THE PROFESSION OF THE LAW*

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INTRODUCTION

Permit me at the outset to thank you for your invitation, and the honor that you have bestowed upon me in having asked me to be your speaker on legal ethics at this important conference. As most of you know, last year I had the honor and pleasure of being the keynote speaker at the Annual Meeting of the American Intellectual Property Association and the luncheon speaker at the Inaugural Meeting of the Pacific Northwest Patent Law Conference. On those occasions I spoke on the status of the legal profession and professionalism and legal ethics. I must add that I was greatly encouraged by the reaction of your colleagues to my remarks that were intended to improve the profession of the law. As I stated, the status and respect due our profession is a subject of great...
importance to all segments of the profession - the organized bar, the judiciary, all practicing lawyers, law professors, legal scholars and law school administrators. Clearly, because of its important role in the administration of justice and our society, each segment of the profession must play a vital part in restoring the profession to the lofty status that it properly deserves. With your permission, once again, my subject will be the status of our profession. On this occasion I should like to speak on The Profession of the Law.

Anyone who would attempt to speak of the profession of the law or professionalism would, at the very outset, have to acknowledge our indebtedness for the contribution of the great legal thinker Dean Roscoe Pound who reminded us all of the public service nature of any profession and the law in particular. Although Dean Pound has contributed so much to our subject, we would do well by starting with the basic definition of a profession and the meaning of professionalism.

Generations of lawyers have boasted that they are members of a learned profession. Lawyers have derived great pleasure and pride in being members of one of the historic and learned professions along with the clergy and medicine which have been traditionally regarded as professions throughout the centuries. Basic definitions may serve the purpose of reminding us of the noble purpose and heritage of the profession of the law. The briefest definition tells us that a profession is “a calling requiring specialized and often long and intensive academic preparation.”2 A somewhat more detailed definition states that a profession is “a vocation or occupation requiring advanced training in some liberal art or science, and usually involving mental rather than manual work, as teaching, engineering, writing, etc.; especially, medicine, law, or theology”(traditionally called the learned professions).3

The word profession is derived from the Latin professio or professionem which means to make a public declaration. The term evolved to describe the calling or an occupation that required new entrants to take an oath professing their dedication to the ideals associated with the learned calling. At this juncture it is well to recall that our English colleagues, from whom we borrow not merely our common law, but also so many of our legal customs and traditions speak of

2 WEBSTER'S NEW COLLEGIATE DICTIONARY (1977).
3 WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1983).
the *calling* of the law. The word *calling* conveys the thought that students of the law are not merely admitted to the bar for the practice of law, but are *called* to the bar.

The word *calling* brings to mind a noble notion of dedicated service. Hence, it is well to recall that our English colleagues do not speak of being admitted to the bar, but rather, of being *called* to the bar. To answer a calling is to enter a ministry, a ministry of justice whose members are committed to the rendering of service to attain the peaceful and just resolution of disputes. Indeed, the admiration of some experienced American lawyers is such that they have written about the "priesthood" of the English bar.  

It is important for us to remember that when Dean Roscoe Pound defined a profession he stated that "[t]he term refers to a group... pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood." The primary or central purpose is the pursuit of a learned art "in the spirit of public service." Although many efforts have been made, it is agreed that no simple definition better captures the spirit of the legal profession than Dean Pound's "pursuing a learned art as a common calling in the spirit of public service." The task of lawyers in the practice of their profession is to particularize what is implicit in that terse definition. It is intended to give meaning to the purpose and spirit that it hopes to express or evoke.

The *professions* exist for the purpose of rendering service for the benefit of others, whether persons or communities. It is the rendering of service to those in need that gives the satisfaction of pursuing a vocation or calling, and not merely a money-making occupation. In summary, the opportunity of service is the element that gives the work of lawyers a moral dimension and a sense of fulfillment. It is a dimension that extols the role of lawyers as counselors, who, as healers and peacemakers work to avoid and spare clients the stressful and often traumatic experience of litigation. In a word it affords lawyers the opportunity to do good and gives substance to the notion that lawyers can and should be ministers of justice.

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5 ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).
Although much has changed in the world since the day that the great Roscoe Pound wrote those words which speak of a "common calling in the spirit of public service," the question for us today is whether essential elements of the legal profession have changed so drastically as to make what is implicit in those words anachronistic, obsolete, and, hence, inapplicable in the world today. Surely we agree that the essential qualities of honesty, integrity, ethics, truth and professional responsibility are still the moral values which underlie our legal profession. Differently stated, the question that may be asked is whether we have lost our moral moorings.

In a recent report by the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, the Commission stated that it believed that "the spirit of Dean Pound's definition stands the test of time." The practice of law 'in the spirit of public service' can and ought to be the hallmark of the legal profession. The report of that Commission contains so much that is pertinent and valuable that much good would result if it were to become serious mandatory reading for every member of the legal profession and, surely, for all those who wish to embark upon a career in the law.

The following may serve as a useful summary of the elements that comprise the privileges and responsibilities of the profession: that the practice of the profession requires substantial intellectual training and complex judgments; that since the clients cannot adequately evaluate the quality of the service, they must trust and rely upon those whom they consult; that the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest as well as the public good; that the profession is self-regulating, i.e., organized so as to assure the public and the courts that its members are competent and do not violate their client's trust.

At the outset in this presentation, to highlight the professional status of lawyers, reference was made to the elements of a profession. One of those elements is that the profession is self-regulating, i.e., organized so as to assure the public and the courts that its members are competent and do not violate their client's

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6 COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 261 (reporting to Board of Governors and House of Delegates of American Bar Association which was presented in New York, August 1986) (quoting Dean Roscoe Pound).
Perceived abuses inevitably lead to the imposition of restraints and legal regulation. The contingency fee is an example. Reference may be made to the contingency fee as one of the causes that has led to dissatisfaction with the profession. As a consequence, additional efforts have been made to regulate contingency fees. As an example, in the State of New York attorney fees in malpractice cases are “capped on a sliding scale.”

