

February 2017

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Recommended Citation

Edward D. Re (2017) "The Partnership of Bench and Bar," *The Catholic Lawyer*: Vol. 16 : No. 3 , Article 4.
Available at: <http://scholarship.law.stjohns.edu/tcl/vol16/iss3/4>

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THE PARTNERSHIP OF BENCH AND BAR[†]

EDWARD D. RE*

YOUR GRACIOUS INVITATION to deliver the Mr. Justice Robert H. Jackson Lecture does me great honor. It is an honor, however, which gives pause for a variety of reasons. Not only do I succeed a formidable array of outstanding scholars and jurists, as prior speakers, but I also address a distinguished assemblage of state trial judges each of whom, I am sure, is master within his field of the law. These facts constitute a mandate to strive to bring you a message both significant and timely.

The administration of justice is the cause that brings us together. Our common bond is the love of the law, respect for the courts, and an understanding of the legal profession. Nothing less than the doing of justice is our common mission. Each of us here is privileged to participate in an ageless process designed to achieve justice here on earth. Also we share common goals and ideals, and reverence for the law as an instrument of justice. "Justice," said Daniel Webster, in his eulogy of Mr. Justice Joseph Story, "is the great interest of man on earth."

In that sense we may properly be regarded as "ministers of justice." Yet we cannot lose sight of the reminder of Charles Evans Hughes, in his Presidential address to the American Bar Association, "that the justice to be administered is justice^oaccording to law."¹

I am confident that all of you must share my deep concern and regret that so many topics could be chosen that reflect the crises in which the administration of justice finds itself today. A sense of history will

[†] The Mr. Justice Robert H. Jackson Lecture, National College of State Trial Judges, Reno, Nevada, Aug. 18, 1970.

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¹ Hughes, *Liberty and Law*, 11 A.B.A.J. 563 (1925).

show that within our society and our profession there are seeds that permit both self-evaluation and self-improvement. So I speak not as an alarmist, nor even as a reformer, but rather as one who has not only conviction in our profession, but also confidence in its ability to continue to perform the lofty mission of doing justice according to law.

Surely there is no thought of shirking responsibility, or neglecting problems requiring solution. There is, however, an awareness that the problems are not really new. Preceding generations also have been faced with the responsibility of adjusting and improving in order to meet the needs of a developing and evolving society.

This awareness seems indispensable in our democratic society whose ideals and lofty goals, as expressed by our founding fathers, were admittedly only aspirational. Such a society, it must be remembered, is not a fully developed society, but rather one that is, in a sense, unfinished, still developing and evolving.

Anyone concerned with the administration of justice would profit greatly by reading Dean Roscoe Pound's notable address entitled: *The Causes of Popular Dissatisfaction with the Administration of Justice*.² Delivered as far back as 1906, at the 29th annual meeting of the American Bar Association in St. Paul, Dean Pound's address has been described by Dean Wigmore as

"the spark that kindled the white flame of progress."³

Writing in 1937, Dean Wigmore stated that "the great result [of Dean Pound's address] was that the soul of the profession had been touched."⁴ There can be no doubt that, for more than a generation, that address had a profound influence on the improvement of the administration of justice in America.

Dean Pound observed that "[d]issatisfaction with the administration of justice is as old as law."⁵ He then set forth the causes of dissatisfaction under four broad categories:

- (1) Causes for dissatisfaction with *any* legal system,
- (2) causes lying in the peculiarities of our Anglo-American legal system,
- (3) causes lying in our American judicial organization and procedure, and
- (4) causes lying in the environment of our judicial administration.⁶

There is so much in Dean Pound's memorable address, that is so valuable and so pertinent today, that one is tempted, almost beyond endurance, to treat and comment upon all of the points that he so wisely and eloquently raised. I have restrained myself, however, and have chosen to discuss only one small phase of his critique. That phase pertains to what is commonly called *the adversary system*.

The adversary system has been described

² Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

³ Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. SOC'Y 176 (1937).

⁴ *Id.* at 178.

⁵ Pound, *supra* note 2.

