NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
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PROFESSIONALISM AND THE CORPORATE BAR

An Address by

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American Bar Association
Section of Corporation,
Banking and Business Law
Annual Meeting Program
Honolulu, Hawaii

August 5, 1980

Periods of major economic and social difficulties precipitate uniquely American reexaminations of our institutions. In the tradition of Yankee ingenuity and pragmatism, the public wants to know what is not working correctly and how to make it right. Thus, for example, the Great Depression led to a fundamental restructuring of society under The New Deal. Today, as we struggle with the highest inflation rates of this century and brace for the possibility of the most severe unemployment in five decades, it is not surprising that we are also entering a new period of societal introspection.

Yet, even if we are on the brink of a social watershed equal in magnitude to the 1930's, there is an important difference. More and more, we read of charges that government is itself the problem and hear that the regulatory solutions to past crises have grown into the proximate causes of this one. That is, remedies enacted to cure discrete economic and social misallocations and injustices have, over the years, subtly taken on an independent existence not always limited to their origins. As a result, many feel that we are, as a nation, economically over-regulated and socially over-legalistic.

At least, this latter perception is certainly accurate. America has become the most legalistic society on earth. We have three times as many lawyers per capita as Great Britain and twenty times as many as Japan. And, probably for reasons

not unrelated to this explosion in the legal population, we are also producing more laws and more litigation. But, it would be a mistake to assume that a nation with more laws is, therefore, a more moral or even a more pleasant society. As a Royal Commission reviewing the British legal profession recently concluded, "A society in which all human and social problems were regarded as apt for a legal remedy or susceptible to legal procedures would not be one in which we would find it agreeable to live." On a more philosophical plane, Alexander Solzhenitsyn -- in his provocative talk several years ago at Harvard -- warned that "[w]henever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity."

While these issues should concern all Americans, they have a special significance to those in this room -- the members of the corporate bar. Nowhere is our society more legalistic than in regulating our economic life. Ironically, however, society is simultaneously becoming more -- rather than less -- questioning of the social benefits of the exercise of private economic power. Indeed, that skepticism may be a manifestation of the moral mediocrity which Solzhenitsyn described. When the private sector loses final decisionmaking

power over important areas of its activity in favor of a superimposed regulatory scheme, it inevitably also begins to lose its economic bearings and discipline and -- even more importantly -- its sense of moral responsibility. When business is required to operate in a regulatory environment -- and, when it is concerned that any misstep which it may make will be used to justify even more regulation -- business is compelled to become more and more attentive to its regulators and, consequently, becomes less rather than more responsive to the needs and expectations of the market and the public. Correspondingly, business's unique entrepreneurial ability to create and innovate -- the ultimate justification for an independent private sector -- tends to atrophy. This partial eclipse of the market discipline does not, however, mean that business becomes more sensitive to the other needs and expectations of the society or that it becomes more socially responsible. Indeed, in a regulatory environment, business tends, over time, to view the government as the arbiter of acceptable behavior and, therefore, to presume that any course of action which is not prohibited by the government is, consequently, an acceptable alternative. Business, in effect, relinquishes its responsibility to establish its own parameters for proper business conduct -- and leaves the government to fill the vacuum.

Therein lies our dilemma. On one hand, regulation tends to diminish the regulatee's initiative and sense of responsibility for the consequences of its conduct -- a result which, in turn, leads some to advocate still stricter control to satisfy society's expectation that the regulated power group or institution will conduct itself in a manner which contributes to -- and does not frustrate -- a fair and orderly society. Opportunities for the private sector to assert its independent sense of responsibility become pre-empted by the imposition of regulation. We are presented with a process in which regulation diminishes business's sense of accountability, which in turn, precipitates even greater regulation to fill that accountability vacuum -- an unending downward cycle which could culminate, without deliberation or conscious decision, in the destruction of the private enterprise system as we know it.

