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## Keynote Address: Why Is Accountability Important?

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## KEYNOTE ADDRESS: WHY IS ACCOUNTABILITY IMPORTANT?

DENNIS ARCHER\*

I want you to know that is perhaps one of the best introductions I've had in some time and if you just come back to Detroit with me and introduce me all the time, I'd appreciate that. You should know that South Carolina is blessed to have a tremendous number of lawyers who do just a great job on behalf of our profession and William Hubbard is one of them. He is a very well respected bar leader all across this country for his hard work, for his fairness, and for his keen intellect. Levy Johnson, whom he mentioned from South Carolina, from Columbia, in addition to being an outstanding lawyer happens to be a funeral director. We met when we were both going to be presidents of our respected state bars and I've enjoyed his friendship. Roy Stuckey, who sits to my left, was very active in the section of legal education and admission to the bar. We see each other. I see a colleague here from Cooley Law School in Lansing. Roy and I were actively involved in the work to assure that young people who were graduating from law school received good quality education. I served on the law school accreditation committee and then I served a couple of years on the counseling section of legal education and admission to the bar. Another colleague who is over to my left, Deborah Rhode, just finished a fabulous year chairing a commission on opportunities for women in the profession and having been a state bar president. Ms. President I'm delighted that you saw fit to be here on Saturday, a day that you could be anywhere else, enjoying this wonderful weather and this great state, that you're here. And to another colleague who had engaged in public service. I met him for the first time when the American Bar Association went over to London for its second half of its annual meeting. And Philip [Lader] who is sitting back in the back was our United States Ambassador to the United Kingdom and we had the privilege of going to where he was living and it was a real treat to be able to go to the Ambassador's home and to see what he was doing on behalf of all of America. And if you think about it, and I'll mention it a little bit later, that is what makes our profession great. Public Service. And for those of you who are here in Charleston, please share

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\*President-Elect of the American Bar Association, Former Mayor of Detroit, and Former Justice of the Supreme Court of Michigan.

with my friend, Mayor Joe Riley, my fondest regards. He is one of the more recognized, outstanding public servants in the U.S. Conference of Mayors and in the National League of Cities for his continuing, always looking for new ways to enhance the quality of life of the citizens here in Charleston.

We come together today at a time of great uncertainty. Our nation lives under the shadow of a terrorist attack, not knowing if or when another might occur. We are at war with terrorists in the Middle East and, at the same, our Government is employing methods to ferret out terrorists on our own soil. And while this is going on, we're contemplating yet another military action, this one against Iraq for its possession of weapons of mass destruction, its desire to quickly develop nuclear weapons, and for its contribution to the spread of terrorism.

This climate of uncertainty, coupled with the erosion of the federal government surplus, the collapse of several corporations, the dramatic losses in the stock market, job layoffs, terminations, and loss of pensions for many have permeated our lives and our society. Our normal sense of security and safety has been shaken to our very core. One very tangible result of this uncertainty is the vicissitudes of our economy as experienced in recent months. The economic prosperity we enjoyed for over a decade in the 1990s is now, at least for the moment, a thing of the past. Conflicting signals about whether we are indeed in a recession or whether we're in a short term period of readjustment, or whether we're experiencing an economic downturn that may last well into next year and beyond, leave us again not knowing where we stand and uncertain as to where we will go from here.

President Bush seems totally preoccupied with Iraq and has not, at least openly, focused his energy in the same fashion on setting a corrected course for a return to a robust economy. In recent months we've seen telecom firms, energy traders, and airlines either filing for Chapter 11 or disintegrating completely. We've seen mass layoffs, top corporate executives facing prosecutions like never before, and the role of the once infallible chief executive officer being called into question. These events have had staggering effects, not only on unemployment figures and stock market losses, but also in the toll they've taken on the public investor's confidence. While investors, politicians, and prosecutors search for the people to blame for the bankruptcies and scandals, a new target, as expected, has emerged—lawyers.

We are now under fire along with the executives, accountants, bankers, and Wall Street analysts for the role some may have played in possibly aiding and abetting dubious transactions at fallen

companies. The President, Congress, and the SEC are looking for ways to regulate corporate lawyers and to institute reforms, some of which would dramatically change the practice of law as we know it. The legal profession has a long and proud history of policing itself through state Supreme Courts.

Few professions monitor and regulate the conduct of its members to the extent that national, state, and local bar associations guide the conduct of lawyers. When lawyers have publicly displayed unacceptable behavior, the American Bar Association and the state bar associations have acted quickly and decisively to correct the problem. Moreover, groups such as the American Bar Association Center for Professional Responsibility, the Nelson Mullins [Riley and] Scarborough Center on Professionalism—here at the University of South Carolina—and the Keck Center on Legal Ethics and the Legal Profession at Stanford Law School regularly compel us to take a look at ourselves and hold ourselves accountable for our actions and comportment as attorneys.

