

POSSIBILITIES FOR MULTIDISCIPLINARY COLLABORATION IN CLINICAL PRACTICE: PRACTICAL ETHICAL IMPLICATIONS FOR LAWYERS AND CLIENTS

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The economic and commercial value of multidisciplinary partnerships between lawyers, accountants and financial advisors has galvanised changes to legal practice rules in the US and Australia, with some jurisdictions in Australia amending restrictive practice requirements to permit such structures. At the other end of the market, the value of multidisciplinary practices in providing effective services to the disadvantaged is seen as imperative by practitioners in that area, and many such practices have appeared in recent years. This has occurred primarily in the United States, notwithstanding the ethical and professional barriers to such arrangements. This article examines the development of such structures in practices for disadvantaged persons, the development of models designed to address ethical conflicts and the practical impact of the conflicting ethical duties of lawyers and other professionals in such circumstances. This article evaluates practical and theoretical debate in the area, concluding that the existing rules of ethical and professional conduct create a significant barrier to truly multidisciplinary practice models.

I INTRODUCTION

Providers of legal services for the poor and disadvantaged encounter particular challenges in addressing the varied problems faced by those clients. Clients attending such services typically experience multifaceted problems that extend beyond, and impact upon, identifiable legal problems. Effective resolution of legal problems can be elusive if other issues are not also addressed.¹

Clinical practices in Australia uniformly focus on the provision of legal services to the financially or legally disadvantaged. A proliferation of clinical programs in the last decade has seen clinical practice offer legal services across a spectrum of

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1 Jacqueline St Joan, 'Building Bridges Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality' (2001) 7 *Clinical Law Review* 403, 415; Stacy Brustin, 'Legal Services Provision Through Multidisciplinary Practice – Encouraging Holistic Advocacy while Protecting Ethical Interests' (2002) 73 *University of Colorado Law Review* 787, 789 and 792; David Trubek and Jennifer Farnham, 'Social Justice Collaboratives: Multidisciplinary Practices for People' (2000) 7 *Clinical Law Rev* 227, 266; Susan Poser, 'Main Street Multidisciplinary Practice Firms: Laboratories for the Future' (2003) 37 *University of Michigan Journal of Law Reform* 95, 118.

client groups, including homeless persons,² persons believed to have been wrongly convicted of criminal offences,³ victims of domestic violence, migrants and refugees⁴ and many others.⁵ Sixteen universities in Australia⁶ currently offer clinical programs which provide legal services to people in need. Some of these programs focus on particular client groups,⁷ while others are offered in collaboration with existing community legal centers, and deal with the full spectrum of clients.⁸

The involvement of law schools and law students in providing legal services to disadvantaged persons is no coincidence. A lack of legal aid resources has prompted law schools in the United States, the United Kingdom, and Australia to fill a perceived gap in the provision of legal services by offering clinical programs. These have also had the effect of enhancing educational opportunities for students.⁹ Law clinics have been set up and managed by law schools in the US and Australia for well over 30 years. It is in these clinics that many multidisciplinary practices ('MDPs') have been devised and trialed. It is also from these practices that much of the literature on this topic has emerged.¹⁰

A Legal Problems in Context

Often, even a positive legal outcome for a disadvantaged client addresses little more than the tip of the iceberg. Ongoing underlying issues will continue to have a pervasive influence on the client's life and on their future legal status. In many cases, the ability to address a client's legal problem in the first place will be compromised by other issues affecting the client. Clients suffering from mental

2 The Adelaide Legal Outreach Service, operated by the University of Adelaide Law School, has been offering legal advice services to the homeless since January 2005.

3 The Innocence Project, a partnership between Griffith University and a private legal firm, operates to investigate the cases of persons convicted on what may prove to be unreliable evidence.

4 Murdoch University, in collaboration with the SCALES community legal centre in WA, offers legal services to victims of domestic violence and to migrants and refugees; see University of New South Wales, Kingsford Legal Centre, *Clinical Legal Education Guide* (2007) 24.

5 See University of New South Wales, Kingsford Legal Centre, *Clinical Legal Education Guide* (2007), which provides details of all clinical programs in Australia.

6 Ibid.

7 Examples include the University of New South Wales' Employment Law Program, Adelaide University's Adelaide Legal Outreach Service for the homeless and disadvantaged and Griffith University's Innocence Project.

8 Examples include Griffith University's clinical program at the Caxton Legal Centre, La Trobe University's clinical program at Victoria Legal Aid and Monash University's clinical program at the Springvale and Oakleigh Legal Centres.

9 Poser, above n 1, 116–9.

10 The ethical implications for MDPs arise from the interaction between the lead professionals (under whose professional supervision the students work) and from the overarching principles of ethics of the particular profession to which the trainee students aspire. As such, the occurrence of such practices in student clinics is coincidental and the assumption of this article is that there is no variation in the ethical obligations of any of the professionals, or through them the students working at their direction.

health problems, homelessness,¹¹ or who have been in and out of jail or persecuted¹² have immediate concerns that can render a legal problem comparatively irrelevant. This raises particular difficulties where legal services use a self-help model of legal advice and support¹³ rather than conducting the case for a client. In these circumstances, it can be even more problematic to overcome surrounding barriers in a client's life and empower them to take action on their own behalf. Health and social issues such as substance abuse, brain injury, domestic violence and lack of housing all compromise a client's capacity to self-manage legal problems. These issues ideally require the support and intervention of professionals skilled in those areas.

For this reason, the possibility of providing clients with services and support from professionals in other areas, such as financial counseling, social work, health care, and others is enormously attractive to legal practitioners working with clients with multiple needs. However, such collaboration, whether involving formal or informal collaboration between legal and other service providers, can raise significant ethical issues.

Although this paper focuses on MDPs for the disadvantaged, the perceived benefits of MDPs extend to all areas of the legal services market.¹⁴ Much of the impetus for the development of MDPs has come from international law and accounting firms representing powerful corporate interests,¹⁵ where market share and corporate profit goals drive the delivery of services by different professional groups to a single market.¹⁶ However, small business, family law and estate planning are examples of areas where the multifaceted services of financial planners, counselors, accountants, and lawyers would be clearly beneficial.¹⁷

The purpose of this article is to evaluate the practical possibilities of providing multidisciplinary services in the particular context of disadvantaged clients, to

11 Suzie Forrell, Emily McCarron and Louis Schetzer, Law and Justice Foundation of NSW, *No Home, No Justice? The Legal Needs Of Homeless People in NSW* (2005) 113–35. This publication notes that the hand-to-mouth existence of homeless persons renders the consequences of even serious legal problems less pressing than day-to-day matters such as food, health and accommodation.

12 Tribe cites the example of refugees suffering persecution in their homeland who harbor deep distrust of authorities and are reluctant to divulge the very personal information that has resulted in persecution in the first place: Rachel Tribe, 'Therapeutic Work With Refugees Living in Exile: Observations on Clinical Practice' (1999) 3 *Counseling Psychology Quarterly* 233, 234. Significant barriers to communication between lawyer and client may be broken down over time, but the intervention of qualified counselors might well facilitate this process and result in better and more timely outcomes for the client.

13 For example, the Adelaide Magistrates Court Legal Advice Service, run jointly by Adelaide and Flinders Universities in South Australia, offers advice and support but cannot take over the running of cases for clients who must do much of the work themselves.

14 See eg Poser, above n 1, 110, which discusses the value of MDPs for all clients but particularly those in the middle of the spectrum: neither multinational corporations nor disadvantaged, such as small businesses, families, and other 'middle class' clients.

15 Susan Jones, 'Promoting Social and Economic Justice through Interdisciplinary Work in Transactional Law' (2004) *Washington University Journal of Law and Policy* 249, 303.

16 Douglas Hume, 'MDPs in Montana: It's the End of the World as We Know It and I Feel Fine' (2002) 63 *Montana Law Review* 391, 392.

17 Poser, above n 1, 97; Jones, above n 15, 304.

consider the implications of such models on legal practitioners, and the complex ethical considerations that arise in such context. My own experience in operating legal advice clinics for refugees, the homeless and the disadvantaged, has reinforced the importance of MDPs for these clients, but has also underlined the acute tension between the perceived need for seamless holistic service delivery and the ethical imperatives that guide lawyers and other professionals in this context.

The steady development of MDPs in recent years in the US has prompted considerable literature in that country on the ethical and associated implications of such practices for lawyers, much of which has been prompted by law schools trialing such initiatives as part of clinical law programs. It has also stimulated much debate within national and state Bar Associations. In Australia, where MDPs are accepted in principle on a national level, and have been permitted in several states, there has been relatively little analysis of these issues to date, notwithstanding that there are already practices experimenting with multidisciplinary approaches. In addition, whilst the US and Australian professions share the same core ethical values, there are subtle differences in the way such values have been interpreted, and divergence in policy where the acceptability of MDPs is concerned.

In exploring these issues, I look first at the rationales supporting the development of MDPs for the disadvantaged, and outline some of the models of MDP that have been developed in clinics in the United States.

I then explore the nature of the ethical dilemma, from the perspective of lawyers, in light of the often conflicting professional ethical standards of other professions with whom collaboration might be sought.

Finally, I consider and evaluate some of the strategies proposed to avoid ethical conflicts in MDPs for the disadvantaged, and conclude that the very nature of legal ethics, and the conceptualisation of the role of the legal profession, creates barriers to the development of truly multidisciplinary collaborations between lawyers and other professionals.

