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2007-03-22 H. Thomas Wells, Jr. ABA Presidential Speech

H. Thomas Wells Jr.

University of Alabama School of Law

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**DRAFT REMARKS
COUNCIL OF CHIEF LEGAL OFFICERS
BOCA RATON, FL
THURSDAY, MARCH 22, 2007
BY TOMMY WELLS, ABA PRESIDENT-ELECT NOMINEE**

Good evening, everyone. That was a wonderful dinner and a great session this morning. And I always enjoy a good round of golf with good friends.

Thank you, Bill, for planning the sessions and for inviting me here, and thank you Franni and Melissa for making all the arrangements. And thank you all for your warm welcome and friendship.

My name is Tommy Wells, and I am president-elect nominee of the American Bar Association.

That's president . . . elect . . . *nominee*.

In ABA-speak, president-elect nominee means that I have been chosen by our nominating committee to run as the slated candidate in our upcoming election for the office of president-elect.

The election will be decided this summer before our 546-member national representative body, the House of Delegates. The House is convening at the ABA's Annual Meeting in San Francisco in August.

Nobody else is expected to file against me.

And it's an up-or-down vote.

So I figure the odds are at least 50/50 of my becoming the ABA's president-elect this August. . . . And they've assured me that if I don't mess up too badly, as president-elect I'll automatically become ABA president in August 2008 and serve the traditional one-year term.

I'll have my work cut out for me as I prepare to lead our association—which, by the way, is the world's largest voluntary professional association with 413,000 members.

We represent lawyers throughout America—solo practitioners, associates and partners of law firms of all shapes and sizes—both urban and rural—government lawyers, public interest lawyers, litigators, transactional attorneys, prosecutors, public defenders, plaintiffs and defense attorneys, judges, and—of course—corporate counsel.

I, for one, am a shareholder and litigator with Maynard Cooper & Gale in Birmingham, Alabama. I mainly work on defense of complex mass tort, environmental, and product liability cases. In doing so, I've had the pleasure of working with many wonderful general counsels over the years.

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As you can imagine, keeping us all under one umbrella while encouraging each of us to pursue our unique professional interests is quite a responsibility for the president of the ABA. It actually takes a full year and a half for someone like me to plan their presidential term, which is why they give me a title like *president-elect nominee*.

And that's one of the reasons why I'm so appreciative of Bill Ide's invitation to meet with you and speak here this evening. Now Bill knows something about my current situation, as he was president of the ABA from 1993-94. So I figure he can't steer me too far astray.

Right, Bill?

The ABA is an open organization and welcomes ideas and participation from all members of our profession. The Conference Board and the Council of Chief Legal Officers share many of the same general goals with the ABA, particularly as they relate to the effectiveness of our institutions and public confidence in them.

In the coming months, I want to meet with as many groups as possible so I can develop ideas for my presidential priorities. In these meetings, I do appreciate the opportunity to talk. But I'm even more serious about the opportunity to listen to each of you.

To give us a framework for our discussion, I'd like to spend some time going over just a few of the ABA's concerns and activity—especially as it relates to your interests as corporate counsel and as members of the legal profession.

After I speak, I'm eager to continue our discussion with your comments and questions.

The first topic I'd like to talk about is independence . . . independence of the bar and independence of our judiciary. I'll get to our judges in just a bit, but first I'd like to tell you about

the work the ABA has been doing to protect attorney-client privilege, which we believe is a core aspect of an independent legal profession.

As you know, the government has devised policies that would erode the ability of corporate employees to engage in honest and open counsel with their lawyers. The attorney-client privilege, which is older than the Constitution itself, is a cornerstone of our system of justice.

The privilege been undermined in three areas of government activity regarding corporations: Justice Department prosecution, sentencing, and securities law enforcement.

* The Justice Department's McNulty Memorandum of 2006 modified the 2003 Thompson Memorandum on corporate charging guidelines for federal prosecutors. Although McNulty was intended to address the concerns raised by groups including the ABA, the Association of Corporate Counsel, and the U.S. Chamber of Commerce, many of us believe the changes don't go far enough.

Two weeks ago, our current ABA president, Karen Mathis of Denver, testified before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. She urged lawmakers to act against government policies that pressure corporate targets of federal criminal investigations to waive their attorney-client privilege.

* On the sentencing front, as you know, the good news is that the U.S. Sentencing Commission, thanks to the efforts of the ABA and other groups, rescinded its guidelines for reduced sentences for those who waive the privilege.

