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REMARKS AT OPENING SESSION

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*President of the American Bar Association
and ALI Council member*

*The eighty-seventh Annual Meeting
of The American Law Institute
convened in the Grand Ballroom
of The Mayflower, Washington, D.C.,
on Monday morning, May 17, 2010.
President Roberta Cooper Ramo presided.*

President Ramo: People say this all the time but, in this case, it is truly from my heart. It is my honor and my pleasure to introduce to speak to us this morning the President of the American Bar Association, Carolyn Lamm.

It is our custom to have the President of the American Bar Association address our Annual Meeting. What is unusual is that, in this case, the President of the American Bar Association is not only a member of The American Law Institute but a member of our Council. Her contributions to us are well known to each of you. She has served in many capacities for The American Law Institute.

I also want to recognize Carolyn's husband, Peter Halle, who is also an ALI member. What I want to say about Carolyn, though, is more on both the global and the personal side. Carolyn and Paul Friedman sat with me and my husband in a small room for 88 ballots when I lost a race for President of the American Bar Association. (*Laughter*) They missed planes, as the day went on, because they did not want to leave me alone to face my fate, although there were moments when it was looking pretty good. It was a very long day, but you get to know people in a way in those situations that you don't often have an opportunity to do.

Carolyn is a remarkable lawyer. Many people in this room work in international law, and we all know that seven out of every ten law students when you ask them what they want to be say, "I want to be an international lawyer."

Carolyn is that remarkable person who actually is an international lawyer. International clients and countries call on her to represent them in matters of extreme difficulty. It is a mark of the respect that everyone has for her intellect that she is often the person explaining not just their case to countries, to leaders all over the world, but she is their guide to the American legal system. In many ways Carolyn Lamm is the ambassador of the American legal system as she goes about her work as a lawyer, not only as she goes about her work as the President of the American Bar Association.

One might think that someone with a practice at that high level would have lost sight about what it means to be a lawyer in a small firm or in solo practice in the United States, but that could not be farther from the truth. Carolyn is a person who, in spite of the press of her own practice, is able to understand and act for American lawyers from every practical situation. She has led to a revolution in the dues structure of the American Bar Association to make it possible for young lawyers and lawyers in small firms to participate in much more meaningful ways. She has been at the forefront of civil rights. She has been an enormous force in trying to make legal services for poor people, both on the civil and criminal side, a reality.

Carolyn Lamm is one of the people I most admire, and what I feel extremely appreciative of is not only that we will all have an opportunity to hear her today, but that she will be a part of The American Law Institute for a very long time, and I am especially appreciative, Carolyn, that you are my friend. Carolyn Lamm. (*Applause*)

President Carolyn B. Lamm: Wow, what a good introduction. I really should just sit down.

Roberta is fabulous, and you will notice she won the second time around. Paul and I worked very hard to assist her and make sure.

But what an honor and a pleasure it is to be here to address you all today and certainly from a relatively unique perspective, because I am a member of the ALI Council and have worked hard for a long time in this organization, and it is usually the reverse. Usually people become President of the ABA and then join the Council, so I think I have a unique perspective to share. Also, because of my international practice and representing the ABA around the world, I have really been able to work with lawyers around the world and appreciate and observe some of the issues really confronting our profession and our legal lives, and it is from that vantage point that I wanted to share with you today a few observations about the state of the legal profession and, of course, have some recommendations for what the ABA is doing and what the ALI should be doing. I couldn't resist the opportunity to address the latter.

Certainly, to be clear, the impact of globalization and technology on the legal profession, on our clients, on the way we practice law is undeniable, and I want to describe to you some of the things that the ABA is doing to consider and address this, including Ethics 2020, and that is the ABA's response to some dramatic changes we see in terms of globalization and technology.

