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Ellyn S. Rosen

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THE ART OF THE POSSIBLE: MISSISSIPPI LAW REVIEW SYMPOSIUM KEY NOTE ADDRESS

Ellyn S. Rosen

I. INTRODUCTION

It is an honor to join you today to discuss the work of the ABA Commission on Ethics 20/20. Thank you to the Mississippi College Law Review, Dean Rosenblatt and David Parker for inviting me to participate in this symposium. I also want to thank Dixie Pond for all of her help, and Professor Campbell for his kind introduction. What a wonderful event this is.

Professors Giesel, Maute, Giannoni-Crystal, Doskow, and Krauss spoke about the substance of the Commission's work. As we wrap up, I want to shift gears and focus my remarks on the Commission itself-its process, and some of the challenges we faced.

II. THE ABA COMMISSION ON ETHICS 20/20:

Since 2009, I have served as Counsel to the Ethics 20/20 Commission. It was an honor to learn from and work with the esteemed lawyers, judges and ethicists who comprised the Commission. It was a great privilege to partner with our Chief Reporter, Professor Andrew Perlman of the Suffolk University Law School.¹ For those who do not yet know him or his work, Professor Perlman is and will continue to be a shining star in the world of legal ethics and professional responsibility law. Professors Paul D. Paton² of the Pacific McGeorge School of Law, W. Bradley Wendel³ from the Cornell University Law School, and Anthony Sebok⁴ from the Cardozo School of Law contributed their invaluable expertise to the project regarding alternative litigation financing and alternative business structures. While the Commission did not make formal recommendations on these topics, their work is memorialized in reports that will continue to educate the profession about challenging and evolving issues that are not going away.⁵

1. See *Faculty Profile*, SUFFOLK UNIV. LAW SCH., <http://www.suffolk.edu/faculty/directories/faculty.cfm?instructorID=42> (last visited Aug. 31, 2013).

2. See *Full Biography*, UNIV. OF THE PAC., http://www.mcgeorge.edu/Paul_D_Paton.htm?display=hard_return>FullBio (last visited Aug. 31, 2013).

3. See *Professional Biography*, CORNELL UNIV. LAW SCH., <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=83> (last visited Aug. 31, 2013).

4. See *Biography*, CARDOZO LAW, <http://www.cardozo.yu.edu/directory/anthony-sebok> (last visited Aug. 31, 2013).

5. The April 5, 2011 Issues Paper on Alternative Business Structures may be viewed at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.pdf. The December 27, 2011 White Paper on Alternative Litigation Financing is available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

When you get down to it, the substance of the Commission's work, like all such projects, is in many ways a reflection of the people who participated—their principles, commitment to the profession and its future, and their experiences. So I would be remiss if I didn't tell you a little bit more about them.⁶

ABA Past President Carolyn B. Lamm, an international lawyer, created the Commission and then served as a member. She had the vision to see that the ABA needed to lead this work. She appointed Jamie S. Gorelick and Michael Traynor to co-chair the project. Jamie is a former Deputy Attorney General of the U.S. and was a member of the 9/11 Commission.⁷ Mike is President Emeritus of the American Law Institute. I cannot think of a better complement of intelligence, tenacity, patience, political astuteness, and wisdom to successfully guide a project of this breadth and depth to conclusion. They were amazing leaders; adeptly negotiating the diverse landscape of Commissioners' views, the positions of the hundreds who commented on the Commission's drafts, as well as the ABA process.

Other members were esteemed ethicists including New York University School of Law Professor Stephen Gillers and Professor Theodore Schneyer from the University of Arizona James E. Rogers College of Law, state supreme court justices, small to large firm practitioners, and lawyers with in-house and government experience. The Commission was a legal melting pot. Regardless of how busy they were with their "real jobs and lives," the Commissioners and liaisons poured thousands of pro bono hours into this project over the last three and one-half years. No matter the time of day or night; no matter where in the world they were located.

