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AS HE LAY DYING, a certain lawyer mused about many things. He thought of the men of the law, and of the men of medicine, in whose hands his hope of life then lay, and of other things.

One odd thought kept returning, a thought of some of the mighty men of the law—friends and acquaintances, dedicated like himself to law and justice. Almost he could see them—Mel Belli at the head of his bed, Perry Nichols at the foot of it, Al Averbach at his left hand, and Craig Spangenberg at his right; and many others.

The ghostly figures stood there silently. He half smiled to think of it—musing to himself: "Much help they could be to me now, the paladins of the law! One physician, now—any physician—is worth more to me *now* than all the lawyers in the world."

Many times he had viewed it quite otherwise, in the court room, in the law office, in the law school! Then *his* profession, *his* way of life, had seemed far more significant than those of any medical men. Law is the basis of all civilization. Yet, how natural that, in the fear of death, the physician should seem so much the more important man! Many times, as a lawyer, he had seen the physician only as an exasperatingly hostile figure.

Every lawyer might do well to imagine his own thoughts in a like situation. Very likely he then would determine, were he fated to survive, to do what he could to help heal the ominous breach between the two great callings. For a breach there is; one that grows wider every day. Bitterness between the two great professions grows more ominous daily.

There is no need to recapitulate all the grievances of each profession against the other. They are far too well-known already. Yet it is ironic how the grievances of each one balances out those of the others.

For the lawyers' complaints of doctors' refusals to testify,

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[*Editors' Note:* This is a paper delivered by the author to a national convention of personal injury lawyers at the Belli Seminar in conjunction with the annual NACCA convention, held in Miami Beach, Florida in mid-August 1958.]

there are the doctors' complaints of some lawyers' sadistic cross-examinations.

For the doctors' complaints of mounting malpractice suits, there are the lawyers' complaints of some doctors' arrogant claims of privilege not to be questioned by non-doctors.

There is little point in ticking off all the grievances of each profession. Much more useful would be an objective itemization of what each profession *properly* wants of the other, and what can be done to attain these wants.

The irony of the situation is that the doctors generally do not want to belittle the lawyers, nor do the lawyers generally want to belittle doctors; *but many doctors now believe that lawyers generally are hostile to them, and vice versa.*

This belief, erroneous though it may be, is the source of most of the friction. It should not be so; but it is. Nor is it wise for either to shrug off the error by demanding that the others correct their own misconception. It is far wiser and more generous to try to help to correct it. A spirit of mutual respect and helpfulness is essential for reconciliation of the brother professions. When seventy five percent of cases on court calendars involve personal injury claims—as is true today—the Nation is entitled to demand that doctors and lawyers work harmoniously to achieve justice.

What, then, are the major subjects of friction between the professions, and what can be done about them?

Malpractice Suits

High on the list of doctors' grievances is the mounting tide of medical malpractice actions now being brought. When one out of every fifteen doctors now is being sued for malpractice (as is reported in the Los Angeles area), no wonder that the doctors view lawyers with fear and resentment! And when only five percent of these actions are successful on trial, while some money is collected by settlement in over fifty percent of the cases, the anger of the physicians is easy to understand.

Most doctors admit, without argument, that medicine is as much an art as a science. They admit that there are conflicting schools of thought on many medical matters. They do not pretend to be infallible. They readily acknowledge that they sometimes must work "by guess and by God." They do not deny that physicians who are culpably deficient in skill or in care should be held accountable. The vast majority of them are

heartsick when their efforts fail, and when a patient is hurt rather than helped by their ministrations.

If they have been portrayed as "infallible demigods" by imaginatively emotional writers, sensation mongers, movie scenarios, or even the A. M. A. public relations men, it is not the fault of the dedicated, hard-working practitioner. If laymen unthinkingly swallow every rapturous newspaper story of "miracle drugs" and science-fiction cures, the doctors themselves are the first to protest the misleading "reports." It is unfair to seize on every complaint of every misguided patient who expected a miracle and did not get it.

By no means does this suggest that actual malpractice should be condoned. It suggests only that lawyers should view with reasonable doubts many of the hysterical complaints against doctors, just as they are cautious about accusations of malpractice on the part of a lawyer. As it is now, there are many "attacks" on doctors made or aided by lawyers, from the viewpoint of the medical profession; while "attacks" by doctors on lawyers are relatively rare, from any viewpoint.

