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ADDRESS

By Kenneth C. Frazier, Esquire
Chairman, President, and CEO of Merck & Co.

*The Annual Dinner
of The American Law Institute
was held in the Ritz-Carlton Ballroom,
Washington, D.C.,
on Tuesday evening, May 21, 2013.
President Roberta Cooper Ramo presided.*

President Ramo: It is an interesting thing to put together a program for the Annual Meeting. We have such extraordinary members, each of you so accomplished, so interesting. Your lives are filled with fascinating things. Our projects are completely amazing and the discussion about them at the highest possible level, and so I often think who in the world can speak to these incredibly accomplished people, especially after dinner?

Unidentified Speaker: And wine. (*Laughter*)

President Ramo: And after wine. Don't give that man any more. (*Laughter*)

But when it came time to decide on the speaker for this birthday dinner—I know some of you think I am obsessed with birthdays. I was just telling somebody, at our table, I have gotten so old that my husband tells me we have to start lying about how old our children are. (*Laughter*)

I thought I really wanted somebody that was emblematic of the greatest American stories, sort of the essence of what our country is about culturally, in the best possible ways, and I wanted somebody who also not only understood but had lived the life of what I think of as great American lawyers.

A lot of great American lawyers are people you never hear about. They are people in small towns and sometimes in small practices who do heroic things, and occasionally they are people that you hear a lot about and who have done amazing things on an international stage.

Our speaker tonight is one of those people who is emblematic of everything that is good about our country, and especially he is emblematic about everything that is good about lawyers in practice, in one way or another, and what they mean to their communities, great and small, and, in this case in fact, what they mean to the world. That person is somebody I hope I can say is my friend, our long-time Council member and fellow member, Ken Frazier. (*Applause*)

I realize that a lot of you know a little bit about Ken. He is the CEO of Merck, which I think is—I didn't really look it up today, Ken, but it is one of the Fortune 20 or 15 companies in the world. It is a global company. The implications of what they do are enormous in the lives of all of us. And he is a lawyer that started out in private practice.

He came from, I think he would be the first to tell you, what were humble beginnings but American humble beginnings. His dad had to be the smartest janitor on the planet in Philadelphia and his mom an equally smart person, because what they did was produce a son who they recognized was not only smart, I suspect when he was very little—maybe they saw you as a smart aleck, Ken, I don't know (*laughter*)—but in whom they nurtured all of the important values: education, citizenship, kindness, elegance in manner, all of the things that make such a huge difference that make it possible for our country to be as strong as it is.

I live in a place where you can't tell anything about someone by the way they look, and I think it makes people from New Mexico very powerful, and Ken obviously grew up in a place where economics had nothing to do with how smart you were or how accomplished your parents thought you should be.

Ken went to Penn State University, he went to Harvard Law School, the place where we learned today, the other law school, where people actually make you study.

He was in private practice. He represented many big companies, but he also did the successful representation of a death-penalty case. He understood the need for pro bono work not just personally, but he understood why making sure that everybody was represented was what made our American system possible.

In fact, Ken is the kind of person that made me think again, I had it in the back of my head this phrase that I sort of remember from growing up, but I didn't really know what it meant, and that was "Philadelphia lawyer." (*Applause*)

I went belatedly to look up what that meant, and what I discovered, of course, which all of you probably knew but I did not, is that the

first person referred to in such a positive way as a Philadelphia lawyer was Andrew Hamilton, and it was because he obtained a decision on behalf of John Peter Zenger that truth is a defense to libel, and after that, everybody wanted both to be and to have a Philadelphia lawyer.

But the thing about Hamilton that is so interesting is he obviously had a checkered career. So have I, so I am particularly sympathetic to people who have had checkered careers. But he was everything. He was a lawyer who took his learning and helped us make a country from it.

Ken Frazier is a person like that first Philadelphia lawyer, who has taken the elegance of his intellect, the benefit of his great education, and is making the world a better place, never for one minute forgetting that there are a lot of human beings out there that need his personal help.

