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The Role of Attorneys on Child Abuse Teams

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In the last fifteen years hospitals have come to recognize child abuse as an important problem demanding institutional response. The need to treat patients with inflicted injuries has led to the creation of so-called trauma teams, groups of professionals from different disciplines who consult with the hospital staff about how best to manage such cases. Abuse and neglect most often reflect family crisis and, with multiple causes and different intervention possibilities, case management requires legal, medical and social work input.

At The Children's Hospital Medical Center in Boston, the trauma team consists of a lawyer, pediatrician, psychiatrist, nurse, social worker and coordinator. The team discusses on the ward each week the cases of those patients who have been admitted to the institution and holds formal conferences on the most serious admissions in order to share information and make dispositional plans. When hospital personnel see injuries which they think might be inflicted or caused by inadequate caretaking, they usually consult individual team members as to the necessary or appropriate procedures.

For example, a mother brings a seventeen-month old infant to the emergency ward, complaining that the child has a cold. Upon examination the physician notices that the child's left leg appears swollen and misshapen; X rays reveal a spiral fracture. The physician sees bruises on the back of the child's thighs. The mother, when questioned about the possible causes of these injuries, states that two days earlier her daughter fell from a stroller, an explanation seemingly inconsistent with the nature and severity of the harm.

At this time the examining physician might speak with the team pediatrician to assess the likelihood of abuse. He might ask the team social worker to discuss with the mother her family situation and background. The physician would consult the lawyer who would decide

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whether to file a mandatory report with the state's Department of Public Welfare. If the mother refuses to admit the infant, the trauma team lawyer has to determine whether to seek a restraining order from the courts or, if admission occurs, whether to use the courts as a means of protection and assistance. Each team member, thus, has a distinct role to play in the processing of trauma cases.

This paper concerns the lawyer's role on a child abuse team. It analyzes his impact in various systems or contexts—the team, the hospital, the court and the community—focusing on the strains and conflicts which arise within each setting. Each setting, other than the team, is examined only in so far as it influences team functioning or is affected by its activities.

**Lawyer and Team**

Whenever a group of professionals from different disciplines views the same set of facts, a potential for conflict exists. Each discipline has its own "cognitive lens" which colors perception and judgment. Because of differences in experience and training, each individual has a unique definition of the situation.

A common discussion between the lawyer and other team members is the appropriateness of court action. Most members perceive the courts as the means of last resort, to be used only if less intrusive intervention is unable to protect a child. Disagreement, however, often arises over whether that point has been reached, with the lawyer usually being more reluctant to involve the judiciary than are his associates. This reluctance has several sources.

**Ideological**

The lawyer has been trained to act conservatively. In family matters a presumption of privacy and autonomy exists; in criminal matters, it is preferable to find the guilty "innocent" than a single innocent "guilty."


3. For a presentation of systems analysis, see W. Buckley, Sociology and Modern Systems Theory (1967).

Social workers and physicians, on the other hand, often are action-oriented and more prone to urge intervention. They see non-intervention as potentially more "costly" for the child. This perspective is understandable given their prior training (the physician, for example, learns that when he is in doubt whether a patient is sick or healthy, he should presume sickness and treat accordingly); the risks of inaction (the next time the child may be more seriously injured); the warnings of child abuse literature that such risks are real and that even relatively "minor" injuries might be precursors of more serious harm; and the experience of seeing, over and over, severely wounded children who require immediate protection and care.

Experiential

If one is not familiar with the court process, it is possible to view it as a panacea, as a way of resolving difficult cases. When disciplines such as medicine and social work are unable to resolve a problem, then the problem is "handed on" to the courts, despite the fact that the judiciary might be equally unable to intervene successfully.

The court, indeed, may perform valuable tasks: gathering information on a family through a judicially ordered investigation; providing psychological and social services otherwise unobtainable; stimulating parental cooperation in the use of such services; and transferring legal and/or physical custody of a child to the state so that he might receive protection. The fact that the court might not be able or willing to fulfill these functions, or fulfill them as well as team members expect, means that a difference exists between team member perception and "reality." The attorney must emphasize to his colleagues the negative aspects of court action, both for the parents and the child, and the reality, rather than hope, of court process.

The lawyer, in short, is more aware of the costs and benefits of legal intervention than are the other group members. Non-lawyers tend to underestimate the disadvantages and overestimate the advantages because they are less familiar with court operations. They know about the lack of resources in, and inefficiencies of, the protective service bureaucracy. They are less knowledgeable about the legal system.

5. Aubert & Messinger, The Criminal and the Sick in Medical Men and Their Work (1972).
and, therefore, more prone to consider it favorably as a tool in case management.