II THE MDP DEBATE

The most vociferous proponents of MDPs represent powerful, often global, corporate interests. Internationally dominant accounting firms have lobbied long and hard for the right to include lawyers as legal advisors in their accounting and financial advice practices, so that their business clients can receive one-stop advice on corporate, financial, tax, and related matters.¹⁸ It has been estimated that the annual profit of \$30,000,000 already achieved by these firms might easily double if legal practices could join with existing accounting practices.¹⁹ There is a strong economic motivation for change.

¹⁸ Jones, above n 15, 304.

¹⁹ Kathryn Yarbrough, 'Multidisciplinary Practices: Are They Already Among Us?' (2001) 53 *Alabama Law Review* 639, 645.

Notwithstanding the economic attraction, there is resistance from both within and outside the legal profession to such collaboration. Resistance focuses on two areas.

First, in the context of legally qualified persons employed by non-legal entities (such as accounting firms), ethical rules prohibit the giving of advice by legally trained persons employed by non-legal organizations, because only practitioners engaged in legal practice, who are bound by legal ethical duties to client and court, have the right to lawfully engage in the provision of legal services to clients. Employing legally qualified persons to give advice in the context of accounting or other services evades the normal obligations of legal practitioners. This raises questions as to the definition of the role of the legal practitioner and the effect of this definition on the duty to observe legal ethical principles.

Second, in the context of lawyers working in partnership or collaboration with other professionals, there is a risk that lawyers will be exposed to interests and influences that may result in them breaching the legal ethical rules that bind the legal profession.²⁰

A The First Concern: Defining the Role of the Legal Practitioner

The first context reflects the infamous Enron scandal, in which lawyers employed as consultants by non-legal firms gave advice which conflicted with core values of the legal profession.²¹ The consulting arrangements meant that lawyers were not engaged *as lawyers* by the clients, and so purported not to be bound by legal ethical rules. The crux of the issue is that the lawyers were nonetheless implicated in the provision of advice that contravened legal ethical parameters. This uncertainty in the role of the legal practitioner and its consequences in the Enron example have fueled resistance to multidisciplinary collaborations in the US.²²

B The Second Concern: External Influences on Legal Practice Standards

As for the second context, ethical difficulties posed by such collaborations are myriad. In his article reviewing the political pressure to allow such collaborations, Lawrence Fox outlines the difficulties that a lawyer in an MDP will face in resisting influence from other corporate interests represented by the MDP,²³ and indeed the influence of other professionals who may have a different perspective on the matter and therefore promote an outcome different to that proposed by

20 The pressure or influence might take the form of loyalty to the firm to generate income, or pressure from other professionals to take a particular approach to an issue that is not reflective of the client's desired outcomes.

21 Poser, above n 1, 99.

22 Ibid.

23 Lawrence Fox, 'MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud' (2002) 44 *Arizona Law Review* 547, 553.

the lawyer's client.²⁴ Such arrangements would contravene the lawyer's absolute obligation of loyalty to the client – an obligation to act in the way the client directs without being influenced by other interests (such as the economic benefit to the firm providing the services). These difficulties are compounded when the different ethical principles binding accountants and lawyers are examined.²⁵ Lawyers may only breach client confidence in very limited circumstances, usually to prevent imminent physical injury, or in some jurisdictions, substantial financial injury.²⁶ Accountants have a differently described obligation, to ensure compliance with overarching audit and financial requirements. Whilst there may be conceptual commonalities between the lawyer's and the accountant's obligation to avert socially unacceptable behavior, the degree of risk and the circumstances of reporting are very different.²⁷

Identical concerns arise in relation to a lawyer/social worker collaboration, with fears that the required zealotry of a lawyer's representation will be qualified by the broader and differently focused ethical principles of the social worker. The risk is that the lawyer will be influenced by the social worker's focus on the 'best interests' of the client and will be more paternalistic than a lawyer acting alone.²⁸

1 *Australia and the US Respond Differently*

In response to such concerns, the peak American Bar Association ('ABA') has reaffirmed the principle that a lawyer may not form a partnership with a non-lawyer if the partnership practices law, and may not practice law in association with others for profit where any non-lawyer has a controlling or other interest in the association.²⁹ However, the proponents of MDPs continue to argue for a relaxation of the rules, and an increasing number of states in the US now permit MDPs.³⁰

24 Ibid.

25 Jones, above n 15, 307.

26 See, eg, Law Society of South Australia, *Rules of Professional Conduct and Practice* (2003) Law Society of South Australia <www.lawsociety.sa.gov.au/profession/profcondrules.pdf> at 24 June 2008. Rule 3 permits disclosure of client confidence where permitted by law, in order to prevent the probable commission or concealment of a serious criminal offence, or to prevent imminent serious harm to the client or to a third party. These rules are based on the Law Council of Australia, *Model Rules of Professional Conduct* (2002) Law Council of Australia <www.lawcouncil.asn.au/policy/1957352449.html> at 24 June 2008; see also Dal Pont, below n 53.

27 Laura Noroski, 'New York Ethics Code Changes: An Attempt to Fit Multidisciplinary Practice Within Existing Ethical Boundaries' (2002) 76 *Southern California Law Review* 483, 505; Yarbrough, above n 19, 655.

28 Alexis Anderson, Lynn Barenberg, and Paul Tremblay, 'Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism, and Mandated Reporting' (2006) 13 *Clinical Law Review* 659, 664 and 666.

29 Yarbrough, above n 19, 642; Noroski, above n 27, 491; Jones, above n 15, 307.

30 For details on the take-up of MDPs in the US states, see American Bar Association, *Status of Multidisciplinary Practice Studies by State (and some local bars)* (2003) American Bar Association, Center for Professional Responsibility <www.abanet.org/cpr/mdp/mdp-state_action.html> at 24 June 2008.

The peak body in Australia, the Law Council of Australia, has developed National Model Rules of Professional Conduct which approve of and provide detailed structures for MDPs.³¹ It has also issued guidelines for the introduction of MDPs, focusing on preserving the key values of the legal profession – independence, client privilege and the maintenance of lawyers’ professional ethical duties.³² To date, four states in Australia have permitted MDPs.³³ It is also notable that in Australia, discussion of MDPs at both state and federal levels has focused on the provision of legal and other services by and to large corporations.³⁴

III MDPS AND DISADVANTAGED CLIENTS

Although the debate in the US and Australia is driven by corporate interests, practices which have never considered profit as a feature of their work also advocate for the right of lawyers to engage in collaborative multidisciplinary partnerships. The voice of the community lawyer, described as ‘invisible’ in the ABA debate,³⁵ is becoming more strident as practitioners develop and trial MDPs that clearly work for the benefit of their clients.³⁶

Proponents of MDPs argue that they are imperative in providing services for the disadvantaged.³⁷ St Joan refers to the ‘layers of protection’ that MDPs can provide for a domestic violence victim, who will need legal advice and representation, as well as personal security, counseling and financial and medical services.³⁸ Trubek and Farnam suggest that collaboration between professionals is ‘the only way to

31 Law Council of Australia, *Model Rules of Professional Conduct* (2002) Law Council of Australia <www.lawcouncil.asn.au/policy/1957352449.html> at 24 June 2008.

32 Law Council of Australia, *Policy on Lawyers Business Structures* (2001) Law Council of Australia <www.lawcouncil.asn.au/policy/2067361651.html> at 24 June 2008.

33 New South Wales permitted multidisciplinary partnerships in 2004. The *Legal Profession Act 2004* (NSW) relevantly provides that an MDP may consist of legal and non-legal partners (but not, by implication, of only non-legal partners): s 165(1) The Act also provides that all lawyer employees or directors are bound by applicable legal ethical principles: ss 171 and 181. The only exception to these provisions is not-for-profit Community Legal Centers: s 165(3). Related provisions dealing with the incorporation of legal practices also prohibit any inducement of legal practitioners employed by or directors of a corporation to breach legal ethical principles: s 164. Part 2 of the *Legal Profession Act 2004* (Vic) and Part 2 of the *Legal Profession Act 2007* (Qld) (both based on the Law Council of Australia’s Model Rules) permit the use of MDPs. In South Australia, the Legal Profession Bill 2007 proposes multidisciplinary partnership provisions that are also modeled on the Law Council of Australia’s Model Rules.

34 See Law Council of Australia, ‘Multidisciplinary Practices Paper’ (Press Release, 5 October 2000), which suggests collaborations between lawyers, accountants, financial consultants, architects, mediators, patent attorneys or software programmers, migration agents and interpreters. See also Law Society of South Australia, ‘The Future of the Legal Profession’ (2002) 24(9) *Law Society of South Australia Bulletin* 15, 19.

35 J Michael Norwood and Alan Paterson, ‘Problem Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Service?’ (2002) 9 *Clinical Law Review* 377, 356.

