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Prefatory Remark

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THE DEVITT COMMITTEE REPORT[1] RECOMMENDS that the American Bar Association re-examine its accreditation standards with a view towards requiring each law school to provide trial advocacy training.[2] While the Devitt Report goes into some detail regarding the extent of that training, it is in some significant aspects inadequate and, with respect to its inadequacies, renders a disservice. Its principal weakness flows from the statement of objectives and purposes.

The Report's opening sentence states: "The committee was appointed to investigate the quality of *trial advocacy* in the federal courts, and, if deficiencies were found, to recommend ways that those deficiencies could be remedied."[3] Though the narrowness of such a stated purpose is subject to question, the Committee stuck rigidly to that objective.

The advocacy process is rarely fully used in resolving a legal conflict. In my opinion, it is improper to emphasize trial advocacy to the exclusion of other means of solving disputes. The Devitt Report gives not the slightest hint of or reference to negotiated settlements, arbitration or mediation as methods to assist in settling disagreements. The Committee, by apparently accepting without dissent the Report's stated objective, ignored the broader social purposes to be served by requiring law schools to emphasize skills training in general.[4]

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[1] *Reprinted in* 83 F.R.D. 215 (1979).

[2] The specific recommendations call for increased emphasis in the law schools on trial skills training, including simulated trials and instruction by experienced litigators. The recommendations also suggest experimentation, in cooperating pilot districts, with an examination on federal practice subjects, an experience requirement, and a peer review concept. Finally, we urge support for post-law school seminars and continuing legal education programs on trial advocacy and federal practice subjects.
Id. at 231.

[3] *Id.* at 218 (emphasis added).

[4] Even if it was deemed satisfactory to limit the work of the Committee to trial advocacy in the federal courts, it would have been desirable to have included a charge to the Committee that it explore, or cause to explore, in depth the causes for deficiencies. The chairman of the Committee, Judge Edward Devitt, has asserted: "After three years of research and study, a United States Judicial Conference committee has concluded that there is a significant problem with the quality of trial advocacy in the federal courts and that this problem is caused primarily by lack of training." Devitt, *Law School Training: Key to Quality Trial Advocacy*, 65 A.B.A.J. 1800, 1800 (1979). The report, however, contains no data upon which this conclusion is based.

A vastly different statement of probable cause was given in the report issued by the American Bar Association Task Force on Lawyer Competency. "A lawyer's actual performance may fall short of the appropriate standard for any number of reasons unrelated to competence: inattention, laziness, the press of other work, economic factors, or mistakes. Indeed, available evidence suggests

The purpose should have been more broadly propounded: to investigate and find means to improve the quality of the solution of disputes which might be or are brought to the attention of the courts. There are at least two basic differences between this statement and the objectives considered in the Devitt Report. First, under the proposed objectives, the scope of the inquiry would not have been limited to federal courts but would have included all other courts. In this respect, the objective might have been further broadened to include any dispute-resolving mechanism, such as arbitration tribunals. Second, the restated objective would have included any dispute which potentially might come before the courts. Thus it would have included all disputes that reach lawyers' offices, and do not go beyond those walls.

There is nothing improper with desiring to teach trial advocacy. The serious problem arises when emphasis is solely directed to trial advocacy as the only apparent skill needing education.[5] Obviously, the skills and principles used in negotiating a settlement are different from those utilized in a courtroom proceeding.[6] Thus, the Devitt Report must be viewed as proposing a solution to only one component of the serious omissions in education on dispute resolution. In this regard the Report is disappointing.

With the exception of professional responsibility, accreditation stan-

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that reasons such as these, not lack of capacity to do a proper job (incompetence in the narrow sense) are the causes of the most instances of lawyer facture." ABA TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF THE LAW SCHOOLS 9 (1979) [hereinafter cited as ABA TASK FORCE]. The Task Force Report, however, does not cite the available evidence.

For a proposed method to analyze these causes see Brown, *Legal Autopsy*, 39 J. AM. JUD. SOC'Y 47 (1955).

[5] Obviously, law students should be completely familiar with the ultimate mode of action in court, and a substantial portion of law school time should be devoted to the study of lawsuits. But it is often difficult to find, either in terms of basic training or general perspective, any serious introduction for students to other, less expensive and more efficient means of settling issues such as preventive action, arbitration and negotiation. Our courts are overcrowded, our society is exceptionally litigious, and our training of students in law does not focus enough of its heralded skepticism on the disadvantages of lawsuits and the advantages of other modes of problem resolution.