**Evidentiary**

The attorney, in considering court action, has to determine whether he has sufficient information to meet his burden of proof. Even though a *res ipsa* standard may be sufficient for the initiation of a petition, a higher standard is usually necessary to prove one's case at the hearing, *e.g.*, the petitioner must show by "clear and convincing" evidence that a child has suffered harm and that such harm has resulted from parental unfitness or an inability to care for, or protect, the youngster.

In many cases child abuse is difficult to prove. The child-victim is unable or unwilling to testify and the explanation by the parent (*e.g.*, that the infant fell from a stroller) may be impossible to refute. In one case, for example, a mother brought her two-year-old son into the hospital with a second degree "glove" burn of the hand. The mother explained that she had boiled water to wash her clothes and that, while she was in another room, her son had tossed his plastic toy into the air and it had landed in the water. According to the mother the burn had resulted from his attempt to recover the object. A plastic surgeon felt strongly that such a burn could not have occurred unless someone had held the child's hand under the water. A child psychiatrist, on the other hand, argued that the youngster was "unusually persistent" and that, had the toy actually fallen into the sink, he probably would have pursued it. In such a situation, the attorney is faced with a difficult evidentiary situation in determining if court action should be recommended.

The petitioner's attorney, of course, should not initiate action unless he feels the medical and social work data are sufficient to meet his legal burden. Occasionally, however, the social worker or the psychologist may "feel" that a child has been abused but have little documentation. He may not understand the distinction between belief and fact and the ability to prove such by the introduction of evidence. The feelings of perceptive and sensitive colleagues must be given respect. However, the lawyer is understandably reluctant to base court action on intuition.

In most decisions, the team attempts to reach a consensus on the appropriate disposition. Consensus decision-making results from the group's need to maintain its cohesion, since too strong or frequent disa-
Agreement threatens the survival of the interdisciplinary structure.\textsuperscript{8}

If the other team members decide that court action is desirable, then the attorney, by denying the request, increases team division and risks personal ostracism. He must decide whether he is an agent of the group who fulfills all requests to the best of his ability or whether he has sufficient independence to refuse to act, especially when he perceives legal action as undesirable or without sufficient foundation.

More frequently than the situation where the lawyer is confronted by a decision made by the other team members is the situation where the lawyer is told to decide what to do. Physicians and social workers present the case materials and the lawyer is asked, “Do we have enough evidence on which to go to court?” In answering this question, the lawyer is given much power. If, in his opinion, there is insufficient information to justify legal action, he can encourage the consideration of other, less intrusive alternatives. If, in his opinion, there is sufficient evidence to meet his burden of proof, he can still discourage court action by persuasively arguing the advantages of other alternatives or the possible disadvantages of court involvement.

In asking the lawyer this question, in giving him ultimate decision-making responsibility, there is the incorrect assumption that correct answers exist. The statutes pertaining to neglect cases are frequently so vague and broad that any answer is inherently subjective and all answers potentially accurate.\textsuperscript{9} In effect, the lawyer is responding to the issue of whether court action should be considered, not to the question of whether the courts can be used. In effect, then, his response is ideological and personal, not legal.

Instead of merely giving his opinion and risking the anger of those who differ, the attorney might question those who have presented case data and, by gentle cross-examination, emphasize the gaps in the information. By playing the role of skeptic and by assuring that conclusions are supported by facts (and that facts exist), the lawyer can help the team in its decisions.\textsuperscript{10}

Such interrogation, if carelessly conducted, can seem like implicit criticism of one’s colleagues. In one case, for example, a child who had been hospitalized in a psychiatric unit was sent home for two days

\textsuperscript{8} Bourne & Newberger, Interdisciplinary Group Process in the Hospital Management of Child Abuse and Neglect (1977) (unpublished paper).


\textsuperscript{10} Meador, The Mind of the Lawyer, or Why Doctors Should Not Have Trouble with Lawyers, 22 ALA. L. REV. 503 (1970) [hereinafter cited as Meador].
of a three-day holiday weekend. Having left Friday afternoon "in good spirits," she returned depressed on Sunday afternoon. A therapist argued that such depression resulted from poor mother-child interaction and that it might be used in court to demonstrate the mother's inability to properly care for her daughter. When asked by the attorney whether the child's psychological condition might not have arisen from the requirement to return to the institution, especially since so many youngsters had been permitted a longer leave of absence, the therapist denied the validity of this position and felt an unjustified intrusion on his professional "turf."

The fact that one frequently confronts other professionals, combined with the emotional strain of observing abused and neglected children and of making decisions which have such impact on families (e.g., whether or not to remove a youngster from his natural parents) creates much stress in trauma team members. This stress becomes especially strong when dealing with hospital personnel and politics.

