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THE LAWYER AS COUNSELOR AND THE PREVENTION OF LITIGATION*

*The Honorable Edward D. Re,
Chief Judge, United States Court of International Trade,
New York, New York***

INTRODUCTION

It is both a great privilege and honor to have been invited to inaugurate the Brendan F. Brown Distinguished Lecture Series. To have been selected as the inaugural lecturer is in itself a great honor. To be afforded the opportunity to record my esteem and friendship for Dr. Brendan F. Brown is a special privilege for which I am deeply grateful.

It is most fitting for The Catholic University of America to perpetuate the memory of Dr. Brendan F. Brown, distinguished Catholic educator and legal scholar.

Dr. Brown received his A.B. and LL.B. undergraduate degrees from Creighton University, and several graduate degrees from The Catholic University of America. He obtained the Ph.D. in Law from Oxford University under the tutorship of Harold Hanbury, Vinerian Professor of Common Law. He studied Jurisprudence as a special student at the Harvard Law School under Roscoe Pound.

Dr. Brown's remarkable career as a teacher began in 1921 at Creighton University in Omaha, Nebraska, as an instructor of English, History and Latin. These subjects are indicative of his wide-ranging intellectual interests. In a law teaching career that covered half a century, he taught most of the traditional law school courses.

On the campus of The Catholic University, Dr. Brown is best remembered as Dean and Professor of Law who taught Jurisprudence with

* The First Brendan F. Brown Distinguished Lecture, delivered by Chief Judge Re at The Catholic University of America School of Law, March 25, 1982.

** B.S., (1941), LL.B (1943) St. John's University; J.S.D., New York University (1950); D.Ped. (Hon.), University of Aquila, Italy (1960); LL.D. (Hon.), St. Mary's College, Notre Dame, Ind. (1968), St. John's University (1968), Maryville College, Missouri (1969), New York Law School (1976), Brooklyn College, City University of New York (1978); D.H.L., College of Staten Island, City University of New York (1981); Distinguished Professor of Law, St. John's University School of Law.

extraordinary dedication. As the sixth Dean of the Law School, he succeeded Monsignor Robert J. White, who served from 1937 to 1948. I was privileged to work with Monsignor White on projects of mutual interest in the field of military justice.

Dr. Brown served as Dean of the Law School from 1949 to 1954, when he joined the faculty of Loyola University in New Orleans, Louisiana. There he continued to teach Jurisprudence, International Law and Comparative Law, subjects which for many years brought us together at a variety of scholarly meetings throughout the country.

My friendship with Dr. Brendan Brown began more than thirty years ago with our common efforts to perpetuate the memory of Thomas More by furthering the work of the Thomas More Society of America. In 1975, Loyola University respectfully dedicated an issue of its Law Review to Dr. Brown. This issue of the Loyola Law Review is of special interest for, in addition to a beautiful tribute by Dean Antonio E. Papale,¹ it contains an inspirational address by Chief Judge Howard T. Markey on the life of Thomas More.² In publishing Chief Judge Markey's address, the Editor of the Law Review expressed the following thought that seems most appropriate at a lecture dedicated to the memory of Dr. Brown:

The students and faculty at Loyola University School of Law sincerely believe that the ideals of Saint Thomas More which Chief Judge Markey has so poignantly expressed have been exemplified in the fruitful life of Dr. Brendan F. Brown.³

Dr. Brown's distinctive contribution to The Catholic University Law School is well-known to you. In addition to an active teaching career and his service as Dean, he authored four books and innumerable articles and book reviews. Most legal educators will remember him for his philosophical contributions to the law, and the missionary zeal with which he urged the study and influence of natural law.

Dean Papale has noted that Dr. Brown "won many converts to the natural law," and that, "This accomplishment," which was "a driving force in his life . . . added a new dimension to natural law thinking . . ."⁴

Many students and scholars will honor him for his *Natural Law Reader*, published in 1960, in which he attempted to present the "causes of the rise, decline and contemporary revival of natural law."⁵ In this valuable collection of writings, Dr. Brown referred to the use of natural law "as a crite-

1. Papale, *A Tribute to Dr. Brendan F. Brown*, 21 LOY. L. REV. 803 (1975).

2. Markey, *Thomas More—Circa 1975*, 21 LOY. L. REV. 807 (1975).

3. *Id.*

4. Papale, *supra* note 1, at 804.

5. *B. Brown, THE NATURAL LAW READER IX* (1960).

tion for the evaluation of human positive law, and as an ideal by which legal systems should be guided.”⁶

Dr. Brown expounded a philosophy of law which he was convinced would lead to a just and more perfect legal and political order. Indeed, the good he sought to achieve was “the kind of civilization which will be most conducive to man’s happiness.”⁷ Today, in this first of many lectures by which we honor and perpetuate his memory, it is my hope to do justice to the ideals and principles which animated his life and work.