Now I was wise enough to choose some of the best from our group to lead the effort. So we have Michael Traynor cochairing our Ethics 2020 with Jamie Gorelick, both of whom I know are well known to you. We also have, as commissioners, Roberta Ramo and Judith Miller and Judge Diane Wood, among many others, so we have really drawn on so many, and, because we had to keep a balance, I couldn't include everyone, but everyone is invited to share their views on this important work. They will be studying until August the impact and what the issues are, and I will report to you a bit on those things at this point, but you may insert your input through the ABA website, Ethics 2020 on our regular ABA website. I will also discuss a few suggestions that I have for the ALI.

First, I will start with some observations that will, I think, drive home the dramatic change that we have seen in legal business over a short time, and we begin with the U.S. trade-flow statistics that I think demonstrate a very stark reality of globalized business.

In 2008, the U.S. exported 1.8 trillion in goods and services, and we imported 2.5 trillion in goods and services. I think the disparity is in part explained by oil. In 2008, there were 23.3 trillion in foreign-owned businesses and assets in the U.S. and 19.8 trillion of U.S.-owned assets abroad. In fact, every state in the United States, except Hawaii, exported more than one billion in trade and services in 2008.

Each of the transactions, very obviously, that underlie the statistics and the disputes related to them, of course, involve U.S. and foreign lawyers in order to accomplish them, lawyers working across border, across legal systems, and cross-culturally. And indeed, if you think about the response to the global economic crisis, it really emphasizes the interrelated nature of our legal systems, civil and criminal. We found

that the unilateral approaches taken in the '30s and the '70s were not the approach required. It gave way to multilateral coordination, once again emphasizing the interrelated and global nature of our world.

Today, globalization of the world economy makes it necessary to have lawyers who are increasingly knowledgeable about domestic, international, and comparative law, skills, and values. Indeed, in 2008, one other striking statistic is that the U.S. exported 7.2 billion in legal services and imported 1.9 billion in legal services. In 2008, U.S. law firms' foreign offices provided 2.9 billion in legal services abroad and foreign firms' U.S. offices provided 104 million in legal services. Those statistics alone demonstrate very starkly the interrelated nature of the practice of law and the legal-services market.

And the other similar thing to think about, of course, is the number of foreign-born residents in the United States who have property, family, and business relationships with their country of origin and here that will need legal services of both U.S.- and foreign-educated lawyers.

Between—and this is another set of statistics that I think is very interesting—between 1990 and 2000, every U.S. jurisdiction had an increase of at least 19 percent in foreign-born population. All except five jurisdictions had at least 30 percent increases. Nineteen jurisdictions had more than a hundred percent increase. And the states with the largest increases are not the ones one would think. It was not California and Florida and New York. These states included Alabama, Arizona, Arkansas, Delaware, Idaho, Kansas, Kentucky, Mississippi, Nebraska, and I could really go on, the Dakotas. So they are not the states that one would think. All of us have seen a transition certainly from localism give way to globalism.

Not many lawyers today practice without confronting some trans-border and international- or foreign-law issues, including in dispute resolution, contracts, transactions, whether they practice on Main Street or Wall Street. And clearly, every day I see the impact of globalization and technology on my own practice and certainly in the work of the

ABA, but a recent article from the Idaho State Bar *Advocate* magazine demonstrates that all really are experiencing this.

The author tells of a specialty plastics manufacturing business contacting a local lawyer in Idaho to finalize a joint venture with a Canadian company to transfer production technology to a third country and then import back the manufactured products into the United States. This took place in Ucon, Idaho, population 943, so transborder international issues are all over. And this convergence of events has really shifted legal practice and regulatory paradigms to which we have become so accustomed. [Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, 52 *THE ADVOCATE* 28, 28-31 (October 2009).]

At the same time as all of the globalization is going on, and perhaps the fuel for that fire, the digital generation of clients and lawyers is upon us. The exponential rate at which technology evolves has changed client expectations for the delivery of high-quality, cost-effective, secure, and very expeditious service.

The number of virtual law offices where clients communicate and provide information to their lawyers via secure portals and off-site servers is growing, and this is of particular interest to small-firm and solo practitioners. They rely on the Internet as much, if not more, as large-firm practitioners. Consumers of legal services seek access to services online more frequently, and they are provided across country borders. They are not necessarily receiving services from U.S. lawyers.