**LAWYER AND HOSPITAL**

The attorney's primary role is to inform the hospital staff of its legal obligations. For example, in Massachusetts as in the other states, a mandatory reporting statute on child abuse and neglect compels various professionals to report suspected cases to the Department of Public Welfare.11

On occasion physicians want to file an unfounded report or, conversely, do not wish to file when the law apparently requires a report. The tendency to overreport probably stems from a desire to make certain a child is safe or a fear of liability if an unreported child is later re-injured. Reluctance to file, on the other hand, may stem from ignorance of the law, a fear of harming doctor-parent rapport, or a belief that reporting will do little to protect or assist a youngster and his family.

The lawyer must inform the hospital staff of the legal requirement to report possible instances of child abuse and has to do so in a way that will not threaten his position in the hospital. In a medical setting physicians generally have higher status and power than do other professionals. By withholding improper filings or by encouraging legitimate ones, the attorney is challenging physician prerogative and is making himself vulnerable to criticism.

To encourage reporting, the lawyer might argue that reporting will benefit the child, though in many cases this result does not occur. The protective service bureaucracy, because of understaffing and shortage of resources, may be unable to respond or to respond effectively. The lawyer might argue that, despite Welfare's inefficiency, filing is mandated and that the doctor risks liability by not cooperating. The fear of suit is often a stimulus to action.

Whatever the argument, physicians frequently feel that they lack time for legal matters, an understandable response given their busy schedules. Reporting child abuse or testifying in court keeps them from doing their "real jobs," administering to the health needs of their patients. The medical role is often narrowly defined: treat the broken leg, but be less concerned about how the fracture occurred.

This tendency toward non-involvement seems especially strong when dealing with affluent and influential parents who are possible abusers. These individuals are assumed to be knowledgeable of their legal rights and "litigious." Every staff contact with the family, every decision, is thus made with extreme care.

The hospital theoretically treats all patients equally. Indeed, there is much concern that poor and/or minority parents who have allegedly abused their children are not victims of socio-economic or racial discrimination. Institutional personnel are careful not to permit bias to influence case management, e.g., discussion about the need to remove a child from his family.

These concerns of racism and elitism, however, do not seem as pronounced as the concern over possible confrontation with the powerful. Protection of a child from such a family vies with the desire to avoid suit.

When he is consulted about the need to report, or the desirability of court action, the lawyer is usually asked for the law. In child abuse and neglect, however, the law is far from clear. The United States Supreme Court, for example, has held that physical beatings by teachers in the public schools, even when blood clots develop, are not constitutionally prohibited.

14. Medicine also lacks such certainty. See Meador, supra note 10, at 495.
a hospital emergency ward and a physician failed to report, he would be risking liability.

The Massachusetts reporting statute,\(^\text{16}\) like that of other states,\(^\text{17}\) is vague and inexact: "reasonable cause to believe" is the standard; the injury must be "serious" before it must be reported; no definition of abuse or neglect appears, an omission especially problematic in a society which condones corporal punishment. As with the question asked by trauma team members, "Do we have enough evidence on which to go to court?", the law of abuse allows the attorney much discretion and subjectivity.

The difficulty of clarifying the law is compounded by the fact that many requests for information occur during times of crisis. For example, a twelve-year-old is admitted to the hospital for a suicide attempt, having swallowed a handful of her mother's valium pills. The youngster reports that her parents ignore her and, on occasion, slap her for "being fresh." She says that she does not want to go home, despite the fact that she is almost medically ready for discharge. The parents arrive and want to remove their daughter immediately, absent medical authorization. Does the team have evidence of abuse or neglect? Are there sufficient grounds for a restraining order to prevent the parents from removing the child from the hospital? Is the child old enough to voluntarily place herself in foster care, despite the wishes of her family?

The lawyer, in this situation, might know what the law allows (if there is a statute, regulation or case law on point). On the other hand, given the crisis atmosphere, he might forget or be unaware of pertinent data or lack sufficient time to check his information and to do research.

At the least the attorney can "talk through" with the staff possible legal issues and attempt to slow down decision-making so that precipitate action is not taken. When calm returns, if the attorney has not provided all relevant material or has failed to ask all the important questions, he might well be criticized, since a retrospective analysis may not take into account the stressful conditions under which decisions were made.

The trauma team attorney is seen as a member of a group and this status also affects the way his role is defined, both by the hospital and by the team. If a staff physician, for example, is upset at the team management of an abuse case, then the team attorney, even if he was not involved in that case discussion, may be less likely to be consulted


17. For a discussion of the various states reporting statutes, see Fraser, supra note 9.
on future issues. If the attorney gave poor advice, then the team as a whole would likely suffer from his mistakes.

The trauma team, on the other hand, might not want its attorney to function independently. It may hold the position that child abuse management is a group effort requiring several disciplines and that the lawyer alone should not be consulted. The attorney, then, is bound to other abuse professionals, and perceptions of him, and his ability to function, are closely linked to the group as a whole.