I. ADMINISTRATION OF JUSTICE

You have invited a law professor who, for the past twelve years, has been privileged to sit on the federal bench. In view of my background in the law, both as a law teacher and as a federal judge, I assume that you would expect that I speak on some phase of the administration of justice. There is, indeed, so much that can be said about so broad, so complex, and so noble a topic. On prior occasions, when I have spoken of the administration of justice, I have attempted to highlight what may be referred to as the human agency in the administration of justice. It would seem obvious that the law is not self-executing, and that any human system requires men and women for its administration and fulfillment. Hence, I have attempted to show that, in order to improve the system, we must improve the calibre and competence of the human participants upon whom depends the success of the system. For many years I have stated to lawyers and law students that even a perfect legal code will not obtain justice in the social order if it is misapplied and maladministered by its human agency.

When we speak of the administration of justice we, of course, must speak of lawyers and judges, for what they do, in large measure, *is* the administration of justice. Therefore, when our attention is directed to the quality of the administration of justice, we ought properly to focus upon the manner in which lawyers and judges do their work. In evaluating the quality of the administration of justice, we, in effect, evaluate primarily the qualitative performance of lawyers and judges. Admittedly, lawyers and judges are not the only participants. The process necessarily requires the participation of others whose services may indeed be indispensable. None, however, possesses the prestige, influence and ability to effect change and improvement as bench and bar.

In 1970, at a lecture delivered at the National Judicial College, in Reno, Nevada, I was privileged to speak of the role of the judge and lawyer. I

6. *Id.*

7. *Id.* at VII.

indicated that if we were to liken the administration of justice to a great human drama, the lawyer and the judge would undoubtedly be its principal and most visible actors. More specifically, I spoke of the crucial role of the lawyer, and stated that the adversary system "can only serve as an instrument of justice if counsel for both sides adhere to proper standards of professional responsibility and competence."⁸ In order to highlight the cooperative effort, and shared responsibilities of bench and bar, I entitled my lecture, *The Partnership of Bench and Bar*.⁹ More recently, in a discussion devoted to the federal judiciary, I treated the complementary values or ideals of judicial independence and accountability.¹⁰

In 1976, at a lecture I delivered at the New York Law School,¹¹ I spoke of the role and contribution of the law professor in the administration of justice. On that occasion, I spoke of the contribution of the law teacher to the legal education of the lawyer and the judge. In particular, I attempted to show the contribution of the law professor in molding the qualities of heart and mind of the law student. I stressed how that initial exposure to the law and the legal profession must have lasting consequences on the attitude and future development of the lawyer. I indicated that since the law teacher vitally affected not only the quality of law school education, but the future competence of the lawyer as well, it was surprising that more attention had not been devoted to law professors as an important segment of the legal profession.

In that lecture, I indicated that since the law is a quasi-public profession, the legal teaching profession directly affects the public interest. Special reference was made to the responsibility of the law teacher in inculcating a sense of professional responsibility and moral values in the law students of today, who will be the lawyers and judges of tomorrow.

On these occasions I attempted to highlight the role of the lawyer as an *advocate*, that is, as a litigator in the courtroom who presents the cause of the client with vigor and competence. I have stated that the lawyer's presentation facilitates the task of the judge in properly deciding the case. A proper appreciation of this role of the lawyer as an advocate justifies the continuance of the adversary system as the common law method for the presentation of cases to the courts of law. When properly understood and

8. Re, *The Partnership of Bench and Bar*, 16 CATH. LAW. 194, 200 (1970).

9. *Id.* at 194.

10. Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221 (1981).

11. Re, *The Law Professor and the Administration of Justice*, 23 N.Y.L. SCH. L. REV. 1 (1977).

applied, devoid of its excesses, that system has served the cause of justice well in the common law world.