⁶ *Id.* at 397.

as that competitive system for the administration of justice that prevails in our country under which "the judge is relatively passive, listening, moderating, and passing on what is offered to him."⁷ I have chosen to discuss the adversary system because its misunderstanding and abuse have seriously affected, if not distorted, the proper role of the lawyer in the American system of the administration of justice. Hence I have chosen to speak of the role of the lawyer in the decision-making process. Since I deem the role of the lawyer to be crucial in the judicial process, I have labeled my remarks: *The Partnership of Bench and Bar*.

Under the second "main head" entitled: "causes lying in the peculiarities of our Anglo-American legal system," Dean Pound discussed "the common law doctrine of contentious procedure which turns litigation into a game." He observed that a "no less potent source of irritation lies in our American exaggerations of the common law contentious procedure."⁸

Noting that it is probably only a survival of the days when a lawsuit was a fight between two clans, and that it is peculiar to Anglo-American law, Dean Pound declared that "it has been strongly curbed in modern English practice."⁹ After observing that "with us, it is not merely in full acceptance," but that "its collateral possibilities have been cultivated to the furthest extent," Dean Pound stated:

Hence in America we take it as a matter

of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record" rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations." It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. . . . The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?¹⁰

Dean Pound's indictment and bill of particulars were devastating when first uttered. I have eliminated several counts that are no longer true today, and that have been cured by modern codes of practice and procedure. Enough, however, remains of the contentious spirit to continue to give life

⁷ Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 409 (1953).

⁸ Pound, *supra* note 2, at 404.

⁹ *Id.* at 405.

¹⁰ *Id.* at 405-06.

to the charges pronounced in 1906. This, of course, means that much more remains to be done in rekindling the spirit of professional responsibility in bench and bar so that each may appreciate the proper role that it must perform in our system for the administration of justice.

But let us turn again to Dean Pound:

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law.¹¹

The learned scholar and keen observer concluded his discussion of the "irritation" caused by the "exaggerations of the common law contentious procedure" with the following crucial sentence: "Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness."¹²

Dean Pound, however, was no prophet of doom, and referred to some of the events that gave hope for improvement. He mentioned our law schools that in his opinion were "rivaling the achievements of Bologna and of Bourges to promote scientific study of the law."¹³ He also referred to the "active Bar Associations in every state to revive professional feeling and throw off the yoke of commercialism."¹⁴ Specifically, Dean Pound looked forward to "deliver-

ance from the sporting theory of justice," and a "near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."¹⁵

All of us share that profound hope, and all of us, I am sure, are working mightily to help achieve it. I should like to refer to certain areas where progress may fairly be reported, and then to mention areas which require additional effort and our continuing attention.

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 or bar.

Although it is the proud boast of all Americans that ours is a "government of laws and not of men," it is axiomatic that justice is administered by men, and that the quality of the administration of justice necessarily depends upon the quality of the men who administer it. Emerson has

¹¹ *Id.* at 406.

¹² *Id.*

¹³ *Id.* at 417.

¹⁴ *Id.*

¹⁵ *Id.*

said that what we are speaks louder than what we say. I should like to add that what we are manifests itself in everything we do. Quite properly, therefore, the attention of all citizens should initially focus upon the quality of the judiciary. Perspective, however, requires that the inquiry must be broader than the judiciary. An appreciation of the proper role of the lawyer in our system for the administration of justice will cause us to agree with the assertion of Mr. Justice Vanderbilt, a distinguished law school dean and president of the American Bar Association, that a "judicial system in the long run can be no better than its bar."¹⁶ By this statement Justice Vanderbilt was not merely referring to the obvious fact that the judges are selected from among the bar. Rather, he was referring to the key role that the bar, *i.e.*, the lawyer, performs in the judicial system, for he spoke of the "essential part" of the lawyer, and urged every law student to "know as soon as possible what are the professional responsibilities of The Legal Profession."¹⁷

At this juncture we are reminded of what Mr. Justice Cardozo called the "Paradoxes of Legal Science."¹⁸ Quoting Demogue, the learned jurist pointed out that "[t]o bring about reconciliations is the great work of jurists."¹⁹ In his Carpentier lecture, delivered at Columbia in 1928, Mr. Justice Cardozo spoke of the "fundamental

opposites that clash and are reconciled." Stated in broad terms, he noted that "rest competes with motion, permanence with flux, stability with progress." He quoted Alfred North Whitehead to indicate that these antitheses are "inherent in the very nature of things," and that they are not peculiar to the law. Its special applicability to law is of course of particular importance to us, for in the words of Demogue, "[t]o bring about reconciliations is the great work of jurists."²⁰ Stability and progress, precedent and equity, justice that is universal and yet individual, are but a few of the "opposites" that the jurist must "reconcile" if his work is to be qualitatively acceptable.