Professor Gillers noted in his article, "A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It,"

The next twenty years are likely to see greater transformation in how the American (and world) legal professions are organized and ply their services than was true for any comparable period in history. We have two choices. We can try to impede these forces in order to preserve a familiar and comfortable world that seems to be slipping away. Or we can decide that today's rules should adapt to accommodate and direct the forces at bay in order to preserve the values of the American bar, which include the efficient delivery of legal services as reasonable cost.⁸

6. Short biographies of the Commissioners may be viewed at: http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html.

7. Formally known as The National Commission on Terrorist Attacks Upon the United States. See *National Commission on Terrorist Attacks Upon the United States*, <http://www.9-11commission.gov> (last visited Aug. 31, 2013).

8. Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953 (2012).

The Commission chose the latter path. It plotted a course to accomplish that goal, including a carefully crafted process and timeline for its work. That process, as much as the people that comprised the Commission, shaped the substance of its proposals. It was a process that I believe enabled the Commission to make important and yet necessarily measured progress in responding to the impact of technology and globalization on the profession.

I also want to talk about certain externalities present during the course of our work—those inherent in the way that the ABA develops legal policy, and more importantly, the profession’s internal struggle with its place and role in a “brave new world.”

III. THE COMMISSION’S PROCESS

From the outset the Commission committed to a process that was participatory, transparent and global. It built on the model used by its predecessor, the ABA Commission on Multijurisdictional Practice.⁹ The Ethics 20/20 Commission recognized that, in addition to its charge to amend the Model Rules of Professional Conduct and related regulatory policies, there existed a second, but no less important mission—educating the profession. This included the state supreme courts responsible for adopting professional regulatory rules and members of the ABA House of Delegates that would ultimately be voting on the Commission’s proposals.

The Commission understood that before anyone would be able to accept proposed changes to the status quo, it had to identify how technology and globalization were impacting clients and the delivery of legal services. In sum, and to some surprisingly, the profession (both domestic and international) needed to be educated about some basic facts and current developments. In addition, the Commission needed to clearly show why change was necessary. As a result, simultaneous with our substantive work, the Commissioners, reporters and I engaged in a broad outreach and educational effort. The outreach effort consisted of domestic and international in-person sessions (CLE, public hearings and roundtables), as well as the research, development and release of “issues papers.” The Commission also made sure that drafts of its work product were widely circulated for comment as early and often as possible.

The Commission opened itself to constructive criticism from all corners of the profession, including academia, and put such comments out there for the world to see. If you look at the progression of the drafts the Commission released, you can see that we showed ourselves open to change based on that input. The Commission was invested in doing its best for the profession, not in ownership of its work product.

9. *Commission on Multijurisdictional Practice*, ABA, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html (last visited Aug. 31, 2013).

The Commission created seven substantive working groups—each charged with studying and developing initial proposals for consideration of specific topics. They were:

- 1) Technology;
- 2) Outsourcing;
- 3) Lawyer and law firm ratings and rankings;
- 4) Alternative litigation financing;
- 5) Inbound foreign lawyers;
- 6) Alternative business structures; and
- 7) Conflicts of interest, uniformity and choice of law.

The Commission then did something unique in my 17-year experience at the ABA. It populated these working groups not only with Commission members, but with individuals from relevant ABA and outside entities, like the National Organization of Bar Counsel. It gave these groups, through their representatives, a vote on what the substance of the initial proposals presented to the Commission should be. The Commission gave the profession “skin in the game” from the very beginning. And it paid off. I would highly recommend this process to other ABA and other policy making entities.

IV. EXTERNALITIES

A. *ABA House of Delegates*

The Commission had some “real world” externalities that it had to be sensitive to throughout its work. Future Commissions and Task Forces will need to do the same. First, the Commission, as an ABA entity, understood that in order to affect needed change at the state level it would first have to convince the ABA House of Delegates to adopt its proposals. Quite simply, that is the hurdle that the ABA requires. Overcoming that hurdle, however, is far from simple. And it should be challenging in order to ensure that the profession and the public are well served by the Association’s policies.