* But as you know, there's still much work to be done in the area of securities law, specifically in response to the SEC's Seaboard Report. Although some would say that Seaboard does not explicitly require companies under investigation to waive legal rights in every situation,

we've found that the policy has led many SEC staff to regularly pressure companies to waive their privileges during investigations.

Now what do I mean by "*we've found*"? Most of the legwork done for the ABA in the area of attorney-client privilege has been carried out by our Task Force on the Attorney-Client Privilege, chaired by Bill Ide. If you haven't already done so, you'll want to take a look at the task force reports and background material at the ABA's web site, at www.abanet.org.

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The letter to Chairman Cox also pointed out that Seaboard has undermined something else we in this room value greatly: corporate internal legal compliance programs. Seaboard discourages company leaders from seeking legal guidance from their lawyers and from conducting internal investigations designed to quickly detect and remedy misconduct. The Seaboard Report, like the Thompson and McNulty Memorandums, also erodes employees' constitutional and other legal rights by pressuring companies to refuse to pay their legal fees or to terminate them unless they agree to waive their Fifth Amendment right against self-incrimination.

So, what can we do? The most obvious thing is to urge lawmakers to support legislation such as U.S. Senate Bill 186, known as the Attorney-Client Privilege Protection Act and sponsored by Sen. Arlen Specter. Sen. Specter's bill would preserve the government's ability to

obtain the factual information from companies that it needs to enforce the law. But it would bar federal agencies from pressuring companies to waive their attorney-client privilege or work-product protections. And it would keep agencies from undermining employee legal rights in return for receiving cooperation credit.

As general counsel, you'd be most useful to join our efforts to preserve the attorney-client privilege. The ABA's web site has background material you can use to write your legislators, or you can join us in April—April 18 and 19, to be exact—for the ABA's annual lobbying activity on Capitol Hill.

We call it ABA Day. It's not lobbying, per se, as the ABA is not a PAC, it doesn't make political contributions, and it's not a registered lobbying agent. Instead, the ABA as a grassroots association organizes face-to-face meetings with lawmakers—it's simply constituents meeting with their members of Congress. And we don't expect you to do it alone. At ABA Day, we provide plenty of training on best practices for conducting such meetings.

I've been participating in ABA Day for several years, and it's one of the most rewarding activities I do as a lawyer. I'll be in Washington again this year, and I hope you can join us. Last year we had more than 200 lawyers join us. Again, that's April 18 and 19. Please let me know if have any questions on how you can participate.

Attorney-client privilege is a hallmark of the independence of the bar. But it's equally important for lawyers—as officers of the court and defenders of the system that earns us a living—to work actively to uphold the independence of our judiciary.

A fair, impartial, qualified, and independent judiciary, free from political or other intimidation, is the hallmark of our judicial system. Yet there are several areas where this ideal is being undermined:

* Judicial elections are getting more and more politicized. In my home state of Alabama, for example, our last election saw the most expensive race for our state supreme court. I'm concerned, frankly, that the public will perceive that our judges are accountable not to the law and the constitution, but to their campaign contributors.

Even if we lawyers can trust our judges to make sound decisions according to the law, how does it affect the public's perception of an independent judiciary when judges and judicial candidates are receiving unprecedented amounts of campaign cash from interest groups with issues that will come before the courts?

* Lawmakers and voters often attempt to reign in the authority of judges. For example, in South Dakota we saw in the last election a ballot initiative called "Jail 4 Judges" that would have abolished judicial immunity. Initial polling for this initiative was highly favorable. If something wasn't done and done fast, that initiative was going to pass.

But our friends in the South Dakota Bar put together an impressive coalition that stood up and spoke out and went from one end of South Dakota to the other, educating the public on the importance of a fair, impartial, and independent Judiciary, accountable only to the law and to the Constitution and not to political intimidation.

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I'm sure many of you can recount similar attacks on an independent judiciary in your states—not to mention threats on the federal level, such as the Terry Schiavo fiasco and our

federal judges' shrinking compensation, which Chief Justice Roberts discussed in his Jan. 1 report on the Judiciary.

If past is prologue, as we now enter the national political campaign season, judges and our judiciary will again become a political football. As lawyers, we need to prepare ourselves to respond vigorously and quickly to attacks on our judiciary. The ABA, working with our partners in the state and local bars, has been a leader in helping lawyers advocate in this regard. We provide sample speeches, newspaper op-eds, talking points, and other background material for public outreach on why judicial independence is so important to our way of life. If lawyers won't make the case, nobody else will.

