

Mental Health Care and the Law

Linda Roberson and Gary Young

October 12, 2001
University of Wisconsin - La Crosse
La Crosse, Wisconsin

Discussion Problem: Patty, Part I

Patty, your new client, age 19, is a student at UW-La Crosse. She has just moved to La Crosse from Kewaunee, where for the last two years she says she received counseling from Susan Lewis, a social worker. Patty has signed a release permitting you to obtain her records from Lewis. Three weeks ago you faxed the release and a request for Patty's records to Lewis, and a week ago faxed a follow-up request. But Lewis has not responded in any way to either request.

In her initial interview, Patty reports that during her counseling with Lewis, she remembered her father raping her at the age of twelve, with her mother watching. She also remembered that a few months later her mother took her to a doctor in Madison for some medical procedure that she now believes was an abortion – she believes that her father had made her pregnant. As she reports this to you, Patty bursts into tears. Patty reports that she had never had any memory of any of these things before meeting Lewis, but that Lewis had used hypnosis to help her remember. In response to your query, Patty says that Lewis explained to her that hypnosis would help her recall “difficult memories” more clearly; Lewis did not give Patty any further information about hypnosis. Patty says that shortly before moving to La Crosse, she confronted her parents in Lewis's office and told them she knew her father had raped her and her mother had abetted the rape. She says she told her parents she never wanted to see them again.

Still sobbing, Patty reports that Lewis told Patty that as a result of her father's rape she had developed a “multiple personality.” Patty says she had always known that she had two sides, what she called a “hard” side and a “soft” side. Sometimes she would cry spontaneously, and sometimes she became very angry. She says Lewis explained that these experiences were signs of two different personalities inside her, a tough woman whom Lewis named “Joan,” the same age as Patty, and a sensitive, reclusive thirteen-year-old, whom Lewis named “Michelle.” Lewis told Patty she had split into these two personalities as a result of her father’s rape. Abruptly recovering her composure, Patty tells you that Lewis helped her to recognize these two personalities and live with them. Patty adds that Lewis recently suggested that Patty might also have a third personality, a sneaky, uncooperative, disingenuous, older woman Lewis named “Madonna.”

You ask Patty if she recalls signing any forms in connection with Lewis's treatment. She says no. She also tells you she did not take any written or oral diagnostic tests with Lewis, except an “ink-blot” test and a “free association” test.

You have no independent corroboration, and no disconfirmation, of anything that Patty has told you.

1. After talking with Patty but not doing any diagnostic tests, do you have any initial, tentative, clinical impression regarding Patty?
2. After this initial interview, are you willing to accept Patty as your client?
 - a. If not, why not – what “red flags” warn you not to accept her?
 - b. If not, would you refer her to another mental health care professional? To whom?
 - c. If so, do you see any need to take any precautions to minimize potential risks from this professional engagement? What are the potential risks from this engagement? What precautions will you take? Does it make any difference what goals you and Patty agree on for the treatment?
 - d. What do you do if you do are not permitted to reject Patty as a client?
3. Do you routinely make any disclosures about treatment to new clients? Any disclosures about the extent to which information and records regarding the therapy are confidential? If so, precisely what disclosures? Do you routinely ask any clients to sign a consent form containing those disclosures?
4. In Patty’s case, would you make any *further* disclosures or require any further signed consent forms? Does it make any difference what goals you and Patty agree on for the treatment, or what methods of diagnosis and treatment you agree on?
5. Would you require written consent from anyone other than Patty? Would you tell Patty you were required to disclose information to anyone else, or notify any one else, about her status as your client, her diagnosis, or her treatment?
6. Suppose you accept Patty as your client. Will you take any steps to determine whether her memory of her father raping her is true or false? Why or why not? Precisely how does your answer to this question relate to your plan of therapy? If you do take such steps, what will they be? Whatever you decide to do, how can you best protect yourself against the resulting malpractice risks? What are the resulting malpractice risks?
7. Do you have any concerns about the adequacy of the treatment Lewis provided to Patty? If so, what specifically concerns you? Does Lewis’s treatment create any malpractice risks for you? If so, what steps can you take to minimize those risks? Would your answer change if Patty told you she intended to continue to see Lewis for therapy whenever Patty was back in Kewaunee?

