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UNITED STATES OF AMERICA

4

DEPARTMENT OF JUSTICE

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JANET RENO

8

ATTORNEY GENERAL

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"ALTERNATIVE DISPUTE RESOLUTION AND

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NEGOTIATION"

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American Judicature Society

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Chicago Bar Association

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Standard Club

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Chicago, Illinois

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February 5, 1998

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P R O C E E D I N G S

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ATTORNEY GENERAL RENO: Thank you

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very much, Patty. It is a real pleasure to

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be here.

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It is particularly wonderful for

6

me, Esther, to have the opportunity to see

7

you presented with this recognition. You

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have been there, as a support, ever since I

9

came to Washington, and thank you. You are

10

an example for us all.

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Scott, I want to congratulate you,

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and thank you, again, for your willingness to

13

undertake the interim responsibility. That,

14 sometimes, is more difficult than the new one
15 you embark on.

16 Dick, thanks for being here. My
17 heart is always with local prosecutors.

18 You can't get out of it, after 15
19 years. I really want to thank Patty and the
20 Bar Association; Terry Murphy, for all that
21 you have done to make this possible; and the
22 American Judicature Society; and Sandy, I

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1 really appreciate that, the effort that you
2 all have gone to, to make this possible.

3 I love the law, and I love good
4 lawyers. I don't like greedy, indifferent
5 lawyers. I really love lawyers who use the
6 law as an instrument of justice; who use the
7 law in defense of liberty.

8 I love lawyers who use the law to

9 build community, to help their Nation, and to
10 help those who cannot afford a lawyer.

11 I have had the opportunity, in
12 these last five years, to meet so many
13 wonderful lawyers across this Nation. I am
14 very, very proud of the profession. But as a
15 Nation and as a profession, we face a great
16 challenge.

17 Individuals across this country are
18 isolated, one from another. We move from
19 place to place without putting down roots.
20 With every increasing frequency, we change
21 jobs, as a skill or a vocation becomes
22 obsolete.

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1 We build out walls to close out
2 others. We don't listen with a listening
3 ear, and we don't know how to talk to each

4 other. We, too often, talk through each
5 other. We move so fast and go so long on a
6 day; that we don't take the time to form the
7 ties that create community.

8 Many Americans feel helpless,
9 disenfranchised, and alienated. More and
10 more Americans who work hard are falling
11 behind in earning power, as the middle class,
12 in some instances, evaporates. Too many
13 Americans have no sense of hope or purpose,
14 and they turn to the law. But too often,
15 they do not find answers.

16 They don't find answers in the law
17 because, in many instances, they cannot
18 afford the law. For the law was not used to
19 solve their problem, or the law created more
20 troubles and caused more division and more
21 conflict than it ever achieved in healing.
22 Sometimes, they just lost the case, and

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1 sometimes, they won the case, but it wasn't
2 worth it because of the expense, the time,
3 and the trouble.

4 I suggest that lawyers, in America
5 today, can play a powerful role in addressing
6 this situation in this country, if they
7 explore, expand, and prize their role as
8 problem solvers and peacemakers. I think, if
9 we are to preserve the law as the magnificent
10 tool for justice that it is, we have no
11 choice but to address this challenge.

12 On the east wall of the main
13 Justice Building in Washington, on Ninth
14 Street, there is a marvelous statement carved
15 in the stone of the building: "The common
16 law is derived from the will of mankind,
17 issuing from the people, framed by mutual
18 confidences, and sanctioned by the light of
19 reason."

20 If people don't believe in the law,

21 if the law doesn't serve the people, if it
22 doesn't solve their problems, if it doesn't

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1 defend them, the law, as we love it and know
2 it, can be irreparably hurt.

3 The question, then, is: How can
4 we, as lawyers, in this complex, modern
5 society, in a profession that is rife with
6 competition and specialization, achieve the
7 goals, the goals of peacemaking and problem
8 solving?

9 I have a few suggestions. First,
10 we must take steps to make the law seem less
11 complex to the ordinary citizen.

12 Winston Churchill said it best:
13 "We need to use small, old words."

14 Everyone of us can do this, when
15 you advise a client, draft a will, prepare a

16 contract, file a pleading in court, or
17 prepare legislation. This sounds like such a
18 small thing.