Judge Rifkind, a distinguished jurist, and an advocate of extraordinary ability, in writing of the adversary system, stated that:

[T]he utility of [the adversary process] is that it relieves the lawyer of the need, or indeed the right, to be his client's judge and thereby frees him to be the more effective advocate and champion. Since the same is true of his adversary, it should follow that the judge who will decide will be aided by greater illumination than otherwise would be available.¹²

The adversary system, when not abused, has served us well. It cannot be doubted that a competent presentation by counsel renders valuable assistance to the court or judge charged with the responsibility of decision.¹³

Indeed, I have noted that by the application of professional skills lawyers attain three valuable goals: they fulfill a responsibility owed to the client; they render valuable assistance to the court or judge who must decide the case; and they perform a vital public function in shaping, developing, and making the law itself.

Today I shall continue the theme of the responsibility of the human participants in the administration of justice, and shall return to the important contribution of the lawyer.

II. THE AVOIDANCE OF LITIGATION

Although I shall speak of the lawyer, I shall not speak of the lawyer as an advocate, but, rather, as a *counselor*—a professional person who gives valuable advice and counsel concerning the multitude of problems that arise in a complex, modern society. More particularly, I should like to highlight the crucial role that the legal counselor can play in *avoiding* controversy and in *resolving* disputes *without resorting to litigation*.

With increasing frequency, Americans are turning to the courts to resolve their private disputes, inundating the judicial system with cases of every kind, both novel and commonplace.¹⁴ In view of the relatively short time in which this litigation explosion has occurred, one must wonder as to the cause or source of these disputes. Are the litigants asserting newly created rights; or are they, for the first time, asserting ancient rights? In the

12. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. 534 (1975).

13. *Re, supra* note 8, at 207-08.

14. *See* Burger, Year-End Report on the Judiciary 2 (Dec. 28, 1981). "United States Court of Appeals case filings will rise between the judicial years 1975 and 1983 by 80%. . . . During the same period, the projected increase in the District Courts will be 78%." *Id.* at 2-3.

past, were these disputes resolved in other ways; or were they simply left unresolved?

Among the factors which have caused an increase in litigation, Judge J. Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, indicates the decreasing effectiveness of school, church and family as forums for dispute resolution. He also refers to the willingness of courts and legislatures to recognize or create new causes of action.¹⁵ It is significant that Judge Wallace also suggests that, for lawyers, there are economic incentives which sometimes promote rather than discourage litigation.¹⁶

An ironic consequence of the litigation explosion is that the *quantity* of persons now seeking justice in the courts threatens the *quality* of the administration of justice. The sheer volume of the litigation with which the courts must contend reduces the efficacy of the courts as instruments for the just resolution of disputes.

This phenomenon has led thoughtful persons to consider the viability of alternative methods of dispute resolution. It has been suggested that neighborhood justice centers and lay magistrates be used to settle minor disputes.¹⁷ In disputes involving complex issues of law, the use of neutral advisers who are experts in the applicable law may forestall litigation.¹⁸ Chief Justice Burger has recently advocated the expanded use of arbitration as an alternative dispute resolution mechanism.¹⁹ Other suggestions for reducing the quantity of litigation include the adoption of no-fault compensation systems, and the creation of advisory panels which can screen out non-meritorious cases.²⁰

It is anomalous that, with so much effort being expended in an attempt to ease the currently overwhelming backlog of cases in state and federal courts, little attention has been given to the contribution that the lawyer may make toward the avoidance and prevention of litigation. We ought to be reminded that, "[t]he lawyer often can and does keep people from litigating."²¹

The lawyer, when acting as a *counselor*, performs a function that is extremely beneficial to society, in that effective legal counseling minimizes

15. Wallace, Working Paper—Future of the Judiciary 12 (Feb. 20, 1981) (unpublished study).

16. *Id.* See also Burger, *supra* note 14, at 4. "Abuse of the discovery process often serves nothing other than to enlarge the fees of counsel." *Id.*

17. Wallace, *supra* note 15.

18. Nilsson, *A Litigation Settling Experiment*, 65 A.B.A. J. 1818-19 (1979).

19. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

20. Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611, 614, 622 (1981).