Ladies and gentlemen, Ken Frazier. (*Applause*)

Mr. Kenneth C. Frazier: Thank you, Roberta, for that very kind introduction, extremely kind, and also for being such a tireless and effective advocate for, and I would also say splendid exemplar of, our profession's highest ideals and aspirations.

It is a distinct honor for me to be asked to speak to you at this 90th Annual Meeting of the ALI, an institution that has had a long and distinguished history of bringing together representatives from the academy, from the bench, and from the bar, working together to clarify and sometimes to reform the law.

This evening I would like to offer some reflections on my experience as a lawyer in private and in-house practice, and from my current vantage point as CEO of a global healthcare company, on the importance of our legal system and lawyers for business, for society, and for all our people.

The rule of law and the work of lawyers never have been more important than I believe they are today, in a world in which communication and commerce are becoming more global in nature, where problem solving is becoming more interdisciplinary in nature, and

where trust is an increasingly scarce commodity for lawyers and the institutions they represent.

The irreversible shift towards more interdependent and interconnected activity has profound implications for lawyers tasked with guiding our most important institutions and crafting answers to the largest and most complex issues that confront them. I believe that we must guard against allowing the role of lawyers in this emerging global society to become too narrowly defined.

Let me begin, if I may, with three principles that I hope have guided my approach to representing and advising clients throughout my professional life. First, as Ronald Dworkin famously said, “Moral principle is the foundation of law.” The law is not simply a form of logical or deductive reasoning. The content of the rules matters. The methods by which the rules are developed matters. This is where the ALI has made countless important contributions. And lastly, the way in which the law is administered matters.

Our law should express our deepest convictions about how to establish a just society and to interact within it. Now I realize this idea that morality is the foundation of law has been contested almost forever. Indeed, conscientious citizens like Rosa Parks, for example, have purposely violated the law when they believed a moral prescription was stronger.

Some might find Dworkin’s premise, that there are right answers to legal questions, to be somewhat simplistic, but I trust that we as ALI members would agree that there often are better or worse answers to legal issues.

This brings me to my second point. As lawyers, our job is to find those better answers based on our fullest understanding of the entire context in which a legal question or dispute arises. Rule 2.1 of the ABA Model Rules of Professional Conduct states that in providing legal advice, lawyers may refer to relevant “moral, economic, social and political factors.” The Comment to this rule further observes that “Advice couched in narrow legal terms may be of little value” and that

“moral and ethical considerations . . . may decisively influence how the law will be applied.” This is as it should be.

In my observation, too many lawyers restrict themselves to the narrowest and most technical boundaries in interpreting the law and their role. That is certainly not the case of the people in this room. It is certainly not the case of people like Geoff Hazard, whom we heard about this afternoon, a career that certainly most of us, if not all of us, are jealous of.

And Geoff, I have always wanted to say to you and I will say publicly, you are a huge inspiration to me in terms of what a lawyer really ought to be, and I am just pleased to be here tonight to say that. (*Applause*)

But having said that, my concern tonight is that for many young lawyers the on-the-job training that they are receiving now does not and will not equip them to function well outside very specialized areas of expertise. In fairness, some clients, including general counsel, seek to confine their lawyers to these kinds of technical roles. But if we allow our profession to become too compartmentalized, we willingly take a back seat to management consultants, investment bankers, and others when critical decisions are being made. We must return to a broader view of the role of the lawyer as general counselor. As Ben Heineman has said, lawyers who aspire to be leaders must move beyond simply asking whether a proposed course of action is legal to what he calls “the ultimate question—‘is it right?’”

This, in turn, brings me to my third principal point, which is the critical importance of the rule of law. Individuals and businesses depend on a predictable, fair, and accessible system of laws to protect their rights and to provide the certainty that permits them to plan for and invest in the future. Lawyers support the rule of law by bringing all of their knowledge, energy, talent, and perspectives to bear for all their clients.

A key trend that is transforming the legal profession and global society more generally is the blurring together of traditional categories of organization and thought that we have used to understand the world

in which we practice. This is just another way of saying the idea that lawyers should be restricted to thinking only about the purely legal aspects of problems is no longer valid, if indeed it ever was.

