When Does Healthcare Ethics Consultation Constitute the Practice of Law?

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Anya E. R. Prince & Arlene M. Davis, *Navigating Professional Norms in an Interprofessional Environment: The 'Practice' of Healthcare Ethics Committees*, 15 **Conn. Pub. Int. L.J.** 115 (2016), available at SSRN.

Following the New Jersey Supreme Court's endorsement of healthcare ethics committees (HCECs) in its 1976 decision, *In the Matter of Karen Quinlan*, HCECs have become ubiquitous features of health care institutions throughout the United States. In addition to developing policies and providing education about ethical issues in medicine, HCECs play a central role in resolving ethical conflicts related to the care of particular patients. While most HCECs do not purport to issue binding determinations, the manner in which they frame ethical issues and present options for consideration can have significant impacts on how disputes are resolved.

In a thoughtful and comprehensive article published in the *Connecticut Public Interest Law Journal*, Anya Prince and Arlene Davis consider "whether participation in ethics consultations could be considered the practice of law." The consequences of characterizing ethics consultations as a type of legal practice are potentially significant. Non-attorney HCEC members, or attorney members who are not licensed in the HCEC's jurisdiction, could be subject to civil or criminal penalties for the unauthorized practice of law. Even attorneys who are licensed in the HCEC's jurisdiction might run into problems when serving as HCEC members, as they might find it difficult to comply with professional legal obligations "that may be at odds with the expectations and professional rules of the ethics committee itself."

As Prince and Davis explain, many of the most common issues that HCECs address have clear legal dimensions. For example, HCECs may be involved in disputes over whether a patient has decision-making capacity, or, for patients determined to lack capacity, the identification of an appropriate surrogate decision-maker. They also may be called upon when patients or surrogates insist on treatment that a health care provider considers ineffective or "futile." The appropriate resolution of these questions requires not only on ethical analysis but also familiarity with the legal parameters established by applicable caselaw and legislation.

Prince and Davis identify five tests that have been used to determine when an activity constitutes the "practice of law." The first, which they describe as the "most expansive" of the five, asks whether an activity "affects legal rights." They argue that many aspects of HCECs' work could be considered the practice of law under this definition, "especially given that one of the initial motivations of HCECs was to avoid litigation of complicated medical-ethical issues." The second test is whether the activity in question is "commonly understood in the community to be the domain of attorneys." Here, too, they suggest that HCECs could "cross the line into the practice of law" if they "engage in problem-solving" with respect to "complex issues that are commonly associated with law."

The third test involves a distinction between providing legal information — which does not constitute the practice of law — and "applying law to specific facts," which could be considered to "jump[] into the realm of [legal] opinion and advice." Prince and Davis note that the distinction between providing information and giving legal advice has arisen in debates over the scope of activities that may be performed by non-attorney mediators. For example, guidance in Virginia prohibits non-attorney

mediators from offering "legal advice," which is defined under state law as "the application of legal principles to facts 'in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as means of resolving a legal issue.'" They argue that HCEC members could potentially cross this line "through detailed analysis of how case law may apply to a specific consult or what the outcome of potential litigation may be."

The final two tests that Prince and Davis discuss are whether an individual believes she is receiving legal services (the "client reliance" test), and whether the activity results in the creation of "a relationship that looks like the attorney-client relationship." Both tests could potentially pose problems for HCEC members, particularly those who are also attorneys. In this regard, Prince and Davis cite a survey of physicians in Maryland in which two-thirds of respondents thought that "providing legal advice" was an appropriate HEC function. They argue that these results "suggest[] that physicians may expect a certain amount of legal analysis and opinion from ethics consultations." Even if these expectations are mistaken, in some circumstances they could be sufficient to form "an implicit attorney-client relationship."

Having concluded that "HCE consultants may be held as engaging in the practice of law under several of the five common legal tests," Prince and Davis make several practical recommendations for HCEC members. For example, they counsel HCE members to "limit[] in-depth analysis and application of the facts of the consultation to case law and potential litigation outcomes," and to "make explicitly clear when interacting with individuals as part of the consult that they are not providing legal services and that the parties may want to seek outside legal advice." They also call on professional associations, including the American Bar Association, to issue guidance on the distinction between engaging in ethics consultations and practicing law, similar to guidance the association has already issued in the area of mediation.

Price and Davis recognize that, unlike many other professional turf battles — such as the conflict between dentists and non-professional teeth whitening services at issue in the Supreme Court's 2015 decision in *North Carolina State Board of Dental Examiners v. FTC*, or disputes between lawyers and online legal document services like LegalZoom — there is little economic incentive for the legal profession to bring actions against HCEC members for the unauthorized practice of law. It is not as if there is a lucrative market for hospital-based ethics consultations, which private attorneys are eager to exploit. Nonetheless, they argue that HCEC members should still be careful about overstepping their bounds because "[i]ndividuals who are providing legal services should be competent to do so or the public may be harmed."

Prince and Davis' article makes an important contribution to the literature on the practice of healthcare ethics consultation. It is highly recommended for both members of HCECs and policy-makers charged with defining the concept of the unauthorized practice of law.

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