

Attorneys as Healers: Rediscovering the Law's Problem-Solving Tradition

Charlie Asher
March 21, 2006

Under various banners (“collaborative law,” “cooperative law,” “holistic law,” “conciliatory practice,” “therapeutic justice,” and others), more and more attorneys and judges have been reaching out for ways that family cases can be handled to protect the true and broadest interests of clients and their families. While once the conflict between the legal claims of the named parties was the focus, now relationships, the emotional recovery of the parties, nurturing family members’ capacity to move on and find their own answers, the interests of children, the ability of parents to successfully cooperate for the sake of their children, and the law’s duty not to further damage and polarize the family have come to occupy more of the law’s concern.

In short, while rights and the conflict between them used to be the law’s chief concern in family cases, in recent years helping the family to work (or work again) by meeting the needs of its members and relationships is becoming the guiding goal of the law’s involvement with families in transition.

One of the most hopeful and pleasant discoveries of courts using these approaches is just how good and animated attorneys can be when they work in partnerships to find solutions with families.

Yet a minority of attorneys can still be heard to say that “real lawyers are about the fight.” Their claim is usually that something new, soft-headed, and even dangerous inheres in the approach of lawyers who see a duty to consider a client’s broader interests in his family, his community, and peace within his relationships.

Are these critics right? One look at some of the source documents of the true values of the legal profession shows how far they have strayed from lawyers’ true calling as healers of conflict. Indeed, the lawyer is no more justified in “giving the client whatever he wants” than the physician is justified in providing whatever dangerous drugs or treatment the patient requests.

Here now are just a few of those authorities.

1. “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a

superior opportunity of being a good man. There will still be business enough.

“Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.”¹ (Abraham Lincoln, Notes of July 1, 1850)

2. “Dear Sir:

“Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you \$600 to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you.

“You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making \$600 in some other way.

“Most Sincerely Yours,

“A. Lincoln” (Letter of Abraham Lincoln to would-be collection client)

3. “My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature. . . . I realized the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.” Mahatma Gandhi, *The Story of My Experiments with the Truth*

4. “This healing function ought to be the primary role of the lawyer in the highest conception of our profession.” Chief Justice Warren Burger

¹ A couple of remarkable things fly off this page of Lincoln’s notes. For one thing, he virtually assumes peace-making as a primary duty of attorneys. Beyond that, given his proposal that attorneys who stir up strife between neighbors be driven out of the profession, what would he have said about anyone who—intentionally or carelessly—did so in a family case? Lincoln, of course, practiced long before out-of-wedlock birth rates of over 30% and divorce rates of over 40%. Plainly he’d be horrified to think any attorney in family cases wouldn’t be seeking peaceful resolutions whenever and wherever possible.

5. “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.” Preamble to Model Rules of Professional Conduct.
6. “As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations **and explains their practical implications**². . . . **As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client.**”³ Id.
7. “As a public citizen, a lawyer should seek improvement of the law . . . and the quality of service rendered by the legal profession. . . . A lawyer should be mindful of deficiencies in the administration of justice. . . . **A lawyer . . . should help the bar regulate itself in the public interest. . . . The legal profession is largely self-governing. . . . The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.**” Id.⁴
8. “Winning is not an end; it is often only the beginning. Peace is the end, and healing is the journey toward peace.” David T. Link, Dean Emeritus, Notre Dame University Law School
9. “Lawyers have an opportunity to provide healing and support when people are hurting. To be able to enter into people’s lives in a terrible time of need and to provide them with hope and support—to find them a path to bring some good out of that bad—is a wonderful thing for lawyers to be able to do.” Janine Geske, Former Justice Wisconsin Supreme Court
10. “Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation: ‘I do solemnly swear or affirm that: I will support the Constitution of the United States and the

² How often does the warrior family attorney explain to his client the likely return volleys from his first piece of gratuitously aggressive advocacy?

³ Some attorneys express shock on reading in the Model Rules of Professional Conduct this description of the attorney as spokesperson for his client’s nominal adversary.

⁴ I once asked a particularly adversarial attorney why he was taking a family back to court when it was obvious the entire family functioned worse following each visit to court (I was GAL for the children). His explanation was, “That’s just what we do in these cases.” The Rules of Professional Conduct specifically clarify that the law’s processes are to serve the public’s needs, not the other way around.

Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; **I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust,**⁵ but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; **I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged**⁶; **I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest;** I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God.” Rule 22, Indiana Rules for Admission to the Bar and the Discipline of Attorneys.

11. “The entire legal profession . . . has become so mesmerized with the stimulation of the courtroom contest, that we tend to forget that we ought to be healers of conflict. . . . Trial by adversarial contest must in time go the way of the ancient trial by battle and blood. . . . Our system has become too costly, too painful, too destructive, too inefficient for truly civilized people.” Chief Justice Warren Burger, 1984.
12. “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. Comment 1 to Rule of Professional Conduct 1.3.

⁵ Lawyers are clearly invested with such broad authority and responsibility by this oath—so much so that it’s only logical we should be discussing matters of justice regularly and not justifying our involvement as that of mere functionaries. It’s noteworthy that each lawyer is called on to use his or her *personal* good judgment to say whether the action, proceeding, or defense appears just or unjust.

⁶ Query: How could any family—or even an individual client—ever be helped by offensive attorney behavior? The practice should be stopped by the most diligent commitment of courts and bar associations.