Remarks to the Conference of Chief Justices
Regulation of the Legal Profession in a Global Economy
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I am pleased to be with you today to address ethical issues of concern to the legal profession, to the public, and to law firms and lawyers now practicing in a global marketplace. I had the pleasure of last addressing you in Indianapolis in July 2006, near the end of my term as President of the American Bar Association.

I begin with two quotes. The first is by the noted psychiatrist Ronald D. Laing, who died in 1989:

> *"We live in a moment of history when change is so speeded up that we begin to see the present only when it is disappearing."*

That statement, of course, is even more true today.

The second is by William Shakespeare, from *Hamlet:*

> *"We know what we are, but know not what we may be."*

Last May my law firm partner Arnold R. Rosenfeld, who served as Bar Counsel for the Commonwealth of Massachusetts, informed me of the interest of the ABA Standing Committee on Professional Discipline in planning today's program. He asked me to assist the Committee in suggesting today's program to my Chief Justice, incoming Conference of Chief Justices President Margaret Marshall. We did so, and a year later, here we are.

We heard this morning about developments abroad, for example in England and Wales, where non-lawyers are now permitted to hold 25% of the management authority in law firms. In 2011 or 2012, non-lawyers there will be able to own an equity interest in law firms, and to practice with lawyers in business entities that provide legal and other services.

We heard about legislation and rules in Australia that led to the world's first publicly traded law firm, with non-lawyers owning equity interests, and about similar developments in Canada, Scotland, France, and elsewhere in Europe. This

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morning we heard from the Legal Services Commissioner of New South Wales, Australia, who is the primary regulator of the legal profession with all-encompassing powers to discipline, subject to the court's oversight.

In the United States, the American Bar Association since its founding in 1878 has supported and continues strongly to support the authority of our state supreme courts to regulate the legal profession. The state-court-based lawyer disciplinary enforcement system in the US, which stems from the separation of powers form of government created by the Founders, today is professional, responsive, transparent, and greatly admired throughout the world.

The pressures that you, as chief justices, and your colleagues face on our states' highest courts to maintain an ethical and accountable legal profession, and to ensure an independent and accountable judiciary, are daunting. In my travels to some thirty countries prior to and during my term as ABA president, and since then, I have observed first-hand the positive impact of, and the high respect for, our independent judiciary and legal profession, and our justice system, which are viewed as bulwarks for protecting and advancing the rule of law throughout the world.

In meetings with government, judicial and bar leaders of countries such as Kosovo and Kenya, of former Soviet Republics, and of numerous other developing nations in Asia and Africa that are trying to create corruption-free and democratic legal systems, time and again I have been asked how the US has been able to eliminate corruption in the legal profession and judiciary. I explain that we have not eliminated it, but we do our best to control it by clear and firm ethical codes of conduct that are fair and transparent and, most importantly, firmly enforced.

These and other countries continue to struggle with professional and judicial corruption. They look to the United Sates—to our organized bar and our independent judiciary—to help them develop ethical codes and enforcement methods to regulate the conduct of their lawyers and judges for the protection and advancement of the rule of law, their people, and their societies.

Development of effective ethical codes and effective enforcement methods to regulate lawyers is becoming more complicated as lawyers practice in states and countries where they are not formally admitted to practice. My law firm is one of many global, national and regional US law firms affected by changes in the way law is practiced in multiple states and countries, and in the manner that lawyers are and should be regulated in those states and countries. US law firms are experiencing mounting challenges in maintaining a high professional ethic while operating, and representing clients, in business settings where competition has been internationalized and continues to intensify.

There are those abroad—as well as in the US—who believe that our current state-court-based system of regulating the practice of law and the ethical conduct of lawyers is "protectionist," an unnecessary barrier to a "more efficient" world of commerce where the practice of law, governed by a strict business model and the marketplace could better guarantee protection of clients and their interests.

Some argue that you, as the judicial leaders and regulators of the legal profession in the US, could do a better job of helping US lawyers keep up with the

competitive business demands that the global marketplace and clients are generating. Others view any change to the current ethical regulatory structure of the practice of law as leading to the demise of the legal profession. The only thing that appears certain is that each of you grapples with these wide-ranging viewpoints and pressures being created by conflicting segments of our profession.

As chief justices and regulators you are responsible for the effective regulation of the profession for the protection of the public. As I have noted, the ABA strongly supports our more than two centuries-old system of regulation of the profession by our highest state courts, and the ABA has engaged in many battles and has continuously educated the public to preserve that system during the ABA's long existence.