19 My grandfather practiced law and,
20 in those days, complaints were oftentimes
21 three and four pages long for a simple
22 divorce. He did it, in about a page.

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1 Some lawyers snuck into the Clerk's
2 Office, one night, to pull the files to see
3 how he did it. He used small, old words.

4 I am competent that, over time, by
5 de-mythifying the law for people, we can give
6 them a greater confidence in the law and make
7 them more willing to turn to the law for
8 solutions.

9 Small, old words will help people
10 see lawyers and the law in all its true

11 potential and glory.

12 Secondly, we must have the courage
13 and the creativity to stop short of
14 litigation and try more effective and more
15 low-key methods of resolving disputes.
16 Entrusted by our clients with resolving their
17 disputes, we should make every effort to
18 solve the problem that caused the dispute
19 before we resort to the court house.

20 I am not offering anything new.
21 Somebody 150 years ago said it better than I
22 can. He was a member of the Illinois Bar,

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1 and his name was Abraham Lincoln.

2 He said: "Discourage litigation.
3 Persuade your neighbors to compromise,
4 whenever you can. Point out to them how the
5 nominal winner is often a real loser in fees,

6 expenses, and waste of time.

7 "As a peacemaker, the lawyer has a
8 superior opportunity, being a good man.

9 There will still be business enough."

10 And, there will be business enough!

11 At the Department of Justice, I
12 took steps two years ago, to make the use of
13 what I call, not alternative dispute
14 resolution, but appropriate dispute
15 resolution, a reality. I use appropriate
16 dispute resolution, because sometimes a trial
17 is by far and away the most appropriate
18 method.

19 We want to ensure; however, that
20 our attorneys will use problem solving and
21 dispute resolution as a regular tool for
22 seeking justice.

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1 This has been such an exciting
2 project. At first, Assistant United States
3 Attorneys looked at me quizzically. Judges
4 kind of puzzled about it. Magistrates said:
5 "H-m-m-m." And, opposing counsel grimaced.
6 But that is not happening as much, these
7 days, and here are some of the things that we
8 have done.

9 As Patty indicated, I asked Peter
10 Steinland to be the Senior Counsel for
11 Appropriate Dispute Resolution, and we
12 created an office that has focused on this
13 effort.

14 I sent a message to the trial
15 lawyers, that trial lawyering was very, very
16 important. That in everything we did in the
17 Department of Justice, whether it be civil
18 rights enforcement, environmental
19 enforcement, I wanted to go to the people
20 involved, to the industry being regulated,
21 and say:

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"This is the law, and we want to

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1 work with you. We want to resolve problems
2 up front. If it is a CRIPA, an institutional
3 case, we want to focus on that, and work with
4 you to resolve the problem for the long run.
5 If you don't want to work with us, we are
6 prepared to go to trial, and we are prepared
7 to take you to court."

8 If we are going to be successful in
9 this effort, we have got to be at home enough
10 in the courtroom, and vigorous enough in the
11 courtroom, to let people know that we mean
12 what we say. I wanted to make sure that we
13 have the tools to be the peacemaker, to be
14 the problem solver.

15 Every Department of Justice
16 attorney, in civil practice, is being trained

17 to be a better negotiator and to use a form
18 of dispute resolution, such as mediation or
19 arbitration, whenever it is appropriate to do
20 so.

21 We have established a fund that our
22 lawyers can use to hire professional,

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1 third-party neutrals, to assist us and our
2 opponents to reach consensual resolutions.

3 We evaluate our attorneys, not only
4 on their skills in legal research and
5 writing, or on their trial skills, but also
6 on their ability to negotiate and use
7 mediation and other forms of dispute
8 resolution.

9 I have told our supervisors that,
10 when they make decisions such as promotions,
11 they are to give the same consideration to

12 attorneys who settle cases on terms favorable
13 to the government as we have to those
14 attorneys who have litigated cases to a
15 result favorable to the government.

16 Our Office of Dispute Resolution
17 works with Assistant United States Attorneys
18 across the country and with our lawyers in
19 Washington, helping them to find qualified
20 neutrals, advising them in, what I call,
21 mediation advocacy, and working with our
22 client agencies to ensure that they are joint

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1 partners in these efforts.