8. Do you have any concerns about what to include in your case notes for Patty, and what to exclude? What (if anything) will you say in your notes about:
 - a. The truth or falsity of Patty's beliefs and memories?
 - b. Susan Lewis's treatment of Patty?
 - c. The advisability or inadvisability of Patty's accusation against her parents?
 - d. Any other topics you perceive as sensitive or creating a malpractice risk?

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Discussion Problem: Patty, Part II

You accept Patty as your client. Four times in the next three years Patty tells you she has again met with Susan Lewis in Kewaunee for therapy, and that Lewis has hypnotized her and brought to the surface even more details of her father raping her. She says the hypnosis also helped her recover memories of her father's brother, who is a Catholic priest, raping both her and her sister Kathleen one night when her parents invited him to sleep over after a late dinner. Patty says she has discussed her memories with Kathleen, and told Kathleen about her course of therapy with Susan Lewis and with you. She says Kathleen became very agitated in this discussion, and said that these things could not have happened.

You and Susan Lewis have never discussed Patty's case.

In 2004, three years after you began therapy with Patty, Patty's parents sue you and Lewis. Their complaint is attached. Please read this complaint now. You are William James. (*Note:* This complaint is incomplete. Essential parties (for example clinics, malpractice insurers) are missing. Other things are missing or incomplete. It is designed solely to raise issues for discussion.) Antonia Rawlins, the lawyer representing Patty's parents, informs you that her clients would accept five million dollars to settle the entire case.

9. Can you ethically continue to provide therapy to Patty after you become aware of her parents' lawsuit against you? If you were another therapist who had not treated Patty before, would you now be willing to accept her as a patient? If so, what malpractice risks would you foresee, and what steps would you take to manage them?
10. Do you have any professional opinion regarding the effect of this lawsuit on Patty? Does your opinion depend upon any assumptions regarding the truth of Patty's accusations against her parents?
11. The parents' lawyer serves you with a demand that you produce all of your clinical records relating to Patty. By now you have received Patty's records from Lewis, including the notes Lewis took during the meeting in her office with Patty and Patty's parents.
 - a. Are you legally obligated to produce any of the records you received from Lewis?
 - b. Are you legally obligated to produce any of your own clinical records?
 - c. Would your answers to questions 3a and 3b change if Patty were seventeen years old when you receive the demand to produce documents? If she were thirteen?

If you need further information to answer these questions, explain what that information is and how it affects your answers.

12. In your normal course of practice, do you keep any clinical records that you would like to use to defend yourself against the complaint's allegations? Are there any ethical or legal constraints on your use of those documents to defend yourself?
13. Does your professional liability insurance policy require your insurer:
 - a. To defend you against the lawsuit of Patty's parents?
 - b. To pay damages the parents recover for your negligence in treating Patty? If so, up to what amount?
 - c. To pay damages the parents recover for your negligence in supervising or otherwise associating with Susan Lewis in treating Patty? If so, up to what amount?
 - d. To defend you against the complaint the parents have filed against you with the Wisconsin Department of Regulation and Licensing?
 - e. To defend you against Patty's lawsuit for breach of confidentiality and invasion of privacy when you give her parents her clinical records without her informed consent?
14. Suppose Patty's parents sue only Susan Lewis, not you. Antonia Rawlins, the lawyer representing Patty's parents, serves you with a subpoena requiring you to appear at a deposition in the parents' lawsuit, and to bring with you all clinical records in your possession or control relating to Patty.
 - a. What should you do when you receive this subpoena?
 - b. You appear at the deposition with your lawyer. Rawlins asks you whether, in your professional opinion, Susan Lewis was negligent (failed to use reasonable professional care) in any of the respects listed in paragraph 12 of the complaint. Are you required to answer? Why (not)?
 - c. If you answered, what would your answer be?

Now suppose all the facts are the same except that you are not William James and have never treated Patty. Your meticulous research, extensive clinical practice, incisive writings, and memorable presentations at professional meetings have led to your recognition as a pre-eminent expert in the area of false/repressed/recovered memory. Antonia Rawlins, the lawyer representing Patty's parents, asks you to be an expert witness for them in their lawsuit against Susan Lewis and William James.

