

Testimony to the Task Force on Corporate Responsibility

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Chicago, Illinois**

Mr. Chair, Members of the Commission.

It is my great pleasure to appear here today.

It was also my pleasure to have reappointed all of you to this task force so that you may continue this important work on behalf of the association. I thank you for your time and continuing dedicated effort.

Unfortunately, events continue to unfold in the world of American business that highlight the relevance and crucial timeliness of the work you have undertaken.

Indeed, the eyes of American business and the American press are upon us. My daily existence now includes at least one call a day from the press - and not just the financial press – regarding corporate governance and lawyers ethics.

I know that this task force will respond in a timely and capable fashion.

I am here first to continue to promise you the Association resources and support necessary to get the job done. And to assure you that as the Association's spokesperson, I will continue to seek your advice and support in our public response to this unfolding drama – and I expect that we will be responding at a number of levels. Yes, to the press – but also to provide answers to the regulators, the Congress, their staffs and, of course, the ABA House of Delegates.

I have reviewed closely your preliminary report - and I find it a good start – a solid piece of work. I do have some suggestions for you to consider from the perspective of the ABA's elected leadership which I will share with you momentarily.

But first, please allow me two or three observations –

First, as you know, the Board of Governors, following the renewal of the Task Force, authorized two new members – with two specific objectives. One, to add a lawyer member whose practice encompasses corporate governance and public affairs, as well as someone having a broad based background in the larger ABA. I was extremely fortunate to have my wonderful

predecessor and friend, Roberta Cooper Ramo, accept my request to serve in that capacity.

The Board of Governors authorized another position as well - specifically an ethicist, perhaps an experienced state supreme court jurist, who could speak with experience to the practicality - as well as the theory - of the interface between corporate governance and legal ethics. And I am happy to say I did not have to look too far to find my friend, retired North Carolina Chief Justice Burley Mitchell, to fill that role. Incidentally, I am sure you've been given his credentials and biography. But you should know that I first encountered him 27 years ago – me, a newly minted indigent defense counsel. He - an experienced, tough crime busting D.A. My District Attorney!

Second, you should know one or two things about my professional experience that you may not know, but are pertinent to my views of your task and my testimony here today.

- In the late 70s I was a registered lobbyist in Raleigh, North Carolina and in Washington D.C. for the North Carolina Banking Industry
- In the early 80s, I served a four year stint as a corporate general counsel for a publicly held, NASDAQ-listed, bank holding company – and in this capacity had to face squarely Rule 1.13 more than once
- That following the intricate negotiations and acquisition of my bank holding company by what is now Bank of America,
- I reentered private practice, and for most of the last 20 years have, on a continuing basis, represented numerous publicly held corporations, mostly in the capacity of corporate counsel, with supervisory responsibility for securities compliance.

So, I come to this subject matter, first as an ABA President – but second, with working professional knowledge and experience that is no doubt informed, but at the same time, perhaps, burdens me with my own professional point of view.

We live in a world today that is a far different place than the one we inhabited on Labor Day of 2001. I refer you to my President's Page in this month's ABA Journal as to what I think it means to our profession generally. And I think that all bets are off as any "conventional wisdom" of corporate governance and the ethics of disclosure of client's confidences – The social and moral underpinnings of those constructs are shifting – much like subterranean shifts of tectonic plates over time – shifts that sometimes result in earthquakes. This should be taken into account in your final report.

I would argue that this task force should not be coy or timid about drawing broad public policy conclusions which lead to policy recommendations for the ABA House of Delegates – policy conclusions that go beyond the technical aspects of corporate securities law and the ABA's model rules of professional conduct.

Taking the 30,000 foot view is what leadership is all about and this issue is not going to be solved only by tweaks to specific rules and regulations.

But leaders and great lawyers like yourselves also know that the devil is in the details. So I believe this Task Force should be very specific with respect to proposed new language for ethical prescriptions or proscriptions – or to suggest specific revisions to model corporate laws – or to suggest creative specific regulatory mechanisms that will serve broader and new age public policies.

So, I encourage you to lift your sights and speak to what is undeniably the public's need for a new American corporate ethic.

I believe the ABA House of Delegates will welcome a report with recommendations that speaks in such a manner. I also believe the ABA's various publics – our members, the press, the regulators and our elected representatives - expect nothing less from the American Bar Association

First – I want to reiterate, and appropriate as my own, the charge given to you by my predecessor, Bob Hirshon. I note that within this scope is room a-plenty for the suggestion of a substantive, sweeping, precursor to restatements of the law of corporate governance and the ethical principles involved – with the ultimate objective of a statement of public policy enhancing the public trust in corporate integrity and responsibility.

As to your fine preliminary report and the work going forward, I would respectfully add my commentary.

Corporate Governance

On the matter of corporate governance...