To break this cycle, I believe that greater reliance must be placed on nonregulatory ways to enhance the process and credibility of corporate decisionmaking. To my mind, the only practical alternative available to defend the private enterprise system is to make the system, as designed, work as effectively and credibly as we can, and with a greater sense of accountability for its actions. Over the last three years, I

have spoken on various aspects of this theme. My basic point can be easily summarized: If the private sector is to extract itself from the deepening morass of regulation, each of the many actors on the corporate scene must perform his function responsibly and effectively. Much like a circuit board, each element has a unique function to discharge, and must be fully operational and effective for the system to work. Despite the demonstrated ineffectiveness of much regulatory authority, we cannot expect a structural change in the role of regulation without the initiative on the part of the private sector to ameliorate the role of regulation by assuming a greater burden of responsibility. That includes the corporate lawyer, and it is his role which I want to consider with you today.

It may seem, at first blush, somewhat ironic that one ingredient in my antidote for the ills of an overly legalistic society is an enhanced role for the corporate bar. The role that I envision is, however, not that of the lawyer as technician, but that of the lawyer as counsellor. The species of corporate lawyer who can contribute to solving the dilemma I have outlined is not merely an expert on the law. On an individual level, he is an independent professional whose advice should encompass not only his legal talents, but the full array of his experience and judgment. On an organizational level, the bar, as an entity, must

support him by defining the relationship between the lawyer and his corporate client in a fashion which fosters his fullest possible contribution to the service of that client. This afternoon, I want to address both of these areas.

THE LAW AS A PROFESSION

A Spirit of Public Service

At the outset, I would like to explore the concept of professionalism. This is an era in which our most prestigeous and influential corporate practitioners frequently serve in law firms which are themselves interstate businesses with employees numbering in the hundreds and which command hourly fees rivaling the daily income of their counterparts in more prosaic endeavors. As Justice Harlan Fisk Stone, previously a partner in two Wall Street firms, explained:

> "The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory. More and more he must look for his rewards to the material satisfaction derived from profit as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest . . . . At its best this changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the marketplace in its most anti-social manifestations."

Mr. Justice Stone's observations have become increasingly appropriate. In this milieu, it is important that we remind ourselves what it is about the calling of the law which makes it a profession. Dean Roscoe Pound observed that a profession is characterized by "three essential ideas -- organization, learning, and a public spirit." This element of public spirit ideally supersedes the parochial interests of the profession's individual practitioners. Or, in Dean Pound's words:

> "The gaining of a livelihood is not a professional consideration. Indeed, the professional spirit of public service constantly curbs the urge of that instinct."

This ideal historically has been the justification for the public's reliance on professional self-regulation. Groups -- such as lawyers and physicians -- which hold themselves accountable to altruistic considerations have been thought to be worthy of being entrusted with the responsibilities of regulating their own members. Further, the decisions of the professions have traditionally been received with deference, since the public's interests were assumed to be with the profession.

Increasingly over the past decade, however, our society has witnessed the crumbling of much of the sense of mutual trust which sustains this kind of public faith in private institutions. With respect to the professions, there are

those who would say that no sense of public spirit has ever existed at all -- that it was merely a myth fashioned to rationalize a lucrative monopoly power and to sustain the calculated mystification and arcane terminology necessary to exclude the outsider. These critics would agree with George Bernard Shaw who argued that "every profession is a conspiracy against the laity." Others would suggest that, while a spirit of public service might still stand as a professional ideal, in practice it runs a poor second to more material considerations.

In fact, it is likely that a tension has always existed between the ideals of professionalism and the realities of daily practice. For example, speaking of a sister profession, Oliver Wendell Holmes, Sr., the father of the great jurist and himself a physician, observed that "the truth is that medicine, professedly founded on observation, is as sensitive to outside influences, political, religious, philosophical, [and] imaginative as is the barometer to the changes of atmospheric density." From this perspective, the risks to the erosion of professionalism lie not in the occasional instance of compromise or of out-and-out misconduct. The more serious danger is that practitioners themselves will reject the ideals of public service or dismiss them as naive or archaic. For absent meaningful ideals, a profession is no more than another typical trade association dedicated

to protecting the parochial interests of its members, defined in such an unoffensive way as to attract the largest number.