To be clear, my position is this: while mindful of the pressures being placed on US lawyers and law firms by increased business competition, exacerbated now by an economy in deep recession, we must nonetheless devise ethical regulatory solutions that preserve the legal profession's core values and principles that have served our nation and our people well. Those values are of a learned and noble calling—of a profession—that must not be compromised.

More than a century ago Dean Roscoe Pound defined the essence of a profession. He said:

> There is much more in a profession than a traditionally dignified calling. The term refers to a group of persons 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. Pursuit of the learned art in the spirit of public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.

Dean Pound and other legal scholars early on defined the qualities and duties of a lawyer that differentiate the *lawyer* and the *businessperson*, among them: the duties of *loyalty* and *confidentiality* to the client; the *duty to the court;* and the duty to *avoid conflicts of interest*.

The question we face today, simply put, is this: How can we preserve the core values of the legal profession—*public service, loyalty, trust, confidentiality, competence and avoidance of conflicts of interest*—in a global economy where those values in certain quarters are being modified in order to be competitive in the marketplace? How you ultimately decide to answer this question must serve this important purpose, among others: the public must not come to view the legal profession as having abandoned its values, as having abandoned its responsibilities to the people.

You must insure that we continue to be a *profession*—certainly one capable of operating business-like, well-managed, and competitively in this global environment—but one that still firmly adheres to time-tested ethical codes for lawyer and judicial conduct. In short, the lawyer's ethical and fiduciary duties to clients, court and public must be preserved as we consider in the US adoption of any new structures for law practice.

One hundred years ago the ABA adopted the *Canons of Legal Ethics*. Canon 32, entitled "*The Lawyer's Duty in its Last Analysis*" exhorted:

> *But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.*

While the drafters of the *Canons* were blind to gender, they did articulate the ethical standard to which lawyers—women and men—aspire and are held to in our society: the Lawyer as Public Citizen. The drafters would be sad to know how difficult it is today for lawyers to be Public Citizens.

My primary purpose in appointing the *ABA Commission on a Renaissance of Idealism in the Legal Profession*, chaired by Supreme Court Justice Ruth Bader Ginsburg, Theodore C. Sorensen, Special Counsel to President John F. Kennedy who helped create the Peace Corps, and Mark D. Agrast of the ABA Board of Governors, was to reinvigorate the profession's commitment to public service, to enable more lawyers to serve as public citizens, and to persuade law offices across the US to permit lawyers to perform more public service and *pro bono* work.

I suspect that few if any of the drafters envisioned the vast and powerful national economy that would emerge in the United States in the 20th Century, and the role of lawyers in its development. The economy developed thanks in large part to the adoption of rules, regulations and legislation—corporation acts—that helped spur great economic growth. Those corporation acts underpin the business ethic of maximizing profits for the businessperson's or shareholders' benefit.

The business person's *business ethic* of maximizing profit for the shareholders' benefit has worked well for the U.S. economy.

In contrast, the lawyer's *legal ethic* focuses on providing, with utmost loyalty, trust and confidentiality, for the legal needs of the client, whose interests trump even those of the lawyer.

During the past century, if not longer, there has been a constant tug of war between those who ardently think of the law as a *profession* and those who ardently think the law is a *business*. The ABA, particularly in the last thirty years through its *Center for Professional Responsibility*, has tried to keep pace with developments in the business environment of law practice while upholding the profession's principles. The ABA has formed commissions and task forces to study emerging ideas and practices, and various policy recommendations have been presented to, debated, and voted on in the ABA House of Delegates. Throughout, the ABA's main concern has been the preservation of professional ethics rather than adoption of a purely business model for the legal profession.

For example:

- In 1983, the House of Delegates rejected a proposal for non-lawyer ownership of law firms even though the proponents tried to assure that the professional independence of lawyers would continue.
- In 2000, the House rejected the Report of the *Commission on Multi-Disciplinary Practice* which proposed that lawyers should be permitted to share

fees and combine with non-lawyers in entities that delivered both legal and non-legal professional services, so long as lawyers retained the control and authority necessary to assure their independence.