36 Poser, above n 1, 108.

37 David Trubek and Jennifer Farnham, above n 1, 266; Norwood and Paterson, above n 35, 347; Poser, above n 1, 110.

38 St Joan, above n 1, 405.

practice law to help poor people'.³⁹ Wydra points to the particular needs of the aged client in advocating collaborative associations between professionals.⁴⁰ Cervone and Mauro make similar observations in relation to children.⁴¹ The medical profession has also recognised the importance of legal services in providing effective solutions for patients. A holistic approach to a patient's medical, social, and legal problems has been described as 'a logical and necessary response to crises in poor families'.⁴² Norwood and Paterson concur that the holistic management of complex problems experienced by individuals and families can play an important preventative role in averting crises.⁴³

On a practical level, the provision of coordinated and related services, where a client can receive financial counseling, health care advice, social work support and legal services, means that the client does not have to trail from agency to agency, expending precious money and time, in order to receive assistance from different professionals, who will all necessarily be providing fragmented services in a vacuum. The reality for many clients is that this sort of service delivery never fully meets their needs at any level. Providing 'one-stop' services, where service providers communicate with each other, ensures quality and coordinated care for clients, and improves social as well as legal outcomes.⁴⁴ It is not only a question of geography and clients being able to access the various services, but the problems themselves are commonly interlinked, in a practical if not a legal sense, and need to be teased out and addressed concurrently. The prospective benefits of collaborative services go far beyond convenience. The lives and safety of clients may be better protected if professionals from different disciplines can work together in crisis situations.

A Case Study 'Lindy'

Take the hypothetical example of Lindy,⁴⁵ a woman who has sole care of her four children, one only a few weeks old. Lindy is living in a women's protective housing shelter. She is being harassed by the father of her young baby, who has a history of domestic violence. Electricity and gas have been cut off as she has not paid the bills. The shelter is threatening to evict her because her ex-partner regularly turns up drunk and abusive and has damaged property. On occasions, she has let him in

39 Trubek and Farnham, above n 1, 266.

40 Heather Wydra, 'Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client' (1994) 62 *Fordham Law Review* 1517, 1529.

41 Frank Cervone and Linda Mauro, 'Ethics, Cultures, And Professions in the Representation of Children' (1996) 64 *Fordham Law Review* 1975, 1976.

42 Pamela Tames, Paul Tremblay, Thuy Wagner and Ellen Lawton, 'Lawyer Is In: Why Some Doctors are Prescribing Legal Remedies for their Patients and How the Legal Profession can Support This Effort' (2003) 12 *Boston University Public Interest Law Journal* 505, 505.

43 Norwood and Paterson, above n 35, 358.

44 Brustin, above n 1, 789.

45 The case of 'Lindy' is extrapolated from typical problems experienced by clients at the Adelaide Legal Outreach Service for the homeless and disadvantaged. The author's observation in such cases is that the client is often paralysed by indecision due to the range of problems faced at any one time, and legal outcomes do not match the immediacy of other pressing concerns.

to avoid a scene at the shelter, and is therefore in breach of a restraining order that the police have taken against him at her request, as well as being in breach of her tenancy agreement with the shelter which bans partners from the site. The children have various health issues and are not attending school regularly. Lindy has been underpaid by a job that she held before the birth of her baby, and believes she was wrongfully dismissed because of her pregnancy. She is also having problems with the relevant social security authority, which has withheld payments due to her innocent failure to properly declare income prior to the birth of the child. None of the fathers of her children are paying child support. She has a debt to the public housing authority and is ineligible for re-housing until that debt is addressed. Sometimes she is so afraid of her former partner that she flees the house with the children and spends the night with friends or in her car, which is unregistered and uninsured.

Nested in this scenario are a number of legal issues. Resolution of some of them will make a real difference to Lindy. But there are other immediate problems that are acutely important – accommodation, power, safety from a violent ex-partner and the health and wellbeing of her children, which are likely to eclipse any attempt to deal with the legal issues. In cases such as Lindy's, keeping appointments or finding time to locate relevant documents may be beyond the client's coping capacity. By the same token, resolution of the legal issues without attention to the other matters will still leave major problems in Lindy's life.

In a practical sense, the creation of a multidisciplinary team around Lindy may be the only way to address her problems. This would include a financial counselor to help with budgeting; a lawyer or advocate to negotiate on her behalf with service providers based on advice from the financial counselor; collaboration with the police to enforce the restraining order; a social worker to assist Lindy and her children with day-to-day matters of health and wellbeing and to liaise with income support and housing authorities; a health care professional to support Lindy with her children; a lawyer to negotiate the intricacies of obtaining child support payments, to seek payment of entitlements from the past employer and address the discrimination issue to ensure she has future employment. If each such instance of support is provided separately, Lindy will be required to spend much of her time dealing with different professionals and endeavoring to communicate to each of them what the others are doing, a task that will probably be beyond her. How much more effective would it be for the professionals to work in a collaborative manner, sharing information and ideas and working as a team?

The difficulty with this ideal is that the ethical principles that bind the professionals involved are different and often inconsistent.

IV ARTICULATION OF LEGAL ETHICAL RULES

The debate surrounding MDPs in the US has not centered around services for the disadvantaged, but has focused instead on the problems to be encountered by for-profit collaborations of professionals, usually lawyers and accountants.⁴⁶

At this level, the discomfort with MDPs turns on the perceived threat to the core values of a lawyer posed by multi-professional partnerships.

Loyalty, competence, confidence, avoidance of conflict, responsibility to the legal system and promoting access to justice are the core values attributed to the legal profession in the US.⁴⁷ Interestingly, it is the first four of these values that are the focus of the MDP debate. It is argued that collaborations between lawyers and other professionals bound by other professional rules will undermine the capacity of lawyers to observe ethical boundaries. In essence, a lawyer must maintain absolute independence over work practices and client relationships in order to guarantee focus on the client to the exclusion of all other interests or influences. The lawyer cannot be answerable to another professional who does not share his or her professional values, either economically, or as part of an organisational chain of command. The lawyer cannot share information, or be required to share information, with another person outside of the lawyer-client relationship. The lawyer cannot allow independent judgment to be influenced by the views of other professionals who do not have a lawyer-client relationship with the client. If lawyers are the gatekeepers of justice, then the practice of justice cannot be compromised by the involvement of professionals with different ethical obligations.⁴⁸

In most jurisdictions in the US, Australia, and the UK, social workers and health care professionals are subject to mandatory reporting requirements,⁴⁹ particularly in the area of child abuse. Social workers must weigh their responsibilities to the wider community against their own client's interests, and in some cases their duties to others may trump their duties to promote the wellbeing of their clients. In such cases, the social worker will be ethically precluded from assisting clients in a way that will have a negative impact on the community.⁵⁰ Accountants, when acting as auditors, have reporting obligations, and also have responsibilities to the public.⁵¹ In both cases, these reporting obligations transcend obligations of confidentiality to the client. However, lawyers are subject to an overriding obligation of loyalty to clients, which is not eroded by any competing public interest or other reporting requirements. A lawyer may not participate in any illegal activity, but short of actual or threatened illegality, is bound to follow the client's instructions. Except

46 Yarborough, above n 19, 646–8; Poser, above n 1, 96.

47 Trubek and Farnam, above n 1, 259.

48 Norwood and Paterson, above n 35, 351.

49 Anderson, Barenberg and Tremblay, above n 28, 691.

50 Ibid, 670; Jane Aiken and Stephen Wizner, 'Law as Social Work' (2003) 11 *Washington University Journal of Law and Policy* 63, 66; Paula Galowitz, 'Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship' (1999) 67 *Fordham Law Review* 2123.

51 Brustin, above n 1, 812; Yarborough, above n 19, 653.

in narrowly defined circumstances, considerations of broad public interest do not come into play.⁵²

The different ethical obligations binding on the various professions have obvious practical implications for multidisciplinary practices, as well as much more profound philosophical implications. These conflicts will arise in any circumstances where professionals from more than one discipline interact with a client. The recognised and closely guarded public interest in lawyer-client confidentiality is based upon the understanding that only with complete disclosure from a client can the adversarial legal system operate effectively.⁵³ Words, nuances or implications that arise in a lawyer-client interaction will convey much, and are prima facie confidential. Interpose a third party into that relationship – one with differing ethical obligations – and the information conveyed may not remain confidential, because only the lawyer is bound by legal ethical obligations. The third party may learn information communicated verbally, by action, manner of response or other conduct. The third party may not verbally convey the information learned from the client, but it may nevertheless lead the third party to report a suspicion, propose a course of action, or intervene in a case in a way that is adverse to the interests of the client, and in a way that would not otherwise have happened if the third party had not been privy to the conversation between the lawyer and the client. The third party might also be subject to a court (or other legal) order to reveal or produce information that could not be compelled from the lawyer by operation of the doctrine of legal professional privilege.

A Case Study 'Lindy'

Take the example of 'Lindy' outlined above. Lindy's view may be that keeping her family together is the most important issue. Perhaps she reveals that the power has been cut off, that her two elder children are not going to school, and that the baby has chronic bronchitis but she is afraid to leave the house to take her to a doctor. Her instructions to the lawyer are not to bother with a further restraining order against her former partner, as she does not want to anger him further, but to pursue payment of outstanding wages and welfare benefits. Whilst a client-centered lawyer may well probe further as to the welfare of the children and recommend additional social supports for Lindy, the lawyer will only be prompted to reveal the family's situation if there is serious imminent risk to safety, which does not appear to be the situation here.⁵⁴ A social worker, on the other hand, who is familiar with the family and well aware that there have been ongoing issues with neglect of the children, may well take steps to bring in child welfare authorities, resulting in the

52 See above n 26.

53 G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (1996) 212.

54 The term 'imminent harm' has traditionally been limited to physical harm or danger. However, the traditional view has been somewhat relaxed in Australia, to include financial or other detriment arising from felonious activity: Dal Pont, above n 53, 218. Whether this definition would extend to less immediate and catastrophic harms such as the impact of failing to attend school, or to long-term psychological harm or distress, is far from clear.

temporary or permanent separation of the family. The social worker may also take steps to enforce the restraining order.