It goes without saying that the American public is angry. Their confidence in the capital market system is very low, perhaps its lowest since the scandals that spawned the Securities and Exchange Commission in the 1930's. And that confidence will only return when they see real change in corporate governance and behavior.

So...the key to overcoming the problem that our nation faces is to see real change - not just the appearance of change. It is my view that the recommendations in your final report in the area of corporate governance should be both broad in scope; and aggressive in implementation. What do I mean by that?

First, to the issue of Scope:

I believe that in addition to the extraordinary work contained in your report, this Task Force should also consider the development of a major public policy

statement. I believe that a general roadmap of principles of corporate governance – that can be applied to all businesses covered by state law – can and should be addressed.

Second, to the issue of implementation:

It is my strongly held position that the key to real change – which is the only prescription that will resuscitate the public trust and confidence in the corporate marketplace - lies more in proactive public policy and less in self-regulatory agencies and blue ribbon commission which tend to lack the teeth and uniformity that is so necessary to create real change. I am sure most of you will agree that in the area of corporate governance we need more than standards - we need good solid public policy. This means SEC regulations...this means legislative acts of congress and state governing bodies...and other forms of mandatory compliance.

Your preliminary report gives a real good example of an implementation instrument that does has *teeth*. You cite the Model Business Corporation Act, which is widely used in creating legislation and law. I would encourage this task force get involved in that process. No one has more to say about changes to this act than the group now before me. I'd ask that this commission partner with the Business Law Section on this matter as soon as possible.

Your preliminary report recognized that changed is in the air with the following passage... (and I'll quote it)

“State courts that review the fiduciary duties of care and loyalty of directors and officers can be expected to identify and give effect to evolving expectations regarding oversight responsibility, conflicts of interest and director independence, and the Task Force believes that such common law development will improve the level of corporate responsibility.”

I couldn't agree more with that. Development of common law is on the way. And I believe that passage underscores my point about both scope and implementation. Number one: Development of this common law will require us all to consider the big picture. Number two: this development of common law is the recognition that real implementation will occur only through public policy.

So I ask you, ladies and gentleman, to consider yourself 'public policy generalists'. I offer my complete support to this Task Force in marshalling your considerable intellect and prestige to help shape what that common law and the new American corporate ethic will be. That is what the ABA is all about – fair administration of justice – improvement of the laws and jurisprudence. A wide view? Certainly. But that is the only way to view the forest from the trees.

Ethics

I believe a wide view is also necessary on the lawyer's ethic side of the equation as well.

You all know as well as I do, that the opportunity for thought-leadership from this task force on the matter of professional ethics extends well beyond specific model codes of professional conduct. I know every member of this task force personally represents the highest ideal of the upstanding, honorable lawyer. So, I would encourage this group to think beyond the particular model codes and bring to the final report some of your wisdom, some of your insight, some of thinking about what it means to be a lawyer.

I believe we need to educate the public, as well as those walking the corridors of our Congress and state legislatures, about the role of a lawyer in the operation of a corporation. Development and disclosure of financial data is not the responsibility of a lawyer. Nor is the assurance that such data is accurate. We should articulate that, unlike the accountants, we have rejected dual roles for ourselves. Our vote in the House of Delegates on MDP signified that we find it our professional duty to avoid conflicts of interest. So in talking about lawyer ethics, we must hold ourselves to high standards for what we are responsible for...but also explain what we are not responsible for. As Chairman Pitt did on August 12, we must take every opportunity we can to distinguish our profession from others. Your report presents us with such an opportunity. I suggest that it is an opportunity you should not pass up. Do these concepts go beyond the model rules? Certainly. But I'm of the mind that they come under your purview.

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This is not to say that we ignore the intricacies of the model code. Your preliminary report did a terrific job of outlining your positions on each one and I support each and every recommendation.

I would also encourage this task force to become actively involved in the actual drafting of the language. To get your hands a little dirty. Please work with the Standing Committee on Professional Responsibility. It's Chair, Marvin Karp, has assured me that they are ready to work in tandem with you. And I hope, in February, if things are looking tight in a vote before the House of Delegates, that we can count on your significant political skills to move the ball forward. You can certainly count on my help and support.

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In closing, I would like to reiterate my unwavering support for this task force. I would like to commend you for an excellent preliminary report. You have already made all of us in the leadership very proud. And I have a feeling the best is yet to come.

We are at a momentous time in our nation's history. Post Enron, Post 9-11, our nation is seeking answers to some of the most difficult questions imaginable.

The American Bar Association is a key player in finding a solution to this crisis of corporate confidence. And how the ABA reacts – what the ABA does – is, to a large extent, in your hands. To this end, each one of you carry a tremendous responsibility on your shoulders. And I know you will exercise it well. Please call me anytime, for any reason. I'm here to support you and your efforts.

Thanks you very much.