A lawyer may receive 30% of the first $250,000 of a judgment, 25% of the next $250,000, and so on. Fees above $750,000 are capped at 10%. A bill pending in the State of New York has been proposed which would remove those sliding scale fees permitting lawyers to set their own contingency fee in malpractice cases, which, it is assumed, would range between one-third and one-half of a final award. The sponsor of this legislation has complained that, without this legislation “lawyers face economic risk if they lose cases in jury trials.”

A New York newspaper states, “As it is, New York is awash in contingency-fee-driven litigation,” and concludes “The state doesn’t need to give lawyers the keys to open a Pandora’s box of more legal hi-jinks. Gov. Pataki needs to veto this bill right away.” Governor Pataki did indeed veto the bill. This news was welcomed by the newspapers that stated: “Gov. Pataki . . . snuffed out legislation that would have fattened the already hefty fee trial lawyers receive for medical malpractice cases they take on a so-called contingency fee basis.” The Governor’s decision to veto the legislation was said to be “a victory for doctors and tort-reform advocates who denounced the measure. They contended that removing the caps on contingent fees would have picked the pockets of consumers who hire the lawyers for malpractice claims.”

The elements of the profession, as distinguished from an ordinary
occupation, are helpful in determining or defining the relationship that exists between the member of the legal profession and the client. One cannot accept the notion or criticism that, by insisting that the law is a profession which imposes special responsibilities, one is being an elitist, and is minimizing the importance of other callings or occupations. To highlight the professional responsibility of the legal professional is not to minimize other occupations or relationships. The effort, rather, is to highlight the uniqueness of the attorney/client relationship and that the relationship is one of special trust and confidence, and that to ignore the professionalism aspect of the practice of law is to ignore the very element that distinguishes the lawyer's special relation with the client and the lawyer's role in the administration of justice. The problem or difficulty may be the failure fully to understand or appreciate that there is a vast difference between entering into an ordinary contract with someone, and engaging a lawyer to represent a client as an attorney, as an advocate before the courts or as a legal counselor.

I hasten to add that my remarks are in no way intended to minimize the honesty, integrity, or function of merchants, artisans or others engaged in countless commercial or other activities. Although there is no intent to cast any aspersion on the honesty and integrity of any career or occupation, the fact remains that the relationship with an attorney is of necessity a fiduciary relationship and requires more than the ordinary sense of honesty and integrity that, in the language of Justice Cardozo, may be acceptable in "the marketplace." Even in today's modern world it is not asking too much of a member of the legal profession to be reminded of the standard of honesty and integrity that a Justice Cardozo would require of persons who serve in a fiduciary capacity. His words in the case of Meinhard v. Salmon13 should be as applicable today as they were when written:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilious of an honor most sensitive, is then the standard of behavior.

In a word, the fiduciary capacity of the lawyer-client relationship

13 240 N.Y. 458 (1928).
requires a higher standard of behavior and responsibility.

I. THE CONTRIBUTION OF LAWYERS

In any discussion which includes dissatisfaction with the legal profession, it is well to recall the observation of Justice Robert H. Jackson about lawyers. Justice Jackson stated that countless examples may be given of courageous lawyers who have promoted and supported causes and aspirations of people who were subjected to governmental abuse of power and whose rights would not have been vindicated without the aid of dedicated lawyers. Perhaps, one need also to be reminded of the role of lawyers in the drafting of great charters of human liberty. One should not forget that of the fifty-six signers of the Declaration of Independence, thirty-three were lawyers, and that of the fifty-five members of the Constitutional Convention, thirty-four were lawyers.\textsuperscript{14} The Declaration of Independence has probably done more to advance the cause of human freedom than any other document since the Magna Carta.\textsuperscript{15}

In pursuing great causes, the role of lawyers has been crucial, for it was their successful pleading and advocacy that removed so many barriers to human freedom. This, in turn, gave a wider and fuller meaning to the ideals of human dignity and liberty enshrined in the Declaration of Independence, the Constitution and laws of the United States. An impressive array of decided cases and legal literature can be amassed to show the extraordinary contribution of lawyers in expanding the frontiers of justice and human rights.

This role of lawyers in the public service and as servants of the community at large is often neglected when one speaks of the contribution of lawyers to society. Discussion of the role of lawyers is usually limited to their service to clients, and seldom is there any expression of appreciation of the contribution to society and the nation. In this connection it is enlightening to read an address of Woodrow Wilson. Writing as a lawyer, in an address entitled "The

\textsuperscript{14} See generally CHARLES A. GOODRICH, LIVES OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE (1976).

Lawyer and the Community,"16 Woodrow Wilson made the perceptive observation that "[t]he history of liberty is a history of law."17 The following remarks about lawyers are also worthy of quotation:

We are lawyers. This is the field of our knowledge. We are servants of society, officers of the courts of justice. Our duty is a much larger thing than the mere advice of private clients. In every deliberate struggle for law we ought to be the guides, not too critical and unwilling, not too tenacious of the familiar technicalities in which we have been schooled, not too much in love with precedents and the easy maxims which have saved us the trouble of thinking, but ready to give expert and disinterested advice to those who purpose [propose] progress and the readjustment of the frontiers of justice.18

Notwithstanding such irrefutable historical data, so clear and overwhelming, it is nonetheless important to ascertain the reasons for the present low esteem of the legal profession in general and lawyers in particular.