But judicial independence doesn't stop with defending against attacks on it. As important, the ABA works to ensure that our judiciary is competent and accountable to standards of professionalism and ethics. Our newly revised and adopted Model Code of Judicial Conduct is the national standard. And our nonpartisan Standing Committee on Federal Judiciary helps ensure that our federal judicial nominees meet the highest standards of professionalism.

An independent bar and independent judiciary factor centrally in a core area the ABA is pursuing: the rule of law.

My predecessor, Bill Neukom, who will become ABA president this August, is heading up a far-reaching initiative that will help America and the world define and adhere to the rule of law for years to come. Bill Neukom, as you may know, was general counsel at Microsoft for 17 years before joining in 2002 what is now the Seattle law firm of Kilpatrick Lockhart Preston Ellis and Gates.

The term "rule of law" is familiar to many of us, but its practical definition can be elusive. One of the project's preliminary tasks was to develop a working definition of the rule of law that we can all agree on—not just lawyers, but all stakeholders in a law-based society, including business interests. Here's what the justice project has come up with, and it's quite thought-provoking. Maybe there's even room for modification or even disagreement. According to the ABA's World Justice Project, the rule of law is:

1. A system of self-government in which all persons—and the government—are accountable under the law;
2. A system based on fair, publicized, broadly understood, and predictable laws;
3. A fair, robust, and accessible legal process in which rights and responsibilities based in law are enforced; and
4. A system involving *diverse, competent, and independent* lawyers and judges.

The rule of law, we believe, is the foundation for societies of opportunity and equity—societies that offer sustainable economic development and free government.

For years, the ABA has provided technical legal assistance on rule of law issues to developing countries and newly emerging democracies in the former Soviet bloc, Latin America, Africa, Asia, and the Middle East. Volunteer lawyers and judges travel with the ABA to far-flung areas, where they teach courses and train their local counterparts. It's one of the most rewarding volunteer activities the ABA offers.

But the ABA's emerging rule of law vision goes much further. It involves holding all countries, *including our own*, to a reliable rule of law standard.

At this stage, we're reaching out to experts throughout the world in a variety of fields to develop a rule of law index—a set of factors by which society could evaluate its efforts to

establish a system and culture of the rule of law. This index, we hope, will be an authoritative and useful measurement, much like the Conference Board's Consumer Confidence Index and Leading Economic Indicators.

The ABA is also planning to develop and convene a multidisciplinary World Justice Forum, akin to the World Economic Forum in Davos, Switzerland. It will include people from many fields: the clergy, teachers, labor and management, physicians, journalists, engineers, architects, public servants, the military, and others. The forum will stimulate fresh thinking and inspire new projects to advance universal rule of law principles.

Through these activities, we're hoping to answer some basic questions:

- * Does the rule of law matter, and how does it matter?
- * Is the rule of law the platform for a fair and free, participatory government?
- * Is it the platform for economic development?

In planning these activities, we acknowledge that one of the communities that would benefit most from a fair evaluation against a set of objective factors is our own country. Unfortunately, despite our best efforts, we have room to improve when it comes to some of the principles we espouse:

- * First, as I've discussed, there's the erosion of attorney-client privilege.
- * In addition, our legal process is inaccessible to some 40 million Americans. This remains the case even while the ABA advocates in Washington year after year to continue funding for the Legal Services Corporation. And, I might add, disasters like Hurricanes Katrina and Rita, which affected the coastal areas of my state, uncovered a massive need to reform our legal practices so that victims can get the legal help they need.

* Another symptom of rule of law problems here at home involves those who view the Bill of Rights as an obstacle to be overcome as opposed to the embodiment of our most precious liberties. If anyone questions the need to look to rule of law issues at home, you only have to review the remarks of former Assistant Secretary of Defense for Detainee Affairs, Cully Stimson, in which he attacked lawyers who provide pro bono representation to detainees at Guantanamo.

Fortunately, many in the bar and elsewhere rose up in response to these remarks by pointing out that these lawyers are upholding one of the oldest and greatest traditions of our profession and our country—that even the most despised or underprivileged in our society are still entitled to adequate representation.

* Another threat to rule of law here at home is not often discussed in rule-of-law terms but still affects public confidence in our system. It's this simple fact: Our profession does not yet reflect the rich diversity of the people of this country. The ABA with our partners in state and local bars and bars of color have made great strides in this direction, including scholarships, training, mentoring, and pipeline programs for minority law and prelaw students.

The progress we've made has a great deal to do with America's corporations and their general counsels, many of whom have insisted on working with law firms of diverse members. I was pleased to see Thomas Mars, Wal-Mart's senior vice president and general counsel, receive the ABA's Spirit of Excellence Award last month for his leadership in diversifying his own staff. Equally important, he was honored for his initiatives to ensure that Wal-Mart does business increasingly with outside counsel who are women and lawyers of color.

