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THE LAWYER AS COUNSELOR AND PEACEMAKER†

EDWARD D. RE††

As my full-time teaching career at St. John's Law School came to a close, the letter of your president, Mr. Peter T. Roach, a graduate of the class of 1978, was most welcomed, for it informed me that I had been chosen by the Alumni Association of the Law School to be the recipient of the St. Thomas More Award. The award is to be presented during the annual Alumni Luncheon at the annual meeting of the New York State Bar

† Remarks of the Hon. Edward D. Re on the occasion of the presentation of the St. Thomas More Award by the Alumni Association of St. John's University School of Law, January 24, 2003, Hilton New York.

†† Chief Judge Edward D. Re served as the first chief judge of the United States Court of International Trade. He retired after twenty-three years of federal judicial service and was named Chief Judge Emeritus of the court. Upon retirement, he returned to St. John's University School of Law as Distinguished Professor of Law.

From 1958 to 1969, Judge Re served as a member of the Board of Higher Education of the City of New York. In 1961, Judge Re was appointed Chairman of the Foreign Claims Settlement Commission of the United States by President John F. Kennedy. President Lyndon B. Johnson appointed Judge Re to serve as an Assistant Secretary of State for Educational and Cultural Affairs, with jurisdiction over the Fulbright program.

In 1968, Judge Re was appointed to the United States Customs Court by President Johnson. In 1977, he was named Chief Judge by President Jimmy Carter. Chief Justice Warren Burger presided at the Investiture Ceremony, which is reported in 439 Federal Supplement. In 1980, he became the first Chief Judge of the United States Court of International Trade. As Chief Judge, he served as a statutory member of the Judicial Conference of the United States. In 1990, Judge Re was appointed by Chief Justice Rehnquist to its Executive Committee and to its Committee on Long Range Planning. Pursuant to fifty-two separate designations by Chief Justices Burger and Rehnquist, Judge Re served on eight United States Courts of Appeals and four United States District Courts throughout the United States.

In 1947, after service in World War II, Judge Re was appointed to the faculty of St. John's University School of Law School. In 1950, he received a Doctor of Juridical Science degree from New York University School of Law and, in 1997, was awarded the Matheson Medal for fifty years of service as a member of the St. John's Law School faculty. Judge Re has authored numerous legal texts and casebooks and is the recipient of over twenty honorary degrees. He is a Colonel in the Judge Advocate General's Department of the United States Air Force (retired).

Association in New York City. As an indication of the importance of the award, Peter Roach set forth the names of the distinguished past recipients of the St. Thomas More Award, which included the Honorable Judith Kaye, John Cardinal O'Connor, Justice Scalia, and Dean Bellacosa. In my letter of acceptance to Peter Roach, I stated that I looked forward to the great pleasure of being with him and so many other wonderful former students who have made my more than half a century of teaching law at our law school a truly rewarding and memorable experience.

I rise to express my gratitude for your selection of me, and I briefly wish to state a few of the reasons why the conferral of an award that bears the name of St. Thomas More, the first lay Lord Chancellor of England, is particularly significant to me. St. Thomas More, rather than compromise his deeply held principles, incurred the mortal wrath of King Henry VIII by refusing to take an oath acknowledging the King as the Supreme Head of the English Church. Thomas More was named after Thomas Becket, who also became Chancellor and a martyr. Both these names in English history are stellar examples of adherence to deeply held values and principles. They exemplify the supremacy of principle above expediency, as well as the spiritual quality of justice.

In my brief letter of acceptance to my friend Peter Roach, I stated that any award that bears the name of St. Thomas More is particularly appreciated by me, since from my earliest days as a law student I have had a special devotion to St. Thomas More, whom I have regarded as the patron saint of lawyers. As a professor of the law of equity for half a century, I hasten to add that St. Thomas More, as the first lay Lord Chancellor of England, led the way in the application of moral and equitable principles to legal problems, and he gave legal effect to countless moral norms that humanized the common law. By applying principles of equity, the early Chancellors gave legal effect to the Aristotelian virtue of *epieikeia*, which became the *aequitas* of the Romans and the equity of the common law. All this made possible the rendering of judgments that are just and equitable in each particular case.

