radioactive pollutants. The amendments make clear that the Act contains authority for EPA to regulate radioactive pollutants. Previously, there had been considerable uncertainty as to whether the Act covered this material.

SANCTIONS

Reflecting a tougher stance on environmental and health issues by the Carter Administration, the penalty provisions for violating the Clean Air Act were increased. EPA is now authorized to seek a civil penalty of up to $25,000 per day for violations in addition to its existing authority to seek injunctive relief against violators. Further, the definition of the term "person" was broadened to include responsible corporate officials. This change clears up any confusion there may have been as to whether individuals could be held criminally responsible for violations committed by corporations over which they had control. They can be. The maximum penalty for a repeat violation is a fine of up to $50,000 and up to two years imprisonment.