It is against this background of the paradoxical nature of the law that one ought to examine the paradoxical role of the lawyer in our society. In a Carpentier lecture of a subsequent generation, Professor Elliott Cheatham referred to the American lawyer as "a paradox within paradoxes."²¹ Like Dean Pound before him, he too spoke of the paradox, if not oddity, of the adversary system that prevails for the administration of justice. Professor Cheatham calls attention to the anomaly that "a trial, which the state employs in settling unresolved controversies, is not a cooperative effort by state agencies to determine the facts and apply the law." He notes that in the adversary system "[t]he lawyers are the active agents who investigate, present, and urge their views of the facts and the law."²² In this system, Professor Cheatham describes the

¹⁶ A. VANDERBILT, *CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 26-27 (1952).

¹⁷ *Id.*

¹⁸ Cardozo, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 251 (M. Hall ed. 1947).

¹⁹ *Id.* at 255.

²⁰ *Id.*

²¹ E. CHEATHAM, *A LAWYER WHEN NEEDED* 4 (1963).

²² *Id.*

role of the judge “the only impartial participant” as being “passive—listening, moderating, and passing on what is submitted to him.”²³

Clearly, under the system described, the role of the lawyer is crucial. And here we can best appreciate the paradoxical and conflicting nature of his role. Professor Cheatham states it well:

Though engaged in the public function of the administration of law, and its most influential participant, he is privately retained by one side, and he aids, guides, and defends that side alone. While called an officer of the court, he is a partisan representative relying on private retainers for his livelihood.²⁴

What is required under this system is beautifully set forth by Professor Cheatham, and I shall adopt his words as the text upon which to build my thesis.

Under this system something more is required than wise and just laws. Men expert in the law are needed to individualize the law, to apply it, to employ it, and even to develop it in concrete cases. In court, where the law is graphically applied, the work of lawyers makes this need manifest. In our country especially the need for lawyers in court cases is great. In no other nation does the representative of the public, the judge, have so limited a role in court, and the partisan representatives, the lawyers for the parties, so dominant a part.²⁵

Surely it can be seen at a glance that the

adversary system that prevails in the trial and appeal of cases, extols the role of the lawyer. It would seem clear, therefore, that, as long as the system is retained, no effective improvements may be achieved without improving the qualitative contribution of the lawyer. Necessarily, this implies an awareness of the key role of the lawyer, and an appreciation of the responsibilities that he must fulfill if the system is to work effectively as a device designed to achieve justice according to law.

It must be noted that few would wish to discard the adversary system. Dean Pound, for example, only decried the American “*exaggerations* of the common law contentious procedure.”²⁶ Since the examination of witnesses is the function of the lawyer, the system is best suited to preserve both the reality and appearance of judicial impartiality which is indispensable for the continued respect that must be enjoyed by the judiciary. Most thoughtful observers still believe that “the interested striving of two contending parties is, in the long run, an infinitely better agency for the ascertainment of truth than any species of paternalistic inquiry.”²⁷ Yet, it must be constantly remembered that the goal is the ascertainment of truth, and that the mission is the doing of justice. The system must be made to reveal truth and illuminate. It cannot be the instrument of foreclosing proper inquiry and obscuring vital areas requiring examination.

Experience has shown that the adversary

²³ *Id.*

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 5.

²⁶ See notes 8 & 11 *supra* (emphasis added).

²⁷ Millar, *The Formative Principles of Civil Procedure I*, 18 ILL. L. REV. 1, 16 (1923).

system or process will achieve its goal, and fulfill its lofty mission, only when all of the participants fully perform their professional responsibilities. More particularly, it can only serve as an instrument of justice if counsel for both sides adhere to proper standards of professional responsibility and competence. Under this system, competence is no mere desideratum; rather, it is the indispensable quality that is required to make it effective, worthy of our confidence, and to justify its preservation.

