Lawyers

Fast Facts:

Lawyers historically have been responsible for peacefully resolving disputes and preventing battle.

Competence, not zealousness, is the current standard of professional behavior.

In practicing loyal advocacy and competence, consider involving physical and mental health professionals who could help your client, legalizing apologies, trying alternative dispute resolution, and recognizing truth as the goal of the justice system.

Lawyers who heal and counsel not only enhance the profession's public image, but better discharge the duty of competence they owe their clients.

as Healers

Feel better about yourself and the law through six simple suggestions

By John W. Allen

At the May, 2001 graduation of the University of Michigan Medical School, the Surgeon General of the United States, David Satcher, gave a stirring commencement address on "The Twenty-First Century Physician: Opportunities and Challenges." He called these new medical professionals to a career in healing, which compelled all those in attendance to envy the constructive and hopeful futures emerging before these new doctors.

But must such constructive and hopeful roles be reserved only for healthcare professionals? Cannot lawyers also be healers? Is healing inconsistent with our duties as advocates and counselors? Do lawyers have a duty to assist clients in healing techniques? How can a lawyer be a healer?

The History of Lawyers as Healers

The history of lawyers—even trial lawyers—is not to do battle, but to prevent it. In the early 12th century, faced with increasing incidents of violence and with the local nobles assembling private armies, Henry II systemized the earlier experiments of his grandfather, Henry I, by sending his "court" (in the form of traveling justices) on regular circuits through his realm.[1] The purpose was to substitute the peaceful resolution of disputes, for the old method of trial by battle.[2] Advocates soon emerged to represent those appearing at the local "court," and the tradition of Anglo-American lawyering was born. From the beginning, the lawyers were intended to remove the sting and cleavings of "trial by battle." Thus, even for litigators, our history emphasizes our role to *resolve* disputes, not to create them.

This duty continues today in the Michigan Lawyers' Oath, which states:

> *I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;*
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> *I will employ for the purpose of maintaining the causes confided to me such means only as consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.*[3]

Modern leaders of the profession have reaffirmed our duty as healers. Twenty years ago, U.S. Supreme Court Justice Warren Berger, frequently a candid and healthy critic of our profession, observed:

> *The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts.*
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> *Law schools have traditionally steeped the students in the adversary tradition rather than in the skills of resolving conflicts.*[4] (Emphasis added.)

"Zealous" Advocacy is NOT the Law

Some will respond that lawyers' ethics require "zealous" advocacy and that every cause must be pursued with warm zeal, bound only by the outer requirements of the law. Legally, this is just wrong, and it has been legally wrong for almost one hundred years. As observed by a member of the neighboring Indiana bar, "too many lawyers hide behind the ethical duty of zealous advocacy to justify all manner of outrageous misconduct."[5]

In fact, "zealousness" has not been part of the lawyers' ethical canons since the 1908 canons were replaced in 1969 by the Model Code of Professional Responsibility (MCPR), Canon 7 of which stated: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Even under MCPR, this was only an "axiomatic norm" and not a standard of conduct, nor a rule of discipline. The Model Rules of Professional Conduct (MRPC), proposed by the ABA in 1983 and adopted by Michigan in 1988, eliminate "zealousness" entirely from any of their text. Instead, the principal duties of the lawyer to the client are sometimes referred to as the "Six *C*s," and can be summarized as follows:

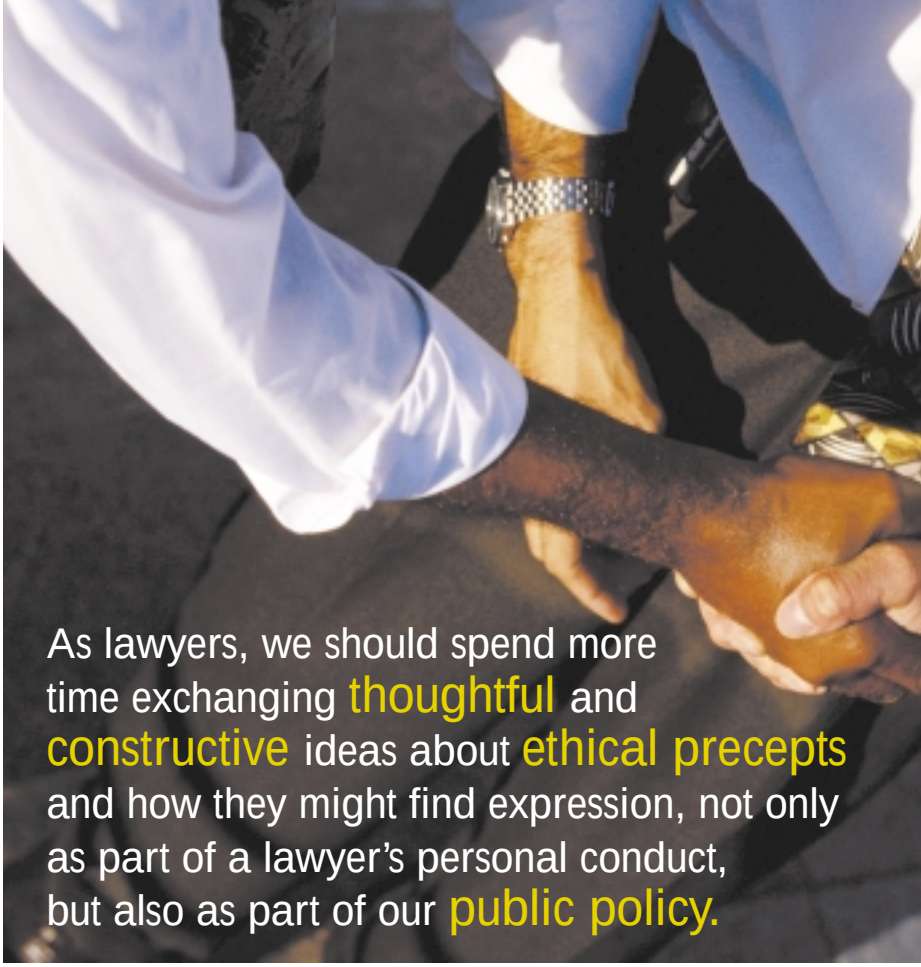
- Choice of Client (MRPC 1.2)
- Competence (MRPC 1.1 and 1.3)
- Communication (MRPC 1.4)
- Confidentiality (MRPC 1.6)
- Conflict Avoidance (MRPC 1.7–1.9)
- Candor (MRPC 4.1, 4.3, 3.3 and 3.4)

Thus "competence," not "zealousness," is the standard of professional behavior for lawyers in the 21st century. Yet, the Rules of Professional Conduct provide little guidance, beyond the minimum of required conduct, unlike the former Code of Professional Responsibility, which also contained "Ethical Considerations," the aspirational objective toward which every professional should strive. These were not mandatory and were never intended to be a basis for imposing discipline. Nevertheless, the "ECs" were abused in both disciplinary

proceedings and civil litigation, generating the pressure that deleted them from the Model Rules of Professional Conduct. This has created an "aspirational void" in lawyers' ethics which has never been replaced. Sadly, this void has also been ignored by the current work of the ABA Commission on the Evaluation of the Rules of Professional Conduct (sometimes called "Ethics 2000").[6]

But no ethical palette is complete without exhortation to aspirational goals. Our reach should always exceed our grasp. Clients want this. Lawyers desire this. And the public demands this. All ethical guidance need not be dictated by the American Bar Association or the Michigan Supreme Court. The MRPC are quasi-criminal, strict liability rules of discipline and minimum standards of acceptable conduct; on the other hand, true ethical guidance has its origins within each of us and is not imposed by an outside authority.

As lawyers, we should spend more time exchanging thoughtful and constructive ideas about ethical precepts and how they might find expression, not only as part of a lawyer's personal conduct, but also as part of our public policy. Our profession needs to help by encouraging more of those exchanges. We all need the help.