Folks like Thomas Mars understand that we strengthen the rule of law by ensuring that our profession looks more like the citizens we serve.

* Finally, as I've mentioned, there are ongoing threats to our independent judiciary that we must constantly monitor and respond to.

In the end, we're ultimately talking about promoting the rule of law as a guiding principle:

* When lawyers advocate for policies and legislation that serves the common good, we're advancing the rule of law.

* When lawyers provide legal services to the poor and support organizations that do so, we're advancing the rule of law.

* When lawyers hire, mentor, and recommend a diverse array of talent to perform in our profession, we are advancing the rule of law.

* When lawyers engage in professional activities that help us do a better job, we're advancing the rule of law.

* When lawyers take up the causes of unpopular clients and when judges make proper but unpopular decisions, we are advancing the rule of law.

These issues are nonpartisan. Conservatives and liberals, Republicans and Democrats alike can find common ground on the core ideals that shape the rule of law and the legal profession's role in it. Whenever I'm asked if the ABA is conservative or liberal, I respond that there's room for only one "L" word in our organization. That word is "lawyer."

I hope I've given you some food for thought this evening, and I'd like to hear your thoughts as well on attorney-client privilege, judicial independence, rule of law, diversity, or whatever else is on your mind.

Thank you for your time and attention.

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* First, as I've discussed, there's the erosion of attorney-client privilege.

* In addition, our legal process is inaccessible to some 40 million Americans. This remains the case even while the ABA advocates in Washington year after year to continue funding for the Legal Services Corporation. And, I might add, disasters like Hurricanes Katrina and Rita, which affected the coastal areas of my state, uncovered a massive need to reform our legal practices so that victims can get the legal help they need.

* Another symptom of rule of law problems here at home involves those who view the Bill of Rights as an

obstacle to be overcome as opposed to the embodiment of our most precious liberties. If anyone questions the need to look to rule of law issues at home, you only have to review the remarks of former Assistant Secretary of Defense for Detainee Affairs, Cully Stimson, in which he attacked lawyers who provide pro bono representation to detainees at Guantanamo.

Fortunately, many in the bar and elsewhere rose up in response to these remarks by pointing out that these lawyers are upholding one of the oldest and greatest traditions of our profession and our country—that even the most despised or underprivileged in our society are still entitled to adequate representation.

*** Another threat to rule of law here at home is not often discussed in rule-of-law terms but still affects public confidence in our system. It's this simple fact: Our**

profession does not yet reflect the rich diversity of the people of this country. The ABA with our partners in state and local bars and bars of color have made great strides in this direction, including scholarships, training, mentoring, and pipeline programs for minority law and prelaw students.

The progress we've made has a great deal to do with America's corporations and their general counsels, many of whom have insisted on working with law firms of diverse members. I was pleased to see Thomas Mars, Wal-Mart's senior vice president and general counsel, receive the ABA's Spirit of Excellence Award last month for his leadership in diversifying his own staff. Equally important, he was honored for his initiatives to ensure that Wal-Mart does business increasingly with outside counsel who are women and lawyers of color.

Folks like Thomas Mars understand that we strengthen the rule of law by ensuring that our profession looks more like the citizens we serve.

*** Finally, as I've mentioned, there are ongoing threats to our independent judiciary that we must constantly monitor and respond to.**

In the end, we're ultimately talking about promoting the rule of law as a guiding principle:

*** When lawyers advocate for policies and legislation that serve the common good, we're advancing the rule of law.**

*** When lawyers provide legal services to the poor and support organizations that do so, we're advancing the rule of law.**

*** When lawyers hire, mentor, and recommend a diverse array of talent to perform in our profession, we are advancing the rule of law.**

*** When lawyers engage in professional activities that help us do a better job, we're advancing the rule of law.**

*** When lawyers take up the causes of unpopular clients and when judges make proper but unpopular decisions, we are advancing the rule of law.**

These issues are nonpartisan. Conservatives and liberals, Republicans and Democrats alike can find common ground on the core ideals that shape the rule of law and the legal profession's role in it. Whenever I'm asked if the ABA is conservative or liberal, I respond that there's room for only one "L" word in our organization. That word is "lawyer."

I hope I've given you some food for thought this evening, and I'd like to hear your thoughts as well on attorney-client privilege, judicial independence, rule of law, diversity, or whatever else is on your mind.

Thank you for your time and attention.