Although Thomas More considered a monastic life, he became a lawyer. I would hope that the invocation of the name of Thomas More would inspire everyone, and lawyers in

particular, to commemorate the life and death of this man for whom truth and integrity were the supreme values that he would not compromise.

Notwithstanding his many early achievements and his classic work entitled *Utopia*,¹ the immortality of Thomas More was assured by his martyrdom rather than his earthly achievements. There are several great biographies of Thomas More that set forth the life, accomplishments, and contributions of this great lawyer, Lord Chancellor, author, and Saint.² It was his dear and close friend, the great Renaissance scholar and humanist Erasmus of Rotterdam who bestowed upon More the title of "a man for all seasons."³

There can be no doubt that for lawyers, trained in the traditions of the common law, St. Thomas More is a particularly appropriate figure to be our patron saint. I stress the word profession for I speak of the law as a calling to be practiced in the "spirit of public service." To this day, our common law colleagues in the United Kingdom speak of "being called" to the bar and not merely being "admitted" to the bar.

Thomas More was incorruptible, a man who would rather die than compromise his deeply held values and integrity. If I were asked, "If Thomas More were here today, what advice might he give to restore the respect and esteem that are properly deserved for lawyers and the legal profession?" I strongly suspect that he might say, "When properly understood and applied, the adversarial system of litigation that prevails in the common law world has served the cause of justice well." However, he might also note that American lawyers, trained in the adversary system primarily as advocates, too often tend to view a dispute as a contest "to obtain maximum advantage for one's client to the detriment of the other party rather than to seek a compromise that is mutually agreeable, and morally acceptable."⁴ Hence, I am confident that he would urge that our training for the legal

¹ SIR THOMAS MORE, *UTOPIA* (Ralph Robynson trans., David Harris Sacks ed., Bedford/St. Martin's 1999) (1556).

² See David L. Gregory, *Thomas More, By Richard Marius*, 29 CATH. LAW. 344, 344 n.1 (1985) (book review).

³ Erasmus, *Erasmus of Rotterdam to His Friend Thomas More* (June 9, 1511), in 2 COLLECTED WORKS OF ERASMUS, THE CORRESPONDENCE OF ERASMUS 163 (R.A.B. Mynors & D.F.S. Thomson trans., University of Toronto Press 1975).

⁴ Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 695 (1982).

profession should concentrate more on the role of the lawyer as counselor and not devote almost all of our time and efforts to advocacy. He would stress the crucial role that legal counsel can perform in avoiding controversy, encouraging settlement, and resolving disputes without resort to litigation.

Indeed, a Thomas More of today's modern world might quote Chief Justice Burger, who recalled President Lincoln's advice: " 'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.' "⁵ Indeed, he might state that lawyers, who have traditionally been honored for their skill as advocates and litigators, have it within their power to be honored as healers and peacemakers, and that, in addition to serving as ministers of justice, they can also become our ministers of peace.

As for me, permit me to say, commencing in January 1947, as I have stated in my classes and in many lectures, I have always regarded the role of a law professor to be more than merely that of a teacher who would teach principles of substantive law and procedure. I have regarded the role of the law professor, in addition to teaching principles of law, as being that of a mentor, whose mission is more than merely teaching principles of law but also whose mission is to inculcate the ethical and moral values, as well as the responsibilities, of a great profession.

In fulfilling my responsibilities as a teacher and mentor, I have always stated that, in any discussion of the administration of justice, we must speak of the human agency that administers justice. Hence, we must speak of the work of legislators, lawyers, and judges, that is the human beings who have a role in enacting and applying the law in the cases that are presented for adjudication. Hence, commencing with the Robert H. Jackson Lecture delivered at the National College of State Trial Judges in Reno, Nevada, on August 18, 1970, entitled "The Partnership of Bench and Bar," I have always spoken of the human beings

⁵ Warren E. Burger, *Forward to American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 808, 809 (1989) (quoting Abraham Lincoln, *Notes for Law Lecture* (July 1, 1850), in 2 COMPLETE WORKS OF ABRAHAM LINCOLN 140, 142 (John G. Nicolay & John Hay eds., 1894)).

who administer justice.⁶ In that process, I have highlighted the role of the lawyer, for it is the lawyer who performs the most essential function of informing the judges and the court of the facts and the law. Our adversarial system of justice extols the role of the lawyer, and to function properly, the indispensable requirements are dedication, competence, and professionalism.