Both lawyers and doctors feel "two strikes against them" in the very *making* of any charge of professional malpractice. Hence the high percentage of settlement of medical malpractice claims, as compared with the low percentage of judgments. Professional courtesy, in or between professions, is not an aristocratic gentlemen's agreement at the public's expense. It is an integral part of the highly selective process of *qualification* for professional status. It means that, *prima facie,* the professional word or opinion of a doctor or a lawyer should be taken at face value, over a hot-tempered or malicious accusation of a disgruntled layman. And if this is undemocratic, aristocratic thinking, I refuse to withdraw it. Too long, in this country, have we valued the opinion of any lout or lunkhead, on matters requiring special training and skill, as equal to that of the professional man (the "egghead," to the lunkhead).

The vast majority of medical malpractice cases would evaporate if lawyers would view them critically rather than hopefully. A few telephone calls, *seeking objective truth rather than helpful evidence,* would dispose of many such claims. To view every such claim as prima facie valid (a "case," with the probability of settlement of *any* such "case") is a perversion of the lawyer's function. He is an officer of the court, as well as an advocate for his client—to repeat the well-known phrase that so often receives lip service.

What I am saying is nothing less than this:

It is the duty of the lawyer to discourage malpractice suits generally, except where they are reasonably well-founded. Not merely out of courtesy to physicians, but as a matter of duty to the law, the courts, the legal profession, and to society.

To cite only one fairly certain result of such a general professional policy—we can be sure that the doctors themselves will be far readier to help prosecute valid malpractice claims, when they know that lawyers will press such claims only in proper cases.

Doctors as Expert Witnesses

High on the list of lawyers' grievances is the difficulty of obtaining high calibre physicians as expert medical witnesses. Especially in cases charging medical malpractice, the reluctance of doctors to testify against each other has been often excoriated (frequently called "a conspiracy of silence") even by the courts —by judges who certainly are fair and objective in their views. In fact the doctors freely admit this reluctance, and point to the sharp disapproval of such testimony by the medical societies as a major reason.

To some extent this reluctance is natural. Few men enjoy attacking a member of their own profession. Whenever a man does so, to some extent he is undermining his own status.

The same difficulty applies, to a lesser extent, when doctors are asked to testify as expert witnesses for one side or the other in a case of personal injuries. Inevitably, this battle of experts tends to impugn the knowledge and ability of whichever physician is on the losing side. The fact that there may be two schools of thought, or different techniques applicable to the particular injury, is small consolation to the "losing" physician. In the eyes of the community, or at least of the jury, he feels implicit in the verdict a finding of deficiency on his own part. Closely connected with the same problem is the problem of expert witness fees. The physician naturally dislikes to have his expert witness fees set by non-physicians, as often is the case. He values his own time and knowledge highly, as well he should after spending perhaps half his life in merely qualifying as an expert. But the lawyer, with a desolate or impecunious client at his shoulder, and with his own pride of status to consider, bridles at the demand of perhaps hundreds of dollars for a few minutes of opinion evidence.

Then the final indignity, from the doctor's point of view, is the searching, and often devastating, cross-examination of his opinions and professional knowledge.

This last, more than most doctors will admit, is a source of very real fear. It is a rare case in which the lawyer cannot find some material in the medical literature with which to cast some doubt on a medical expert's opinion. Often it is easy to find conflicting theories, in medical treatises, on many medical subjects. The physician-witness is almost sure to be faced with contrary opinions of medical treatises, for example, in almost any case. Unaccustomed to legal debate, faced by a determined and skillful advocate, and spotlighted in the witness' chair, it is a rare physician who cannot be confused and harried into perspiring discomfort in a courtroom. No wonder that most doctors dislike the task!

A doctor with a cultivated courtroom manner (a good testifier) may easily carry the jury, despite the adverse testimony of another doctor with greater knowledge and integrity but with a less awe-inspiring courtroom manner. The adversary system of medical expert testimony makes the lawyer more interested in good testifiers than in good doctors.

In the doctor's natural habitat—the hospital—surrounded by nurses, orderlies and other hospital personnel sworn to unquestioning obedience, and with a patient desperately eager to believe in everything he says, the doctor is a lord. It is a heady wine of subservience that he drinks, in his hospital. What an unpleasant contrast is the critical, doubtful, contrary attitude of an opposing lawyer, in the lawyer's natural habitat—the courtroom!