The lawyer's professional ethical mandate is to accept the client's instructions, so long as they are within relevant legal parameters and no imminent risk is apparent. The social worker's ethical mandate is to do what is best for Lindy and her children in a broader family and social context. Both professionals in this instance are bound by rules that reflect a different ethos. The lawyer is bound by the public interest in absolute confidence between lawyer and client, which serves the proper functioning of the legal system by giving effect to the client's interests as expressed by the client, not as defined by the lawyer. The social worker is concerned to address the immediate and long-term personal and social wellbeing of Lindy *and* her children, and may have a role in determining what those interests are. Whereas the lawyer must ultimately accept the client's description and understanding of their own best interests, the social worker is not bound to act on instructions from the client, but may take action that is discordant with the client's stated views based upon the social worker's own knowledge and understanding.

For each of these professionals, there will be dilemma enough in applying their own ethical standards in this difficult case. The dilemma is magnified when competing professional ethical standards arise in the context of the same case.

B Practical Risks Inherent in Professional Collaboration

In this section I deal first with the practical implications of different ethical and legal obligations, and then consider the broader philosophical issues.

Child abuse provides a good context to illustrate the implications of the different underlying ethical conflicts.

In the context of a domestic violence service, there is a strong possibility that the children of clients will also have suffered abuse. In most jurisdictions in the US, the UK and Australia, social workers, along with teachers and health care professionals, are required to report reasonable suspicion of child abuse (past, present, or threatened).

Lawyers, with an overriding ethical duty of confidentiality to clients, are not mandatory reporters. They are only permitted⁵⁵ to breach client confidence to prevent imminent (future) serious harm to the client or another person.⁵⁶ The ethical duties on lawyers are not comparable to those of any other professions.⁵⁷

55 It is notable that in such a situation a lawyer is permitted, but not required, to breach confidentiality. See Janine Sisak, 'Confidentiality Counselling and Care: When Others Need to Know What Clients Need to Disclose' (1997) 65 *Fordham Law Review* 2747, 2751–2.

56 'Harm' has generally been taken to mean physical harm. Psychological harm from past, present or future conduct may meet the criteria of 'imminent harm', but there has been little exploration of that possibility in legal circles.

57 Hume, above n 16, 393.

Social workers and health care professionals also have an obligation to respect the privacy of their clients or patients, and not to transfer information to third parties, except in accordance with their ethical codes.⁵⁸ Whilst these ethical codes permit transfer of information in broader circumstances, there is still an underlying duty to respect the client's privacy.

Any form of collaboration that involves a lawyer and a social worker interviewing the client together, sharing case notes or files or engaging in frank discussion about the case raises the risk that information revealed to the lawyer in confidence will be deliberately or accidentally transferred to the social worker, and then reported by the social worker.

There is also a risk posed by the reverse flow of information. If a social worker were, during the course of a case review, to reveal that the client was abusing a child, or failing to act to prevent abuse by another party, the lawyer's capacity to independently and zealously defend the client's interests *as expressed by the client* may be compromised by that knowledge.

In the first example, the lawyer's duty of confidentiality to the client is breached. In the second, the lawyer's duty of loyalty and independence is compromised.

In either example, the privilege that arises between lawyer and client, which protects communications between the two, is lost if the communication is extended to a third party.⁵⁹

V MODELS FOR MULTIDISCIPLINARY SERVICE

Despite the limits imposed on multidisciplinary practices, a proliferation of community law services that incorporate collaboration between different professionals exist in the US, and to a lesser extent in Australia.⁶⁰

Examples include multidisciplinary community services providing holistic services to community clients,⁶¹ and specialist clinics (often dealing with children and domestic violence),⁶² where organised collaboration between social workers and lawyers, or doctors and lawyers, are developed. In some cases, lawyers are the predominant service providers, with other professionals taking a secondary or

58 Cervone and Mauro, above n 41, 1980.

59 Noroski, above n 27, 506; Brustin, above n 1, 813.

60 A notable initiative is the provision of legal advice to refugees by law students at the SCALES legal clinic operated by Murdoch University in WA, where a multidisciplinary approach included counselors in the process of advising refugee victims of torture; see M Kenny and L Fiske, 'Marriage of Convenience or Match Made in Heaven' (2004) 10 *Australian Journal of Human Rights* 137.

61 Brustin describes a 'typical' community centre providing a range of services throughout the US: Brustin, above n 1, 788.

62 For example, the University of Denver Interdisciplinary Violence Clinic described by St Joan, above n 1, 404–13. See also Trubek and Farnham, above n 1, 241, for description of a number of approaches to domestic violence clinical work.

consulting role.⁶³ In other models, lawyers support the work of health professionals, and do not take on a clearly legal role.⁶⁴ Others involve coordinated collaboration between lawyers and other professionals working together at a single site to meet multiple client needs.⁶⁵ In a number of these examples, students of various disciplines make up the workforce.⁶⁶ In others, the service providers are qualified professionals working via an organised voluntary network.⁶⁷ In some, separate organisations (which may or may not be co-located) refer clients to each other and deal concurrently with the clients' needs.

A Models to avoid ethical conflict

1 St Joan

St Joan outlines the operation of the University of Denver interdisciplinary domestic violence clinic, a collaboration between law and social work students.⁶⁸ In this clinic, law students and social work students work together to address clients' domestic violence issues. In an area where mandatory reporting of suspected abuse of children is incumbent on social workers, great care has to be taken to protect confidential information given to a lawyer. If a client were to reveal information regarding abuse of a minor to both the lawyer and the social worker in a joint interview, the social worker would be required to report that information to the authorities, whereas the lawyer would be bound to keep it confidential. The confidence between lawyer and client is effectively lost by virtue of the collaborative arrangement. St Joan analyses three discreet models that endeavor to address this conflict.⁶⁹

63 St Joan, above n 1, 415–7, describes a collaboration between law students and social work students. The social work students tended to provide support to students dealing with domestic violence cases, expanding the services that could be provided, and the insight of the law student into the issues, but not supplanting the essentially legal focus of the process.

64 The Family Advocacy Program at the Boston Medical Centre was developed to include lawyers in addressing multiple problems experienced by children and their families. See Tames et al, above n 42, 508.

65 See Trubek and Farnham, above n 1, 240.

66 Poser, above n 1, 117–8, describes clinics dealing with issues as diverse as small business development, HIV and child advocacy, in which students from different disciplines work in teams to address client needs.

67 Trubek and Farnham, above n 1, describes a highly organised collaboration of professionals in a child advocacy service providing health, education, legal, social work and support to users of the service and their families.

68 St Joan, above n 1, 431–4.

69 Ibid.

(a) The Consultant Model

In this model the social worker is in the position of a consultant to the lawyer. The consultant relationship prevents the social worker's mandatory reporting obligations overriding the lawyer's ethical obligation of confidentiality to the client.

(b) The Employee Model

This model, which is similar to the consultant model in effect, sees the social worker in an employment relationship with the law firm, such that the social worker is bound by the ethical obligation of the law firm (in the same way as other non legal employees of the firm or law practice).

(c) The Independent Model

In this model, the professionals work separately but have multidisciplinary case reviews at which they discuss the case together. Each professional complies with their own professional ethical obligations, in particular by refraining from mentioning information that is confidential to the client.

2 *Norwood and Paterson*

In their detailed examination of the development of MDP practices in the US, Norwood and Paterson also suggest four, somewhat more formal, models for multidisciplinary practices⁷⁰ that can be broadly aligned with St Joan's models.

(a) The 'Leadership' Model

The lawyer leads a multidisciplinary team, with team members in the position of employees of the lead lawyer and answerable to that person or partnership. This model clearly aligns with St Joan's employee model.

(b) The 'Ancillary Business' Model

'Spin off' separate corporate entities handle particular non-legal aspects of the client's business (for example, the creation of lobbying or real estate partnerships to handle non legal related needs of clients). Referral of clients to these independent 'spin off' entities can then occur.

⁷⁰ Norwood and Paterson, above n 35, 345-6.

(c) The ‘Coordinated Collaborative’ Model

Independent professionals work in loosely formed teams, on an ad hoc basis, or have a more formal cross referral relationship between different firms. This model is most closely aligned with St Joan’s Independent Model.

(d) The ‘Full Partnership’ Model

This model envisions a fully integrated multidisciplinary practice of different professionals in a legal partnership.

As a basis for furthering debate, the American Bar Association has proposed five models for MDPs that are broadly similar to the models outlined by Norwood and Paterson, and St Joan⁷¹.

B Evaluation of Models to Avoid Ethical Conflict

1 Employee/Consultant/Leadership Model: Inequality of Professional Roles

The struggle to align differing professional standards, in devising and analysing these models, is obvious. The models proposed by St Joan and by Norwood and Paterson acknowledge that one simple means of addressing conflict between ethical codes is to have one primary service provider, with all others acting in an employee, consultant or advisory capacity to the lead professional.