Regulation of Practice

Indeed, more and more, the professions have divested themselves of their ideals and traditions and taken on the trappings of commercial ventures, including mass advertising, impersonal merchandising, and associations perceived as mutual protection societies which lobby reflexively against proposals which might impinge on their or their clients' short-term interests. Not surprisingly, the public's response has been to reduce its deference to the professions while government has enhanced its interest in their activities. The latter is especially significant. After all, government regulation has been the classic social response to perceived business unaccountability.

In the long-run, nothing is more critical to a profession's survival than the public's perception of it. And, in an era of widespread suspicion of all institutions, the professions are especially poorly perceived. If the professions wish to enhance their status and regain some of the lost measure of public deference -- indeed, if they want to defend their heritage of independence -- they must reaffirm the moral force which has traditionally marked them as callings dedicated to public service. For

the practice of law, that means, in part, the formulation of a code of professional conduct which meets the public's reasonable expectations of behavior for lawyers. Appropriately, the American Bar Association is presently engaged in that task. I applaud the ABA for accepting that challenge and I admire the thoughtful and conscientious efforts of those primarily responsible for giving birth to the new Code -- the members of the Commission on Evaluation of Professional Standards. The undertaking on which they are embarked presents a special opportunity for the bar to reaffirm its tradition of professionalism, as well as its commitment to meeting the contemporary public's reasonable expectations. I would urge that the bar's deliberations on the Code be conducted in this context and that the tempering of the proposed Code from the original proposal be reviewed from the perspective of professional ideals and of the message it communicates to the larger society.

But, even the most ideal Code is meaningless without the will to enforce it. Yet, critics point to a gap between the bar's professed obligations to the public and its tendency to protect fellow practitioners -- and, indeed, the profession itself -- from any critical light. This phenomenon seems to reflect a basic reluctance among self-regulatory groups to subject themselves to standards higher than the existing norm

of behavior. The result, however, is a reduction in the deference accorded the bar by other institutions.

Let me make this point more concrete by relating it to an issue of current concern to the corporate bar -- the Commission's administration of Rule 2(e) of its Rules of Practice. That rule, as most of you are undoubtedly aware, authorizes the Commission to discipline professionals who practice before it. The Commission has an important interest in ensuring that the members of this category of practitioners are not unqualified or unethical. As the Second Circuit recognized in sustaining the validity of Rule 2(e):

> "[T]he Commission necessarily must rely heavily on both the accounting and legal professions to perform their tasks diligently and responsibly. Breaches of professional responsibility jeopardize the achievement of the securities laws and can inflict great damage on public investors."

The question, then, is to what degree must the Commission exercise a primary role in protecting these interests and to what extent can it defer to other institutions -- such as the organized bar -- with the expectation that meaningful standards, even if not necessarily identical to those which the Commission would apply, will be vigorously enforced. In my opinion, if unqualified and unethical lawyers are subject to such standards enforced by professional disciplinary bodies, then, absent unusual circumstances, Rule

2(e) would not need to be applied to lawyers. Conversely, however, if professional self-regulation is lax, our role must expand.

Even under an ideal Code, enforced by means of an ideal disciplinary mechanism, disagreements will necessarily arise concerning particular examples of attorney conduct, and I would not want my remarks today to be construed as relating to any particular case. Rather, my point is that the most fruitful issue for examination by this Association is not whether the Commission should be deprived of its authority under Rule 2(e). The question, instead, is whether the bar's enforced standards of competence and integrity are sufficient to protect against lawyer abuse of those components of the public interest embodied in the federal securities laws. If they are not, society must look to other institutions -- including the Commission -- to fill that role.

But, the exalting spirits and traditions which are the true mark of a profession can only arise from within the bar. They can never be imposed from without and still have a profession survive. Imposition from the outside must inevitably be destructive of the profession. While the practice of law could be regulated as a business, the profession of law cannot be. Professional aspirations

must be generated internally -- from those loving critics who know the bar's tensions, its frailties, its capabilities, and its limitations, but who cherish the profession and can offer their fellow practitioners a new vision. In an earlier era, Jeremy Bentham played this role for the English law, as did Dr. Abraham Flexner for modern medical education. As their examples demonstrate, individual minds and consciences from within a profession -- and only that kind of internal leadership -- can establish and maintain the sense of ethics which separates a profession from a business.

