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U.S. SECURITIES AND
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THE WORTHY LAWYER

Stephen J. Friedman, Commissioner

I would like to share with you two alternative scenarios for your future as lawyers -- indeed, alternative scenarios for the legal profession itself. While history and tradition are powerful shaping forces for the bar, it is in a constant process of recreation and reformulation. In a far greater sense than you can appreciate today, you hold the future of the legal profession in your hands. Years from now, that profession will be the sum total of what you and your colleagues have become.

In its most fundamental sense, law is the basic instrument for ordering human affairs. It allocates power and responsibilities among people and among institutions of government. It sets the ground rules which constrain and direct liberty, self-expression, innovation, and the forces that drive men and women to place their imprint on the world. This is not mere rhetoric. Taxes and torts, securities law, energy law and antitrust are only subsets of the attempt to impose order in ways consistent with the general welfare and individual liberty.

The law is truly a noble undertaking, and lawyers have played a special role in the history of this country and the evolution of its political institutions. While planters dominated the contributions of Virginia to our Founding Fathers, in the Northeast it was the legal profession that played the major role. That role has continued and has been pre-eminent in our public life in this century, particularly since the 1930's. As such, the legal profession should deserve the respect of the whole society. But it does not do so today to a degree that I find satisfactory. Whether it will do so in the future rests with you.

There are two major sources of the current public views about lawyers. The first is a natural by-product of the commanding role played by lawyers in the New Deal and in the evolution of the institutions it generated. Social and political institutions often have a relatively short life cycle (unlike social and political values). Precisely because they represent an attempt to control human conduct in a highly diverse and complex society, all but the most fundamental are doomed to failure -- or at least ossification -- over the longer term.

The Carter Administration's dismantling of so much economic regulation in the airline, trucking, communications and banking industries is the last stage of those regulatory experiments. The current Administration is carrying deregulation forward. New institutions will take the place of the old. A similar pattern is discernible in the flowering in the 1970's of the seeds of social welfare that were planted in the 1930's. Some of the limitations of those experiments are becoming sharply visible and the process of reassessment is in train.

Those instruments of social control and income redistribution depended very heavily on the law and the adoption and enforcement of rules -- rather than incentives. As history exposed some of the limitations and excesses inherent in government by prescription, Americans began to lose respect for the rules and the people who wrote and enforced them.

The debates about the efficacy of price controls in dealing with inflation are a microcosm of this development. If the evil of inflation is excessive price increases, there is a compelling directness in saying that we can stop inflation by commanding prices to stand still. Quite apart from the fact that price controls do not deal with the underlying reasons for inflation, and thus are of only limited usefulness, price decisions are made by millions of people every day. Although the system always begins with promises to keep it "limited and sensible," conventional considerations of uniformity and equity produce powerful forces to extend controls to as many of those price decisions as possible. The system is drawn inexorably to seeking to control more and more transactions until it reaches the price of paper clips in the corner stationery store. The result can only be contempt for the law and for the people who insist upon rules that reach down into the details of everyday life.

I trust that this experience is running its course, and that the legal profession will have the ability to step back and consider with clear eyes some of the infirmities of the old ways of dealing with social and economic issues. There is a critical role for lawyers to play in the creation of new approaches and the design of new institutions, for the underlying social problems will not disappear.

I can think of no better example of this role than an article written last year for Foreign Affairs by Lloyd Cutler, a distinguished Washington lawyer who was serving as the President's Counsel. He focussed on the sharp limitations on Presidential leadership created by our constitutional system of checks and balances. Instead of suggesting a radical change to a parliamentary system -- which would be quite unworkable in this country -- he proposed some far more modest changes to tie the political fortunes of legislators more closely to those of the President. It was, in my mind, a classic example of the lawyer's public role in America.

The second reason for some loss of the respect the legal profession enjoys is both more fundamental and more within the control of individual lawyers. It reflects a diminished institutional identity of lawyers as members of an ancient and noble profession as opposed to a service business whose sole function is to serve the interests of clients. It represents the carrying to a debilitating extreme of the principle that a lawyer's primary duty is to his client, and that both inside the courtroom and around the conference table, a lawyer's job is to repre-

sent his client's interests within the restrictions of the law and the Code of Professional Responsibility. That conventional wisdom is true, but not the whole truth. No person can live a worthy life and observe only the written rules. No professional can represent the best in his profession and be governed only by the Code of Professional Responsibility.

There has been much confusion in recent years about the ethical problems which face lawyers. For many, that question has become one of the propriety of a lawyer's bending his talents to serve a client of whose business or practices the lawyer disapproves: for example, a company that pollutes the environment or does business with authoritarian regimes in other countries. You may view this as splitting hairs, but while I recognize the legitimacy of those questions, they strike me as issues that are common to all men and do not arise out of the lawyer's special role. They simply ask the question, "Do I want to be associated with this kind of a person or company?"

There are, however, a unique set of ethical problems which lawyers face every day. They can be summed up with the question, "how far do I pursue the interests of my client?"

That is a question that becomes more difficult as the lawyers come increasingly to view their responsibilities as congruent with their clients' interests. There are structural changes occurring in the bar that increase that sense of identity of interests. The enormous growth of corporate law offices deepens the identification between corporate counsel and their employer-client. The very size and scope of the largest law firms creates institutional imperatives for management techniques and business-like behavior that, in a subtle way, alters the lawyer's self-image.

The question of a lawyer's standards is involved in a hundred small ways countless times each month:

- is it appropriate to try to impeach a witness whose testimony you know to be true?
- is it proper to use the discovery system to drag out a litigation because time redounds to the benefit of your client?
- how far do you push an ambiguity in the tax law in claiming favorable tax treatment in a system that depends upon voluntary compliance?
- in making a difficult judgment about the materiality of unfavorable information that has not yet been disclosed to the securities markets, how much weight do you give to your client's desire to remain silent?

-- before adoption of the Foreign Corrupt Practices Act, what should you have done upon discovery that your client is bribing foreign government officials, in violation of their law?

I could multiply the examples, but the nature of the problem is very clear. On the one hand, it is not appropriate for you to substitute your ethical judgment for that of your client. But you are clearly a participant in the judgment your client makes. And you are the primary actor in the legal judgment. The law is necessarily broad, and if you interpret your mandate as pressing that vagueness as far as it will go in the interests of your client, then the sum total of all your efforts will not be worthy of this great profession. Your professional life will be best characterized by having achieved the lowest common denominator.

Nor will you earn the respect of your clients. Whatever their desire to come out on top in a particular litigation or negotiation, they will not think much of a legal system that appears capable of being bent in a way that defeats its own objectives. It is here that a lawyer's relationship with his client is most subtle and important. A businessman who asks for an opinion that a proposed course of conduct is legal is doing more than seeking protection from a later claim that he engaged in it knowing it to be wrong. No matter how aggressively he deals with his lawyer, he is ordinarily seeking independence of judgment as well as analytical skill in thinking up "arguments" that can be made to justify the proposal.

Moreover, losing your independence is not in the best interests of your client. A tax lawyer who influenced heavily my early years as a lawyer always counselled his clients about the dangers of "putting both feet in the trough." Harold Williams made the same point more formally when he said that "conduct which is fashioned to comply only nominally with the law merely invites, if the public's expectations are breached, more detailed and prescriptive law and regulation describing what is, and what is not, permissible behavior."

When all is said and done, however, more is involved than the interests of your client. The decision on each of these small issues, in total, represents the success or failure of our legal system.