Having highlighted the role of the lawyer, and having alluded to the indispensable requirement of competence, I wish to mention certain hopeful signs of progress.

Since our subject essentially involves an appreciation of professional responsibility, the most recent accomplishment pertains to the new Code of Professional Responsibility approved by the American Bar Association in 1969. This Code, the product of almost five years of work by the Association's Special Committee on Evaluation of Ethical Standards, represents a comprehensive restatement of the former Canons of Professional Ethics. Most of the principles and concepts embodied in the old canons, and the opinions and decisions based upon them, have been embodied in the new Code.

The Code contains nine canons with ethical considerations and disciplinary rules under each canon. The canons constitute brief, general statements of subject matter, embodying the general concepts from which are derived the ethical considerations and disciplinary rules. The ethical considerations are of an aspirational nature, and represent objectives or ideals toward which every lawyer should strive. In many specific

situations they constitute a body of principles upon which a lawyer may rely for guidance. The disciplinary rules, however, unlike the ethical considerations, are mandatory in character and state the minimum level of conduct below which no lawyer can fall. A violation of a disciplinary rule subjects a lawyer to disciplinary action. Although the Code does not prescribe either disciplinary procedures or penalties for violations of a disciplinary rule, an enforcing agency may find interpretive guidance in the basic principles embodied in the canons and the objectives reflected in the ethical considerations.

Of particular relevance to our subject is the new Canon 6 of the Code of Professional Responsibility. Canon 6 provides that "A Lawyer Should Represent a Client Competently." Especially pertinent is Ethical Consideration 6-1 that states that "because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients." It also states that "[h]e should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle." Under Canon 6, Disciplinary Rule 6-101 deals specifically with "Failing to Act Competently." It provides that:

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.

The foregoing canon and disciplinary rule should be read in conjunction with the ethical considerations set forth under Canon 7 which provides that "A Lawyer Should Represent A Client Zealously Within the Bounds of the Law." Under the heading of the "Duty of the Lawyer to the Adversary System of Justice," Ethical Consideration 7-19, after stating that our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary and procedural law, states the following concerning our adversary system:

An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.

It adds that: "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

Perhaps most germane to the point that I wish to emphasize is Ethical Consideration 7-20 that states:

In order to function properly, our adjudicatory process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process.

Clearly, therefore, the adjudicatory pro-

cess can only function well if the impartial tribunal has been "informed." This necessarily requires a "competent, adverse presentation of evidence and issues." The recognition by the Code, and through the Code, the organized Bar, of the key role of the lawyer in informing the tribunal is, in my opinion, one of the major progressive features of the Code. It is a major feature because it places the requirement for the competent handling of a case in its proper perspective. Its importance is not limited to the protection of the rights of the client, but is acknowledged and treated as an essential element in the adjudicatory or decisional process. It is placed in the context that the decisional process "requires an informed" and impartial tribunal. Too often there is stressed the element of impartiality at the expense of information and enlightenment. Impartiality implies a judicial attitude of detachment and neutrality between the parties. It means not favoring one litigant over the other, and that judicial behavior and conduct ought never even appear to be partisan. It does not mean disinterest or insensibility to the ends of justice. The ideal of impartiality is separate from the necessity of being adequately informed. The Code highlights the responsibility of the lawyer in "informing" the tribunal.

Surely it is not necessary before this audience to indicate the overwhelming importance of facts, and how the court, in the words of the late Professor Llewellyn, is interested "in discovering, from and in the facts, where sense and justice lie."²⁸ The

²⁸ Llewellyn, *The Modern Approach to Counseling and Advocacy*, 46 COLUM. L. REV. 167

responsibility of counsel competently to present the facts of a case cannot be disputed. Obviously the court is not expected to know the facts. Apart from the doctrine of judicial notice, cases are decided on the basis of the record made at the trial. Nor may the appellate court consider matters not set forth in the certified record.²⁹

What is important for us to note is that counsel's responsibility is not limited to the competent presentation of the facts of the case. He is also responsible for the competent presentation of the applicable law. Ethical Consideration 7-23 sets forth the following observations:

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client.

One may very well inquire as to the limits of counsel's professional responsibility. For example, is counsel under a professional responsibility to disclose to the court a decision directly adverse to his client's case, and that is unknown to his adversary? The answer to this question ought to reveal the true nature of counsel's responsibility and the duty that he owes not only to his client,

but also to the court and to the legal system itself.

