Department of Justice

REMARKS OF

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For all of us, this has been a wonderful, full week -- filled with meetings and seminars and sessions designed to bring us up to date on the latest in the law, to provide us with an opportunity to discuss and debate troubling legal questions, and to share each other's company. And all in the incomparable setting of this lovely city in this beautiful land, Australia. For me, however, these days -- and the earlier sessions in Hawaii -- have represented something even more significant. They have given me time to be with the members of my profession, to reacquaint myself with the problems of the private bar, and to wax a bit nostalgic about my days as a trial lawyer. Indeed, they have given me an opportunity to reflect a bit on the role of the Attorney General as compared to the role of the private attorney --as viewed from the perspective of this former trial attorney turned Attorney General. These are the reflections I'd like to share with you now.

When I first came to this high office, I was confronted by an oft-repeated generalization -- that because the work of the Attorney General is really only that of the government's lawyer, all you need to be a good Attorney General is to be a fine lawyer. I have to confess now that I felt a bit ambivalent about that hoary old cliche. Like most members of our profession I prided myself on my legal acumen, but I doubted that legal ability alone would be sufficient for the demands of this office.

As you may have suspected, this particular generalization, like most, turned out to be neither wholly true nor wholly false. While I leave it to you to decide what that says about either my lawyering, or my "Generaling," I will try to describe why I think the generalization is less than accurate.

Of course, on one level the generalization is patently correct. Many of the problems I face are legal ones, many of the references I cite are law books, many of the people I deal with are lawyers. Without lawyering skills the job would be impossible. But despite these similarities, the differences between my job and yours are fundamental.

Perhaps the most significant difference involves client relations. You can talk to yours, ask him what his true interests are, and in a pinch leave the tough decisions to him. I can't. As Attorney General, I have litigating authority over most disputes involving most government agencies. But I do not represent simply the agency which is involved in the matter at issue, nor even the government as a whole. Instead, I am sworn to uphold the interests of the American public at large. And that is a client who cannot talk to me, and to whom I cannot leave the tough decisions.

Of course, my client does have some quite legitimate institutional representatives who can talk to me -- Congress, executive agencies, independent regulatory commissions, etc. The problem is that these often disagree among themselves as to exactly what my client's best interests are. And sometimes

they even equate them with their own. Because I must uphold the interests of my silent client above the interests of those who can speak, I am often put in the position of having to say "no" -- no, we cannot make this argument, no we should not prosecute this individual, no we should not defend this lawsuit -- even though it may serve the immediate interest of a particular government entity to do so. And believe me, saying "no" is not the quickest way to win a popularity contest.

A closely related difference between the private practitioner and the Attorney General relates to our differing responsibilities toward judicial tribunals. The ABA Code states that the private lawyer should represent his client "zealously." Although the Kutak Commission's new proposed Model Rules make considerable inroads upon the old concept of the lawyer as a gladiator who presents his case and leaves "justice" to the judges, even those Rules affirm that, (quote), "the advocate's duty in the adversary system is to present the client's case as persuasively as possible, leaving presentation of the opposing cause to the other party." And, even more significantly, the proposed Model Rules continue, (quote): "an advocate does not vouch for the justness of a client's cause but only for its legal merit."

For the government attorney, such wholesome partisanship cannot be the whole story. While proposed rules requiring varying degrees of disclosure of client wrongdoing, and even

of material only helpful to one's opponent, are now a major topic of discussion among the private bar, to a great extent they are already law for the public prosecutor. And well they should be, for the government attorney does not vouch solely for the legal merit of his or her cause. When the enormous resources of the United States are arrayed against one of its citizens, the public's attorney must vouch for no less than the essential justice of the government's argument. And it is the Attorney General's responsibility to separate out the varying views as to what truly is just, and guide the positions of the Executive Branch accordingly.

Indeed, fidelity to the public interest often requires exercises of self restraint that the law does not, or does not yet, require. For example, when a year ago the Supreme Court said the Constitution did not bar prosecutors from consenting to the closure of pre-trial hearings, that was not enough to decide the matter for us. Our analysis of the critical contribution of publicity to the fairness of our judicial process led to the conclusion that even if the law did not require openness, justice did. Accordingly, we began drafting guidelines intended to drastically limit the occasions upon which a federal prosecutor could consent to the closure of any proceeding, whether pretrial or trial. I am pleased to report that those draft guidelines required no more than minor adjustments when, just this past June, our high Court again confronted the closure problem -- now in

the context of a full trial -- and this time declared that the presumption of public proceedings must reign. While the Court has stolen some of the thunder from our guidelines, we are still glad to see the rain.