Sophisticated clients do not want pure legal advice; they want workable solutions to their problems, problems that they understand to be situated at the intersection of law, business, technology, politics, and moral judgment. Smart clients expect their lawyers to help them find these integrated solutions to their most vexing problems.

By analogy, the medical field is experiencing an unprecedented surge in technical and scientific insights. For example, the sequencing of the human genome has provided new and important insights into both health and disease mechanisms and how they can vary across subpopulations of humanity. Now one might expect that these kinds of advances in chemistry, biology, human genetics, and medicine would lead quite naturally to an enhanced ability of researchers to produce useful innovations for patient health, but that has not quite been the case, at least not yet.

Observers suggest that this explosion of new and highly specialized scientific knowledge has also spawned increased complexity, and they postulate that increased scientific complexity has led in the short term to a decrease in research productivity. It is not that this highly specialized knowledge lacks usefulness, but applying this complex knowledge requires thought leaders to integrate and collaborate across many specialized areas.

Just as scientific progress often stems from the convergence of knowledge across specialized domains, I believe problem solving in business increasingly requires creative thinking that draws on knowledge from a variety of disciplines.

Decades ago, judges from the Cardozo school acknowledged the importance of such integrated knowledge. The modern interdisciplinary bent in legal education also reflects this awareness of the need for more comprehensive thinking.

Ninety years ago, the eminent and forward looking jurists, professors, and practitioners who founded this Institute stated that two

chief defects in American law, its uncertainty and its complexity, had produced a general dissatisfaction with the administration of justice. According to the founders, the uncertainty stemmed from the lack of agreement on fundamental principles of common law, while the complexity derived from the multiple jurisdictions within this country.

In today's world, boundaries between sovereign nations and between disciplines are more permeable. Manufacturers, retailers, service providers, and creators of intellectual property may and often do operate across borders, thereby encountering many competing and often conflicting rules that might govern a particular transaction or operation. The practical impact of this blurring of the traditional boundaries simply cannot be overstated. The drafters of Model Rule 2.1 seem to have anticipated that, in such a world, good lawyering just might require broader insights.

Prior to the adoption of Rule 2.1, there were pointed debates about whether lawyers should offer this kind of broad advice. Some felt it was not the lawyer's role. After all, just arriving at the correct legal answer can be a nontrivial exercise. Others worried about whether the attorney–client privilege would apply if lawyers strayed from their familiar turf.

Perhaps, as a result, the language of Rule 2.1 has the feel of some uncertainty. In actuality, it is anything but a rule. While the rules that establish the lawyer's key fiduciary duties are stated in mandatory terms, "a lawyer shall" or "a lawyer shall not," Rule 2.1 is permissive in nature. Another rule that is similarly permissive is Rule 6.1, which covers voluntary pro bono, to which I will return later. For now, let me just say that I have always viewed Rules 2.1 and 6.1 as invitations for lawyers to lead.

As the CEO of a global company subject to the competing demands of multiple stakeholders, I want and need lawyers who appreciate that many issues require consideration of a host of factors that operate in relation to one another but often in no easy, obvious, or formulaic fashion. If my lawyers do not understand the broader context

in which their legal advice will be applied, they often cannot even give sound technical legal advice.

Given the need to synthesize so many inputs, the role of in-house counsel has become much more prominent in corporate governance. In-house counsel help companies like mine navigate complex situations where more than a discrete legal decision may be needed, where adaptive approaches may be required to govern similar situations in the future, and where deliberations touch on not just the potential for profit or the reduction of transactional costs but broader societal issues like human rights. The challenge is to find ways to promote the company's business without compromising its core values or jeopardizing its standing or reputation. I have the good fortune to have such an able and creative general counsel, Bruce Kuhlik, who also happens to be a member of this Institute, and that is no coincidence. I might add quickly, though, that Bruce has had considerably worse luck with respect to the designation of his client. (*Laughter*)

The best legal advisers appreciate the actions that their clients take, given the advice they get can either promote or erode the fragile trust on which an institution's license to operate sometimes depends. Thus, I believe we should reexamine the norms underlying Rule 2.1 to explicitly recognize that, in certain situations, lawyers should, not merely may, guide clients to the best holistic answers without abandoning their primary duty to provide sound legal advice and to ensure that their client understands the parameters of that legal advice. Put differently, without usurping the client's role to make business decisions, the lawyer should ensure that the client fully appreciates that, in many contexts, mere compliance with the law will be deemed insufficient.

