

AMERICAN LAW INSTITUTE STUDY ON PATHS TO A "BETTER WAY": LITIGATION, ALTERNATIVES, AND ACCOMMODATION

Foreword

WARREN E. BURGER*

This excellent *Study on Paths to a "Better Way"* deserves the close attention of our profession—and the public. The problems discussed have been with us a long time. In 1954 then Attorney General Herbert Brownell convened a Conference on Court Congestion and Delay. His successor William P. Rogers repeated that process a few years later. Perhaps because the "patient was not at death's door" interest soon lagged, but the "patient" is in critical condition now. In 1976 a national conference was convened in St. Paul, Minnesota, the city where Roscoe Pound made his seminal criticism of American justice—and of the "sporting contest" approach of many litigators. His speech was viewed as an indictment of our profession and although Pound's speech was to the American Bar Convention, the *ABA Journal* at first refused to publish the speech. It was at this 1976 conference that "ADR" entered the legal vocabulary and Judge Adams has given the subject new impetus. The 1906 Pound speech was in a sense an "indictment" of our profession and it was not wholly unjust.

A related study of how our profession is responding in terms of professional standards was ordered by American Bar Association President John Shepherd with former ABA president Justin Stanley as Chairman. A valuable study followed and an "implementation committee" was appointed to pursue the Stanley recommendations. As the voice of our profession, the Association should vigorously pursue this subject along with the ALI.

The machinery of justice is in the hands of the profession; lawyers and judges have a duty to make the system work better and the public has a right to look to us for some answers.

* Chief Justice, United States Supreme Court, 1969-1986.

Since the 1976 Pound Conference, the situation has become aggravated by the “drug war,” malpractice litigation and other factors, including the all too widespread abuses of processes to delay and the filing of complaints by lawyers followed by pre-trial determination of whether there is a basis for the complaint.

In the administration of criminal justice the problems are more difficult to resolve, and we must constantly search for a balance that preserves the rights of the accused but does not allow the criminal calendar to make all other claimants wait indefinitely. Judges are not without fault and surely not without responsibility to check the growing abuses of the processes of justice. Judges must not be reticent about dealing firmly with flagrant abusers. Some judges have not hesitated to impose fiscal sanctions on lawyers.

Some lawyers were disturbed when I wrote that lawyers should be “healers not gunslingers” but I have not hesitated to restate it. It is our responsibility to find a “better way” and the *Study on Paths to a “Better Way”* by the American Law Institute deserves the support—and the thanks—of the bar.

Abraham Lincoln had it right:

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. As a peace-maker the lawyer has a superior opportunity of being a good man. . . . A good man!

Never stir up litigation. A worse man can scarcely be found than one who does this.¹

1. A. LINCOLN, *Notes for Law Lecture* (July 1, 1850), in 2 COMPLETE WORKS OF ABRAHAM LINCOLN 140, 142 (J. Nicolay & J. Hay eds. 1894).

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ACCOMMODATION**

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