II. THE PRESENT DISSATISFACTION

Our topic, of necessity, requires that we attempt to ascertain the causes for the present dissatisfaction and to seek practical solutions. As Dean Pound pointed out years ago, dissatisfaction with the administration of justice in general, and the legal profession in particular, is as old as the law itself.19 The present dissatisfaction, however, to adopt the words of Dean Roscoe Pound, is "more than the normal amount."20 Since it is widespread and pervasive,21 it is a matter of great concern because lawyers are key participants in a profession that is historically acknowledged to be honorable and noble.22 Furthermore, dissatisfaction threatens to undermine the

17 Id. at 437.
18 Id. at 421.
20 Id. at 396.
22 See Mallard v. United States Dist. Court for the S.D., 490 U.S. 296, 311 (1989) (Kennedy, J., concurring) ("[B]ecause our duties go beyond what the law demands... ours remains a noble profession."); United States v. Perlstein, 120 F.2d 276, 285 (3d Cir. 1941) (Clerk, J.,
crucial role and historic contribution of lawyers in the effective administration of justice. It cannot be denied that lawyers and non-lawyers alike have noted the serious decline in lawyer professionalism and the failure to adhere to the standards of ethics and civility that have made the law a respected and honorable profession. National polls are not required to reveal that in the area of “moral and ethical standards,” lawyers receive very low ratings.23

I would like to assume that all lawyers are familiar with Dean Pound’s famous speech delivered at the 1906 meeting of the American Bar Association in St. Paul, Minnesota, entitled “The Causes of Popular Dissatisfaction with the Administration of Justice.” That famous address, commonly referred to as “Dean Pound’s St. Paul speech,” had a profound effect upon judicial reform in the United States.24 Dean Pound spoke of the abuses of the adversary system which he described as “the common law doctrine of contentious procedure which turns litigation into a game.”25 He regarded the “American exaggerations of the common law contentious procedure” as a “potent source of irritation” which resulted in a bullying of witnesses and sensational cross examinations, thus creating a general dislike and impairment of the administration of justice.26 The “Sporting Theory of Justice,”27 as he called it, not only irritates parties, witnesses, and jurors in particular cases, but also gives “the whole community a false notion of the purpose and end of law.”28 One might also add increasing examples of uncollegial behavior and lack of civility.

It has become necessary to be reminded that the adversary system
dissenting) (stating that law is honorable and noble profession); Kendall B. Coffey and Thomas F. Nealon, Non-Compete Agreements Under Florida Law: A Retrospective and a Requiem?, 19 FLA. ST. U. L. REV. 1105, 1112 (1992) (“The legal profession... has for centuries been regarded and adjudicated to be a great and noble profession.”).


25 Pound, supra note 19, at 404. Pound observes that our adversary system “leads counsel to forget that they are officers of the court.” Id.

26 See Pound, supra note 19, at 404-05.

27 Pound, supra note 19, at 404.

28 Pound, supra note 19, at 406.
for the presentation of cases, as developed in the common law, was designed to *ascertain truth*. Lawyers in that system, however, are not only *advocates* for clients, who have a duty to represent clients competently and zealously, but are also *officers of the court*, whose zeal is circumscribed by a professional responsibility founded upon rules of law, codes of professional responsibility and canons of professional ethics.

Without professional and ethical restraints upon the role of the lawyer in the adversary system, there would still be validity in Dean Pound's characterization of the system as the Sporting Theory of Justice. In the vernacular, this has been called the "hired gun" approach, that is, the party who engages the most zealous and cunning lawyer is the one most likely to prevail. One commentator noted that "lawyers are hired guns; they know they are, their clients demand that they be, and the public sees them that way." We must recall, however, that canons of ethics and professional responsibility have always and continue to set forth the ethical restraints upon the lawyer's zeal in the effort to win cases. It is unfortunate that the lawyer-client relationship is often turned into one in which the attorney is the legal hired-gun and the client is simply the impersonal vehicle bringing the case. Hence, lawyers are often viewed by a large segment of society as amoral guns for hire. Canons of ethics and rules of professional responsibility specifically provide that "a lawyer should represent a client zealously within the"
Furthermore, the disciplinary rules found in the various canons of ethics only state a minimum requirement. The standard that ought to prevail is one of professionalism, a standard that views the practice of law as a "calling in the spirit of public service." It is one that includes ethical and moral considerations. It has been suggested that if lawyers are forced from their hired-gun pedestal, they might be more likely to follow their moral instincts.

III. LAWYERS AS "OFFICERS OF THE COURT"

A. Professional Duty in the Decisional Process

A careful rereading of Dean Pound’s classic St. Paul’s speech will reveal an additional evil that results from the adversary system in which the lawyer is regarded as purely a tool or agent of the client whose primary or central goal is to win. When winning is the central goal, regardless of considerations of right and justice, it is easy to understand why persons would regard the lawyer as a "hired gun." After noting that the adversary system in England is probably a survival of the days when a lawsuit was a fight between two clans, Dean Pound stressed that "it has been strictly curbed in modern English practice." He also observed that "with us, it is not merely in full acceptance," but that "its collateral possibilities have been cultivated to the fullest extent." Significantly, he adds, "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." He states that "we resent such interference as unfair, even when in the interests of justice." We must take particular note of his conclusion that

[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 the judge 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 . . . ]

34 POUND, supra note 19, at 405-406.
Dean Pound enumerates some of the evils of the unrestrained adversary system. Some of the evils enumerated are "exertion to 'get error into the record,'" turning witnesses "into partisans pure and simple," "sensational cross-examinations" and "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." Dean Pound continued that under such a system "[T]he inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?" 35

Although efforts have been made to do away or minimize the evils inherent in the adversary system, it cannot be said that either the role of the judge or that of the lawyer has been changed sufficiently that the evils mentioned have in fact been eliminated. Implicit in the criticism of the "exaggerated contentious procedure" discussed by Dean Pound is the criticism of lawyers who regard their roles primarily, if not solely, those of advocates for the client, and judges who feel that their role is to be a passive one in which they are to listen to what is submitted to them by counsel for the parties. Professor Elliott Cheatham spoke of the paradox "if not oddity" of the adversary system in America. He called 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." 36

In highlighting this aspect of litigation, or what has been accurately termed the oddity or anomaly of the adversary system, one can readily appreciate a difficulty or weakness of the system. The heart of the matter lies in the paradoxical and conflicting role of lawyers. Although engaged in the important function of the "administration of the law and justice" and being influential participants in the process, lawyers are privately retained by one side of the controversy, and they aid, guide and defend that side alone. 37 In the words of Professor Cheatham, "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." 38 The more the drama of the trial and

35 Id. at 405-06.
37 See id. at 4-5.
38 Id. at 5.
the role of the lawyer is examined in the adversary system, the more one must conclude that the lawyer is the key and central participant, and that any improvement in the system inevitably requires an appreciation and modification of the role of the judge and lawyer.