Whilst they may be based on different organisational structures, the ‘consultant’, ‘employee’ and ‘leadership’ models proposed by St Joan and by Norwood and Paterson respectively bear close comparison and endeavor to meet the needs of clients in similar ways. In these models, the lawyer is the lead professional, engaged in a lawyer-client relationship with the client. The other professionals consult to or are under the direction of the lawyer, and as such have a professional relationship with the lawyer, not the client. Importantly, it is the lawyer’s professional ethical obligations that govern the relationship. The other professionals will play a valuable role in assisting the lawyer to deal with the legal issues in context, and will enable more comprehensive advice to be provided to the client, but do not have a professional relationship with the client. Their ethical standards are not relevant. The other professionals in this relationship would appear to be at arm’s length, and as such are unable to provide the full range of their professional services to the client. This model also places the lawyer at risk of exceeding his or her authority and skill. To what extent will the lawyer attempt to stand in the shoes of the other professionals in conveying advice or counseling the client on the basis of information received from the other professionals acting as consultants? This is a

71 Hume, above n 16, 397–9.

reverse Enron situation – with lawyers potentially providing professional advice in areas beyond their qualification and license.

Whilst this model significantly enhances the lawyer's capacity to provide a broad and suitable service, which acknowledges and to some degree addresses the client's complex circumstances, the very premise of this model would appear to be potentially unsatisfactory for other stakeholders. The lawyer is put in the difficult position of having to limit his or her role to legal advice, even though he or she may be informed by insightful opinion and advice from other disciplines. The other professionals are deprived of a proper professional relationship with the client, and the client is receiving less than complete services to meet what might be complex and pressing needs. There is also the proposition that such an arrangement is little more than a sham – that while in appearance, the social worker or other professional is providing advice and support directly to the client through the medium of the lawyer, but in reality, they work for the lawyer who controls the flow of information and advice. This problem has been addressed in at least one US jurisdiction with relevant ethical rules permitting limited MDPs for the purpose of provision of legal advice provided that non-legal professionals do not go beyond a supportive role and provide advice or services on non-legal matters within their area of expertise.⁷² Thus a social worker supporting a lawyer in a particular matter would be prohibited from providing advice to a client that was not directly related to the legal issues at hand.

These models also pose significant internal professional challenges. A lawyer employed as an accountant can rightly say that he or she is not providing legal advice. But if that lawyer strays beyond financial counseling and does in fact provide legal advice, is a lawyer-client relationship formed? Can the lawyer avoid his or her legal ethical obligations by claiming a consultative or employment role? Can a social worker avoid being bound by clear ethical guidelines by becoming an employee or consultant? Assume, in the case of Lindy, that a consultant model is adopted. Lindy reveals to her lawyer, who in turn reveals to the social worker on the case, that her ex-partner has abused one of the children. Can the social worker avoid ethical professional responsibility for reporting this fact by virtue of being a consultant? And if so, at what cost to the social worker's professional ethical values and understanding of their role?

2 *Independent/Coordinated Collaborative Model: Equality of Professional Roles*

The models that overcome the subservience of one or more professional roles to a single lead professional – the independent or collaborative model – envisage a collaboration between independent professionals, with each observing their own professional standards and ethics, but working together to the extent that they are able to do so to achieve the client's interests.

72 Poser, above n 1, 96.

The independent or collaborative model envisages case conferences between professionals to provide better overall service, and presupposes that the client consents to this collaboration. This side-by-side model poses little ethical risk as all professionals continue to be bound by their ethical obligations in dealing with each other. This model also reduces the inconvenience of seeing multiple professionals each working in a vacuum, and (at least in theory) provides the client with a more holistic service he or she could otherwise expect to receive. Each professional is engaged in a professional relationship with the client, and can pursue the ends perceived as necessary independently. The convenience is in the co-location and the limited collaboration in the form of multidisciplinary case meetings.

However, there remains a risk of breaching ethical rules, particularly in the case of the reverse flow of information. A lawyer is not only required to keep client confidences confidential, but is required to give the client the benefit of their knowledge. If, in a multidisciplinary meeting, another professional discloses opinions, information, or recommended action that is either relevant to the case, or that will be against the client's perception of his interests, must the lawyer convey that information to the client? The ethical answer is that the lawyer cannot put loyalty to the multidisciplinary team above loyalty to the client. Yet this potential conflict would have far reaching implications on the capacity of a multidisciplinary team to work and communicate effectively.

3 Formal Full Partnership Model

The full partnership model proposed by Norwood and Paterson goes a step further than the independent or collaborative models. Professionals do not loosely collaborate within their own professional boundaries, but set up a functional, legally-formed partnership.⁷³ This model requires that any potential breaches of ethical boundaries be formally addressed and incorporated in the operating structure of the group of professionals.⁷⁴ The Norwood and Paterson model takes St Joan's independent model a step further by formalising any collaboration between professionals, and more closely reflects the formal service structures that are permitted by MDPs providing corporate services.

The fully-fledged partnership model, as proposed by Norwood and Paterson, is the model that currently offends ethical standards in many United States jurisdictions. It has been accepted in Australia subject to strict organisational and hierarchical guidelines, which require legal ethical values to have priority in the event of conflict.⁷⁵ Applied literally, this seems to have the same effect as the consultant or leadership models.

73 For the restrictive structures that apply to such arrangements in Australia, see above n 34.

74 Norwood and Paterson, above n 35, 365.

75 See above n 32 and accompanying text.

C The Consent Model

The models discussed thus far reflect an apparent need for a formal structured approach to guard against the risks involved in unfettered and unplanned professional collaboration, and to ensure that issues of conflicting ethical parameters are addressed in the structure of the interdisciplinary relationship. Implicit in this need is an acknowledgement that ethical duties of professionals are different, and that they are absolute. However, none of the models fully acknowledge or protect competing professional standards, and a close examination of the models indicates that in many cases, the potential compromise to service delivery or professional conscience is so significant that the purpose of the exercise may be defeated.

Recognising the real difficulty in reconciling professional ethical obligations in any of these models, St Joan develops a model that relies upon disclosure and consent rather than any formal structure between professionals.

This model envisages a client being informed of the different roles of the lawyer and the other professional/s and being asked to consent to the sharing of information between the members of the team. The client must be warned of the implications of information sharing and must be informed of the nature of the collaborative relationship, such that he or she can understand the implications of information sharing and be able to consent or otherwise to the proposed arrangements.⁷⁶ Anderson, Barenberg and Tremblay, in discussing the impact that a social worker's approach might have on a lawyer,⁷⁷ suggest a similar approach. Their suggestion is that the collaborating lawyer seek explicit, informed consent from the client for less client-focused representation from the lawyer.⁷⁸ One example of this approach is the Boston Law Collaborative, a multidisciplinary law firm that provides legal, psychological, financial, and workplace advice.⁷⁹ There, clients are asked for a waiver of confidentiality vis-a-vis other professionals in the practice, if it is believed that consultation between professionals will be advantageous to the client. If consent is not given, the professionals may still collaborate, but will not transfer any identifying information to their colleagues.⁸⁰

The possibility of client consent or waiver overcoming ethical issues is discussed by a number of other commentators,⁸¹ who, along with St Joan, ultimately find significant risks with this model.

The reality for disadvantaged clients with multiple needs is that there are scarce services available, and it is probable that the client simply has no option but to

76 St Joan, above n 1, 434.

77 See above n 28 and accompanying text.

78 Anderson, Barenberg and Tremblay, above n 28, 664.

79 Rees Hawkins, 'Not "If," but "When" and "How": A Look at Existing De Facto Multidisciplinary Practices and What They can Teach Us About the Ongoing Debate' (2005) 83 *North Carolina Law Review* 481, 510-1.

80 Ibid 512.

81 Brustin, above n 1, 827; Tames et al, above n 42, 522; Noroski, above n 27, 504; Scott Cummings and Ingrid Eagly, 'A Critical Reflection on Law and Organizing' (2001) 48 *University of California, Los Angeles Public Law Review Series* 443.

accept services from the provider at hand. Moreover, experience suggests that most clients will consent to the sharing of information, or to waiver, or to almost anything else at the commencement of a legal relationship because they are in crisis and in urgent need of assistance.⁸² In these circumstances, consent is not meaningful, and is little more than an attempt to absolve the practitioners from liability should a breach of confidence occur.

Even if the view is taken that such consent or waiver is workable, there remains the question of the effect of consent. Does the initial consent or waiver last for the duration of the relationship? If, at a later stage, the lawyer fears that the client is entering an area of concern, should the client be warned again? What if information ‘slips out’ before the lawyer has a chance to warn again – should the lawyer decide not to divulge it to the other professionals?⁸³ Can the lawyer prohibit the referral or use of information revealed to the lawyer at a meeting at which other professionals are present, or which can be inferred from a file note? Suggestions that the lawyer should negotiate this sort of issue in advance⁸⁴ fail to recognise that the client may not be in a position to understand or meaningfully instruct the lawyer on such technical issues at the commencement of the relationship. Many disadvantaged clients have multiple legal and other problems, and have a long-term relationship with a legal advisor whilst various legal needs are explored and resolved. The implications of disclosure amongst an interdisciplinary team cannot be predicted in the long term.