21. J. FRANK, COURTS ON TRIAL 28 (1949).

the likelihood of conflict between parties by stabilizing relationships and promoting understanding and cooperation. Effective legal counselors provide the "solvents and lubricants which reduce the frictions of our complex society."²² In the role of counselor, the lawyer serves as an instrument of peace.

Most practicing lawyers spend a great deal of their professional time interviewing and counseling clients.²³ Yet, little is done to help new lawyers acquire the necessary skills of an effective counselor. Furthermore, good counselors are rarely honored for their achievements. While stellar advocates are lionized by the profession and the public, the best counselors work in obscurity.²⁴ This circumstance "misleads the public and attorneys into believing that the lawyer's only, or principal, function is representation in the adversary process."²⁵ Overlooked is the fact that many lawyers "spend all or most of their time in their offices advising clients. Many clients go to them to obtain assurance, confidence. . . . The lawyer thus often serves as a tranquillizer, as an allayer of the doubts of perplexed men."²⁶

I suggest that there ought to be a rearrangement of values and a reordering of priorities. The importance of the counselor's role needs to be recognized and appreciated. Lawyers should be taught how to avoid litigation, just as they are taught how to conduct successful litigation. By teaching lawyers how to advise, plan, conciliate and negotiate, two important social goals are achieved: first, we lighten the burden of cases which is threatening to crush our judicial system; and second, we reduce the economic and emotional toll which always accompanies litigation.

A proper appreciation of the lawyer's role as a legal counselor must begin with a more complete understanding of the counseling function. Professor Thomas Shaffer, of the faculty of Washington and Lee University, and a former dean of the Notre Dame Law School, described the counseling function as one of "influencing, facilitating, and implementing choices in the law office"²⁷ The key word is "choices." It is the counselor's function to help clients make informed and rational choices among alter-

22. Burger, *The Future of Legal Education*, 15 *STUDENT L.J.* 18-19 (1970).

23. "One survey suggests that lawyers spend from 30 to 80 percent of their time in activities the lawyers themselves describe as 'counseling.' Another says that lawyers spend more time 'interviewing clients' than in any other professional activity." T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING I* (1981).

24. See Kenison, *By Way of Introduction, Preventive Law Symposium*, 38 *S. CAL. L. REV.* 377, 378 (1965).

25. Brown & Brown, *What Counsels the Counselor?*, 10 *VAL. U.L. REV.* 453, 465 (1976).

26. J. FRANK, *supra* note 21.

27. T. SHAFFER, *supra* note 23, at 2.

native courses of conduct. Counsel must assist the client in choosing the course of conduct that is most beneficial to the client, as well as to the interested parties and society.

Performing this task necessarily involves the client and counselor in an "intimate and searching relationship."²⁸ The client must be candid in providing the facts; the lawyer must be candid in assessing these facts and in the advice that is offered. When advising clients, the lawyer must not "illusion them about their legal rights. He should, for his own sake and theirs, tell them the facts of life."²⁹

In the performance of this function of counseling, the lawyer must maintain a certain detachment so that an objective decision may be made.³⁰ Unlike the role of advocate, the counselor cannot rely on a disinterested third party or a zealous adversary to give balance to an unduly favorable view of the facts and law. In a counseling relationship, the ultimate decision is made in the law office by the client based solely on the information and advice provided by the counselor.³¹ For that reason the counselor "must perceive and appreciate the other's viewpoint. He cannot stress only the matters most favorable to his side, for he does not submit a case to a tribunal for decision, he acts alone or deals directly with his opponent. His primary concern is not conflict but coordination."³²

III. THE PRACTICE OF PREVENTIVE LAW

In helping clients to make these private legal decisions, the counselor engages in what has been termed the practice of "preventive law." Preventive law has been defined as "a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties."³³ Working entirely inside the law office, the counselor offers advice and assistance that is intended to help clients conduct their affairs in a manner that will avoid controversy and litigation.³⁴ Professor Louis M. Brown, formerly of the University of Southern California Law Center, has indicated that:

In preventive law, the lawyer's purpose is to guide his client so as

28. Redmount, *An Inquiry Into Legal Counseling*, 4 J. LEGAL PROF. 181, 208 (1976).

29. J. FRANK, *supra* note 21, at 28.

30. Brown & Brown, *supra* note 25, at 456.

31. T. SHAFFER, *supra* note 23, at 252.

32. L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 130 (1971).

33. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1798 (unabridged 1961). *See also* BROWN, *A Memorandum on Nonadversarial Law Practice and Preventive Law*, 6 J. LEGAL PROF. 39 (1981).