This particular duty of counsel was formerly dealt with in various opinions of bar association committees on professional ethics. Mr. Drinker, a leading authority on professional ethics of the bar, in 1953 wrote:

The extent to which it is regarded as counsel's duty to advise the court as to matters relevant to the proper decision of the case of which opposing counsel is ignorant or which he has overlooked turns on the degree to which the old idea that litigation is a game between lawyers has been supplanted by the more modern view that the lawyer is a minister of justice.³⁰

Mr. Drinker adds:

Always, however, must be borne in mind the principle that the theory of our system is still that justice is best accomplished by having all the facts and arguments on each side investigated and presented with maximum vigor by opposing counsel, for decision by the court and jury.³¹

Relying on respectable authority, and interpretations of Canon 22 of the former Canons of Ethics, Mr. Drinker concluded that:

A lawyer is bound to tell the court of any decisions directly adverse to any proposition of law on which he expressly relies, of which the lawyer on the other side is apparently ignorant and which would reasonably be considered important by the judge sitting in the case.³²

(1946), quoted in K. LLEWELLYN, *THE COMMON LAW TRADITION* 238 (1960).

²⁹ See materials cited in E. RE, *BRIEF WRITING AND ORAL ARGUMENT* 52 (1965).

³⁰ H. DRINKER, *LEGAL ETHICS* 76 (1953).

³¹ *Id.*

³² *Id.* at 78.

In addition to opinions of bar association committees on legal ethics, considerable authority has existed which favored disclosure. An excellent exposition is found in the New Jersey Supreme Court case of *In re Greenberg*³³ decided by Mr. Justice Vanderbilt. All doubt on the question, however, has been put to rest by the new Code, which requires disclosure and upholds the duty of the lawyer as an officer of the court, or in the beautiful phrase used by Mr. Drinker, as "a minister of justice." You will remember that I have referred to the Code as a recent hopeful sign.

Disciplinary Rule 7-106(B), under Canon 7, expressly provides:

In presenting a matter to a tribunal, a lawyer shall disclose:

- (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

The extent of the responsibility is set forth as follows in Ethical Consideration 7-23:

Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but having made such disclosure, he may challenge its soundness in whole or in part.

It is to be noted that the new Code of Professional Responsibility limits the duty of disclosure to "legal authority in the con-

trolling jurisdiction directly adverse" to the position urged. In one respect the new Code does not adopt the standard of disclosure indicated in Opinion 280 handed down in 1949 by the American Bar Association's Committee on Professional Ethics and Grievances. Opinion 280 stated in part:

We would not confine the Opinion to "controlling authorities",—i.e., those decisive of the pending case,—but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case. . . . The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Mr. Justice Vanderbilt, in the *Greenberg* case considered and adopted Opinion 280, but limited it, however, "to decisions of the courts of this State and, with respect to federal questions, to decisions of the courts of the United States."³⁴ In effect, Mr. Justice Vanderbilt applied the standard or duty of disclosure presently required by the Code of Professional Responsibility. Many may feel that it does not go far enough. Although I, too, agree with that view, and prefer the test or standard set forth in Opinion 280, one cannot overlook the

³³ 15 N.J. 132, 104 A.2d 46 (1954).

³⁴ *Id.* at 137, 104 A.2d at 49.

progress inherent in the express recognition that the lawyer owes such a duty to the court and to the legal system. Setting this responsibility forth in the new Code, and couching it with the dignity and force of a disciplinary rule, is properly regarded as a hopeful sign.

A reading of the *Greenberg* case will reveal certain other statements of Mr. Justice Vanderbilt that serve to introduce another aspect of the subject. These statements also highlight the responsibility of the lawyer. Mr. Justice Vanderbilt wrote:

The process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state.³⁵

Although the learned jurist and judicial reformer limited his statements to the "process of deciding cases on appeal," it is clear that the "joint" effort mentioned applies throughout the entire decisional process, and is not limited to the appellate process. The cooperative effort, which I have chosen to call *The Partnership of Bench and Bar*, applies to every phase of the decisional process. Indeed, it is designed to emphasize and highlight the role and the contribution of the lawyer in the decisional process.