To summarize, then, the hospital staff is ambivalent about lawyers and the law: it wants to avoid suit and fulfill the expectations of courts and legislatures; yet it has a different perspective on issues and feels that physicians, not lawyers, should make what are perceived as medical judgments about patient care and treatment.

**LAWYER AND COURT**

The hospital attorney, because of the frequency of neglect petitions initiated, becomes well-known to court personnel. Assuming attorney competence, the fact that a hospital has a child abuse group and that it is an institution of high prestige means that judges are usually responsive to petitioner's viewpoint and recommendations. This acceptance, and the low status and power of most respondents, create a potential for bias.

Some have argued, for example, that since the hospital can "get anything it wants" from court, its evidence need not be as strong or complete as would be necessary were it a less familiar presence.

In fact, the court's favorable response to hospital petitions arises because of the careful preparation of cases. Should the court be used unnecessarily, or if the evidence turns out to be weak, the judge's perception of the hospital lawyer's capability (and respect for his opinions) would surely lessen.

It is important to emphasize the relationship between the court and team functioning. If the court, for example, does not follow a team recommendation, then the group is less likely to view court action positively and is less likely to suggest legal action when management alternatives are under discussion.

In one case, for example, the hospital initiated a care and protection petition on behalf of a one-year-old child who came to the emergency ward with severe head trauma and with several new and old rib fractures. Because of the seriousness of the injuries, their varying age, and the inadequate parental explanation of the trauma (that the child had fallen from a bed onto the floor), the team felt that court interven-
tion was required and urged foster placement and a temporary transfer of legal custody. The judge, after being presented with medical and social evidence, allowed the youngster to remain in the physical custody of her parents.

The treating physicians were extremely upset by this decision and questioned whether the trauma attorney had presented all of the case materials. The team members, aware of the judge’s reluctance to remove children from their families, attempted to justify their practice to these physicians and also determined that the next time they would more vigorously protest a court decision with which they strongly disagreed. The impact of this case, however, was that court action was more negatively viewed by both hospital personnel and team. Actions in one system thus influence behavior in the other systems.

**Lawyer and Community**

If the protective service system (the state Department of Public Welfare) is inadequate, the activities of the trauma team have less impact. It is difficult for a hospital to provide continuing social intervention; its primary role is the short-term provision of medical care. Unless the state has adequate personnel and resources, cases of abuse will fail to receive the support and supervision they require.

The trauma group in its conference may decide that, in order to protect a child from re-injury, the mother should have use of day-care facilities and involvement in a Parent-Child Center teaching caretaking skills. If such programs are unavailable, then more coercive intervention such as court action might become necessary. Such actions are taken, not because they reflect what is in the child’s “best interest,” but because the lack of services makes a preferred alternative impossible.

As the operation of the trauma team is dependent upon the actions of others, much of the lawyer’s time is spent in urging other institutions to fulfill their responsibilities. These other institutions argue, in turn, that since they are understaffed and The Children’s Hospital has a broad range of resources and skilled professionals, it should assume child protection duties.

For example, in Massachusetts, once a mandatory case report has been filed with the Department of Public Welfare, the state has the responsibility to take the family to court if further legal involvement becomes necessary. However, the Department often argues, that,

since the child is in the hospital and the trauma team has assumed a management role and has developed medical, legal and social work data, it should initiate the petition. Both hospital and government agency attempt to shift the task burden.

CONCLUSION

The lawyer's role on the trauma team is to give consultation on reporting possible instances of child abuse and the advisability of court action. More importantly, the lawyer should question the presentation of facts and recommended dispositions so that the least drastic means of intervention is used to protect the child. He is a skeptic, challenging the medical and social data and the conclusions offered by his colleagues. He educates team members about the courts and the courts about the trauma team, attempting to form a linkage among the various systems. In the hospital at large, he attempts to insure that abuse and neglect cases are processed according to the legal requirements and that neither underinclusion nor overinclusion of cases occurs. He attempts to prod the governmental bureaucracies into action and to lobby for increased appropriations for children's services.

In dealing with cases that are tragic and emotionally draining, in making decisions which have profound consequences for families, and in confronting both team participants and hospital personnel, the attorney tends to "burn out." The fact, however, that one is in a multidisciplinary setting, working with sensitive and informed colleagues, makes the position rewarding, as does the direct involvement with human problems.

Lawyers frequently are insensitive to multi-dimensional issues, focusing only on the legal and ignoring the wider context. In divorce actions, for example, they attach the house and the car without attempting to mediate the relationship between husband and wife so that tensions are minimized.20

In child abuse, which has medical, psychological and other aspects, a single orientation is insufficient for determining "best interest."21 By respecting different professional views and by showing the ability of the law to promote child protection, the abuse lawyer can contribute to effective and humane case management.