The current climate nationally, before Congress and the SEC is not an easy one for us. While accountants, Wall Street analysts, and CEOs have taken a beating, we knew that lawyers would be next in line. The domino effect has now reached our profession. They now look at the role of lawyers and ask whether we should be regulated differently. In the past year, in advance of the collapse of companies and Congress's and the SEC's oversight, the American Bar Association's House of Delegates passed recommendations put forth by the Ethics 2000 Commission and the Commission on Multijurisdictional Practice that provided improved model ethical rules for states to consider and hopefully to adopt.

Once the Enron matter became public and knowing there would be other changes needed, our immediate past American Bar Association President, Robert Hershon, created a task force on corporate responsibility to examine the issues that have shaken the confidence and effectiveness of the legal and regulatory systems. In July, the task force issued a preliminary report containing a number of specific suggestions for continuing the system of checks and balances on corporate governance including several proposals for strengthening the Model Rules governing the ethical duties of corporate lawyers. A copy of this report is posted on the ABA website.<sup>1</sup>

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1. Draft Rules and Explanatory Memos for Public Comment, *available at* <http://abanet.org/cpr/cover2-21.html> (last visited Apr. 3, 2003).

However, on July 30, President Bush signed sweeping corporate reform legislation, known as the Sarbanes-Oxley Act.<sup>2</sup> While the new law focuses on regulating the conduct of accountants and corporate officers, it also contains several provisions that could have far reaching, long-term effects on corporate lawyers as well. While these provisions are, no doubt, well-intentioned, we at the ABA have concerns about some of their unintended effects.

As written, the Act requires the SEC to adopt new minimum standards of professional conduct for corporate lawyers appearing or practicing before it that could conflict with overriding existing state court ethical rules that currently govern the conduct of our lawyers. State courts have traditionally governed lawyer conduct, and we believe that they should continue to do so. Lawyer regulations should remain in the province of the judicial, not the executive, branch of government. State courts license lawyers, discipline lawyers in the case of wrong doing, and set the standards for lawyers: both ethical standards and standards of practice. These functions should continue at the state level.

The Act also requires the SEC to adopt a specific new rule requiring all corporate lawyers practicing before it to report misconduct to company management, and if necessary, directly to the Board of Directors. Although the ABA task force has recommended similar changes to existing ethical rules, we believe that changes to these rules ultimately should be achieved through the adoption of new state court rules, not through federal regulation or federal agency regulations. Creating special new federal legal ethics rules just for corporate lawyers could easily confuse both the lawyer's dual role as a zealous advocate for the client, and as officer of the court. In addition, we're concerned that giving a federal entity—the SEC—the power to overturn state ethical rules as they apply to corporate lawyers, may interfere with the attorney-client relationship. By granting the SEC broad power to adopt new ethical rules for corporate lawyers, the Act could threaten the attorney-client privilege, the work product doctrine, and other evidentiary rules designed to encourage open and frank communications between the client and the advocate.

Now that Sarbanes-Oxley has become law, the SEC has until late January of next year to issue new proposed ethical rules for corporate lawyers. In August, the SEC chair, Harvey Pitt, invited the American Bar Association to participate in a thoughtful and constructive dialogue with the agency as it drafts the new rules. The American Bar Association President, A. P. Carlton, Jr., has accepted this invitation.

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2. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

Although the Association continues to have concerns about the federalization of corporate lawyer ethical standards, and the risk that it entails, the ABA will endeavor to work with the SEC to ensure that these final rules are as constructive as possible. In addition to working constructively with the SEC, the ABA will also continue to review and update the Model Rules of Professional Conduct to ensure that we hold lawyers to the highest ethical standards while preserving our independence and our ability to counsel clients in an honest, forthright manner.

For example, the ABA Standing Committee on Client Protection has circulated a draft proposal to amend the Model Rules of Professional Conduct to require disclosure of a lack of professional liability insurance. The ABA Taskforce on Corporate Responsibility will continue to examine the framework of laws, regulations and ethical principles governing the roles of lawyers, executive officers, directors and others. It has been in dialogue with regulators, legislators, major financial markets, and others, focusing on legislative and regulatory reform to improve corporate responsibility. The Taskforce met just last week to hold the first of several public hearings on this issue. For its part, the American Bar Association Center for Professional Responsibility is working with the Conference of Chief Justices to promote disciplinary procedural rules and programs to enhance judicial regulatory mechanisms and professionalism initiatives.

Since 1996, the Center and the Conference have worked cooperatively to strengthen the courts' oversight of the profession. In 1999, they published a national action plan on lawyer conduct and professionalism that may be viewed on-line at the ABA website.<sup>3</sup> The action plan contains programs, initiatives and recommendations designed to increase the efficacy of the courts' inherent regulatory authority.

Most recently, the Center and the Conference developed and published an implementation plan for the national action plan. That implementation plan is now being promoted by the Center's Joint Committee on Lawyer Regulation and Implementation Committee of the Conference of Chief Justices. Sally Winkler from the Georgia Chief Justices Commission on Professionalism, will, I suspect, expound upon that later this morning. I'm pleased to note that efforts such as these are making a difference. State supreme courts are forming implementation committees to consider these important proposals and are making changes to the way our profession is

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3. See <http://www.abanet.org/cpr/home.html>.

regulated that should enhance the public's perception of the legal profession. Justice Veasey, Norm Veasey, who is in the back of the room, will undoubtedly discuss this work in greater detail during his remarks. He led a fabulous effort on behalf of the American Bar Association for us to look at ourselves, and we adopted the recommendations, almost in total, of the great work of his committee that he led.

