Correspondence

Dear Editor:

Two recent issues of MEDICOLEGAL NEWS contained pieces addressing, among other things, the ethics of lawyers practicing in the health care field: *The Dilemmas of Dying* by Justice Liacos and *Where Are the Health Care Lawyers When We Need Them?* by George Annas.[1] My concern is that these selections, though generally enlightening and thought-provoking, appear at some points to suggest that lawyers should undertake a course of action which is clearly unethical.

Before elaborating on this concern, I think it would be helpful to develop a general background concerning lawyers' ethics. In the last century legal ethics have evolved from unwritten customs to written codes of conduct. Although their content varies from state to state, the codes in virtually all the states are patterned after the *Code of Professional Responsibility,* which is a model code drafted by the American Bar Association. Three of the duties imposed by the ABA Code are of central importance to the ethical issues raised by Justice Liacos's speech and by your editorial:

> A lawyer should not advise a client unless he is proficient in the field of law involved and unless he has done whatever preparation and research is necessary for the particular issues involved.
>
> A lawyer owes his client an obligation of undivided loyalty in evaluating and implementing lawful courses of action and "should exercise independent professional judgment on behalf of a client."
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> A lawyer should respect the autonomy of his client by discussing fully the possible courses of action which the client may lawfully undertake. The goal of this conference is to clarify the possible legal consequences and practical advantages and disadvantages of each alternative. The attorney's advice should be far-ranging and may even include moral considerations, but ultimately the decision is the client's, not the attorney's.

Justice Liacos's article and your editorial both criticize health lawyers for giving clients the "wrong" advice concerning the law. In order to assess this criticism I think it is necessary here to distinguish between two types of lawyers. The first type of lawyer is simply uninformed and his advice is based on ignorance. The second category involves a more complicated situation. An example of this category is a lawyer who, after taking reasonable steps to learn the law about a particular question, advises his client as follows:

> The law is unclear on the legality of a particular act or failure to act (for example, a failure to resuscitate). Because of the legal uncertainty of this issue, the client must realize that there are risks involved in the client's undertaking a particular course of conduct and that it would be prudent for the client (to whom the attorney owes an undivided loyalty) to avoid the risks of this uncertainty by refusing to act in a certain way unless, for example, a court order has removed the uncertainty.

This lawyer might discuss the moral dimensions of the problem (for example, a doctor's obligations to patients), but the decision is for the client to make. In order to insure that the client fully appreciates his autonomy, this lawyer would stress that the client has the right to undertake a more risky course of conduct if the client feels that this is proper and that the lawyer will do whatever is legally permissible to implement his choice and to minimize its possible adverse consequences.

It is clear that health lawyers who fall in the first category are unethical, but it is equally clear that those in the second category are not unethical. Indeed, it seems to me that the behavior of this second group is the required ethical approach. They are competent in their field, they give undivided loyalty to their client, and they respect client autonomy by implementing decisions made by the client after a full consideration of all the issues.

It is very likely that Justice Liacos and you are directing your criticisms only to the first type of lawyers. To the extent that such incompetence exists, your criticisms will hopefully result in more ethical behavior in the future. However, my concern is that some of the language used might, for example, suggest that it is wrong for an attorney to advise a doctor to minimize uncertainty where there are potential consequences, however unlikely, which could be very detrimental or that it is wrong for the attorney to view the matter solely in terms of the doctor's self-interest. Any such suggestion would be mistaken. Minimizing uncertainty and focusing on the client's interests are not wrong. Quite the contrary, they are ethically *required.*

Sincerely,

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Editor's Response:

MEDICOLEGAL NEWS thanks Professor Hubbard for his views, which as far as they go, are difficult to argue with. I agree that it is unethical for a lawyer to give advice in a field in which he is not competent. But how does one define competence in the health law field? And what is the nature of the attorney-client relationship when the client is a physician who seeks advice on how to practice medicine?

It is my assertion that anyone who calls himself or herself a health lawyer must have an understanding of how physicians view the law, and, therefore, of how their clients are likely to react to legal advice and "uncertain risk." In the post-*Saikewicz* era, for example, I continue to believe that lawyers advising physicians had a duty to do more than simply tell their clients that they were taking "unknown risks" by not going to court. Even if one agrees (which I do not) that the *Saikewicz* opinion changed the law procedurally, lawyers should still have been able to tell their clients precisely: (1) how the law was changed, *i.e.*, what was the law before *Saikewicz;* and (2) under what circumstances would they risk civil or criminal prosecution for terminating treatment on an incompetent patient?

Not doing this is simply an invitation to predictable over-reaction, such as that that was experienced by, for example, resuscitating a patient 70 times in a 24 hour period. The point is that the over-reaction is readily predictable (because of the monolithic way physicians tend to view the law and their fear of malpractice and criminal liability), and *unnecessary* (because physicians every day operate quite well with uncertainty — and are only likely to modify their behavior when they believe the risks of not doing so are at least measurable. In these circumstances, not attempting to put the risks of prosecution in perspective (instead

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