It is important to note that counsel's responsibility is not limited to the competent presentation of the facts of the case. Competence in representation also requires a competent presentation of the applicable law. In the words of Justice Brandeis, "judge[s] rarely perform[] [their] functions adequately unless the case before [them] is adequately presented."⁷ It cannot be forgotten that by the competent, professional handling of a case, the lawyer is performing, and has the duty to perform, a role that assists the judge or court in deciding the case justly and according to the 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 what is required for our system to work well and to accomplish its lofty mission of doing justice. For example, in the writing of briefs to be submitted to a court, counsel has the opportunity to shape not only the judicial opinion but also the law itself.⁸ Justice Brandeis stated the point most candidly when he discussed the importance of adequate presentation.⁹ These statements indicate that by properly fulfilling the responsibility to the client and by the competent and thorough presentation of a case, counsel simultaneously is fulfilling a responsibility in the public interest by helping to shape the judicial opinion and the law itself.

Whitney North Seymour, a former president of the American Bar Association, in an address entitled "The Bar as Lawmaker," emphasized this responsibility by reminding the bar that

⁶ See Edward D. Re, *The Partnership of Bench and Bar*, Robert H. Jackson Lecture delivered at the National College of State Trial Judges Conference (Aug. 18, 1970), in 16 CATH. LAW. 194, 194 (1970) (remarking that lawyers are "privileged to participate in an ageless process designed to achieve justice here on earth").

⁷ Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

⁸ See Edward D. Re, *The Lawyer as a Lawmaker*, 52 A.B.A. J. 159, 159 (1966); EDWARD D. RE & JOSEPH R. RE, *BRIEF WRITING AND ORAL ARGUMENT* 84-85 (8th ed. 1999).

⁹ Brandeis, *supra* note 9, at 470.

[T]he 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.¹⁰

The reference to the contribution of Daniel Webster recalls the famous decision of Chief Justice Marshall in *McCulloch v. Maryland*.¹¹ For 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, it adopts several statements made by Webster. Indeed, his statement, "[a]n unlimited power to tax involves, necessarily, a power to destroy"¹² becomes Chief Justice Marshall's famous utterance, "the power to tax involves the power to destroy."¹³

Speaking to our Alumni Association is for me a great privilege. It is a continuation of the privilege to fulfill the teaching mission of instilling values of professionalism in the sense that has made our profession a beacon of light for all those who have sought our counsel, so that they may enjoy the ideals that are set forth in our great documents that promise justice, liberty, and freedom.

This opportunity of addressing our alumni affords me the additional privilege of speaking with those former students who know from personal experience of the efforts of teachers in preparing students for the challenges that lie ahead as members of their chosen profession.

As I have said at the conclusion of all my classes, I have never had a class that I did not like and enjoy. Indeed, may I add that many friends, whose friendship I cherish, have been and are former students whom I had the pleasure and privilege of having as students in one or more of my classes.

¹⁰ Whitney North Seymour, *The Bar as Lawmaker*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 174 (Monrad G. Paulsen ed., 1959).

¹¹ 17 U.S. (4 Wheat.) 316 (1819).

¹² *Id.* at 327.

¹³ *Id.* at 431. See generally JULIUS J. MARKE, VIGNETTES OF LEGAL HISTORY 33-50 (1965) (providing an interesting discussion of *McCulloch v. Maryland* in its historical context).

Hence, I conclude by expressing my fond hope and wish for all of our students that whatever their goals may be, those goals may become a reality and that the legal education that they have received in law school may not only enrich their lives but also the lives of all of those whom they may be privileged to touch. With these words of friendship, gratitude, and appreciation, I bid each of you good-bye, which, in the classic sense of the word, means “may God be with you.”