Uncertain or potentially conflicting legal and quasi-legal rules and standards, often expressed as general principles, like human rights, transparency, environmental sustainability, or social responsibility, require a deeper level of deliberation and reflection by lawyers to help clients decide not just what may be legally required but also what may be deemed right and responsible.

Incidents like the recent tragedy in Bangladesh may be illustrative. In a world of global supply chains, is it sufficient that contracts American lawyers draft for American companies provide remedies for breach but do not impose upon their foreign contractors any obligation to meet minimum safety standards? What about contracts with mining companies in African countries that employ seven-year-olds in gold mines? In my own business, we have to find effective ways to facilitate affordable and sustainable access to life-saving medicines and vaccines in low-income countries, notwithstanding our obligation to our shareholders to defend intellectual-property rights.

Even if there is no legal obligation to those nameless, faceless workers employed in unsafe factories or children who toil beneath the earth or people living and dying in the midst of disease pandemics, companies still must decide what their policy positions will be and how their actions could affect their reputations and the broader public good.

And because good intentions are never enough, and naïveté can result in unintended consequences, clients need sage legal advisers who can help them understand the ethical and legal considerations and the practical consequences that can flow from their choices. Lawyers can also help institutions that are increasingly operating at a trust deficit to understand, and if possible reconcile their actions with, the beliefs and expectations of society.

I would like to speak briefly about an issue of institutional trust that is close to home for me. I am a member of the board of trustees of Penn State University. Over the past 18 months, our university community has been dealing with the painful and tumultuous fallout from the child sexual-abuse scandal associated with the former assistant football coach, Jerry Sandusky. The initial Sandusky grand-jury report alleged, among other things, that certain university officials failed to take appropriate action to ensure the safety of children on our campus.

The board asked me, as one of the few lawyers on the board, to commission and oversee a complete and independent investigation into why university personnel might not have taken adequate steps to stop a serial pedophile from preying on children. We retained former FBI

Director Louis Freeh to conduct the inquiry. At the risk of stating the obvious, the legal and reputational stakes associated with conducting such an investigation were very high.

Typically, the board—or, in our case, the special investigation task force established by the board—would review the investigative report before it became public to ensure that there were no obvious factual errors in it. But the Sandusky case was unprecedented, both from the standpoint of public interest and also with respect to this trust factor I talked about. My instincts and prior experience as a defense counsel would have favored reviewing the Freeh report before its publication, but drawing on the kinds of factors identified in Rule 2.1, we reached a different outcome. My fellow board members and I decided to forgo our prerogative to preview the report, in order to avoid even the appearance that we sought to influence or dictate its content.

The Freeh report has engendered a great deal of controversy since its release last July. Some strongly disagree with its findings and conclusions. The NCAA used its interpretation of the report as the basis for imposing unprecedented sanctions against Penn State's football program. I have been asked why, given my personal experience, I was comfortable with the decision to waive our right to pre-publication review. The answer is straightforward: By being willing to allow the chips to fall wherever they would, the university demonstrated its resolve to face up to an independent public assessment of its shortcomings, no matter how difficult or unpleasant the legal or other consequences might be. I believe our judgment was appropriate in that it confirmed the university's core values.

Coming back to my main theme, lawyers can and should help foster the kind of thoughtful deliberation that will increase the probability that decisionmakers will conform an institution's behaviors not only to legal requirements but to that institution's own stated values and civil society's ethical and moral expectations. Our profession must look beyond the established traditions and formidable strengths of specialization in particular legal areas if we are to meet the challenge of training leaders in the broadest sense, leaders capable of anticipating and addressing the larger issues confronting institutions and society.