34. *See* Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. JURIS. 125, 148 n.46 (1972).

to minimize risks, and maximize rights. . . . [T]he purpose, and effect, is to *avoid possible dispute*. Where such a result is successful the forum is the law office rather than the courtroom. . . . This observation is important because it means that the final determination of legal consequences takes place in the law office. Legal decisions are finalized by client and lawyer. In this context, the decisional process of the law office is as significant for a particular client as would be the decision of a court for a litigant.³⁵

Broadly speaking, the legal counselor seeks to avoid controversy and litigation by offering to the client the services of a thoughtful adviser, a careful planner, and a skilled negotiator.

The counselor, as an adviser and planner, must accurately predict for the client the legal ramifications of contemplated action, evaluate the merits of alternative courses of conduct, and effectuate the client's choice.³⁶ The lawyer's skill in providing this information, advice, and service to clients is critical to the administration of justice, and to the avoidance of litigation, because, as Justice Jackson has observed: "Law-abiding people can go nowhere else to learn the everchanging and constantly multiplying rules by which they must behave"³⁷ If a building contractor wishes to cease work or assign a contract; if a tenant wishes to abandon or sublet an apartment; if a person wishes to direct the disposition of personal or real property, the likelihood of litigation will largely depend on the quality of the counseling provided by the lawyer.

When called upon for advice as to the outcome of litigation, the lawyer must, of course, give a professional opinion as to how a court of law will ultimately view the legal consequences of any contemplated act.³⁸ But the lawyer, *as a counselor*, should not feel constrained to advise the client only on the purely legal effects of the act. The counselor must, to the extent possible, inform the client of the practical and social consequences of the act. If a perfectly lawful act creates the likelihood of a dispute and, perhaps, a lawsuit, the attorney should advise the client of those possibilities. The effort should be to prevent or avoid both the dispute as well as the possible lawsuit. As Chief Justice Burger recently noted, a favorable result following litigation "is often drained of much of its value because of the time lapse, the expense, and the emotional stress inescapable in the litigation process."³⁹ Given the facts of legal life, the possibility of litigation

35. T. SHAFFER, *supra* note 23, at 252 (quoting Louis M. Brown) (emphasis added).

36. See Kenison, *supra* note 24, at 378.

37. Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

38. Oliver Wendell Holmes defined law as the "prophecies of what the courts will do." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

39. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

may be enough to deter a client from embarking upon an otherwise lawful course of conduct.

In assessing the merits of alternative courses of conduct, the counselor should take into consideration all of the factors that appear to be relevant. Rule 2.1 of the proposed Model Rules of Professional Conduct, though not yet formally adopted, is illustrative of the wide range of considerations which the counselor may properly bring to the client's attention. Rule 2.1 states: "In rendering advice, a lawyer may refer not only to law but to other considerations as well, such as moral, economic, social and political factors, that may be relevant to the client's situation."⁴⁰

Having informed the client of all of the relevant factors, and having advised the client on how best to proceed, it is then the responsibility of the counselor to effectuate the client's choice of action. In carrying out the client's wishes, the most striking example of preventive law lies in the drafting of legal instruments.⁴¹ In wills, declarations of trust, leases and contracts, the counselor actually creates the rules and standards of conduct which will govern people's lives. By seeing to it that the rights and liabilities of the interested parties are clearly stated and understood, the counselor can do much to assure the trouble-free completion of the transaction or course of conduct.

IV. THE SETTLEMENT OF DISPUTES

In the relevant legal literature, the concept of preventive law has been confined to those activities already mentioned: advising; planning; and drafting legal instruments.⁴² There is, however, another facet to the practice of law which, I believe, may also properly be considered part of preventive law. I refer to the process of private dispute resolution—the process of settling existing disputes through negotiation, conciliation and compromise.

Disputes, whether or not they might have been avoided, do sometimes occur. Often, it is only after a dispute has arisen that a lawyer is consulted. What, then, should a lawyer do when a client is involved in a legal dispute? How should the lawyer proceed in the effort to solve the problem?