THE CORPORATE LAWYER

The Lawyer As Counsel

It is this concept of professionalism that the corporate lawyer must bring to his client counselling. Corporate lawyers have become an indispensible participant in the system of persons, groups and occupations whose interrelationships comprise the corporate environment. Each component of that environment has important roles and responsibilities. Management's primary mission is to ensure that the corporation generates adequate profits over time by satisfying customers' needs with goods and services at an attractive level of quality and price. Directors must bring to management the best informed and most objective available advice, perspective, support, guidance, and, when necessary, discipline.

Auditors assure the credibility of the financial information upon which those external to the corporate structure judge the economic results of management's stewardship. And, lawyers -- along with their more mundane responsibilities -- must be the architects of the accountability processes which provide the corporate structure with the discipline necessary for effective decisionmaking and which legitimize the corporation's power and impact in society.

In a sense, this means that the corporate lawyer has an obligation to protect the corporation as a societal institution. These obligations transcend the narrow interests of particular clients. But that concept is hardly unique. The bar's professional ethics already recognize that a lawyer -- by virtue of his special office and skills -- has responsibilities broader than loyalty to his client. For example, a lawyer acting in the traditional role of trial advocate has a duty to disclose decisions in the jurisdiction adverse to his client's immediate, personal interests in the case. This requirement, obviously, recognizes that, as officers of the court, lawyers have an overriding obligation to maintain the integrity of judicial institutions. Similarly, the lawyer cannot counsel his client in the commission of a crime -- again, because society recognizes that it has certain claims on legal officers which are more potent than those of the client.

In contemporary times, the role of the lawyer has, of course, expanded beyond the traditional confines of the courtroom, and, particularly in the corporate world, most lawyers function as advisers rather than as advocates. In my view, corporate lawyers must adjust their concept of their professional obligations to match society's evolving conception of the responsibilities of the institutions which the corporate bar serves, the rights of those impacted by such institutions, and the needs of the larger society.

There is, however, a disturbing trend among some corporate lawyers to move in the opposite direction -- to see themselves as value-neutral technicians. True, ethical dilemmas can be avoided if one's job is viewed as profit-maximizing or as uncritically representing -- and not questioning or influencing -- the corporate client's interests so long as they are not illegal. In many ways, eliminating these tensions and professional responsibilities would be a comfortable and less contentious alternative. But, indifference to broader considerations would not be professional. Similarly, it would not serve the client well. A counsel does a disservice when, in effect, he limits his advice to whether the law forbids particular acts or to an assessment of the legal exposure, and does not share with the client his view of the possible ramifications of the various alternatives to the short-

and long-term interests of the corporation and the private enterprise system. He preempts the opportunity for his client to make the fullest possible judgment by not providing the full range of information and advice of which he is capable and on which the client can make the most informed choice. To correct this tendency, the bar must place greater emphasis on the lawyer's role as an independent professional -- particularly, on his responsibility to uphold the integrity of his profession. In the balance of my remarks, I want to apply this observation to two important areas where the proposed rules do not fully recognize the professional responsibilities of lawyers who counsel the most important and pivotal private sector institution in American society -- the corporation.

Communicating With The Client

One of the cardinal attributes of the attorney-client relationship is free and frank communication. In the corporate context, that should entail an obligation to communicate to the corporation -- meaning its officers or, if necessary, its board -- if he or she is aware that the corporation is embarked on a course of conduct which, while arguably lawful, may be questionable and is of such significance that the corporation's interests -- not limited to legal liability -- may be materially affected.