From time to time, I am asked what experiences have prepared me for my current position at Merck. Now the question is okay; it is the occasional tone of incredulity that gets me. (*Laughter*)

Without question, I believe that I am fortunate to have practiced law first at Drinker Biddle & Reath and then at Merck, where the special craft and contributions of lawyers are valued and where the standards of professionalism are high. I have also benefited immensely from my association with this Institute and its distinguished membership.

And while I have focused my remarks this evening on the need for lawyers to be adept at leading across various national borders in substantive disciplines, as Roberta said, I still identify myself as a Philadelphia lawyer. (*Applause*) And one who tried cases. (*Applause*)

Just between us, this CEO thing is an overrated experience. (*Laughter*)

My most meaningful and rewarding representation was volunteering as a death-penalty lawyer. That work allowed me to see firsthand the many flaws and inconsistencies in our system of justice and the need for members of our profession to recommit ourselves to improving the quality and availability of legal representation of poor people, especially those who either face, or are already under, a sentence of death. I was privileged— (*Applause*)

I was privileged to represent, in postconviction proceedings, Bo Cochran, a man who spent the better part of two decades on Alabama's death row for a crime that he did not commit. He was convicted despite being denied virtually all the fundamental rights we associate with a criminal trial, including effective assistance of counsel and a fairly selected jury of his peers. The granting of habeas corpus and Bo Cochran's subsequent acquittal and freedom are, without a doubt, the highlight of my professional life.

Mr. Cochran's case, sadly, is no anomaly. The advent of DNA technology in court proceedings, as we have witnessed numerous times, has exonerated people beyond any shadow of scientific doubt. We also can infer that those exonerated through DNA testing cannot constitute the complete cohort of wrongfully convicted persons. That is why, as

a lawyer, I have come to regard the moral issue of whether the death penalty should ever be imposed as secondary to the question whether the justice system, as it exists in many places in this country, could ever be said to apply the death penalty fairly and consistently and only to those who have been legitimately condemned to die at the state's hand. (*Applause*)

Recent experience, including DNA analysis, hardly confirms the current system's accuracy or its procedural and substantive fairness. I firmly believe that if one looks objectively at how our criminal-justice system dispenses justice to the poor and disadvantaged, to the poorly represented, and to people of color, one cannot easily discount the unacceptably high risk of wrongful death-penalty convictions or the hideous implications of their finality.

All of this is prelude to an acknowledgment. My immense pride of association with this Institute, which I thought could not possibly have been any greater, was further heightened by the position the Institute took with respect to withdrawing the provisions of the Model Penal Code [§ 210.6] that defined which cases were death-eligible and set forth procedures to be followed in conducting capital litigation. While the Model Penal Code was designed to be neutral with respect to the moral, social, and political issues that surround capital punishment, this Institute was correct, in my judgment, to take into account the realities of cases like Bo Cochran's and many others. As Professor Dworkin reminds us, how the law is administered also matters greatly.

Without question, the world is increasingly characterized by the free flow of people, goods, and knowledge across national borders, physically or virtually, and where the best solutions often result from analyses and insights borrowed from multiple disciplines across science and the humanities. In such a complex, globalized society, we need lawyer-leaders whose broad vision and understanding also extend across borders of all kinds. Clearly, the legal academy has realized this as the curriculum has moved towards broader and more interdisciplinary approaches to law and legal processes, but this is not just a question for law schools.

As it restates and systematizes legal knowledge, I would encourage ALI to continue helping to reinforce the important societal role that lawyers should play, irrespective of their career goals or practice settings, as well as better equipping lawyers, particularly young lawyers, to assume leadership roles in the increasingly globalized, complex, and interdisciplinary world of the 21st century.

Without doubt, specialization has its place and value, but too much specialization risks consigning lawyers to a narrow, technical role adjacent to the real decisionmaking in society. Without abandoning the theory, precedents, or critical perspectives that uniquely define us as lawyers, we must be willing to more readily embrace thinking from other relevant disciplines, whether to better comprehend the mixed questions of science, economics, politics, and morality that are often implicit in a client's request for legal advice or toward the end of helping to construct a more just, rational, and enlightened society.

Thank you for your most generous listening and for the privilege of addressing you this evening. (*Applause*)