As to the observation that under the adversary system the judge’s role is limited to that of an umpire, i.e., one who listens and plays a passive role, a great deal of progress has been made on the part of judges who assume a much more active role in the trial of cases. Many would urge that much more needs to be done, and that judges should play a much more active role in enforcing codes or rules of professional ethics and civility in the trial of cases. It is clear, however, that the umpire or passive role can no longer prevail. It simply has not worked well. A specific example is the decline or lack of civility in the trial of cases. The fact that so many codes of civility have had to be enacted by courts and bar associations indicates that the decline or lack of civility has become a serious problem that required the attention of the organized bar and the courts.

Under the prevailing system counsel is regarded and, indeed, too often plays a role that is entirely partisan. In a word, lawyers represent, speak and work on behalf of the party to the controversy who has engaged them. Although this highlights the role of the lawyer as an advocate in the litigation, it tends to obscure, minimize or neglect the crucial role of the lawyer as an officer of the court.

The status of the lawyer as an officer of the court must be stressed because it is the role that highlights the crucial function of the lawyer, in the spirit of public service, as a key participant in the administration of justice. It is the role of the lawyer that transcends the purely partisan interest of the client and highlights the role of the lawyer as a quasi-public official in the administration of justice. This renewed emphasis on lawyers as officers of the court stresses the professional duty of lawyers to the court and the administration of justice, and places in proper perspective the duty to promote, defend and protect the rights of the client within the bounds of law and professional ethics.

In the practice of law, important roles of lawyers include the trial of cases and the bringing or defending of appeals. “When trying a case or arguing an appeal, a lawyer has a professional duty vigorously to assert the client’s cause in an effort to win the case. A second, and equally important responsibility, however, is the
lawyer’s duty to assist the court in deciding the case justly and according to law.” What, then, is a lawyer to do when to assist the court may produce an unfavorable result for the client, or when vigorously to assert the client’s cause may produce an unjust result? The conflicts between the professional responsibilities associated with the dual roles of “advocate” and “officer of the court” give rise to some of the most important and troublesome ethical questions confronting the legal profession.

As stated elsewhere, in a discussion of the appellate brief, “Candor and fairness of presentation ought to be the principal characteristics of the brief.” One aspect of the requirement of candor is counsel’s duty to disclose to the court legal authority directly adverse to the client’s case when not presented by opposing counsel. Rule 3.3, “Candor Toward the Tribunal,” of the Model Rules of Professional Conduct provides that “(a) [a] lawyer shall not knowingly... (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .”

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as noted from Rule 3.3 . . . an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party.

This, however, is a minimum standard. It is my firm belief that full disclosure of authorities promotes understanding, inspires the confidence of the court and contributes to the just resolution of the litigation.

40 The art of advocacy is “beset with perils of a very special kind, and for that reason the first quality beyond all others in the advocate . . . is that he must be a man of character. The Court must be able to rely on the advocate’s word.” The Right Honorable Lord Justice Birkett, quoted in Marke, The Art of Advocacy – a Bibliographical Commentary, N.Y.L.J., July 19, 1977, at 4.
41 MARVELL, APPELLATE COURTS AND LAWYERS 35-36 (1978) (“Counsel’s mistakes and, especially, lack of candor color the rest of his arguments in the eyes of many judges.”).
In a discussion of an effective appellate argument, I refer to the "ABC's" of all advocacy and state that the "letters refer to Always Be Candid, a reminder that candor instills confidence and respect, and that lack of candor breeds distrust and disbelief."\textsuperscript{43}

\section*{B. Codes and Canons of Ethics and the Restatement}

From August of 1969 to August of 1983, the ethical standards of the legal profession were set forth in the American Bar Association's \textit{Model Code of Professional Responsibility}. The Code contained nine Canons, with Ethical Considerations and Disciplinary Rules under each Canon. The Canons were brief, general statements of subject matter, embodying the general concepts from which were derived the Ethical Considerations and Disciplinary Rules. The Ethical Considerations were of an aspirational nature and represented objectives or ideals toward which every lawyer was to strive. They constituted a body of principles upon which the lawyer relied for guidance. The Disciplinary Rules, unlike the Ethical Considerations, were mandatory in character and stated the minimum level of conduct below which no lawyer could fall. A violation of a Disciplinary Rule subjected a lawyer to disciplinary action.

The Code was the object of much comment and criticism, and, in 1977, the ABA Commission on Evaluation of Professional Standards undertook, "a comprehensive rethinking of the ethical premises and problems of the profession of law."\textsuperscript{44} This rethinking resulted in the adoption, and, on August 16, 1983,\textsuperscript{45} the publication of a new set of professional standards denominated the \textit{Model Rules of Professional Conduct}. The "Rules" discarded the Code's format of Canons, Ethical Considerations, and Disciplinary Rules in favor of rules accompanied by comments, but retained much of the substance that was embodied in the \textit{Code of Professional Responsibility}.\textsuperscript{46}

Today the ethical premises of the legal profession are found in the \textit{Model Rules of Professional Conduct}. The following quotation from the Preamble of the Model Rules is helpful because it states clearly that in resolving conflicts that may arise lawyers must exercise "sensitive professional and moral judgment":

\textsuperscript{43} Id. at 131.


\textsuperscript{45} 152 U.S.L.W. 1 (Aug. 16, 1983).

[I]n the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by basic principles underlying the Rules.47

Clearly, in cases of doubt, professionalism requires that lawyers be guided by ethical and moral considerations that reflect the professional responsibility of lawyers. The broader role of lawyers in the public service and as servants of the community at large is often neglected when one speaks of the contribution of lawyers to society. Discussion of the role of lawyers is usually limited to their service to clients, and seldom is there any expression of appreciation of the contribution to society and the nation.