American lawyers, who are disciples of the adversary system and trained primarily as advocates, too often tend "to view a dispute as a contest for advantage, not an opportunity for settlement."⁴³ Almost instinctively it

40. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (Discussion Draft 1980).

41. E. PATTERSON, JURISPRUDENCE 182 (1953).

42. See Kenison, *supra* note 24.

43. L. PATTERSON & E. CHEATHAM, *supra* note 32, at 144-45.

would appear that the effort is to obtain maximum advantage for one's client to the detriment of the other party rather than to seek a compromise that is mutually agreeable, and morally acceptable. It would seem that today's lawyers are more likely to seek a favorable result by out-maneuvering their opponents rather than to negotiate an equitable solution to a legal dispute. This unyielding attitude, which many lawyers reflexively adopt when called upon by a client involved in a dispute, often leads to unnecessary litigation—litigation which is stressful, frustrating, time-consuming, expensive and frequently unrewarding for the client.⁴⁴

When a problem occurs, lawyers should not be quick to summon the weapons of the advocate. Too often too many lawyers assume that litigation is the only means of resolving disputes.⁴⁵ Chief Justice Burger recently recalled President Lincoln's advice: "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."⁴⁶

After a dispute arises, counseling continues to be an important part of the lawyer's professional work. A dispute should not be intensified and exacerbated by a provocative attorney's claims letter which threatens litigation. Before any pleadings are drawn, before summons is served, the counselor should make every effort to resolve the dispute privately, through *nonadversarial procedures*.

The private dispute settlement process is "based on the premise that people in conflict remain capable of acting responsibly."⁴⁷ It is the lawyer's duty to implement that premise by acting as a conciliator and negotiator.⁴⁸ The skills which are valuable to the counselor in the planning of personal and business transactions should also be used to develop reasoned and intelligent solutions to the problems which may have befallen the parties. By analyzing the problems in a detached and objective manner, the counselor should be able to suggest and provide solutions which are fair, reasonable and practical, and, therefore, acceptable to both parties.

It is well known that, once a lawsuit has been commenced, the judge having jurisdiction over the case may perform an important function in the

44. Burger, *supra* note 19, at 275. Chief Justice Burger, in his annual address to the American Bar Association, deplored these unfortunate characteristics of litigation and called upon the bar to develop nonjudicial means of settling disputes. He focused his remarks on arbitration as an alternative to litigation. *Id.*

45. See Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611, 613 (1981).

46. Burger, *supra* note 19, at 275.

47. L. PATTERSON & E. CHEATHAM, *supra* note 32, at 145.

48. *Id.*

process of settlement before trial.⁴⁹ The lawyer, however, should not wait for the guiding or coercive hand of the judge to begin seeking a settlement. It bears repeating that part of the counselor's function is to resolve disputes privately, through conciliation and compromise, without judicial assistance.

Encouraging and facilitating the expeditious and nonjudicial settlement of disputes is a service that benefits both the individual client and society as a whole. It eases the burden on the judicial system, and reduces the stress, frustration and expense which always accompany litigation. In their capacities as conciliators and negotiators, lawyers fulfill their classic role as healers, rather than promoters of conflict.⁵⁰

In view of the important benefits that effective legal counseling can bestow upon individuals and society, it can be readily appreciated that lawyers should also be good counselors. The indispensable skills for the process of conciliation and settlement are not the qualities of advocacy necessary for the successful trial and appeal of cases. As concerned members of the legal community, how do we develop good legal counselors? How can we make sure that lawyers know how to prevent litigation and settle cases?

V. TEACHING NONADVERSARIAL LEGAL SKILLS

Our law schools must bear the initial responsibility for training lawyers to be good counselors.⁵¹ Some schools already offer clinical programs which allow students to deal with people in a legal setting. Indeed, the Law School Division of the American Bar Association conducts a Client Counseling Competition.⁵² Clearly, not enough is being done.