Too often one thinks only of the influence of the lawyer as a legislator or as a

public official. As far back as Alexis de Tocqueville, in his famous work, *Democracy in America*, one reads statements such as: "In all free governments, of whatever form they may be, members of the legal profession will be found in the front ranks of all parties."³⁶

Surely the observation is accurate. But it underscores the role of the lawyer as a public office holder and his leadership while he holds political office. It does not reflect, however, his influence and ability to improve the quality of the administration of justice by the competent practice of his profession. It tends to obscure the influence and contribution of the lawyer in his daily, and more usual, capacity as an advocate. There is need to be reminded of the principal role that the lawyer, not only does perform, but must perform in the deciding of cases. Furthermore, under our system, it is a role that only the lawyer can perform.

Since the usual aspect of a lawyer's work is that of an advocate, too often one thinks only of the contribution that the lawyer makes to the client. None other than Woodrow Wilson, speaking as a lawyer, in an address entitled *The Lawyer and the Community*, said: "Our duty is a much larger thing than the mere advice of private clients."³⁷ He indicated that "[w]e are servants of society, officers of the courts of justice."³⁸

It is often forgotten that by the compe-

³⁵ *Id.* at 137-38, 104 A.2d at 49.

³⁶ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (P. Bradley ed. 1956).

³⁷ Wilson, *The Lawyer and the Community*, 35 A.B.A. REP. 419, 421 (1910).

³⁸ *Id.*

tent, professional handling of a case, the lawyer is performing, and has the duty to perform, a role that must assist the judge in deciding the case, justly and according to law. Too often judges, lawyers and the public, think of the decisional process as the sole responsibility of the judge. Such a thought falls far short of the fact, and does violence to the cooperative effort that must prevail if the system is to succeed.

It must be admitted, however, that there is an explanation, if not justification, for the neglect in the appreciation of the role of the lawyer in the decisional process. Too often, in understanding the judicial process, the concentration of effort has been on the mental process of the judge. The judicial process seemed naturally to imply the judge's mental process. The inquiry seemed to be: How does the judge decide the case presented? What factors does he consider and what are the elements that move him?

A remarkably successful effort to "describe the process" is found in Mr. Justice Cardozo's lectures entitled *The Nature of the Judicial Process*.³⁹ His incisive and penetrating "introspective searchings of the spirit"⁴⁰ have been most helpful. They have offered insight to countless law students, and valuable instruction to many grateful judges. It would be vain or presumptuous to ask for a finer exposition or discussion of "the formula,"⁴¹ insofar as it may be expressed, according to which American

judges decide cases. But here again the analysis and effort center around the role and contribution of the judge. In this lecture I have attempted to extol and give prominence to the contribution of the lawyer in that process properly called by Mr. Justice Cardozo, the "judicial process."

One aspect of the lawyer's work that will serve to demonstrate the essential nature of the lawyer's contribution to the judicial process, is the writing of briefs that are submitted to the court. This phase of the lawyer's workaday world can be regarded as tedious and dull only if one fails to appreciate its importance in the judicial decisional process. Once a lawyer is made to realize the crucial part that a brief can play in the decision of a case in a particular way, the writing of a brief will be undertaken with renewed vigor and interest.

Justice Rossman, a former Justice of the Supreme Court of Oregon, summarized well the point I wish to make when he wrote: "If better briefs are written, the courts will produce better decisions."⁴²

The statement highlights the direct relationship between the input or contribution of the lawyer, who in the first instance must prepare the case and submit his authorities for adjudication, and the end product of the adjudicatory process, *i.e.*, the judicial opinion.

Mr. Justice Brandeis stated the point most candidly when he said: "A judge rarely performs his functions adequately

³⁹ Cardozo, *The Nature of the Judicial Process*, in *SELECTED READINGS OF BENJAMIN NATHAN CARDOZO* 107, 108 (M. Hall ed. 1947).

⁴⁰ *Id.* at 110.