The most recent Restatement of "The Law Governing Lawyers," emphasizes the gap or chasm between the minimal standard of behavior or conduct that will not subject a lawyer to legal liability or disciplinary proceedings and the standard that should prevail as a matter of personal professional and moral responsibility. In an introductory section entitled "Reporter's Memorandum," the Restatement reminds the readers that

this Restatement of the Law Governing Lawyers, . . . aims to restate the law. It reflects decisional law and statutes and takes account of the lawyer codes in its formulations. The formulations in general, are statements of the law applicable in legal malpractice and disqualification proceedings and other contexts to which that body of law is applicable.

Hence, it states that "[b]ecause this is a Restatement of the law, the Black Letter and commentary do not discuss other important subjects, such as considerations of sound professional practice or personal or professional morality or ethics." Under the heading of "Preface" it adds a "cautionary statement . . . concerning the necessarily narrow and 'legal' focus of the Restatement." The

47 RE AND RE, supra note 42 (noting that "Model Rules" may be found in 52 U.S.L.W. 1 (Aug. 16, 1983) and 8 MARTINDALE-HUBBELL LAW DIRECTORY, pt. IV, 1 (1998)).
Preface continues:

At the same time the Preface points out the obvious importance of non-legal topics not considered. Some members have urged that the Preface, or the Restatement as a whole, say more about the importance of ethics or of other considerations that should lead a lawyer to practice under standards more exacting than what the law requires. While the Reporters heartily agree that the law should be practiced in that way, as we urge our students to do, for the reasons stated in the Preface we believe that wholesale introduction of non-legal considerations into the Restatement would create serious risk of uncertainty as to the law itself. That had proved to be the case with the 'sound professional practice' points that had been introduced into early Drafts, but were deleted, as most agreed they were susceptible to being misread as stating legal requirements.48

There can be no doubt that the Restatement is a statement of minimal legal requirements that will not subject lawyers either to "legal malpractice," "disqualification" or "disciplinary proceedings." Clearly a higher and more exacting standard of conduct is required of members of a great profession in the conduct of the profession of the law.

Topic 2 of the Restatement deals with the process of Professional Regulation that considers "who may become a lawyer and provide legal services."49 Areas dealing with admission and unauthorized practice are designed to ensure that "only competent individuals properly credentialed as lawyers provide legal services. That is done on the justification of ensuring that clients, the legal system, and the public are not harmed by incompetent or corrupt practitioners."50 It is important to note that in addition to "collegiate and legal education, bar examination and other state requirements, the conditions for admission to practice include good moral character, and scrutiny by a committee on admission." Formal admission in most states customarily also includes a swearing-in ceremony before a designated court of the state.51 The screening of candidates for the bar for the common law world dates back to medieval England. The central inquiry continues to be whether the

49 Id. at 12.
50 Id. at 13.
51 See id. at 14.
candidate possesses "the ability and disposition to practice law competently and honestly." 52

Surely it could not be made any clearer that the Restatement deals with a legal text of liability and discipline for illegal and wrongful conduct and not with the standard of behavior expected and required of members of a noble and honorable professional.

IV. CAUSES OF DISSATISFACTION AND LOW ESTEEM

Many "causes" can be discussed for the present dissatisfaction with the legal profession. Commencing with the persistent abuses of the adversary system, materialistic attitudes manifested in unjustified billing practices, the commercialization of the profession, lawyer and litigation explosion, lawyer advertising and abuses of the contingent fee, sufficient causes can be identified to indicate the seriousness of the problem.

The ever-increasing number of lawyers, the explosion in the number of cases filed with the courts, and the bringing of frivolous suits have accelerated the erosion of trust and confidence in lawyers. Even if lawyer competence were assumed, ethical lapses, widely publicized scandals, and attitudes of self-interest have all led to a perceived lack of professionalism and ethics with the inevitable loss of respect and esteem.

Since respect must be earned, it is fundamental that, to regain trust and confidence, lawyers must demonstrate understanding the responsibilities of membership in a noble profession, the principal goal of which is to serve clients and administer justice. 53 The ideal of the profession is service, rather than the maximizing of profits and billable hours. 54

Although no one questions the right of just compensation for professional services rendered, lawyers must resist the temptation to make self-interest the primary goal of the practice of law. In the words of Dean Pound, a profession is "no less a public service because it may incidentally be a means of livelihood." 55 Furthermore, it is disheartening to find it necessary to state that

52 Id. at 17.
53 See A.B.A. REPORT, supra note 30, at 140. Striving to promote justice and providing adequate legal services to those who cannot afford them are fundamental values of the profession. Id.
54 See id.
55 POUND, supra note 5, at 5.
lawyers must understand that *honest dealing* is indispensable to restore the belief that lawyers are worthy of trust and confidence. Public service, pro bono service as a professional obligation, and a genuine concern for the interests and welfare of clients should be distinguishing features of the legal profession.\(^5^6\)

The view is widely held that lawyers who are taught to master the adversary system and are trained primarily as advocates, too often tend "to view a dispute as a contest for advantage, not an opportunity for settlement."\(^5^7\) Apart from the training in the adversary system, it cannot be said that lawyers fully appreciate or are consciously taught the various roles required of lawyers in a modern society.\(^5^8\) Beyond their role as trial and appellate advocates, lawyers have neglected other equally important roles in the practice of law, such as counseling, the settlement of disputes, and the prevention of litigation.\(^5^9\)

As stated at a prior occasion, lawyers that "counsel settlement and just solutions to legal problems, rather than maximum advantage and costly litigation will help restore the dignity and good name of the profession."\(^6^0\)

V. THE ROLE OF LAW SCHOOLS

Since the problem is serious and affects not only the entire profession but also the society which it serves, an effective solution is in the best interest of all segments of society. Beyond the efforts of lawyers, the organized bar, the judiciary, and the pertinent government agencies, no effective solution is possible without the

\(^{56}\) See Stephanie B. Goldberg, *Bridging the Gap*, A.B.A. J., Sept. 1990, at 44; see also A.B.A. REPORT, *supra* note 30, at 214 (positing that every lawyer, regardless of position or status, has obligation to find time to help disadvantaged); N. Lee Cooper, *Refocus the Spotlight Toward Public Service*, N.Y.L.J., Aug. 18, 1986, at S12 (arguing that it is incumbent on public profession to shift its emphasis from monetary gain to public interest representation); Daniel P. Sheehan, *Rich Lawyers: Where is Your Conscience?*, NEWSDAY, May 17, 1988, at 62 (noting that attorneys have more opportunities for good deeds than members of any other profession).