There is yet a third difference between the habits of thought of a private practitioner and those of the nation's own Attorney. What I refer to are the time frames in which we must view events. By and large, lawyers in private practice represent specific clients in specific disputes. You look to this case, to this client, to this trial. Indeed, to be faithful to your client, you cannot do otherwise -- to sacrifice a current client's interest for the sake of a future one would be a conflict of interest of the highest magnitude.

For me, however, matters are quite different. I cannot look to what is best for only this case, or this agency at this time. I must consider how positions taken in this case will affect others not yet even contemplated. Sometimes that means sacrificing an agency's interest in today's case for its or another's interest in the case that may arise tomorrow, or next year, or the year thereafter. No one has yet tried to apply the "Rule on Perpetuities" to this exercise, but sometimes I think it would be helpful -- if I could remember it.

Moreover, the subject matter of my responsibilities also makes my time frame different. The Attorney General is

seldom a litigator, and not just a lawyer. He must in addition be a manager, an administrator, a planner and, most important, a leader. Less than 10 percent of the Justice Department's personnel are lawyers devoted to litigation. Nineteen of our 26 operating units are devoted to activities other than trial, and many, like the FBI, DEA and Border Patrol, are hardly involved in lawyering at all. The bulk of the Department's 2.5 billion-dollar budget has little to do with courtroom representation. Thus, the ordinary patterns of a litigator's life, the familiar pretrial, trial, and post-trial periods, are simply not the relevant time dimensions for an Attorney General.

One time dimension which is, unfortunately, quite relevant is set by the budgetary process. For you, 1981 will not come for another five months; for me, fiscal 1981 begins in just 45 days. In fact, my 1982 budget is due in less than a month.

But it isn't just the budget process that requires long-term planning. The time lag from inception of a law reform idea, to passage of legislation, to final implementation is seldom measured in periods shorter than years. Sometimes it is measured in decades. Planning for the reform of our federal criminal code began in 1966. We are still hopeful it will finally pass this year. Thus, the Attorney General has to be concerned with two-; five- and even ten- year plans. Even the Russian commissars may not have it so tough.

Of course, there are some compensations. Unlike most lawyers, an Attorney General has the authority, on some occasions, to function like a legislator. Congress and/or the President have empowered him to promulgate regulations in fields as disparate as immigration and foreign intelligence. In fact, in some cases, notably the Newspaper Preservation Act, I am empowered to act not just as a legislator but as a judge.

Now I want to make it clear that none of this is meant as braggadocio. If it were, I know that Australia's Attorney General, the Honorable Peter D. Durack, could quickly put me in my place. After all, he has an authority that this Attorney General would gladly make great sacrifices for -- authority over the budget of the courts. Now think about those possibilities for improving the administration of Justice.

Moreover, unlike my humble self, Attorney General Durack need not simply draft his proposed legislation and hope the votes go the right way. For he also carries the title of Senator Durack, and can back his ideas with his vote. Of course, with high privilege comes some disadvantages. While I can hide from the wrath of Congress in my fifth floor fortress, he sits in Parliament and is subject to questions without notice from his legislative colleagues each sitting day. At times I take great comfort in those nine city blocks and five stories that separate the Justice Department

from the occasional shouts of angry Congressmen. On the other hand -- Ah to be able to shout back . . . .

I do not only want you to know that I am not bragging; I also want to be sure I don't leave the impression that the qualities of a good lawyer are somehow irrelevant to the needs of an Attorney General. That is hardly the case. Indeed, there is one quality which quite alone can take you more than halfway there. It's encapsulated in that much-maligned phrase, used by generations of "Paper Chase" law professors to enthrall their neophyte law students: It's the ability (quote) "to think like a lawyer."

What it means has never been wholly clear to me, but surely it includes the lawyer's insistence on getting the facts, on drawing logical conclusions, on forcing people to consider the implications of their actions. It includes looking behind the report to the methodology, making the advocate justify his conclusions and reveal his prejudices, and not taking statements at face value. And it includes the trial lawyer's vaunted ability to become an instant, if only temporary, expert in a myriad of unfamiliar fields.

These are the skills that have stood me in the best stead this past -- often hectic, sometimes harrowing, but always exciting -- year. And these are the qualities which, as I look back over this past week, I could not help but see

in my fellow ABA members. Frankly, you make me proud of my profession, and honored to hold the office I do -- Attorney General, with the accent on that first, very important, word.