So the increasingly borderless world, whether physical or virtual borders, in which the practice of law occurs, poses very special challenges to our place-based system of lawyer regulation and professional regulation that really require our considered thought and analysis. The proliferation on top of that of global, regional, and bilateral trade initiatives involving legal services demonstrates the importance to the U.S. economy of legal services to our marketplace.

And at the same time, we see other developments that have a dramatic impact on all of us that practice in any way transborder, and they are the efforts, driven largely by consumers and the public, in

Australia, England and Wales, Scotland, Canada, France, Spain, and others, to reconsider and reform how the legal profession is structured and regulated, and certainly the impact on U.S. lawyers and U.S. law firms cannot be ignored.

In 2001, New South Wales, Australia, has permitted the incorporation of law firms without restrictions as to who could own shares and allowed multidisciplinary practices. The first publicly traded law firm is there. All Australian states and territories have followed suit.

The U.K.'s Legal Services Act of 2007 [(c. 29) *available at* http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf (last visited June 17, 2010)] permits alternative business structures, and in 2011 will permit publicly traded law firms. They have a little bit more of a rigid structure in terms of a governance body approving the ability of someone to invest, but nonetheless, if you pass a fit-to-own test, they will have public investment in law firms. And there are all kinds of financing arrangements for cases being undertaken by law firms in addition.

Legal-process outsourcing is increasing and raising new issues of supervision of nonlawyers inside and outside the U.S., confidential information, and conflicts. Just last week, or I think it was Thursday the week before, the Advocate General at the European Court of Justice issued an opinion that states the attorney-client privilege does not exist for in-house lawyers [Case C-550/07P, *Akzo Nobel Chemicals Ltd & Akros Chemicals Ltd v. Commission*, *available at* <http://www.acc.com/advocacy/upload/AG-Opinion-AKZO-042910.pdf> (last visited June 17, 2010)]. Now what if you are representing, in the United States, an in-house lawyer that makes disclosures? How are our courts going to deal with that approach?

As President of the ABA, I have certainly recognized that we must give serious consideration to all of these profound changes and the way we practice law, and lead our profession to be prepared to practice in a different world. It is fundamental that the ABA, as the national leader in developing and interpreting legal standards, indeed the reason for its creation, must keep pace with professional change and changes in the

legal marketplace. Of course, they must do it keeping very sacred all of those core values that are very important to U.S. lawyers and to protect the public.

The ABA, at my urging, then created the Ethics 2020 Commission, and I have asked them to review all of these changes, to engage fully with the judiciary, with academia, with lawyers practicing in all practice settings, and to analyze what is going on and to focus on ethical and regulatory issues affecting the entire spectrum of legal work, and initially they will address the issues that arise, because lawyers in the United States are regulated by states on the basis of physical presence, but work increasingly is across state and international borders.

The Commission will focus on admission-to-practice issues: U.S. lawyers practicing abroad, foreign lawyers practicing in the United States; on outsourcing; on conflicts of interest, where we have differing standards among all of the various groups of lawyers on an individual transaction, if you have lawyers from different countries on an individual transaction; on confidentiality, you have different standards across country lines, and lawyers are participating in a single transaction.

I, in fact, just tried a case in April, and in that case, we had lawyers, the international lawyers from the United States together with lawyers from Argentina, from Italy, in a tribunal with members from Switzerland, the Netherlands, and Egypt, all applying their own ethical standards; it was an anational ICSID [International Centre for Settlement of Investment Disputes] arbitration. So you've got people responding to different rules in the same proceeding doing things in very different ways.

Now perhaps the U.S. doesn't want to do anything about that, and we want to continue our approach, but at a minimum, we need to focus on it, analyze it, and make those decisions. Certainly the choice-of-law issues that arise in that context are huge and must be considered. Is [ABA Model Rule of Professional Conduct] 8.5 still the way to approach the many multinational things that are going on?

The Commission is also looking at the regulation of law firms and entities. Only New York and New Jersey regulate law firms. Should law

firms be regulated by all of our states, and, alternatively, what are virtual law firms? People band together for single matters or transactions. All of these things present very challenging issues because of the way law is practiced today.