2 As a result of these and other
3 efforts, we are making good progress in
4 promoting problem solving and peacemaking in
5 the Department of Justice. In two years, we
6 have tripled the number of cases where we

7 have used mediation and other forms of
8 dispute resolution.

9 Mediators have helped us to settle
10 tort claims, environmental disputes, work
11 place disputes, affirmative civil rights
12 cases, False Claims Act cases, issues of
13 administrative law, and disputes involving
14 Indian tribes.

15 Now, Peter is a little bit wrong
16 when he said I got this idea in a classroom.
17 I got the idea by recognizing that, because
18 of crowded calendars and tremendous case
19 loads in a local prosecutors office, we
20 negotiated by far and away the greatest
21 percentage of our cases.

22 Here were lawyers with trial skills

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1 negotiating these cases, but they didn't have

2 negotiation skills, and it seemed to be that
3 we had to look at these range of skills in
4 order to make our lawyers complete lawyers.

5 So, Peter, we need to get on
6 talking about the criminal side, too.
7 Because oftentimes, you can litigate a case
8 and reach a conclusion of guilt or innocence,
9 but you don't solve the problem that caused
10 the situation in the first place.

11 These skills can be useful in any
12 instance, if properly applied, and if applied
13 in the instance where the facts dictate it.

14 As you know, the Department of
15 Justice is responsible for more litigation
16 than anyone else in the Federal courts. As I
17 have indicated, some of these cases cannot,
18 and should not, settle. Those cases are not
19 targets for our program, but there remains a
20 tremendous potential for even greater use of
21 these processes in the future.

22 There are several important reasons

1 why everyone should consider doing everything
2 we can to expand this effort.

3 Litigation looks to the events of
4 the past and asks a judge to decide who was
5 right and who was wrong. The job of the
6 judge is to decide who wins on the facts and
7 legal issues presented in the dispute.

8 The judge, in most instances, is
9 not appointed to be the problem solver. That
10 is our duty, as counsel.

11 In contrast, a mediator asks the
12 parties, what are their interests? Learns
13 what they need, to resolve the dispute. In
14 that sense, the mediator looks to the future
15 and to the problem that underlies the legal
16 issues advanced by the litigator.

17 For this reason, it is not a sign
18 of weakness to suggest to your client or to

19 opposing counsel that dispute resolution be
20 considered as an alternative to litigation.
21 The mediator can help you be a better problem
22 solver for your client.

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1 When disputes arise in the context
2 of a continuing relationship, the role of a
3 mediator can be especially important because
4 that neutral mediator encourages the parties
5 to negotiate creative solutions that will
6 preserve the working relationship while
7 settling the dispute.

8 When parties try to settle their
9 cases, on their own, they often resort to
10 familiar positional arguments, such as: "My
11 case is stronger than yours, so your
12 concessions must be greater than mine if we
13 are going to settle this case."

14 In contrast, a good mediator finds
15 common ground, works with each party in the
16 confidentiality of private sessions to aid
17 them in identifying real interest and
18 creative options for settlement. When these
19 processes are used properly, disputes between
20 supervisors and employees can be resolved in
21 ways that allow parties to continue working
22 together.

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1 I don't think we have begun to tap
2 what can be done with mediation, with dispute
3 resolution, and employer-employee disputes.
4 Similarly, healthy relationships between
5 buyers and sellers are not destroyed when the
6 contentiousness of litigation is avoided.

7 For the Department of Justice,
8 disputes with our citizens can be resolved

9 with a minimum of delay and adversity. By
10 settling cases through dispute resolution, we
11 are gaining better settlements, freeing our
12 resources to litigate more effectively those
13 matters that cannot, or should not, be
14 settled.

15 Such settlements also enhance the
16 public's access to justice by freeing
17 judicial resources for those who truly need a
18 litigated resolution.

19 We, at the Department of Justice,
20 are not alone in recognizing the benefits of
21 dispute resolution to settle litigation.
22 Every United States Court of Appeals, with

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1 the exception of the Federal Circuit, has an
2 established case settlement program that
3 offers free mediation of cases on appeal.