15. Rawlins wants to know whether it is your professional opinion that Susan Lewis was negligent, i.e. failed to use reasonable professional care, in the respects listed in paragraph 12 of the complaint.

She asks you to assume facts substantially like those set forth above. (She explains that the source of these factual allegations is Kathleen Smith, one of her clients' daughters.)

- a. Is it your professional opinion that Lewis was negligent, i.e. failed to use reasonable professional care, in the respects listed in the complaint?
 - b. If so, would you (i) tell Rawlins and (ii) accept this forensic engagement? Why (not)?
 - c. Would (should) your answer to question 15b be different if the lawsuit were filed in federal court in Milwaukee instead of state court in Kewaunee?
16. You accept Attorney Rawlins's request to testify as an expert witness for the parents. At trial you state, as your professional opinion, that Susan Lewis was negligent in each of the respects listed in paragraph 12 of the complaint. The jury returns a verdict finding Susan Lewis causally negligent. Can Susan Lewis sue you for libel? If so, what result?
17. You decline Attorney Rawlins's request to testify as an expert witness for the parents, though you tell her you think Lewis was probably negligent in several respects. Attorney Rawlins then serves you with a subpoena demanding that you appear for a deposition in the parents' lawsuit.
- a. What should you do when you receive this subpoena?
 - b. Are you required to appear at the deposition?
 - c. You appear at the deposition with your lawyer. Rawlins asks you whether, in your professional opinion, Susan Lewis was negligent in any of the respects listed in paragraph 12 of the complaint. Are you required to answer? Why (not)?

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PHYLLIS SMITH and
DEVLIN SMITH,

Plaintiffs,

v.

Case No.: 2004-CV-318

INCOMPLETE EXAMPLE: FOR DISCUSSION ONLY

SUSAN LEWIS and
WILLIAM JAMES

Defendants.

COMPLAINT

The Plaintiffs, Phyllis and Devlin Smith, allege as follows.

1. Phyllis Smith is an adult resident of Wisconsin, residing at 101 South Lake Street, Kewaunee, Wisconsin. Phyllis Smith is the mother of Patty Smith and the wife of Devlin Smith.
2. Devlin Smith is an adult resident of Wisconsin, residing at 101 South Lake Street, Kewaunee, Wisconsin. Devlin Smith is the father of Patty Smith and the husband of Phyllis Smith.
3. Defendant Susan Lewis is a social worker licensed to practice in the State of Wisconsin. Her principal place of business is 700 Green Bay Road, Kewaunee, Wisconsin. She resides at 1901 County Highway D, Kewaunee, Wisconsin.
4. Defendant William James is a clinical psychologist licensed to practice in the State of Wisconsin. His principal place of business is 310 University Avenue, La Crosse, Wisconsin. He resides at 1411 Peony Lane, La Crosse, Wisconsin.
5. Patty Smith is the daughter of the Plaintiffs Phyllis and Devlin Smith. She is an adult resident of Wisconsin, residing at 9871 Commerce Drive, La Crosse, Wisconsin.

6. On information and belief, since 1996, when Patty Smith was a minor, Susan Lewis has provided and continues to provide psychotherapy to Patty Smith.
7. On information and belief, since October, 2001, William James has provided and continues to provide psychotherapy to Patty Smith.
8. On March 23, 2001, in the presence of Susan Lewis at Lewis's office, Patty Smith accused the Plaintiffs, Phyllis and Devlin Smith, of having abused her sexually, physically, and emotionally when she was a child and teenager.
9. Patty Smith has never retracted this accusation.
10. This accusation is false.
11. As a result of this false accusation and its non-retraction, Phyllis and Devlin Smith have suffered physical ailments, including without limitation severe and repeated headaches, nausea, and insomnia, and have suffered severe emotional distress. As a result of this false accusation and its non-retraction, Phyllis and Devlin Smith have lost and will continue to lose wages and have incurred and will continue to incur medical expenses, including expenses for mental health care. This false accusation and its non-retraction have caused and will continue to cause Phyllis and Devlin Smith severe pain and suffering.