Certainly globalization has changed the parameters within which we practice law. We obviously are not going to give up our core values, and we will do all in our power to protect the public, to maintain a strong and independent self-regulating legal profession. That is why we have set this on a three-year track, one year to study what the issues are, next year to take input on how to solve them, and the following year to actually make the proposals and work it through the various ABA sections and the house and the board, as well as the various states, obviously. We are working in conjunction with the Conference of Chief Justices and sharing information, for which we are grateful, and we are working in conjunction with many other entities at the same time.

Certainly, the importance in all of this of international law, not with respect to the profession but with respect to our daily practices, is becoming far more central. With globalization, international law and comparative law really become of almost daily importance. As President Obama said in his Nobel lecture in Oslo, “adhering to standards, international standards, strengthens those who do, and isolates . . . those who don’t,” adhere to international law.

In the U.S., international law has always played a central role in our legal system. It is mentioned in our Declaration of Independence, paragraph 1. It is mentioned in, of course, our Constitution, with respect, in Article VI as the “supreme Law of the Land.” Our cases address it throughout, from 1804 in the *Charming Betsy* case [Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)] until the present day with the latest *Medellín* case [Medellín v. Texas, 552 U.S. 491 (2008)]. I will restrict my comments on that case. (*Laughter*)

Given the impact of globalization and the increasing importance of public and private international law, the ALI must really provide much-needed reliable guidance to courts and lawyers with respect to international legal principles. In this regard, I urged for years our work

on the International Commercial Arbitration project, and I am so proud, I almost feel like a proud parent, that we will be voting on the first section of it that our fabulous Reporters will be presenting to you in the Tentative Draft that you have before you.

This is very important, but it also demonstrates there has been an almost unprecedented level of interest among both ALI members and nonmembers in this project, and I applaud the Reporters and Director Liebman for finding ways, including electronic ones, to open up the commentary so that all can participate and we receive input from a very geographically diverse and numerous group. I applaud the efforts in this area, and I hope we will continue to do that.

As the ALI, I think we must do more to include international law in our work. Practitioners, courts, clients need our guidance in their day-to-day work. I urge, and I have been urging Lance every time I get near, that we must consider updating the Foreign Relations Law Restatement, because life in the law has certainly changed dramatically since 1986. Given the increased importance of international and comparative law, given the globalization of our practice, the ALI cannot afford to let this Restatement become obsolete. Due to the formidable effort by highly talented and insightful teams, this Restatement in fact gained worldwide respect and has become the primary reference authority for so many in the international-law area. But after 24 years, things have happened, and the Introduction to that Restatement itself recognizes the need for revision at least once in a generation, and I fear we may have let more than one slip by.

But I recognize and I applaud the ALI for all of its work that it has undertaken in so many areas of international law: the Principles of Transnational Intellectual Property Disputes, Transnational Civil Procedure, Transnational Insolvency, and our Foreign Judgments work. But, as I mentioned earlier, as a result of globalization and technology, U.S. practitioners and courts interact almost daily with international and comparative law. They need guidance and we should fill that vacuum.

We in the ABA have recognized the profound impact of globalization and technology, and we are taking steps to address it. I certainly encourage the ALI to expand its work in this arena.

And I guess many of you must be wondering why is it that we have a President of the ABA talking about international law and globalization so much, but I think it is because it has become part of our daily life and daily work. We must recognize it, applaud it, and lead the way forward in that arena.

So thank you very much for the time to speak with you. I am delighted to be here and to do that. Most of all, I am delighted to have a seat. Usually, I'm sitting way up in the back because I have come late, (*laughter*) but thank you so much, and thank you Roberta and to all. (*Applause*)

President Ramo: Carolyn, thank you. It is a wonderful thing for us to have an opportunity to have your sophisticated explanation of all of these issues. We are very proud that one of our members is the President of the American Bar Association but probably, like other people in your life, we look forward to August when we can have a little more of your attention focused on us. Thank you very, very much.