Kelly, *The Scandal of American Legal Education* (Report of the Dean, University of Maryland, 1979).

[6] Negotiated settlement takes into account factors that are not involved in trial advocacy, and vice versa. Consider, for example, the personal economic condition of the plaintiff (the need or desire for money now and the solvency of the defendant), the economic dynamics of settlement occasioned by the cost of litigation, time delays, and uncertainty of ultimate litigation decision. Furthermore, the settlement solution may differ in nature from the litigated result. One example should suffice. A suit by a real estate broker against the seller for a commission for the sale of Blackacre is settled by giving the broker an exclusive broker contract for the sale of Whiteacre, another parcel owned by the defendant.

dards do not include specific course requirements.[7] If the accreditation process is to enlarge its scope so as to include surveillance of course work, then the role of the lawyer and law as evidenced by the Devitt Report is far too narrow. Society affords the litigant a means of dual professional protection for legal matters. The lawyer is the first line of that protection; the second line is the judiciary. Presumably the judiciary, as an "intervenor," is there to safeguard the process and the result.[8] The Devitt Report dwells little on the role of the judiciary as protector of the process and as a decider of disputes.

The function of law and lawyers can be divided into two separate categories. The most familiar is the dispute-resolving function accomplished through an adversary process and its corollaries. The other category is the complex of non-adversary functions. In this component belongs all of the legal guidance and direction which clients and others seek regarding rights, duties, benefits and opportunities. Here the law office is the "supreme court." The lawyer is the only official source for obtaining decisions regarding the content of the legal problem—no court intervenes to assist in making decisions. There is a need for education in the skills and principles of these non-adversary tasks.[9]

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[7] *See* ABA, STANDARDS AND RULES OF PROCEDURE, APPROVAL OF LAW SCHOOLS 8 (1979) (Standard 302).

[8] "It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely for the orderly dispatch of business, saving of public time, and maintaining the dignity of the tribunal; and such discretion should be reviewable only for abuse." 5 POUND, JURISPRUDENCE 553 (1959).

[9] The ABA TASK FORCE, *supra* note 4, makes several observations that relate to non-adversary areas of law, law practice, and legal education. It states:

> Lawyer competence, in most if not all areas of law practice, demands a wide range of fundamental skills including the ability to:
> 1. analyze legal problems;
> 2. perform legal research;
> 3. collect and sort facts;
> 4. write effectively (both in general and in a variety of specialized lawyer applications such as pleadings, opinion letters, briefs, contracts or wills, legislation);
> 5. communicate orally with effectiveness in a variety of settings;
> 6. perform important lawyer tasks calling on both the communication and interpersonal skills of:
> (i) interviewing,
> (ii) counseling, and
> (iii) negotiation;
> 7. organize and manage legal work.

Id. at 9-10. It goes on to say:

> Beyond these basic elements, competence in particular settings—such as conducting a trial, drafting an estate plan, or planning a corporate merger—requires an ability to integrate the fundamentals in operation. This demands not only more specialized knowledge and skills but also experience and judgment in choosing among alternative approaches,

My fear is that the Devitt Report, coming under the strong imprimatur of the Judicial Conference of the United States, has received, and will receive such national attention as to over-shadow other more important omissions in legal education. The non-adversarial lawyering process should not be relegated in importance but should receive equal concern among educators and the public.

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effectuating that choice, and dealing with problems of professional responsibility.

Id. at 10. *See also* Griswold, *Introduction: The Legal Profession in the 1980's*, 11 U. TOL. L. REV. 193, 198 (1980).

The well known Professor of Law, Reed Dickerson (Indiana University, Bloomington) in an address August 7, 1978, annual meeting of American Bar Association, New York City, reiterated the preventive law function of lawyers.

> Another crippling assumption is that law is mainly litigation, an assumption that has led many lawyers to conclude that, if an event doesn't take place in court, it is not mainstream stuff. This overlooks the fact that today's typical lawyer is more heavily engaged in planning and counseling than in trying cases an oversight that diverts attention from his preventive and constructive functions. The lawyer as a craftsman of practical arrangements deserves far greater attention.

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