- At the same time the House also rejected the ABA Discipline Committee's proposal to adopt in the ABA Model Rules a system of disciplining law firms. To date, only New York and New Jersey provide for law firm discipline.
- In 2002, the House adopted the Report of the *Multi-Jurisdictional Practice Commission*. While reaffirming the ABA's support for state court regulation of the profession, the House also adopted the following recommendations:
  - *Model Rule of Professional Conduct 5.5(c)* was amended to allow temporary practice in a US jurisdiction by a lawyer licensed in another US jurisdiction as long as the lawyer is subject to discipline in both jurisdictions.
  - The new *Model Rule for Temporary Practice by Foreign Lawyers* identified circumstances where lawyers admitted in a non-US jurisdiction could do the same.
- Three months ago the ABA House of Delegates, at the recommendation of the *ABA Standing Committee on Ethics and Professional Responsibility*, took action on an issue of particular concern to lawyers and law firms. After prolonged and impassioned debate, the House amended *Model Rule of Professional Conduct 1.10*, relating to conflicts of interest, to permit a lawyer to move from one law firm to a new firm without imputing that lawyer's disqualification to lawyers in the new firm, if the transferring lawyer is timely and effectively screened.

  The proponents of the amendment view it as achieving a necessary balance by allowing lawyers and law firms to maintain loyalty, preserve client confidences and avoid detrimental "side switching" in the context of 21st Century law practice.
- There are other conflicts issues of concern to US lawyers and law firms in light of the realities of today's global environment that should be addressed by the *ABA Standing Committee on Ethics and Professional Responsibility* and, ultimately, by the House of Delegates.

  For example, the ability of law firms and clients to utilize advance waivers in circumstances where no client's confidential information is compromised is an important factor in the ability of clients to gain access to legal services from the law firm of their choice.

  Consideration should also be given to the appropriate reach of conflicts imputation rules that are applicable to law firms in situations where effective screens are available, and the asserted conflict implicates a wholly distinct subject matter or transaction.

  Similarly, there should be affirmation of the principle that legal representation of a corporate entity, for conflicts purposes, does not extend to all other entities in the same corporate family in the absence of any risk to confidential client information.

I do not mean to suggest that regulators of the legal profession in Australia, England and Wales, Europe and Canada are any less concerned than we in the US are with preserving professional values and protecting consumers of legal services in the global legal services market. Clearly they are.

In Australia, the Legal Services Commissioner of New South Wales has developed a proactive regulatory regime for incorporated legal practices that requires the entities to implement ethical infrastructures and be subject to audit. The Commissioner continues to work with the New South Wales government to see if the law can be changed to ensure that the lawyer's duties to court and client have priority over those owed to shareholders. He also worked with the publicly traded law firm of Slater & Gordon to ensure that its public offering documents were clear that the firm's duties to shareholders come *after* those owed to the court and the client. And the placing of regulatory objectives and professional principles in Section 1 of the Legal Services Act of England and Wales also demonstrates the primacy of these issues.

It is fair to assume that regulators in the countries I have mentioned believe they are achieving a balance between maintaining the core values of the legal profession and the current economic demands on lawyers and law firms in the global marketplace. Time will tell whether they are correct.

I conclude with this observation.

The US Constitution does not guarantee a citizen the right to consult a doctor when ill, or a member of the clergy when in need of spiritual sustenance, or to consult with a member of any other profession or business, yet it does guarantee the right to legal counsel. Why did the Founders so provide?

Why did Founder John Adams, the second US President who drafted the Massachusetts Constitution, a model for the US Constitution, in his extensive writings so stress the importance of an independent judiciary and independent legal profession to the survival of our democracy?

I think we know the answer to those questions.

As we contemplate whether changes now being embraced abroad ought to be considered in the US, we should take advantage of lessons we can learn from those countries that are now engaging in far-reaching experimentation. We should monitor their progress and their set-backs, but also engage with them in developing fair, effective, and ethical regulatory structures for the legal profession. We need to understand what has compelled the experimentation in those countries, and whether such dramatic changes are necessary in the US.

Questions need to be answered before we seriously consider the types of reforms being implemented in England and Wales and Australia, changes that the ABA in some instances has already considered and rejected during the past quarter century. The questions include but are not limited to these: (1) What benefits, other than profit to non-lawyer investors, would inure to the public and profession in the US by having non-lawyers and business entities own or manage US law firms? (2) How would the US system of justice, and protection of the public, be enhanced by non-lawyer ownership or regulation of the legal profession? (3) Why should not

the state supreme courts, pursuant to the separation of powers doctrine, regulate the legal profession in the US—as opposed to Congress, the Executive Branch of government, the state legislatures, or an independent and all-powerful Legal Services Commissioner as in Australia? (4) How can we make necessary improvements to our justice system, to the ways in which our law practices are conducted and managed, without dismantling that which has served us so well in the US?

We must ensure that any changes made to the legal profession in the United States preserve the core values and principles of an ethical, independent legal profession. That is our challenge, and our responsibility.

Thank you for your kind attention.