But it remains that we must be ever vigilant about our ethical rules, so that they comply with the current law and respond to ever changing conditions of the marketplace. We will be working with the relevant federal agencies to see that challenges facing corporate America, particularly as they apply to lawyers, will provide every assurance that the system is sound, responsible and ethical, and that those responsible for corporate governance are held to standards that inspire public confidence and exemplify integrity.

In the heat of our practice—in the heat of the battle—how lawyers work hard in court on behalf of the clients and have dinner together later—sometimes we forget while we're representing our clients that our legal profession is a very honorable profession. The media and opinion polls suggest that the public often forgets. It's inherently adversarial, the nature of our justice system, and perhaps that's reason why there's some public distrust of our profession. After all, someone must defend those accused of crimes and misconduct. Someone must prosecute or bring suits against those whom others insist are innocent of wrongdoing. A measure of public hostility, a degree of public distrust, comes with the territory.

But the thick skins we develop as a result should not deaden us to the true nature of our profession. I often refer to lawyering as a calling, and I don't hesitate to use that term in a religious sense because I firmly believe that lawyers are ministers of justice. *Romans* 13:4 refers to a lawmaker or government official as the minister of God to thee for good as well as a revenger to execute wrath upon him that doeth evil.<sup>4</sup> Certainly the same description is appropriate for the practitioner of the law.

You are here to discuss a very important aspect of our profession, ethics. And by discussing ethics, invariably, there will be anecdotal examples of what some members do to bring disrespect to our great profession. But I want you to remember why you were drawn to our profession. I want you to think back and draw upon what caused you

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4. *Romans* 13:4 ("For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.").

to think about going to law school and to consider becoming a lawyer. I want you to remember our profession for its nobility, our desire to help others, to be guardians of justice, freedom and democracy, and very simply to do just what is right. We lawyers will always face challenges, and we will, sometimes as a profession, be under fire. But that's the nature of what we do.

As long as we honestly and courageously accept responsibility for our actions and conduct ourselves as the ministers of justice that we are, we will preserve the spirit of the law. We have 1,027,000 lawyers licensed to practice law in the United States according to the 2000 census. Many view us in different ways. But perhaps outside of those who are in a religious profession who are our rabbis, our priests, our ministers, our imams and others, we're the only ones that I know that take an oath to represent the oppressed and the defenseless. As I travel around the country, I remind citizens and lawyers that we're the ones who are the next-door neighbors. We lawyers are the ones who are active in our Girls and Boys Clubs, Boy Scouts, Girl Scouts. We serve on nonprofit boards, giving wisdom and guidance to help if we can, to build more affordable housing, to help the homeless and the like. Do you know that even internationally, that we have a group dealing with the central east European area, known as Ceeli, where over five thousand lawyers, judges and law professors have gone to different countries as they're going to Africa and Asia. They've been requested to come and help—help other countries who want to improve their constitution, their environmental laws, their criminal laws, etc. These five thousand lawyers, judges and the law professors go pro bono with \$125,000,000 of investment. We do good work. And if you want to know what else we do beyond that, I'd invite you to talk to our International Law section and the work that they do in the United Nations, and the countries that we help. We do so much to reduce tension in this world.

And at home, I want you to think about people who cannot afford to purchase legal services. I want you to think about our brothers and sisters who are engaged in the practice of law in our legal services entities, helping those who don't have a voice, who might be a victim, who might need a will, who might need something very simple.

We lawyers sometimes stand between desperation and a desperate act, and we prevent that desperate act as a result of the pro bono services that we do on behalf of those in need. We belong to a great profession. I would hope that those of you who are not members of the American Bar Association will consider joining us in this effort. William Hubbard mentioned the fact that we have come a long way, and we have. I can't tell you how privileged I am to be President-elect of the American Bar Association. We have over 410,000 members



who belong. Yet when I think about where we are going to go, and what it is that each of you do as members of our proud profession to make lives better for the people that you interact with, it makes me feel even more privileged. So for those of you who might have an interest in perhaps serving on an American Bar Association committee or the standing Special Taskforce and the like, the vice- chairman of my appointments committee, is Robert Gray, who is back there. Bob, why don't you just raise your hand so folks know who you are? We need all good people who have an interest. You have a major impact as Justice Norm Veasey has made in terms of giving back. He could sit back and do nothing and just be very content in being a Justice on the Delaware Supreme Court, but he cares about our profession. Mr. Justice Anthony Kennedy, United States Supreme Court, lifetime tenure, could sit back and not be engaged, but he's in play on the issue of dialogue on freedom, because he came up with a program to take into every high school in America to remind our high school students of the value of the freedoms that the United States Constitution affords all of us and the privileges that we have and take so much for granted as Americans. This is a great profession. You've got a lot of great people heading it and we need you. Thank you.