VI THE ‘CONFIDENTIALITY WALL’

In the context of the domestic violence clinical program, St Joan analyses a ‘confidentiality wall’ as one method of facilitating multidisciplinary service without compromising legal ethics. The wall is erected when a client divulges information to the lawyer that might trigger mandatory reporting by a social worker. Once the information is divulged, the lawyer creates a ‘shadow file’ that contains the problematic information, which is kept separately from the regular file and is not accessible to the social worker. Subsequent discussions between the lawyer and the social worker do not include reference by the lawyer to that particular information. The information is effectively isolated to the lawyer’s practice.⁸⁵ This response assumes that the professionals are not together with the client at the same time, and by implication also assumes that both professionals have access to the same files, thus the need to keep information off the lawyer’s file. This strategy further proposes that the social worker ceases working on the file, at the lawyer’s instigation, where continued involvement by the social worker could not be achieved without risk of the reportable information being divulged.

82 Brustin, above n 1, 827; St Joan, above n 1, 434.

83 Tames et al, n 42, 522.

84 Ibid.

85 St Joan, above n 1, 442.

This strategy has a number of implications for multidisciplinary service. First, there cannot be said to be a true collaboration where information is withheld from one of the participants. Second, the service to the client cannot be truly holistic, if part of the value of the service (the social worker's professional expertise and in some cases, ethically mandated intervention) is effectively precluded by withholding of information. Third, as St Joan points out, the professional response of the social worker to a situation of inferred abuse is compromised – some social work students in the program reported that they did not feel they could meet their professional obligations, and that the client and the child were deprived of the necessary support that the social worker could provide, and of the protection that would arise from the mandatory reporting process.⁸⁶

At best, the confidentiality wall permits a substantial but not a complete multidisciplinary collaborative. As an aside, it should be noted that the courts in the United Kingdom and Australia have rejected the concept of 'Chinese walls' in cases where different lawyers in one firm act for opposing clients, on the basis that the risk of communication of confidential information, deliberately or inadvertently, is considered too high.⁸⁷ This position, which is essentially a practical observation on the difficulties of keeping secrets amongst professionals working together, has equal application for MDPs.

A Confidentiality Walls: Case Study 'John'

Take the case of John. John has numerous minor traffic violations and parking fine offences and his driver's license has been suspended. He needs to have his license reinstated, but continues to live in his car and to drive it from place to place when he is 'moved on' from time to time. He wants to re-establish contact with his 14 year-old daughter with whom he has not had any contact for 11 years, and seeks a variation of existing family court orders giving the child's mother sole custody. He is proposing to drive some 1500 kilometers in the near future to make a 'surprise' visit to his daughter for her birthday. He has had a serious drug problem and has been in and out of rehabilitation. He is presently trying hard to stick to a methadone program, but he has told his lawyer that he is using drugs sporadically. If this information were conveyed to the relevant authorities, he would lose his place in the methadone program, which has many people waiting for treatment. His partner of 24 months has taken out a restraining order against him preventing him from seeing either her or their one year-old son. He wants to challenge that order and resume contact with his son. He needs to find stable accommodation so he has somewhere to see his son, and so he can better deal with his drug addiction. However, he has a significant debt with the housing authority, and is not eligible for housing until he starts to deal with the debt. His only support network consists of other drug users, many of whom have criminal records for stealing and drug dealing.

⁸⁶ Ibid 450.

⁸⁷ *Newman (Trustee of Estate of Littlejohn) v Phillips Fox (a firm)* (1999) 21 WAR 309.

The pressing legal issues in this scenario – the fines, the license reinstatement, the restraining order, contact with children, and housing – require a long-term approach. Realistically, until each issue is dealt with, John will remain in a very precarious situation. Obviously, there are issues in this scenario that his lawyer will not pass on – drug use, driving without a license, associating with criminals. Each of these issues has negative implications for some of John’s goals, but can be used positively for others.⁸⁸ At what stage can John meaningfully consent to sharing of information between professionals? Once information is revealed to a multidisciplinary team for any purpose, it cannot be withdrawn in respect of another purpose. The lawyer cannot mislead the Family Court by asserting that the client is a good risk for access to a one year-old child if the lawyer knows of drug use, or criminal association, even though those facts might be influential in obtaining emergency housing. It is no answer to say that John can consent to sharing of information for one purpose and not another – information, once known, becomes part of the professional’s understanding of the case and cannot ethically be excluded. It is not possible to erect a ‘Chinese wall’ of the mind!

In this example, the professionals, particularly the lawyer, are placed in the position of having *all* the information, and of being required to consider it in making decisions. A social worker in this scenario may consider it premature for John to seek access to his son, or his daughter, and may breach client self-determination in the best interests of the client and his family.⁸⁹ Conversely, the lawyer is bound to pursue that goal for the client. The professionals may end up working against each other on the basis of shared information from the client.

VII OTHER STRATEGIES

Other models include an intake process where a single advocate takes the client through the intake process and then facilitates referral to suitable professionals to deal with particular problems,⁹⁰ or an advanced and structured referral process between lawyers and social workers. It is suggested that although there are obvious practical benefits for clients, such referral models are not a true collaboration between professionals, particularly because there is no structured interaction between professionals (such as by way of case meetings). Many agencies already have effective informal relationships with other service providers, but this falls far short of the idea of interactive collaboration between professionals on a case-by-case basis.

Each of these models have advantages and drawbacks, and none of them offer consistent or satisfactory guidance for multidisciplinary services in areas of need. If the obligation of lawyer-client confidentiality is to be the guiding principle that binds all of the professionals in the team, then it is inevitable that other

88 For example, John’s struggle with drug use and his relationships with unsuitable friends may be valuable in persuading a housing authority to provide him with stable and safe accommodation as part of a strategy to leave that lifestyle behind, but will be adverse in the case of contact proceedings.

89 Cervone and Mauro, above n 41, 1980.

90 Trubek and Farnam, above n 1, 248.

professionals will be unable to engage in a provider-client relationship, and will be fettered in the provision of the best service they can provide according to the ethical goals of their various professions. The placing of one professional's ethical values over those of all other professionals seems contraindicative of a successful collaborative effort. Yet the fundamental difference in ethical rules of lawyers and other professionals makes this outcome inevitable.

The creation of barriers within the multidisciplinary team – whether by a confidentiality wall, individual holding back of information, or withdrawal of client consent to share information or waive confidentiality – results in a team that is not truly multidisciplinary, with some or all members not being privy to important information that would have a bearing on how they might approach the case, both ethically and effectively. The resulting fragmentation of information across team members would diminish the effectiveness of the team, and possibly reduce the quality of representation provided by each of them.

It has also been suggested that ad hoc arrangements for multidisciplinary work, perhaps even structured referral arrangements, miss the point of collaboration in that they do not promote the culture of multidisciplinary practice which is needed for meaningful enhancement of justice access for those most in need.⁹¹

Different experiences of multidisciplinary work have also raised issues as to the professional's relationship with the team. In some models, law students work in an equal or subsidiary role with other professionals.⁹² In such cases, to whom do they owe their loyalty – the team or the client? In such instances, the law student is not in a lawyer-client relationship, but is working for a lead professional of another discipline. For a law student who is not yet bound by ethical obligations, the problem is not acute, but a lawyer may find such a position untenable.

VIII CONCEPTUALISATIONS OF ROLE

So far I have considered the possibilities and problems in the practical implementation of MDP models. However, there are deeper professional ethical issues that underline the conflict and require consideration.

The risks of multidisciplinary service go well beyond the chance leakage of information in verbal or documentary form. The very nature of professional ethics pervades and informs the development of a professional's relationship with clients at all levels. A lawyer's focus is ethically mandated to be on the client, in a way that excludes other considerations from the relationship.⁹³ A social worker also focuses on the client, but in a way that is inclusive of other considerations such

91 Poser, above n 1, 113.

92 See V Pualani Enos and Lois Kanter, 'Who's Listening? Introducing Students to Client Centered, Client Empowering and Multidisciplinary Problem Solving in a Clinical Setting' (2002) 9 *Clinical Law Review* 83, which discusses a program of law students doing intake interviews for doctors in a hospital emergency department.

93 This prohibition does not prevent the lawyer from exploring such issues with the client as part of a client-centered approach, but the lawyer is not permitted to let his or her loyalty to the client above all others to be affected by considerations of interests other than those expressed by the client.

as family and community. Thus, whilst both professions have the interests of the client at heart, they conceive of and define those interests differently. In some cases, this difference in approach will result in social workers being prevented from taking action for a client that is contrary to interests of the community, or the best interests of the client. Wydra⁹⁴ outlines typical examples of such conflict. These include the case of an elderly client, who is the victim of family abuse, not wishing to report the abuse to authorities, or the case of an elderly client being manipulated out of financial resources by a third party.⁹⁵ In both cases, if a lawyer apprised of this information by the client were to breach confidence with the client and discuss it with a social worker, the social worker may be mandated to report the situation, or might be permitted to do so by operation of their own ethical principles. If a lawyer and a social worker were working together with a client, then a series of barriers would develop if controversial issues arose.

A Case Study ‘Lindy’

To develop Lindy’s situation, assume that Lindy advises her lawyer that she suspects the father of one of her children may have abused that child in the past, but that she wants to keep that information secret as she fears it may put her at risk of losing custody of her children. In the case of admission of abuse, a client-centered lawyer may encourage the client to consider the implications of not reporting abuse and the interests of the child in having the matter addressed, but where there is no imminent (future) risk of harm, the lawyer is ultimately bound to act as instructed by the client and keep confidence on all issues raised. A social worker may approach the issue in a different way, having regard to the interests of the child in having the matter investigated and addressed, perhaps by counseling or other intervention. The client-centered lawyer and the social worker will have very similar concerns about the situation as a whole, but may be bound to act differently in response thereto.