⁴¹ *Id.*

⁴² Rossman, *Appellate Practice and Advocacy*, 34 *ORE. L. REV.* 73 (1955).

unless the case before him is adequately presented."⁴³

The words selected by the distinguished jurist are most revealing. The inference is inescapable that an "adequate" presentation is required for "adequate" judicial performance. Clearly, if the standard of judicial performance is to be one of "excellence," what is required is an "excellent presentation." This, of course, calls attention to the fact that the calibre of judges will reflect the calibre of the bar. More important for our subject, it infers that the quality of justice and its administration will also in large measure reflect the calibre of the bar. Surely no more serious observations can be made to dramatize the key role of the lawyer and the bar in our society.

The references to brief writing indicate that by the proper performance of his responsibility to the client, by the competent and thorough presentation of his case, counsel is also fulfilling a higher and more noble function by helping to shape the judicial opinion and the law itself.

Mr. Whitney North Seymour, a distinguished leader of the bar and a former president of the American Bar Association, in an address entitled *The Bar as Lawmaker*, emphasized this responsibility and contribution of the bar when he said that:

The advocate has played a part in the lawmaking process through the persuading of judges to decide cases in particular ways. Thus, in any treatment of Marshall's contribution to American constitutional law, it

would be wrong to omit reference to Webster and the other great advocates whose arguments were accepted and became a part of the ultimate warp and woof of the law.⁴⁴

The reference to the contribution of *the advocate*, Daniel Webster, recalls the famous decision of Mr. Chief Justice Marshall in *McCulloch v. Maryland*.⁴⁵ For a dramatic example of the specific contribution of Webster to that decision one ought to read the contentions of counsel set forth in the official report of that famous case. Not only does the Court follow closely the questions presented and the arguments of counsel, but it adopts several statements made by Webster. Indeed, his statement—"An unlimited power to tax involves, necessarily, a power to destroy"—becomes Chief Justice Marshall's famous utterance that "[t]he power to tax involves the power to destroy."⁴⁶

Many specific examples can be given of the contribution of the lawyer's brief to the judicial opinion. Some of these examples reveal the authorship of certain passages and phrases that are well-known to historians and lawyers. Their origin is often attributed to the judge who authored the opinion. As in the example of Chief Justice Marshall in *McCulloch*, research would reveal that many famous phrases represent the skill and handiwork of lawyers—

⁴³ Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

⁴⁴ Seymour, *The Bar as Lawmaker*, in M. PAULSEN, *LEGAL INSTITUTIONS TODAY AND TOMORROW* 174 (1959). See also Re, *The Lawyer as a Lawmaker*, 52 A.B.A.J. 159 (1966).

⁴⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁴⁶ For an interesting discussion of this case in its historical context, see J. MARKE, *VIGNETTES OF LEGAL HISTORY* 42-46 (1965).

counsel who submitted the case for adjudication.

A search for the original author of famous or interesting phrases found in judicial opinions would not be devoid of good humor. An example may be found in the Supreme Court decision of *Greene v. McElroy*⁴⁷ wherein Mr. Justice Harlan in a separate opinion wrote:

It is regrettable that my brother Clark should have so far yielded to the temptations of colorful characterization as to depict the issue in this case as being whether a citizen has a "constitutional right to have access to the Government's military secrets". . . .⁴⁸

With judicial diplomacy and tact, so typical of that gracious jurist, Mr. Justice Clark in a footnote to his dissent replied:

My brother Harlan very kindly credits me with "colorful characterization" in stating this as the issue. While I take great pride in authorship, I must say that in this instance I merely agreed with the statement of the issue by the Solicitor General and his co-counsel in five different places in the brief for the United States.⁴⁹

All lawyers will properly deem it to be high praise for a learned justice to acknowledge "agreement" with counsel's statement of the issue in the brief. More important, however, this has practical significance to the lawyer in the active and daily practice of his profession. It brings to mind the suggestion made by the late Professor

Karl N. Llewellyn, who spoke of "the preferred, phrased opinion-kernel." Professor Llewellyn, in his *The Common Law Tradition*, stated:

What is wanted is a passage which can be quoted verbatim by the court, a passage which so clearly and rightly states and crystallizes the background and the result that it is *recognized* on sight as doing the needed work and as practically demanding to be lifted into the opinion.⁵⁰

All lawyers know, as do all judges, that there is no substitute for careful and painstaking preparation. Enough has been said, however, to demonstrate that thorough preparation is not merely an obligation or responsibility owed to the client. It is a professional responsibility with ramifications that directly affect counsel's duty to the court of which he is an officer, and to society in general. Although the immediate objective may be the vigorous presentation of the case so that he may be successful, his contribution to the judicial process goes beyond the success of the moment. His presentation of the case, if professionally competent, ought to render valuable assistance to the court or judge charged with the responsibility of decision.