Reinforced by unrepresentative incidents of professional misconduct, as well as their frequent choice as a topic for melodrama, lawyers have been the victim of public misperception, characterized by a "win at any cost" mentality, lack of civility, and disregard for basic truth and morals. Worse yet, developments in the law of lawyers' professional liability sometimes seem to penalize the lawyer who dares to assert anything less than every legal right or defense, no matter how thin the gruel. Responsible advocacy should encourage "counseling," not forbid it.

For instance, competence and loyal advocacy is not inconsistent with a holistic approach, involving interdisciplinary assistance from other professionals and a revisiting of our historical role as those who prevent and end battles, not just start them.

Six Simple Suggestions:

1. Changing Your Business Card

It's time for "back to the future." We are not just those who substitute for others (attorneys), but also those who give advice. On each of our professional designations, titles, business cards, and stationery, every lawyer should add the word *counselor.* It will remind us of our higher calling.

2. Involving Other Professionals Where Appropriate

Do a favor to both the client and yourself by making it a regular practice to refer the client to the professional best able to resolve personal and emotional dilemmas. Even if the client decides against pursuing available legal relief, it will give the client the best chance for total health. If the lawyer is engaged by the client, it will make the lawyer's task easier; after all, the physically and emotionally healthy client is better able to evaluate alternatives, make lasting decisions, give sound direction, and reach reasonable results.

Good examples are found in the "Three *D*s" of catastrophic emotional separation: Death, Divorce, and Discharge.

- **Death.** Few events are more devastating than the loss of a companion or close family member. Emotional counselors (priest, minister, rabbi, psychiatrist, or psychologist) provide important support, for which the lawyer is neither trained nor usually inclined. Whenever possible, important decisions should be delayed until after the "decent interval," which permits such counselors to do their work.
- **Divorce.** Barring exigent circumstances (such as domestic violence or irreparable property loss), all prospective divorce clients should be referred to marriage counselors as the lawyer's "requirement" before starting any court action. Once the lawsuit is begun, most opportunities for remediation are almost always irretrievably lost. The toothpaste cannot be put back into the tube. While going through the divorce, professional counseling is even more important.
- **Discharge.** Dealing with the loss of a job is difficult, on both sides of the termination decision. The break-up of a business also usually involves the loss of job, for at least one or more of the participants. Bankruptcy can feature the same problems. Our society is ill-equipped to support people in these situations unless they seek help for themselves from a qualified counselor. Truly ethical lawyers attempt to serve these client needs, even if it means forbearing engagements and income.

3. Legalizing the Apology

A principal conclusion of the Harvard Negotiation Project (''Getting to Yes'') is the importance of symbolic gestures in making agreements and ending disputes:

> *On many occasions an apology can diffuse emotions effectively, even when you do not acknowledge personal responsibility for the action or admit an intention to harm. An apology may be one of the least costly and most rewarding investments you can make.*[7]

Several United States jurisdictions have already acted to ''take the insult out of the injury'' by enacting statutory or rule provisions that make expressions of compassion or commiseration inadmissible, especially when made upon the impulse of benevolence or sympathy. Court decisions permit this in Vermont, and statutes have been enacted by Massachusetts and Georgia.

California has 2000 Cal ALS 195, Stats 2000 ch 195 effective January 1, 2001, which provides that ''the portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action.''

The Washington State Bar has proposed an amendment to Rule of Evidence 408 that would add:

> *Evidence of an apology or benevolent gesture or sympathy is not admissible to prove liability or fault for, or invalidity of, a claim of civil wrong.*[8]

Michigan lawyers agree. Richard L. Halpert, a prominent personal injury lawyer, has recently said:

> *Often times, all the injured person is looking for is recognition of their suffering and a sincere apology from the person who created the problem . . . . Lawyers who are interested in helping their clients recover from their injuries emotionally, psychologically, personally—not just financially—will find that an apology means a lot more than a larger check without the apology.*[9]

Of course, the fear continues that even good faith apologies will be used as admissions of liability or comparative negligence and that insurers will argue that expressions of sympathy violate the ''cooperation'' clause in the insurance policies. These problems also deserve attention by statutory or rule amendment.