4 I have met with these mediators,
5 and I am tremendously impressed with their
6 dedication and professional skill and what
7 they have done within their Circuits to
8 spread the word about how effective these
9 processes can be.

10 Many District Courts have also
11 adopted dispute resolution programs. We are
12 working with the Federal Judicial Center to
13 have more United States Magistrate Judges
14 trained in mediation skills, and will support
15 efforts to promote greater use of dispute
16 resolution through professional or voluntary
17 services in Federal District Courts.

18 Congress passed the Administrative
19 Dispute Resolution Act in 1996 to encourage
20 the Federal agencies to make greater use of
21 dispute resolution at the agency level and to
22 avoid the need for litigation, altogether.

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1 We are working with our client
2 agencies to assist them in developing
3 vigorous dispute resolution programs in a
4 variety of subject matter areas.

5 At the invitation of the Secretary
6 of Defense, I addressed approximately 200 top
7 leaders in the Department of Defense, both
8 military and civilian, and it was fascinating
9 to see the reaction from managers who had
10 never considered, before, what could be done
11 if they resolved the dispute before they sent
12 it over to that Justice Department to fuss
13 with for too long.

14 It is fascinating to see what
15 happens when you remind a client: "Look, you
16 have got to value the case. You have got to
17 understand what it is worth to you. You have
18 got to understand what it is worth in
19 expense, in time, and trouble."

20 We found that, too often, clients
21 didn't evaluate the case. They just dumped
22 it in the lawyer's lap and let the lawyer

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1 take care of it. We have got to go further,
2 and educate clients, all our clients, as to
3 the value and as to the processes of
4 appropriate dispute resolution.

5 As lawyers, we should encourage
6 every opportunity to promote greater use of
7 dispute resolution because of its
8 problem-solving potential.

9 We should also reaffirm our role as
10 peacemakers and problem solvers, and lead the
11 way by teaching our communities how to
12 resolve conflicts without knives and guns and
13 fists. How to solve problems, whether it is
14 rehabing a HUD housing project; where do you

15 get the money; how do you provide the
16 management; what do you do. How to solve
17 these problems, without litigation, by
18 listening, by understanding, and by clear and
19 persistent communications.

20 One way to do this is to ensure
21 that our young people have the tools at their
22 disposal to resolve conflicts that confront

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1 them.

2 I urge you, because I know this Bar
3 has done so much in terms of activities
4 within the community, to work with your
5 schools, neighborhood associations, houses of
6 worship, and other institutions, to promote
7 conflict resolution and problem solving.

8 In San Antonio, Texas, I met with
9 young high school students, who were learning

10 peer mediation, because the Young Lawyer
11 Section of the San Antonio Bar was leading
12 the way in teaching them. It was so exciting
13 to see what the youngsters had learned; what
14 they were teaching faculty members; and what
15 everyone was doing as a result of some young
16 lawyers, who took the time to perfect their
17 skills and to translate them for young people
18 in a way that could be effective.

19 I have had the opportunity to watch
20 teachers learning, on their own time during
21 the summer, about how to be the mediator in
22 the classroom or on the playground, and it is

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1 so exciting to hear a teacher, suddenly, say:
2 "O-h-h, I could have used this, right at that
3 particular point where they got into the
4 fight." To see the excitement on the part of

5 these teachers, as they actually learned a
6 new skill.

7 I just have the dream of every
8 teacher's college being able to teach dispute
9 resolution, problem solving, communication to
10 all of their teachers, so that every teacher
11 in America has that skill.

12 Lawyers know more than most.
13 Lawyers can lead the way.

14 We know that dispute resolution
15 techniques can help us all. I walk out of
16 those training programs with the teachers,
17 and I am a much better listener as I sit at
18 my conference room table.

19 I point out to the teachers that,
20 sometimes, I don't have the luxury of time to
21 let the process take its course and,
22 sometimes, they have to be the arbitrator.

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1 But the listening process, the creative
2 solutions, the communication is so important.

3 Dispute resolution is really a
4 necessary life skill at which we should all
5 be proficient, just like reading, writing,
6 math. These are aspirational goals for all
7 of us. They are steps that we can take to
8 improve our profession and our community.