\(^{57}\) Kanner, *supra* note 32 at 82. Lawyers should be taught how to avoid litigation just as they are taught to conduct successful litigation. Settlement and negotiation should be included and carried out with the same vigor as litigation. *Id.*


cooperation of the law schools. Lawyers are usually first introduced to the profession as students in law school. It is in law school that lawyers first learn rules of law, are introduced to the practice of law, and the ideals of law as a profession. All law teachers, therefore, are potential role models and have the opportunity and responsibility to inculcate notions of fair dealing, professional responsibility, and legal ethics. In the words of the American Bar Association’s Commission on Professionalism, since “the law school experience provides a student’s first exposure to the profession and . . . professors inevitably serve as important role models for students . . . the highest standards of ethics and professionalism should be adhered to within law schools.”

In addition to teaching principles of law, law schools must play a more active and sustained role in molding attitudes and inculcating professional and moral values. Not only must law schools teach professional ethics more effectively, but must also advance core professional values by teaching students their social responsibilities as lawyers. In this vital role, ethics and the ideals of the profession should be regarded as an integral part of legal education. Legal ethics and professional responsibility should not only be taught in a law school “course,” but should be an essential component of every course in the law school curriculum.

This important function of the law school highlights the crucial role of the law professor. The teaching of law, whether substantive or procedural, is only a part of the training for the profession of the law. Law professors must also be mentors who teach and inculcate professional responsibility and ethical values in all courses of the law school curriculum.

It is conceded that it is difficult to “teach” integrity and that no one course can teach legal ethics and professional responsibility. It
is also true that adherence to ethical standards is more a matter of virtue and good character and cannot be tested simply by having passed a law school course on legal ethics. Although character is formed in the students' earlier years, nevertheless, ethical questions that arise in the practice of law, and the temptations to which lawyers are subjected in their practice, should also be presented, discussed and "taught" in law school.

Beyond the teaching of substantive law and procedure, the temptations to which lawyers are subjected and the ethical questions that arise in the practice of law must also be treated in all law school courses. For instance, a course in real estate transactions will undoubtedly deal with situations in which money is placed in escrow with the attorney. At this juncture, the professor should discuss legal as well as ethical considerations, such as the temptation to "borrow" money from this fund for some personal purpose and conflicts of interest. Discussions of the professional and ethical aspects of the law and legal practice should take place in every course. Discussions of ethical aspects of the practice of law should begin the moment students enter law school, and should continue throughout the law school experience.

It is clear that training for the profession of law involves more than merely learning principles and rules of substantive law and procedure. Beyond a knowledge of legal principles, the legal training process requires the transmission of attitudes, values and skills. The inculcation of moral and ethical values and professional skills was formerly accomplished by the apprentice system or clerkship method of legal training, which involved close association with a "master" or mentor who would "teach" or guide the student apprentice. In addition to reading law books and decided cases, the apprentice was guided by and learned by observing the mentor in the practice of law. The apprentice learned not only by reading and writing, but also by observing, emulating and by assisting the mentor in the practice of law.

VI. LAW TEACHERS AS MENTORS

In 1950, in his fifty-first year of teaching law, Dean Pound made

65 See Re, Jeffords Lecture, supra note 64, at 9-10 ("Surely it is possible, in each course, to find cases that lend themselves to a discussion of the ethical problems which confront the lawyer"; problems accentuating ethical limits of advocate's partisan efforts).
some extraordinarily perceptive comments on law teachers and law teaching. Dean Pound referred to a statement by Judge Simeon E. Baldwin, a Governor and Chief Justice of Connecticut, and a founder of the American Bar Association, who had spoken "of the danger to the law in the full-time law teachers whom he saw multiplying and replacing the older apprentice-type law schools by the university law school of today." After referring to the complete victory of the "university law school," and speaking as a law teacher, Dean Pound stated:

[W]e may flatter ourselves that it has been achieved not merely without danger to the law but with conspicuous profit to it. Yet I fear there may prove to be some basis of truth in Judge Baldwin's prophecy, now that preparation for the bar has been put completely in our hands, if we forget that we are training for a profession and bring up a generation with no conscious responsibility to the law and no deep conviction of the profession as a group... pursuing a learned art as a public service."  

Dean Pound noted that, under the conditions of practice in the modern industrial society, the apprentice system of preparation for the bar ceased "to do the work of handing down effectively the tradition of a profession as distinct from a money-making calling." Dean Pound concluded the thought by stating: "I fear we law teachers have not found, nor even tried very hard to find, how to do this part of the task which has devolved upon us." The language chosen by the great scholar-teacher is significant. He speaks of "handing down effectively the tradition of a profession as distinct from a money-making calling." It is particularly important to note that he still spoke of the profession as a "calling." It is from this tradition or culture that one speaks of the law as a "calling." Hence, as noted earlier in this presentation, candidates for the bar are not merely admitted to the bar but are "called to the Bar." The time is long overdue to stress anew the ideals and public service goals of the legal profession. 

Since the responsibility for the training of lawyers has been

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67 Id. at 520 (referring to Judge Baldwin's quote in which Pound emphasized changes for worse that he had noticed during his membership in legal profession).
68 Id. (emphasis added).
69 Id.
70 Id.; see also Edward D. Re, Law Office Sabbaticals for Law Professors, 45 J. LEGAL EDUC. 95 (1995).
assumed by law schools, the inculcation of values must also be the responsibility of law schools. It is the law school professor who is now the guide and substitute for the mentor who was the role model who taught values by example by the manner in which the profession was practiced. Hence, since the function is now that of the law school, law professors must assume the role and responsibility of inculcating professional values and ethical norms.