In addition, lawyers should seek amendment of Federal and Michigan Rules of Evidence 407 (subsequent remedial measures) and 408 (settlement discussions) to treat an expression of apology or regret like an offer of compromise or settlement discussion, or as a subsequent remedial measure. Amicable resolution would be easier, and it would also recognize that the repair of emotions is just as important as fixing the crack in the sidewalk or the defect in a machine.

4. Avoiding the Next Fight

Alternative Dispute Resolution (ADR) will become more frequent in a variety of forms, under new Michigan Court Rules 2.403–2.411. The extraordinary expense and time commonly encountered in litigation mandate that alternatives be considered for the settlement of every lawsuit. Even when litigation winds on in an initial dispute between parties, its eventual settlement at least allows the consideration of ADR for future controversies between or among the same parties. In Michigan, the use of ADR is virtually certain in both state and federal trial courts. Why not anticipate this by using ADR even before the litigation begins? Large amounts of transactional costs could thus be saved.

5. Recognizing Truth as a Goal of the Justice System

The Rules of Professional Conduct are clear in making truth an important value for all lawyers and judges. But the public now entertains a quite different view, relying upon frequent news media reports of the parsing of discovery responses, flat refusals to provide evidence, and even a lawyer/President of the United States being found in contempt of court for lying under oath.

The now countless Codes of Civility enacted in almost every court reinforce the requirements of candor under the Rules of Professional Conduct. The principal duties of compliance lie with the lawyers who advise clients in the discovery and trial process. Reality and experience compel candid lawyers to admit that it is not the client who suggests withholding a document or shaving the definitions of a discovery request and response. What lawyers have done, we must undo.

But there is also a need for courts and judges to take seriously their duty to supervise full disclosure in the discovery process, while still preserving the policies inherent in the protection of privilege and the limits of relevance. The rules against the intentional withholding of information, as well as the oath that the lawyer ''will never seek to mislead,'' provide more than sufficient authority for active judicial case management.

6. Counseling in the Law School Curriculum

Whether denominated as ethics or professionalism, counseling and healing should also be part of every law school curriculum. While many schools already offer some expression of this art as an elective, consideration should be given to some required attendance, at least at presentations offered by the State Bar of Michigan for that purpose.

Rediscovering Our Origins

Lawyers who are healers do not compromise their ethics or the interests of their clients. On the contrary, more fully realizing our roles as counselors not only enhances our image with the public, but better discharges the duty of ''competence'' we owe to all of our clients. You can begin by sending the *Bar Journal* your own suggestions for how lawyers can be healers, or simply by discussing those ideas with your colleagues. By rediscovering our historical origins as the settlors of disputes, we open opportunities to rediscover what brought most of us to the profession in the first place—the power and majesty of the law as a professional calling worthy of nobility, courage, and sacrifice. ✦

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Footnotes

1. Plucknett, ''History of the Common Law,'' p 103 (Little Brown and Co., New York, 5th Ed., 1956).
2. Taswell-Landmeed, *English Constitutional History*, p 58 (Houghton, Mifflin Co., Boston, 1960).
3. Michigan Rules Concerning the State Bar, Rule 15, § 3(1), Clauses 4 and 5.
4. Annual Report on the State of the U.S. Judiciary, given to the American Bar Association Annual Meeting in Chicago, Illinois, on January 24, 1982, as reported by the *ABA Journal*, Vol 68, pp 274–277 (March, 1982).
5. Indiana Bar Journal, *Res Gestae*, p 46 (March 2001).
6. The Commission's ''Final'' Report is still being debated in the ABA House of Delegates, and ''Ethics 2000'' is looking more like ''Ethics 2003'' or later.
7. Fisher, Robert and Ury, William, *Getting to Yes, Negotiating an Agreement Without Giving In*, p 32 (Penguin Books, 1991 (2nd Ed.), New York).
8. Peterson, Jan, Eric, *Washington State Bar News* (May, 2001, p 13). Keeva, Steven, *Does Law Mean Never Having to Say Your Sorry*, Transforming Practices.com (webpage).
9. Volume 15 *Michigan Lawyers Weekly*, #28, May 14, 2001, pp 1 and 17.