The complexities of this debate therefore go much deeper than practical rules for managing information by professionals in different spheres. It goes to the very heart of the role that professionals perceive for themselves in their professional capacity and is informed by longstanding institutional codes of conduct. Practical solutions devised to facilitate better service provision to people in need may never be able to address this underlying difference in the definition of professional roles.

94 Wydra, above n 40, 1519.

95 Ibid 1523.

IX A BROADER VIEW OF LEGAL PROFESSIONAL ETHICS

Poser broadly defines the five core values of the legal profession as loyalty to client, independent legal judgment, confidence with the client, avoidance of conflict with the client and duty to the legal system/access to justice.⁹⁶

The duties arising from the first four values underline the very nature of a lawyer's responsibility to the client, and stem from the role that the adversarial system of justice places on lawyers.⁹⁷ They are requirements that stem from the nature of the legal system, not simply from the idea that communications between the lawyer and the client should be secret. However, often absent from this debate are the other values of duty to the court and access to justice. Duty to the court is an unquestioned obligation on lawyers and overrides other ethical duties in the event of conflict. The duty is traditionally couched in terms of the lawyer's duty not to mislead the court, engage in abuse of process, or participate in a miscarriage of justice. Traditional descriptions of the duty to the court do not include the more generalised and socially-driven concept of access to justice for clients. Yet it is this latter value that is increasingly relied upon by proponents of multidisciplinary practice for the disadvantaged,⁹⁸ and that gives rise to the proposition that positive use of multidisciplinary practices is needed to meaningfully help people of low income.⁹⁹ This argument can be extended to the proposition that professional commitment to access to justice results in an ethical duty to practice in a manner that promotes and achieves such access.¹⁰⁰

If experience tells us that multidisciplinary practice is an imperative if the multifaceted needs of the disadvantaged are to be met, then multidisciplinary practices must be seen as having a central role in achieving the core value of access to justice. If this is so, and there are few lawyers who would not describe access to justice as a legitimate ethical goal of the legal profession, then what impact can a duty to achieve access to justice by multidisciplinary partnerships have on the coexisting duties of loyalty, confidence, and independence?

Proponents of multidisciplinary practices argue that the existing interpretation of the core values of the profession in a manner that precludes multidisciplinary practice simply fail to acknowledge the nature and purpose of providing legal services to the disadvantaged. Equally, in those jurisdictions where MDPs are permitted, they are geared towards the needs of corporate clients and do not translate to the needs of disadvantaged clients. The arguments that corporate merging of legal and accounting firms will result in compromise of core ethical values have

96 Poser, above n 1, 99.

97 Wydra, above n 40, 1522.

98 Tames et al, above n 42, 508; Norwood and Paterson, above n 35, 354.

99 Trubek and Farnam, above n 1, 229, 259.

100 Frank discussion about access to justice as a professional/ethical duty of lawyers is a relatively recent occurrence. Although few lawyers would disagree with access to justice as a goal of their profession, there has yet to be global acceptance by governing bodies that access to justice rates as highly as an ethical obligation. This is clearly a debate that is as yet unfolding within the legal profession, as greater attention is paid to the capacity of the system to meet legal needs across the board.

little resonance at the other end of town, where desperately disadvantaged clients are dependent upon scarce resources to achieve legal and social outcomes. Neither the rules against multidisciplinary practice, nor the arguments against it, fit the nature and role of community practices that are exploring the possibilities of such alliances.¹⁰¹ Nor indeed do they fit the needs of ‘main street’ clients – small businesses and other individuals who are not socially disadvantaged but who would also benefit from the provision of multidisciplinary services.¹⁰²

The failure of the current professional conduct rules to ‘fit’ the needs of disadvantaged clients is not simply a superficial and conservative application of the perceived core values of lawyers in times of potential change. The core values themselves present a fundamental contradiction – overriding duty to a single individual, without regard to the community, or to the lawyer’s view of the best interests of the client – as opposed to a communal obligation to enhance access to justice to those most in need. Whilst many clients, both major corporations and everyday ‘main street’ clients,¹⁰³ have much to gain from integrated service delivery in terms of convenience and cost saving, they are unlikely to be deprived of access to justice if such services are not available. But those in the community who are sorely disadvantaged, and for whom meaningful resolution of legal problems is unlikely to be achieved without attention to other issues, will be denied access to justice in the truest sense of the term.

The frustrating aspect of this conclusion to community services lawyers is that they do not see their role as greatly different to that of other professionals in the sector. Such lawyers simply recognise the value of multidisciplinary problem-solving for their clients, and try to see their clients in the context of their community and their broader interests, rather than as a narrowly-focused legal problem. As Anderson, Barenberg and Tremblay point out, there are shared core values between lawyers and social workers.¹⁰⁴ Yet in application, these values are expressed differently, and these same lawyers would resist any relaxation of their primary duty of confidentiality to their clients, and would see the taking of steps, without instructions, ‘in the best interests’ of their clients, as unacceptable given their professional obligations to respect client autonomy.

It is this fundamental divergence in world view that underlies much of this debate. As can be seen from the above discussion, the divergence is not merely one of wording or convenience, but a divergence that goes to the very heart of the way the professions perceive their roles. Lawyers who are keen proponents of multidisciplinary practice, and who seek broadly the same outcomes for their clients as the social workers and other professionals working with them, still balk at crossing ethical lines of confidence, independence, and respect for client autonomy, for reasons other than the expression of those rules by professional authorities.

101 Trubek and Farnam, above n 1, 267; Brustin, above n 1, 794; Wydra, above n 40, 1536.

102 George C Harris and Derek F Foran, ‘The Ethics of Middle Class Access to Legal Services and What We can Learn from the Medical Profession’s Shift to a Corporate Paradigm’ (2001) 70 *Fordham Law Review* 775, 775.

103 Yarbrough, above n 19, 646.

104 Anderson, Barenberg and Tremblay, above n 28, 665.

X PROPOSALS FOR REFORM

Despite developing literature on this topic, concrete solutions are not abundant. Much of the debate focuses on the failure of the ethical rules to recognise the needs of the disadvantaged, and the significantly different approach to multidisciplinary practice that occurs in community practices as opposed to multinational accounting firms. A number of commentators, whilst acknowledging the problems, come to the view that the benefits of multidisciplinary practice outweigh the risks.¹⁰⁵ Others suggest that more experimentation and development needs to be undertaken before concrete conclusions can be drawn.¹⁰⁶ It has been suggested by one commentator that disciplinary bodies are already inclined to overlook 'well meaning breaches' of the rules.¹⁰⁷ Others suggest that small MDPs should be permitted, but not larger entities,¹⁰⁸ presumably to allow focused client services on a micro level, but to avoid another Enron. Brustin suggests that MDPs should be permitted in the not-for-profit sector, suggesting that the risks of breach of ethical rules are not as acute as in the corporate sector.¹⁰⁹

Norwood and Paterson stop short of recommending changes to ethical rules and suggest a more pragmatic, highly structured, collaborative arrangement with strong management, clear lines of leadership, and a recognition by all participants that lawyers' ethics are a key part in lawyers' relationships with clients and will affect their capacity to communicate with the team.¹¹⁰ This is a good outcome for lawyers, provided they have a clear and principled understanding of their role.

These responses reflect a degree of pragmatism that is no doubt prompted by the urgency of the mission to meet unmet legal need. But they are hardly a satisfactory conclusion to the debate.

The four states in Australia that have moved to accept MDPs and the incorporation of legal practices subject MDPs to a range of protective provisions. These focus on strong management systems that include competent work practices, good communication, shared understanding of processes and effective protocols for identification and resolution of the range of conflicts that might arise. This reflects the model proposed by Norwood and Paterson, relying as it does on good management practices, system protocols, and an awareness of the issues that might arise in an MDP. It has also been suggested that the focus on systems designed to identify and avert ethical breaches plays a significant role in the lack of controversy surrounding the implementation of MDPs in New South Wales, with the NSW Legal Services Commissioner suggesting that the introduction of management systems has resulted in a 'systemisation of ethical conduct'

105 Wydra, above n 40, 1536; Harris and Foran, above n 102, 85; Poser above n 1, 112; St Joan, above n 1, 461.

106 Hawkins, above n 79, 516.

107 Wydra, above n 40, 1536.

108 Hawkins, above n 79, 516.

109 Brustin, above n 1, 864.

110 Norwood and Paterson, above n 35, 364–5.

within the few multidisciplinary practices in NSW.¹¹¹ However, these legislative requirements, reflecting as they do the leadership or full partnership models, are open to precisely the same criticisms.

Poser suggests a risk/benefit analysis to determine whether there is really such a risk in a well managed multidisciplinary arrangement, or a greater risk than those already inherent in legal practice, and suggests that at the non corporate end of the spectrum, the risks are not significant.¹¹² Poser suggests that the rules be relaxed for collaborations of less than 30 professionals,¹¹³ and that there be close monitoring of the development of such collaborations to inform the risk/benefit analysis proposed.¹¹⁴

An ‘ends justifies the means’ approach, given the insignificance of risk, is attractive at a practical level, in achieving more good than it does harm, but still begs an answer to the broader ethical question. If access to justice is seen as a legitimate ethical goal for lawyers, then it is difficult to see how the exposure of clients to such risks could be in furtherance of access to justice.