I doubt that explicit recognition of this duty would mean -- as some have suggested -- that the attorney would be isolated from candid discussion or full information because of management's concern that the lawyer would be a conduit of the board. But, to the extent that it does, it is a responsibility the client must assume. This is not a basis for compromising the lawyer's appropriate ethical standards. Further, we must recognize that management itself may well have obligations to report to the board in similar circumstances. And, if management is not inclined to be open with its board or would chose not to consult counsel rather than risk counsel's going to the board, counsel may well be on notice of larger potential problems with his client's candor and integrity. And, finally, all who deal with an attorney must understand that a lawyer should not be used as a value-neutral technician and that a necessary adjunct to his technical skills is sensitivity to ethical considerations. In my opinion, the prestige that such integrity engenders will enhance -- rather than diminish -- the role of the lawyer as a counsellor.

My concerns in this area go far beyond the possibility that a corporation may risk legal penalties or serious damage to its reputation. More significant in the long-run to the American economic system is the fact that, in some

situations, the corporate conduct is incompatible with the continuation of the corporate system as we know it. And, by acquiescence, the lawyer becomes a party to its further erosion. It would not be consistent with the bar's professional obligation if it insulates attorneys from their responsibility to prevent situations which could contribute to the erosion of the corporate system which they serve.

But, I do not take comfort from the fact that the proposed Model Code would permit the attorney to refer particular matters to higher client authority, including, if necessary, the board of directors or a similar governing body. That Code provision, taken together with the related commentary, erects a number of additional hurdles which would frustrate, rather than facilitate, the attorney's communication with the client. Worse still, these hurdles may be used by timorous corporate lawyers to justify standing mute. For example, the commentary suggests that counsel must have a "clear justification" before going over the head of a corporate officer; in my judgment, the dictates of the attorney's own sense of professional responsibility ought to be justification enough for bringing a matter to higher levels of corporate authority. Further, the comments caution that lawyers must be confident that the question is one of law and not merely policy. To the extent that

considerations of matters which are not strictly legal, such as damage to reputation or considerations with ethical overtones, would be considered as a policy -- rather than legal -- concern, it would seem that the proposed Code restricts the lawyer to the role of legal technician, rather than encourages the corporate attorney to exercise the broader sensitivity and judgment which are the hallmark of a profession.

For these reasons, the proposed Code, in my view, lends credence to the mistaken belief -- ultimately corrosive of the bar, the corporation and private enterprise itself -- that anything which is not illegal is within the realm of the acceptable. Yet, rarely is a complex legal matter not subject to a counter-argument which the lawyer looking for excuses to avoid confrontation could seize upon. Indeed, we are told that, at times, it may be essential for counsel to obtain an independent legal opinion before taking independent action to bring a matter to the attention of the board -- a precondition which appears to undermine the ability of a corporate superior to consider an issue which, a fortiori, is a close and difficult one. Thus, while the Code's direction is right, it does not travel far enough along the road in confirming the corporate lawyer's role and responsibility. When the corporation and the corporate community is pilloried for the course of conduct -- legal but otherwise totally

insensitive to the public or even the corporation's own interests over time -- and the participants are evaluated in the court of public opinion, counsel and the bar will most assuredly not be treated better because the thrust of the canons limited the lawyer's responsibility to the legal issue involved.

The role of the profession must be to encourage and support its members in taking ethical actions. In the example I referred to a few minutes earlier, the lawyer who must disclose an adverse decision to the court is supported in resisting any client pressures to do otherwise because ethical standards which every lawyer is bound to follow compel him to do so. But, the lawyer acting to protect the institutional integrity of a corporate client must face possible threats to career, personal relationships, and other interests without any similar justification or support from the bar -- which merely says, in essence, that he or she "may" or "may not" take such actions. Given human nature, such a permissive standard, in most cases, likely would mean no standard at all. In fact, it may be worse than no standard at all -- for it can legitimize what ought to be unacceptable professional conduct.

The Georgetown Petition

This lack of a meaningful standard would create a vacuum which would not long continue. Other institutions --

particularly, government -- with an interest in maintaining the integrity of the corporate structure would find themselves under increasing pressure to fill the void.