9 As I have mentioned, I had Roger
10 Fisher for Civil Procedure in 1962. Nobody
11 ever mentioned the word, negotiation.

12 I had a chance to talk to the
13 professor from Northwestern, and just in 20
14 years, what he has been able to do. You can
15 learn these processes. Children can learn
16 these processes.

17 The Bar, and lawyers across
18 America, can lead the way in peacemaking and
19 problem solving.

20 I have the dream of every teacher,
21 every mentor, every community police officer,

22 every student learning these skills, just as

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1 they learn to do reading and writing.

2 Think of what it would mean for
3 this country, but there is more to do.

4 We have juvenile justice
5 legislation pending. We have requested
6 funding for these prevention programs. It
7 could cover programs, just such as this.

8 We must work together to get that
9 legislation passed, to get that appropriation
10 passed, so that we can spread this skill.

11 Peacemaking and problem solving:
12 How do we go about conveying it, throughout
13 the profession?

14 Our law schools and other
15 educational institutions have a very
16 important role in shaping our future society.

17 We must begin to train more lawyers, who have
18 multidisciplinary skills, who are prepared to
19 take the kind of steps and processes that
20 will meet the impressing needs of our
21 society.

22 Teach them to value that case.

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1 Okay, it has got this dollar value on it, but
2 have you considered the time and the trouble
3 for the client? Have you considered what
4 putting them through litigation will mean?
5 What is it worth?

6 How do we combine trial practice
7 with the practice of problem solving and the
8 practice of conflict resolution?

9 We can do it, if we put the people
10 first, if we remember that the law is derived
11 from the will of the mankind, that it issues

12 from the people, that it is framed by mutual
13 confidence.

14 Until we truly make the law the
15 instrument of people to solve their problems,
16 we will not succeed.

17 Professor Carrie Menkel Meadow, of
18 Georgetown Law School has written that if our
19 future lawyers are going to be effective
20 problem solvers, they will have to be taught
21 these lawyerly tasks.

22 As law school alumni, we should

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1 participate in ongoing discussions in the
2 legal academic community over how best to
3 train new generations of lawyers, and we
4 should take that training and share it with
5 young people, with others as well.

6 We must do more, and we must

7 realize that there are a whole group of
8 people out there that can't afford the law.
9 With shrinking budgets, we have got to do
10 more.

11 We have got to think in terms of
12 colleges, or the creation of colleges, of
13 community advocacy that would train lawyers,
14 non-lawyers, in how to solve neighborhood
15 problems before crimes are committed; how to
16 advocate for children and families; how to
17 navigate welfare and housing bureaucracies;
18 and how to organize and ensure safe and
19 healthy neighborhoods.

20 I said that, once, at a House of
21 Delegates meeting, and I got a call from
22 Illinois, from a very irate person, who said:

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1 "You are taking cases from lawyers!"

2 And I said, "I haven't seen a
3 lawyer handle some of the cases I am talking
4 about, in a very long time."

5 Most lawyers don't know how to
6 solve the problem of getting the vacant lot
7 cleared, of getting the crack house down, of
8 getting the problem solved with the landlord.
9 There is so much that we can do if we
10 encourage others to be problem solvers, as
11 well.

12 We have an extraordinary
13 opportunity. The legal profession has an
14 opportunity to help bring this Nation
15 together; to build understanding, rather than
16 to divide it; to build community, rather than
17 to fragment it; to be the peacemaker and the
18 problem solver, as never before in the
19 history of the profession.

20 At the same time, we must never
21 forsake our role as defenders of liberty and
22 advocates for justice for all Americans.

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1 But, isn't that what life is all
2 about? When do we use the sword, and when do
3 we reach out our hand and listen and talk our
4 way to understanding?

5 If lawyers are taught how to, and
6 if they hone and prize their skills as
7 peacemakers and problem solvers, then they
8 will be far better prepared to serve their
9 clients, their community, and their Nation.

10 In this next millennium of the
11 practice of law, we may know a more peaceful
12 Nation and a more peaceful world.

13 Thank you very much.

14 (Whereupon, the proceedings
15 were adjourned.)

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