The causes for the low esteem and popular dissatisfaction are many, and some are deeply rooted. It is evident that the dissatisfaction pertains essentially to the failure to adhere to professional and ethical standards, and the placing of financial gain above personal integrity and service to clients. By adhering to fundamental precepts of honesty and integrity, and by adhering to the ideals of the profession, the moral dimension of the entire profession will be restored.

Recently, after noting the negative results of recent surveys of lawyers and public opinion polls, the American Bar Association proposed “effective action” to regain public trust and respect for the legal profession and the legal system. Areas of concern addressed by the ABA included lawyer advertising, recommending improvements in the justice system, and strengthening the image of lawyers regarding pro bono activities and community service. Other areas included the examination of “client concerns as they relate to the attorney grievance, ethics and disciplinary process.”

Beyond “image,” what must be addressed is lawyer conduct and the manner in which lawyers conduct their practice, by emphasizing honesty, integrity, and professional responsibility, ethics and service. Hence the burden and responsibility for improving the public perception of lawyers falls upon lawyers themselves by adherence to ethical standards, as well as upon legal educators

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73 See Cris Carmody, ABA President-To-Be Warmed Up, Ready to Step to the Line, CHI. DAILY L. BULL., Feb. 6, 1992, at 1.
75 Ide, supra note 71, at 65.
76 See PROFESSIONAL ETHICS, BOOK II 20 (Sir Thomas Lund ed., Int'l Bar Ass'n 1970).
who must instill those values and ethical norms in law students throughout their law school experience.\footnote{See generally BANKS McDOWELL, ETHICAL CONDUCT AND THE PROFESSION'S DILEMMA 173 (Quorum Books 1991).}

Although an appreciation of the positive role of lawyers in our society and the proper function of the legal system\footnote{See R. William Ide III, Rebuilding the Public's Trust, A.B.A. J., Sept. 1993, at 8.} are essential, solving the problem of the low public esteem of lawyers must begin with an assessment of lawyer conduct\footnote{See Grezlak, supra note 71, at 1 (finding common complaints regarding attorney misbehavior include over-billing, not returning clients' phone calls, and bringing frivolous suits which tie up legal system and cost clients money).} and the instruction and training that they received throughout their law school careers.\footnote{See Kanner, supra note 32, at 97.}

**CONCLUSION**

It cannot be denied that much has been done in recent years to reverse the trend that has seriously affected the respect and esteem that should be enjoyed by members of the legal profession. The yeoman service of the American Bar Association and the valuable reports that it has produced will undoubtedly soon bear fruit. Since it is obvious that the task of training lawyers has fallen upon the law schools, a deep debt of gratitude is owed to those leaders of the American Bar Association who helped produce what is popularly known as the "MacCrate Report." This Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,\footnote{See A.B.A. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM (July 1992) (Narrowing the Gap).} has already played a major part in highlighting the key role that the law school and law teachers must play in training law students for the profession of the law as embraced in the definition given to us by Dean Pound.

The MacCrate Report and the work of the Professionalism Committee of the American Bar Association\footnote{See PROFESSIONALISM COMM., TEACHING AND LEARNING PROFESSIONALISM (Aug. 1996).} have already helped reverse the trend. Having clearly identified the problems, helpful practical solutions have been offered by responsible members of the profession.

In this presentation I shall conclude by summarizing three aspects

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\footnote{See generally BANKS McDOWELL, ETHICAL CONDUCT AND THE PROFESSION'S DILEMMA 173 (Quorum Books 1991).}
of our subject that would, in my opinion, help restore to the profession the respect and esteem that it properly deserves. The three suggestions for improvement that I shall summarize are: 1) restoring the ethical and moral foundations of the profession; 2) a renewed emphasis on the role of lawyers as officers of the court; and 3) the role of the lawyer as counselor, the settlement of cases and preventive law. These three areas have been selected because each deals with ideals and moral values, and extols the role of the lawyer as a minister of justice in the avoidance of litigation and in the settlement of disputes.

I. RESTORING THE ETHICAL AND MORAL FOUNDATIONS OF THE PROFESSION

What has traditionally been acknowledged to be a noble and honorable profession can once again be made noble and honorable and enjoy respect by revitalizing and restoring its ethical foundations, moral values and its spirit of public service. Professional responsibility and legal ethics in the practice of law are crucial elements if the effort to regain respect and confidence is to succeed. This effort is of the greatest importance not only to lawyers and the legal profession, but also to the administration of justice and society at large.

A survey of the present status of the legal profession and of the causes of dissatisfaction will indicate that there must be a restoration of the ideals of the profession and a revival of the spirit of idealism inherent in the definition of Dean Pound that the legal profession is a “common calling in the spirit of public service.” What is required is a full appreciation that the legal profession cannot lose sight of its idealistic heritage and tradition, and the important role that the moral conscience of lawyers must play in the practice of their profession.

The Preamble to the A.B.A. Model Rules of Professional Conduct states that a “lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”84 This public service aspect of the role of lawyers is an essential element and must be inculcated in students throughout their law school experience. In law school more time

84 A.B.A. MODEL RULES OF PROF'L CONDUCT pmbl.
and effort must be devoted to stressing the idealistic foundations of the profession, and the lawyer's special responsibility as a moral and public person in improving the administration of justice. It is well to remind lawyers of their responsibilities as public citizens and of their "special responsibility for the quality of justice." At the same time it is also necessary to remind all persons concerned with the administration of justice that an independent judiciary and a responsible and respected bar are the essentials upon which depend the quality of the administration of justice.