That is the inherent nature of the situation of the doctor as a witness. Surely it calls for courteous restraint and sympathy from the lawyer, not gleeful attack on an already unhappy witness. The lawyer can and must do his professional duty as an advocate, when it requires the breaking down of the testimony of an adverse expert witness; but this can be done without rubbing salt into wounds that must be opened. It can be done without sadistic pleasure in the doctor's discomfiture.

I can testify, from my own experience, that doctors performing their duties on lawyer-patients certainly are especially considerate and courteous. The lawyers must do no less in extending courteous consideration to doctors on whom they must perform their duties.

Other Grievances

It is not my purpose to catalogue all the sources of friction between the two professions. Unhappily, they already are too well known to both.

The purpose of this paper is to present constructive suggestions—to suggest a cure—rather than to exacerbate the ills.

Then let us consider what can and should be done. It is surprisingly simple, in fact.

A Cure

One fact about the medical profession, a fact fully appreciated by few lawyers, suggests a simple and effective cure for the trouble.

The fact is—the *retired,* elderly but very able hospital staff physicians, of whom there are more than enough to serve all the needs of the courts and the legal profession.

In every major city in the United States there is at least one hospital medical center; in almost *every* city, for that matter. Its staff department heads usually are the best doctors in the area in their respective specialties.

And usually these top medical men retire (or are retired) from full-scale practice, completely or partially, when they reach their sixties. In fact this is a real human-relations problem in many cases. Skilled specialists, at the peak of their mental powers and knowledge, but with hands and eyes not so sure as they used to be, are retired from full-scale practice, often against their wills.

These *emeritus* medical leaders, usually financially secure, still keenly interested and alert, usually are more than willing to do useful work. They have the status, they have the time, they have the will, and they have the knowledge that lawyers need in medical expert witnesses. Incidentally, too, they normally are the dominant figures in the medical societies. Their neglect by the legal profession, to date, has been a great waste. Few practicing lawyers know any of them; or, knowing them, think to call them when medical experts are needed. Only some defense lawyers, ordinarily, seem to call these elder statesmen of medicine; and that only occasionally.

They are the answer to the problem.

There is one other fact that lawyers must acknowledge before they rightfully can demand full cooperation from the medical profession. That is the fact that many medicolegal and other

technical problems are simply beyond the grasp of most jurors.

In their secret hearts, many trial lawyers know this. They know that, all too often, in a complex medicolegal case, the jurors hardly know what the expert medical testimony really means. It simply is too technical and too complex for them. They reach a verdict, because they must, on the medicolegal nature of an injury, with only a foggy notion of what the thing is all about. Many a lawyer with some experience in medicolegal matters feels the same uncertainty in many a case.

I would be the last one to advocate elimination of the right to trial by jury. But it cannot honestly be doubted that many technical matters are simply too complex for sound decision by laymen clerks, salesmen or housewives. The question of medical probability of causation, for example, often finds both doctors and lawyers quite uncertain and confused. In such cases a jury verdict comes very close to decision "by tossing a coin"—or by the emotional influence of "pathetic injuries" or of a "soul-less corporation." No morally honest lawyer can properly desire such a result—and that is the result, far too often.

Yet, the doctors' repeated suggestions for wider use of impartial medical-expert boards, to serve as finders of technical facts, are bitterly opposed by some lawyers. Nor does the fact of successful use of such boards in pretrial (e.g., for five years in New York City, Baltimore, and elsewhere) remove this opposition. Quite the contrary, some lawyers scornfully say that such boards only serve to add a third expert opinion to the two already obtained by plaintiff and defendant. Ignored, in this argument, is the overwhelming probative weight of a finding by impartial experts, as compared with findings of hired experts.

If a court is acknowledged to have power to appoint special masters or examiners to make findings in complex problems, or to take away from a jury such involved problems as financial accountings, why should it not do the same with complex medicolegal problems! The court *can,* and *should* do so, in proper cases.

The *courts* probably will have to adopt these rules. It seems clear that most bar associations now are so fragmented, and so dominated by hidebound politician-lawyers, that little prompt action can be hoped for from them.

Why not, for example, have court rules permitting the referring of complex medicolegal findings-of-fact to impartial medical boards of emeritus physicians! Questions of liability, of course,

must remain in the courts. Why not, at the same time, preserve the jury system by confining individual party rights to cross-examination to *one trial-witness representative of the impartial medical board!* Thus the benefit of objective expert testimony can be had, while the basic right to jury trial is preserved. This means elimination of both plaintiffs' and defendants' hired experts. It means use of *one* technical report, from *one* disinterested source.