The teaching of nonadversarial legal skills needs to be conducted with the same thoroughness and effort which now characterize the teaching of

49. Chief Judge Howard T. Markey has stated that in "virtually every crowded docket of pending cases lies a large number that would be settled in two weeks if an actively managing, fair-and-impartial-but-no-nonsense judge were to announce a pretrial conference at which a firm trial date would be set." Markey, *Judicial Administration—The Human Factors*, 1981 B.Y.U. L. REV. 535, 541. On judicially supervised settlement procedures see Title, *The Lawyer's Role in Settlement Conferences*, 67 A.B.A. J. 592 (1981); Kelner, *Settlement Techniques Part Two*, 16 TRIAL 35 (March 1980).

50. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 378 (1980).

51. "Because lasting images are laid down in law school about how a lawyer functions, these matters cannot be put off until later. . . . [E]arly introduction to these counseling skills must be made." Watson, *Professionalizing the Lawyer's Role as Counselor: Risk Taking for Rewards*, 1969 L. AND SOCIAL ORDER 17, 20.

52. Brown, *supra* note 33, at 45.

legal advocacy, and the adversary system.⁵³ Interviewing, counseling and negotiating skills are not possessed in equal measure by everyone, but they are skills which can be learned. If law schools were to include in the curriculum courses devoted to interviewing and successful counseling, society could reap tremendous rewards in terms of the number of disputes which could be avoided, settled and kept out of court.

In addition to teaching nonadversarial skills, the law school is uniquely equipped to mold the attitudes of future lawyers.⁵⁴ It has been noted that law students, who study a great deal about trials and judgments, and relatively little about the processes by which disputes are settled, "must get a skewed view of both lawyering and reality."⁵⁵ "[T]he most effective realization of the law's aim often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force."⁵⁶ For this reason, legal educators should explore ways of reorienting traditional law school courses to increase the emphasis on the preventive aspects of law so that students will actively think in terms of the prevention of litigation. Surely, these skills for the prevention and settlement of disputes are essential for the successful practicing of law.

It must be stressed that the legal profession's current ignorance and lack of appreciation for the counselor's role are detrimental to the welfare of our legal system. Only when parties are well advised and properly represented can the legal system function efficiently.

VI. CONCLUSION

In conclusion, I wish to emphasize that nothing I have said is intended to minimize the important role of the lawyer in the successful trial and appeal of cases. No one can deny that admission to the Bar implies skill in the art of advocacy, and a full appreciation of the adversary system that prevails in the common law world. What has been said, however, deals with the additional role of the lawyer in performing the valuable service of

53. Dean Charles Halpern of the Law School of the City University of New York observed that: "The idea of training a lawyer as a vigorous adversary to function in the courtroom is anachronistic. With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes." Quoted by Chief Justice Burger in *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

54. Burger, *supra* note 50, at 390.

55. Brown, *The Role of the Law Office in the Administration of Justice*, 67 A.B.A. J. 1127, 1129 (1981).

56. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

planning the activities of clients in such a way that litigation is avoided, thus stressing the importance of conciliation and the settlement of disputes.

It has been my purpose to extol and exalt the role of the lawyer as a counselor, whose advice is designed to avoid conflict, induce settlement, and restore friendly relations among parties to a potential dispute.

The thought has been expressed that, trained in a competitive setting, taught the adversary system, and rejoicing in tales of legal battles in the courtroom, many lawyers tend to see disputes as occasions for victories in the courtroom, rather than opportunities for settlement and peace. It is for these reasons that I have urged a rearrangement of values and reorientation of priorities. Clients in one's law office, potentially involved in a legal dispute, should not be regarded as merely names in the caption of a lawsuit.⁵⁷ It is important that the legal counselor be sensitive to the personal and emotional problems of clients. Clients are human beings who will appreciate most the legal services which will spare them the trauma of a trial, and the experience of hostility and enmity with persons with whom they have otherwise enjoyed friendly business or other relationships.

Lawyers are proud to be called ministers of justice,⁵⁸ and nothing should deter them in the pursuit of justice. Yet, there may be different ways to achieve justice. By seeking justice through nonadversarial means, lawyers can not only reduce congestion in our courts, but can also raise the level of satisfaction among clients potentially or actually involved in disputes. Lawyers, traditionally honored for their skill as litigators, have it within their power to be honored as peacemakers. In addition to serving as ministers of justice, they can also become our ministers of peace.

57. See *Freeman*, COUNSELING IN THE UNITED STATES 99 (1967).

58. See *Re*, *The Partnership of Bench and Bar*, 16 CATH. LAW. 194 (1970).