II. THE ROLE OF LAWYERS AS OFFICERS OF THE COURT

In order to stress the public service role of lawyers as professionals with responsibilities beyond those of mere advocates, it is recommended that the role of the lawyer that ought to be stressed is that of the lawyer as an officer of the court. By highlighting the role of lawyers as officers of the court, we highlight the responsibility of lawyers not only to the court before whom a case may be tried but also their role as quasi-public officials in the administration of justice and their responsibility to the law itself. Furthermore, stressing the lawyer's role as an officer of the court negates the charge of being a mere "hired gun" and minimizes the evils that have resulted from an abuse or the excesses of the adversary system.

The existing codes of ethics and professional responsibility that have been promulgated by the American Bar Association and other bar associations, as well as by the courts, contain specific aspirational declarations and mandatory rules designed to regulate the conduct of lawyers. Indeed, in view of the lack of civility, bar associations and courts have also found it necessary to enact codes of civility. A reading of these codes of professional ethics and responsibility will reveal a high degree of specificity in the many areas that are sought to be regulated. As recently as July 16, 1999, the New York Times contained an article entitled "Bar Clarifies Conduct Rules for Lawyers in New York" which stated, in part, that the New York State Bar Association "announced changes in its code of conduct, clarifying rules on how aggressively lawyers can solicit clients, [and] barring lawyers from coercing sex from clients." 85

Aberrational behavior cannot be assumed to be commonplace. Nevertheless, a special effort ought to be made to emphasize the role of lawyers as officers of the court and legal system, and as public citizens with a "special responsibility for the quality of justice."

III. THE LAWYER AS COUNSELOR: SETTLEMENT AND PREVENTIVE LAW

The view is widely held that lawyers, who are taught to master the adversary system and are trained primarily as advocates, too often tend "to view a dispute as a contest for advantage, not an opportunity for settlement." Apart from the training in the adversary system, it cannot be said that lawyers have been taught or fully appreciate the various roles required in a modern society. Indeed, lawyers usually discuss and extol their role as advocates.

Beyond their role as trial and appellate advocates, lawyers have neglected other equally important roles in the practice of law. These include that of a counselor, and the settlement of disputes and the prevention of litigation. The advice of lawyer Abraham Lincoln is worthy of quotation: "Discourage litigation... point out... [that] the nominal winner is often a real loser—in fees, expenses and waste of time." It is noteworthy that Lincoln also stated: "Never stir up litigation... [a] worse [person] can never be found than one who does this."

As counselors, lawyers can play a crucial role in avoiding controversy and litigation. Effective counseling minimizes the likelihood of conflict between parties by stabilizing relationships and promoting understanding and cooperation. Lawyers as counselors, in the words of Chief Justice Burger, provide the "solvents and lubricants which reduce the frictions of our complex society." In performing their role as counselors, lawyers serve as instruments of peace, and incidentally, reduce some of the burdens of the overcrowded judicial system.

A role of the lawyer that will result in much goodwill and earned

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86 Kanner, supra note 32, at 82 (referring to "Rambo litigation" tactics, in stating that "too many judges simply do not care enough, or for some reason are repelled by the concededly distasteful task of having to police their courtrooms").
87 See Re, Lawyer in Modern Society, supra note 58, at 501 (1985); see also Re, Lawyer as Counselor, supra note 58, at 691 (1982).
88 See Re, Administration of Justice, supra note 65, at 1-12.
respect is that of counselor engaged in the practice of preventive law.\footnote{See generally LOUIS BROWN, PREVENTIVE LAW (1950).} Preventive law has been defined as that "branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties."\footnote{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1798 (1961).} Without resorting to litigation and working within the confines of the law office, the lawyer as counselor offers advice and assistance that is designed to help clients conduct their affairs in a manner that will avoid controversy and litigation.\footnote{See Louis M. Brown & Harold A. Brown, What Counsels a Counselor? The Code of Professional Responsibility's Ethical Considerations — A Preventive Law Analysis, 10 VAL. U. L. REV. 453, 461.} The legal counselor seeks to avoid controversy and prevent litigation by offering the client the services of a thoughtful adviser, a careful planner, and a skilled negotiator.\footnote{See Glenn R. Schmitt, The Search for a Good Lawyer, 61 NOTRE DAME L. REV. 877, 881 (1986).}

The lawyer as counselor must predict for the client the legal consequences of contemplated action and evaluate the merits of alternative courses of conduct. The lawyer's skill in providing this information, advice, and service is not only important to the clients, but is also critical in the administration of justice and avoidance of litigation.\footnote{See Hickman v. Taylor, 329 U.S. 495, 510 (1947) (stating that historically, not only does lawyer have duty to faithfully protect interests of his client, but is also bound to work for advancement of justice).} As counselors, whose goal is the prevention of litigation and the settlement of disputes, lawyers fulfill their classic role as healers and peacemakers rather than promoters of litigation and strife.

With full appreciation of the underlying reasons and purposes of the many codes of professional responsibility that have been enacted in recent years, I wish to conclude by stating to all lawyers my firm conviction that what is required is a basic appreciation and understanding of the role of lawyers who, with a full understanding of the idealistic tradition of the profession, appreciate and comply with the ethical and moral traditions of the profession.

As a law teacher for more than half a century, I wish to say to all students about to enter the profession of the law and their teachers that all students ought to be made aware of the fact that the law is a way of life in public service, and that admission to the bar is a privilege reserved for members of a profession who wish to follow a calling in the spirit of public service. This implies more than earning a
livelhood. It includes an effective role in the promotion of justice and rendering service in the public interest.

I conclude by speaking to the lawyers of tomorrow by affirming that the profession would be greatly improved if all students of the law were to be reminded that, by undertaking the study of the law, they will be learning an art which is a "common calling in the spirit of public service." From the moment of admission to law school, law students should be taught the meaning and reality of that lofty definition of their chosen profession. At completion of law school it would no longer be a mere definition but a preparation for a way of life to be pursued by the graduates who may, with pride in the profession upon which they are about to enter, join with their English colleagues, and proudly proclaim that they, too, are about to be "called to the bar"—to pursue a "calling in the spirit of public service."