In the context of providing multidisciplinary services to the elderly, already recognised as an area requiring a multidisciplinary approach, Wydra suggests that ‘[a]dding a few more exceptions to those ... confidentiality rules already in existence will not change ... [clients’] view of the attorney client relationship,’ because at best clients only vaguely understand the nature of confidentiality.¹¹⁵ Wydra also suggests that provision for lawyers to act ‘in the best interests of clients’ may be appropriate in the context of vulnerable aged clients with difficulties giving instructions or comprehending the implications of their proposed actions. Similar arguments are made in respect of juvenile clients.¹¹⁶ This raises the possibility of a degree of paternalism or intervention in representing clients who are less able to make decisions for themselves. Ethical guidelines already envisage some relaxation of rules in such situations.¹¹⁷

111 Steven Mark, ‘New Structures for Legal Practices and the Challenges they Bring for the Regulators’ (Paper presented at the Conference of Regulatory Officers, Sydney, November 2006).

112 Poser, above n 1, 103.

113 It is not clear why the risks might be thought to be less at this end of the spectrum. The risk of the lawyer’s independence being compromised, or of confidence being breached, could have catastrophic consequences for any client assisted by a multidisciplinary team.

114 Poser, above n 1, 133.

115 Wydra, above n 40, 1538–9.

116 Curtis Heaston, Michael Jenuwine, Diane N. Walsh, and Gene Griffin, ‘Mental Health Assessment of Minors in the Juvenile Justice System’ (2003) 11 *Washington University Journal of Law & Policy* 141, 154.

117 Section 40 of the *Legal Practitioners Act 1981* (SA) provides that where it is necessary for the purpose of protecting the interests of a person of unsound mind in any legal proceedings or other business, the authority of a legal practitioner, notwithstanding that the practitioner knows of the mental unsoundness of the person on behalf of whom the practitioner is acting, continues for the purpose of completing those proceedings or that business. However, this Act is in the process of being replaced by new rules based on the Law Council of Australia’s Model Rules. See also Brustin, above n 1, 815. Wydra, above n 40, 1518, indicates that limited recognition of the special needs of aged clients is reflected in the American Bar Association, *Model Rules of Professional Conduct* (2008).

Elderly, mentally incapacitated, or child clients are easily identified groups with accepted limitations to capacity to instruct and make decisions, and for whom a degree of protective intervention or paternalism in the lawyer-client relationship might be appropriate. But arguments that endorse a variation in lawyer role for such groups do not necessarily apply to other clients. Most of the clients discussed in this article experience extreme difficulty in accessing the system and accessing legal advisors, let alone an adviser that is able to meet their needs and respond to their various issues. They may be illiterate, vulnerable, depressed, at risk of violence, overwhelmed, indigent, or socially inept, but none of these features would normally suggest that a degree of paternalism is called for, or conversely, that the clients should be accorded anything less than the full autonomy that is accorded to clients who do not exhibit such features. Conversely, when considering issues of access to justice, is it arguable that treating all clients identically according to existing ethical parameters – which were, to a large extent, coined in an age when access to justice was not a matter of public concern – is counter-productive and that it is precisely the difference in circumstances that must be addressed if access to justice is to be attained.

Although commentators agree that the existing rules do not ‘fit’ the needs of a large sector of the community, there is not much in the way of solid recommendation for change. Perhaps this is reflective of the fundamental nature of ethical rules to any profession, and the associated reluctance to interfere in long standing cultural rules. It may also be reflective of a disinclination to single out disadvantaged clients. Multidisciplinary practices are proposed to improve the service provided to disadvantaged clients, not offer them a service that is less ethically credible than that offered to the more fortunate population.¹¹⁸ Practitioners that work in different multidisciplinary models accept that there are imperfections in their systems, but remain of the view that the benefits of MDPs outweigh the risks. Does this amount to cutting ethical corners? Or does it expose a much deeper dilemma in the context of legal practice and legal ethics? On the one hand, a lawyer’s duty of loyalty requires the lawyer to give effect to the client’s instructions. There is no room for paternalism, or deviation from such instructions, simply because the lawyer thinks it in the clients best interests to do so. On the other hand, if access to justice is a legitimate goal of legal practice, the development of practice models that include elements of paternalism (via the inclusion of other professionals in the practice model), may be seen as a social imperative.

A Ethics of Care Approach

One theory that ties into this debate is the concept of an ‘ethics of care’ in legal practice. Developed initially by feminist commentators in describing perceived differences in the way women might approach legal practice,¹¹⁹ with emphasis on

¹¹⁸ Brustin, above n 1, 827.

¹¹⁹ Carrie Menkel Meadow, ‘Portia in a Different Voice: Speculation on a Woman’s Lawyering’ (1985) 1 *Berkeley Women’s Law Journal* 39, 39.

a multifaceted and relational approach to client problems,¹²⁰ the concept has been further explored as a possible response to overly rigid application of legal ethical rules. In discussing the concept of an ethic of care, Ellman argues that the ethic of care justifies a significantly greater degree of intervention in client decision making than would normally occur, with the pressing of particular options that are in the lawyer's view more likely to result in satisfactory outcomes for the client.¹²¹ To some extent modern ideas of client-centered legal practice, and the acceptance of the benefits of a more holistic approach to problem solving by lawyers,¹²² has overtaken this discussion. The concepts of exploratory dialogue with clients, the positive obligation on lawyers to involve clients in participatory decision making, as well as a less adversarial and more collaborative approach to dispute resolution,¹²³ all lead to the probability of a client reaching a better understanding of their interests and a better outcomes as a result. The lawyer does not go so far as to impose their own view of what is best for the client and their community or family.

However, this is a step short of a practice model in which it is accepted that a lawyer has a more relational approach to the lawyer-client relationship, and a heightened obligation to care for the overall outcome for the client. This is a significant theoretical variation to the traditional ethical model, and may yet seriously offend existing ethical rules.¹²⁴ It may also cause alarm to lawyers who, whilst deeply concerned for their clients, recognise that they do not have counseling or social work skills and must properly restrict their advice to legal matters, whilst respecting their client's absolute autonomy to make decisions.¹²⁵

While debate flows, multidisciplinary collaborations develop and flourish across the US and Australia. Lawyers work with doctors, social workers, health care professionals, financial advisors, case workers and family members to improve the overall lot of their disadvantaged clients. Large, organised community clinics, offering 'one-stop services' to their clients; clinic collaborations in which 'confidentiality walls' are erected to minimise leakage of information from lawyer to mandatory reporter; and day-to-day ad hoc arrangements between professionals of different disciplines in the interests of their clients, are all part of the legal service landscape.

It would be naïve to imagine that confidentiality walls, or the good sense of practitioners, or consent or waiver documents signed by clients, or carefully structured management protocols, will avoid the inevitable explosion when the

120 Naomi R Cahn, 'Styles of Lawyering' (1992) 43 *Hastings Law Journal* 1039, 1039.

121 Stephen Ellman, 'The Ethic of Care as an Ethic for Lawyers' (1993) 81 *Georgetown Law Journal* 2665, 2665.

122 Christine Parker, 'A Critical Morality for Lawyers. Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49, 70.

123 *Ibid* 70–1.

124 For example, the ideal of lawyer independence from the client is potentially compromised the more caring and close the relationship between lawyer and client becomes, which may interfere in the lawyer being in a position to provide independent and objective advice.

125 Janine Sisak, above n 55, 2758–9.

strategies set up to protect client confidence and autonomy misfire. The fact that no such explosion has yet occurred may be indicative of the inability of a disempowered and vulnerable client base to take action rather than a positive indication of lack of concern.

It does seem clear that the legal profession, bound as it is to principles of ethics dictated by the nature of the adversarial legal system, may have to reassess the impact of traditional ethical rules on access to justice considerations. The conflicting values of promoting access to justice, and maintaining client confidence and autonomy, could result in a stalemate over the provision of meaningful access to justice and legal problem-solving to clients throughout the spectrum.

The answer is not as simple as relaxing existing rules to accommodate MDPs to achieve better outcomes for clients. Deep-seated public policy values reflected in legal ethical duties such as those of confidentiality and loyalty exist for good reason and for the ultimate protection of clients and the community. Yet it is worth noting that existing rules do stem from a historically litigious model of legal practice and reflect the adversarial role of lawyers in the delivery of justice in a litigious system. The great majority of lawyer-client interactions does not involve litigation, yet ethical rules devised when the legal landscape was very different continue to be the primary guidance for the legal profession.

A pragmatic approach would suggest that MDPs, despite the risks of technical breaches, provide meaningful outcomes for people who would otherwise not be able to access their social and legal rights at all. Yet it would seem that to achieve such outcomes a lawyer will inevitably find him or herself in well-meaning breach of strict ethical rules, or limiting the efficacy of a multidisciplinary partnership in order to comply with those rules. The seeds of reform suggested in the concept of an 'ethic of care' and in the suggestion that a more paternalistic approach is warranted in the case of certain classes of clients, may reemerge in future debate on the ethical position of MDPs. In the meantime, legal practices – many of them clinical practices operated by law schools – will continue to grapple with the ethical limits imposed on them whilst endeavoring to provide interrelated services for clients in desperate need.