Some have already looked to the federal securities laws for this purpose. While the Commission has long appreciated the role of counsel in maintaining corporate accountability, it has never determined generally to mandate disclosure of relationships between a corporation and those who serve it exclusively in a legal capacity. Yet, as many of you know, the Commission recently was requested to consider this issue in a rulemaking petition filed by the Institute for Public Representation of the Georgetown University Law Center. A majority of the commentators who opposed the Institute's proposal cited this Association's consideration of a revised code of professional conduct and suggested that that effort would clarify the lawyer's responsibilities -- thereby eliminating any need for the Commission to act. It is my personal hope that the bar will prove these commentators correct. In any event, the Commission did determine not to adopt the proposed rule, and, if the new Code fulfills the expectations which many hold for it, it is unlikely that we will again be compelled to deal with this area.

The Lawyer/Director

Another matter which should be of concern to the bar -- but which already is a subject for public disclosure under

the federal securities laws -- is the lawyer who sits on his client's board of directors. The Commission's survey of 1979 proxy statements -- to be released shortly -- reveals that over 57 percent of all reporting companies have directors on their boards who also collect legal fees from them. It is clear that this dual role can foster a public perception of conflict of interest, and may undermine the objectivity of the advice the lawyer/director renders in either capacity. The concern is both substantive and perceptual, and relates to the corporate mechanism -- the board of directors -- which must function with integrity and be trusted to do so, as the key accountability mechanism if the system, as we know it, is to survive. Ironically, while the Commission's concern about this issue is sometimes cited as an example of regulatory expansionism, I understand that, fifty years ago, it was generally considered unprofessional for a lawyer to sit on a client's board. But, once some lawyers began routinely to serve on boards, other lawyers believed that they no longer could afford to look exclusively to ethical considerations.

The result is that this dual capacity must be meaningfully addressed by the profession. Some have suggested that an outright ban on dual service as a lawyer and a director would be the most appropriate solution. Indeed, an eminent corporate lawyer of an earlier generation, Robert Swaine, in a speech to

the New York Bar Association recommended an ethical canon which would have forbidden a lawyer to accept a place on a client's board in all circumstances. Perhaps a degree of flexibility would be more appropriate, but such flexibility, if it is to be permitted, must be subject to the discipline of meaningful, credible standards which go beyond vague reference to possible conflicts of interests or compromise of independence. For example, the bar could establish a general prohibition against dual service, but allow an independent decisionmaker -- such as approval by an independent nominating committee, and surveillance by an independent conflict of interests committee, of the company's directors -- to make exceptions when warranted. The proposed Code states that "it is often useful that the lawyer serve both as counsel and as one of its directors." Useful to whom? And, for what purpose? I doubt any usefulness that cannot be effectively achieved in other ways. The commentary would benefit from examples. It might also express the necessity for counsel to have free and regular access to the board of directors, includin attendance at board meetings.

CONCLUSION

In conclusion, this afternoon I have addressed some of the issues which I believe will determine the extent to which the bar -- and especially the corporate bar -- will remain

committed to the ideals of professionalism. As the legal community considers these urgent matters, it must fully appreciate that it will be, for all practical purposes, redefining its perception of itself and determining its future role in society. In doing so, it will also affect other institutions, such as corporations, with which lawyers are closely associated and which collectively comprise our private enterprise system. We, and those who follow us, will be required to live with these decisions and, if they prove short-sighted, to pay the price in terms of public confidence and trust and, indeed, perhaps even in terms of a changed system.

I recognize, of course, that these matters have been the subject of much deliberation by many thoughtful attorneys. My purpose today is not to be prescriptive, but to underscore the challenges facing us and to discuss the consequences, as I view them, of the alternatives. To my mind, the fate of our major institutions -- such as the bar and the corporate sector -- should not be determined by our merely floating with the tide of events or by the cumulative impact of group self-interests. I have no doubt that a healthy and dynamic private enterprise system generating substantial economic growth is essential to a free and open society. Without it, personal freedoms and rights will not survive. And, it is the future of that system and such a society with which we must concern ourselves.