This realization of the role of counsel adds a new dimension to the indispensable requirements of thorough preparation and competent presentation of a case. The lawyer, by applying his professional skills, will succeed in attaining several goals. First, he will discharge his responsibility to his client. Second, he will be rendering assis-

⁴⁷ 360 U.S. 474 (1959).

⁴⁸ *Id.* at 510.

⁴⁹ *Id.* at 511.

⁵⁰ K. LLEWELLYN, *THE COMMON LAW TRADITION* 241 (1960).

tance to the court or judge who must decide the case justly and according to law. And third, he will be performing a vital public function in shaping, developing and improving the law itself.

This last-mentioned function is perhaps the most important. Indeed, it is the lawyer's most durable and lasting contribution to the law. Great lawyers, who have regarded the law as a great profession, have all stressed this aspect of the lawyer's work. Chief Justice Vanderbilt, for example, in writing of the functions of the lawyer, stated that it was a "task of the great lawyer . . . to do his part individually and as a member of the organized bar to improve his profession, the courts, and the law."⁵¹

The professional responsibility inherent in this aspect of the lawyer's work has been given new vitality in Canon 8 of the new Code of Professional Responsibility. Canon 8 declares that "A Lawyer Should Assist in Improving the Legal System." The canon is important because it indicates a recognition of the public responsibility of the lawyer as a member of an honorable and learned profession. It is important also because it is responsive to the exhortation, if not admonition, of Mr. Justice Harlan F. Stone:

[M]en serve causes because of their devotion to them. The zeal of the student for proficiency in law, like that of his elder brother at the Bar, comes from a higher

source than selfishness. It is a devotion to his conception of a useful and worthy institution. But that conception is a distorted one if it envisages only the cultivation of skill without thought of how and to what end it is to be used. . . . It is not beyond the power of institutions which have so successfully mastered the art of penetrating all the intricacies of legal doctrine to impart a truer understanding of the functions of those who are to be its servants. That understanding will come, not from platitudinous exhortation, but from knowledge of the consequences of the failure of a profession to bear its social responsibilities and what it is doing and may do to meet them.⁵²

I commenced by discussing our adversary system of law and that, as far back as Dean Pound's famous address, it was a cause of dissatisfaction with the administration of justice. Since the lawyer is admittedly the central participant in that system, the discussion necessarily had to revolve around the work or function of the lawyer in the practice of law, and his role as an officer of the court. It is my conviction that the adversary system will work well, and is deserving of preservation, only if the role of the lawyer in that system is properly understood.

It is in the light of the social responsibilities of the lawyer, and the legal profession, that the lawyer's status may be correctly perceived. And it is in the perspective of his total responsibilities that both lawyers and laymen alike can appreciate the utility and wisdom of the adversary system.

⁵¹ Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and to the Public*, 40 A.B.A.J. 31 (1954), reprinted in 1 F. KLEIN & J. LEE, *SELECTED WRITINGS OF ARTHUR T. VANDERBILT* 5 (1965).

⁵² Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 14 (1934).

The adversary system will work provided its participants know its strengths and weaknesses. For the judge and the lawyer it is imperative that each also know its limitations and shortcomings. It will work well when the lawyer, its central participant, will fulfill all of his responsibilities with equal zeal—to the client, to the court and to the law. It will work best when the lawyer fully appreciates his societal responsibilities in the lofty process in which he serves. The system will be truly worthy of preservation and the confidence of the people when those most responsible for

its proper functioning, lawyers and judges, will perform their duties in accordance with the traditions and ideals of both bench and bar. The acknowledgment of the partnership, and its attendant responsibilities, will enure to the benefit of society, and will earn for both bench and bar the gratitude of all those concerned with the administration of justice. Both lawyers and judges can then assert with justifiable pride that "we are the servants of society, the bond-servants of justice."⁵³

⁵³ Wilson, *supra* note 37, at 439.

The article intended for pages 210-223 has been deleted by the author and the editors.