Traditionally, members of the learned professions have been mutually sympathetic. Unfortunately, the malpractice crisis continues to produce abrasive reminders of how that relationship has been seriously disrupted. On January 17, 1989, the Boston Globe published an op-ed piece written by an attorney without indicating whether it was solicited by the Globe or, having been spontaneously submitted, passed their review process. "The Myths of Malpractice" combined unexceptionable constructive material with considerable artful omission. The author cited financial burdens on plaintiffs should a screening panel find a malpractice case to be without merit, but managed to omit mentioning cases with fat contingency fees for lawyers and no risk to the plaintiff. He emphasized the discouraging cost of hiring a medical expert to write a report at fees exceeding $300.00 an hour without reporting lawyers' hourly charges. He was exercised by the reluctance of many physicians to testify, but neglected to mention that courtroom appearance, the attorney's natural turf, is quite unnatural for the physician for whom it represents time wasted—unproductive and lost from his professional, personal or scientific life. Nor does the author acknowledge that reluctance to testify is also a natural response to unpleasantness stemming from the fundamentally divergent practices of the two learned professions: the adversary system conditions lawyers to try to win at almost all costs including impugning witnesses' credibility. Medical training, with elements of humanism, and an awareness of the mutability of scientific evidence, does not prepare physicians for such encounters.

Recently, physicians have become aware of the thoroughness with which malpractice lawyers study the medical literature and attain remarkable sophistication in items pertinent to cases they strive to win. The occasional malpractice-related articles in medical journals, contributed by attorneys and even physician-attorneys, alert us to this and other pitfalls of malpractice suits, how to conduct oneself in dealing with lawyers and even how to perform in court. (A lawyer once remarked that a trial is like a play with witnesses appearing in attorney-directed roles). Helpful as it may be, the sanitized malpractice advice in the medical literature fails to expose in raw detail the gut level material infesting the legal literature.

The author of the piece in the Boston Globe probably subscribes to the American Bar Association Journal. Physicians would do well occasionally to read that authoritative publication. Its August 1, 1988 number features an article entitled "Pressure Points: Tactics for Taking Your Witness by Surprise" by James W. McElhaney, Esq, the Joseph C. Hostetler Professor of Trial Practice and Advocacy at Case Western Reserve School of Law and also a senior editor of Litigation, the journal of the Section of Litigation of the ABA. "Pressure Points" is an egregious example of some generic differences between our profession and that of our legal brethren. Professor McElhaney advises his readers: "Just as in the first aid manual, pressure points are the only right places to push. Only instead of stopping the flow of blood, pushing on a pressure point makes a witness do what you want." Moreover, "it is worth getting the witness you're going to attack to agree that a learned treatise is authoritative." He shows how the tactic worked on a physician who "had been beautifully prepared for his deposition," with a transcription of questions and answers in which the physician-victim is led to acknowledge the authoritativeness of certain written material that the lawyer wanted him to concede. The object was to tuck this away for later citation to discredit the witness's testimony, leading the jury to believe that, in McElhaney's words, "It seems more like a prior inconsistent statement rather than just another expert who happens to have a different point of view." The aim, of course, is to give a conscientious physician's answers the appearance of inconsistency, thus impeaching his testimony before the jury, regardless of whether it appropriately expresses the current state of knowledge. Significantly, the article is illustrated by a startling drawing of an attorney squeezing the head of an obviously suffering witness.

What has driven a part of the legal profession to

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Response

It is understandably difficult for persons who have spent their entire professional life reaching out to their fellow human beings, to appreciate the hostile environment in which Medicine has to function today. Yet, the solution to “Advocate’s Disease” lies squarely in the hands of physicians, and, as always, the physician must “heal himself.” The time has come for physicians to cease thrashing about, and to look at the malpractice problem as the malignant disease that it is—to analyze its root causes and to find ways to eliminate them. Rest assured that it will not go away spontaneously. There is too much money involved.

Viewed in this fashion, it becomes crystal clear that the physician must: (1) develop and utilize his clinical skills and his considered judgment in order to practice good medicine without injuring the patient, (2) discipline himself to provide adequate informed consent—ie, give the patient ample opportunity to participate, without prejudice, knowingly and intelligently, in the decisionmaking process concerning his illness, and (3) keep precise medical records so they can be used effectively in his defense.

These are the only antidotes, and, if the physician neglects them, he will continue to contribute to his own demise. There is also continuing need for consultation among ourselves in difficult or uncertain cases. The only real strength and support we have is each other—not as inherently suspect organizations of “experts,” willing by prior admission to testify for the defense, but as concerned, dedicated physicians making themselves available to a beleaguered colleague in the clinical setting, to help the patient.

Difficult as it may seem, we must hold to the morals and ethics of our ancient codes, and resist the temptation to be bitter or to retaliate. Our patients, for the most part, have been understanding and forgiving; they deserve our support.

It is incumbent upon the two learned professions—Law and Medicine—to preserve the availability of medical care. Meanwhile, society watches and waits, with bated breath.

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