The courts can readily obtain the cooperation of the emeritus physicians connected with recognized hospital and clinic centers. It will take little pressure to have the hospitals set up boards of specialist-emeritus-physicians to examine injured plaintiffs and make objective reports and prognoses. Similar requests from individual lawyers receive cool receptions, and such requests from local bar associations seem to result only in bickering, politicking, and futility.

Recently, for example, in Cleveland one bar association and the medical society agreed to cooperate in forming and using impartial medical-expert boards. Promptly, the other Cleveland bar association and some plaintiffs' lawyers rose in opposition. Result!—no constructive action.

A year ago, addressing hundreds of NACCA Lawyers at the annual Belli Seminar, in New York, I tried to point out some reforms in negligence practice that should be made by lawyers' associations themselves.[1] These were suggestions often made, in bits and pieces, by many lawyers in many parts of the country. They were not a personal exposition of personal holier-than-thou thoughts. Such leaders of the bar as Belli of California, Spangenberg of Ohio, and Averbach of New York, supported my suggestions. Result!—A very small but very vociferous minority of plaintiffs' lawyers very nearly shouted me down; to the indignation of most of the NACCA men present, it must be added. But the lesson was plain. A few obstreperous opponents can easily block self-corrective action by a lawyers' organization. The more public-spirited men are too busy, too dainty, or too disgusted to fight off the carpers and self-servers. The shocking wholesale indictments for ambulance chasing that began in Brooklyn, N. Y. in late June 1958 were the grim answer to those who succeeded in blocking self-reforms last year. 14 lawyers, 8 physicians, 3 insurance company adjusters, and 11 others, pre-

[1] Oleck, "Reforms Needed in Negligence Practice," 6 Clev.-Mar. L. Rev. 388 (1957); 1957 Trial and Tort Trends, 136-162.

sented for indictment and/or disciplinary proceedings in only the first day of that sordid series of prosecutions, in a single county! How long can such spectacles be tolerated!

In medical society professional self-discipline, also, the same inertia is plainly apparent. Physicians generally refuse to get involved in debates, committee conferences, and arguments—much as they may favor action to improve discipline and inter-professional relations pro bono publico. Here too, the hidebound physician-politicians take control, again by default.

It seems to be up to the courts—unless the bar associations act soon.

If the courts cannot or will not correct the situation, then the people will—the people, represented by politicians scornful of both the bar associations and the medical societies.

Perhaps the late Arthur Vanderbilt was right, when he said that ultimately all important court reforms come when the people, fed up with bar association wrangling, take matters into their own hands! More accurately, into the hands of politicians who are professionals in politics, not in law or medicine.

The problems of medical-legal professional relations, of clogged court calendars, of unbridled selfishness in a few professional men sworn to public service, obviously are near the point of violent public reaction, against both professions.

There is still time for the lawyers—supposedly the leaders of public opinion and action—to speed the process of necessary reorganization. No profession has a right to claim a vested interest in "things as they are," at the expense of the public welfare.

I, for one, know enough doctors and enough about doctors, to be sure that the medical profession will cooperate wholeheartedly, if the lawyers (on whom the burden of court and public progress properly rests) will lead the way with courtesy, consideration, and good will.

Conclusion

A committee of bar association "elder statesmen," from NACCA, cooperating with a like committee from the major insurance lawyers association, should approach the American Medical Association and suggest appointment of a national committee of doctors and lawyers, to establish mutually approved policies and procedures. Failing action by the most affected personal-injury bar associations, the American Bar Association might

be the logical moving force. It already has recommended (in 1957) the adoption of the impartial medical expert system used in New York City and Baltimore; but has not managed to effectuate the idea. Either way, the plans for establishing principles of participation should be based on full use of the retired and semi-retired medical experts, whose services have so long been neglected. Elaboration of the plans, thereafter, to the state and local hospital or city level of active procedure, must be pressed promptly. Whether these procedures shall be based on simply interprofessional agreements, or on court adoption of rules suggested, should be a matter of local preference.

The same approach might well be applied to relations between the bar and the profession of engineering and other professions.

Lacking such public-spirited action by the bar and by medical societies, it will be interesting to see what happens to professions that lose their sense of public mission.