First Claim: Negligence of Susan Lewis

12. On information and belief, since 1996, Susan Lewis has acted negligently in providing psychotherapy to Patty Smith, by
 - a. Negligently undertaking to provide therapeutic services she was not competent to provide;
 - b. Negligently failing to obtain Patty Smith's informed consent to diagnosis and treatment;
 - c. Negligently failing to obtain the informed consent of the Plaintiffs, Patty Smith's parents, to diagnosis and treatment of Patty Smith;

- d. Negligently employing inappropriate and harmful methods of diagnosis, including hypnosis and Rorschach and other projective tests;
 - e. Negligently failing to diagnose Patty Smith's mental and emotional condition correctly;
 - f. Negligently and mistakenly diagnosing Patty's condition as "multiple personality disorder," "dissociative identity disorder," or "post-traumatic stress disorder";
 - g. Negligently employing inappropriate and harmful methods of treatment, including hypnosis;
 - h. Negligently failing to treat and cure Patty Smith's mental and emotional condition;
 - i. Negligently causing Patty Smith falsely to believe and to have false memories that her parents abused her sexually, physically, and emotionally when she was a child and teenager;
 - j. Negligently advising and encouraging Patty Smith to make the false accusation against the Plaintiffs;
 - k. Negligently reinforcing and failing to remove Patty Smith's false beliefs and false memories of abuse;
 - l. Negligently failing to advise and encourage Patty Smith to retract the false accusation against the Plaintiffs;
 - m. Negligently advising and encouraging Patty Smith not to retract the false accusation against the Plaintiffs; and
 - n. Other negligent acts and omissions.
13. On information and belief, the negligent conduct of Susan Lewis was and continues to be a cause of Patty Smith's false accusation and its nonretraction.
14. The Plaintiffs would not have given their consent to the diagnosis and treatment of their daughter, Patty Smith, by Defendant Susan Lewis.

15. On information and belief, the negligent conduct of Susan Lewis was and continues to be a cause of the damages Phyllis and Devlin Smith have suffered and continue to suffer.

Second Claim: Negligence of William James

16. On information and belief, since 2001, William James has acted negligently in providing psychotherapy to Patty Smith, by
 - a. Negligently undertaking to provide therapeutic services he was not competent to provide;
 - b. Negligently failing to obtain Patty Smith's informed consent to diagnosis and treatment;
 - c. Negligently employing inappropriate and harmful methods of diagnosis, including Rorschach and other projective tests;
 - d. Negligently failing to diagnose Patty Smith's mental and emotional condition correctly;
 - e. Negligently and mistakenly diagnosing Patty's condition as "multiple personality disorder," "dissociative identity disorder," and "post-traumatic stress disorder";
 - f. Negligently employing inappropriate and harmful methods of treatment;
 - g. Negligently failing to treat and cure Patty Smith's mental and emotional condition;
 - h. Negligently causing Patty Smith falsely to believe and to have false memories that her parents abused her sexually, physically, and emotionally when she was a child and teenager;
 - i. Negligently reinforcing and failing to remove Patty Smith's false beliefs and false memories of abuse;
 - j. Negligently failing to advise and encourage Patty Smith to retract the false accusation against the Plaintiffs;
 - k. Negligently advising and encouraging Patty Smith not to retract the false accusation against the Plaintiffs; and
 - l. Other negligent acts and omissions.

17. On information and belief, William James supervised, consulted, associated, collaborated, and cooperated with Susan Lewis in providing psychotherapy to Patty Smith.
18. On information and belief, William James negligently failed to take reasonable steps to ensure that Susan Lewis complied with the applicable standard of care in treating Patty Smith.
19. On information and belief, the negligent conduct of William James was and continues to be a cause of Patty Smith's failure to retract her false accusation against Phyllis and Devlin Smith.
20. On information and belief, the negligent conduct of William James was and continues to be a cause of the damages Phyllis and Devlin Smith have suffered and continue to suffer.

WHEREFORE, the Plaintiffs demand judgment:

1. Awarding the Plaintiffs damages against the Defendants in amounts to be determined at trial;
2. Awarding the Plaintiffs such other relief as the court deems just.

Dated: November 17, 2004.

MEYER & RAWLINS, S.C.

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