The ABA is a large and politically complex organization; it has approximately 400,000 members. These members—lawyers, judges, law students, and international practitioners—are all stakeholders. They focus their work and advocacy on specific practice areas. It is often difficult to educate and mobilize these constituencies early on in the policy making process.

The House of Delegates is the Association’s policy-making body.¹⁰ Each of these ABA stakeholders, as well as state and local bar associations, has representation in the House. The House is made up of more than 500

10. See *ABA House of Delegates*, ABA, http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited Aug. 31, 2013).

delegates. A delegate's job is to represent the interests of his or her constituents; those constituents influence their delegates regarding how to vote.

These interests, which rarely align neatly, cannot be ignored if success is to be achieved. For entities like the Commission, charged with addressing topics that intrude on a large segment of the profession's comfort zone, successfully getting a proposal through the House is often as much about the art of listening and truly hearing what the profession is ready for, as it is about substance. It is about prioritizing—exercising judgment about what issues deserve the most urgent attention.

And, it is, for worse or for better, very much about strategy and politics. The constituencies of the House each need to be educated and persuaded that they should vote for your proposal. One way to do that is to get as many cosponsoring entities of import as you can early in the process and then leverage those cosponsors when you appear before other groups. Your opponents will do the same. Lining up the right presenters and speakers to make your pitch to the House is also important. In many ways, the House is a creature of habit. It likes the familiar. That includes hearing from respected long-term House members and present and past ABA leaders. Thanks to the leadership of our co-chairs and members, the Commission planned and executed a successful House campaign.

In this context, I want to talk briefly about the new Model Rule on Practice Pending Admission.¹¹ We did not discuss it today. I think it is a notably important response by the Commission to the pressures that technology, globalization and economic realities have placed on our geocentric system for regulating the profession. Notable because it illustrates how the Commission was able to successfully take the temperature of the profession. The Commission was being urged, strongly by some segments of the profession, to propose a drivers' license model for licensure, or a national licensure scheme.¹² This was an issue the MJP Commission grappled with and determined that the time was not right to propose such a change.

The drivers' license or national license option was appealing to some Commissioners. However, the Commission concluded that, “. . . those advocating for a departure from state-based judicial regulation of the legal

11. *ABA Model Rule on Practice Pending Admission*, ABA, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120221_ethics_20_20_revised_draft_resolution_and_report_practice_pending_admissio_posting_final.authcheckdam.pdf (last visited Aug. 31, 2013).

12. See, e.g., *Submission by the Association of Corporate Counsel*, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/associationofcorporatocounsel_inboundforeignlawyermemorandaandtemplate.authcheckdam.pdf (July 2010); and the submission by the Association of Professional Responsibility Lawyers, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/associationofprofessionalresponsibilitylawyers_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf.

profession in the U.S. had not made their case and, indeed, that there remain strong reasons to maintain our state-based system of judicial regulation.”¹³ However, the Commission knew that something had to be done, *and could be done*, within the confines of the current state based regulatory construct to meet the needs of clients and lawyers for greater mobility. The members understood that the temporary practice rules that the ABA adopted in 2002 are no longer enough, and the admissions process, even admission by motion, can take a long time.

That something is the new Model Rule on Practice Pending Admission. It allows a lawyer who has been engaged in the active practice of law for 3 of the last 5 years to practice from an office in a new jurisdiction for up to 365 days while that lawyer actively pursues admission there through one of the procedures that the jurisdiction authorizes. To address the new jurisdiction’s valid concerns about oversight and competence, the Commission layered additional client protections into the Practice Pending Admission Rule, like the years of active practice requirement. Sounds pretty modest, right? Well, don’t fool yourselves. There was opposition to this by some segments of the profession, including by bar admissions authorities.

I think this new Model Rule is a good example of how the Commission achieved progress beneficial to clients and the profession because it understood “the art of the possible.”

B. Retaining Professional Identity

The next externality the Commission faced ties directly into the interests of the members of the House of Delegates, and to the profession generally. It is the profession’s struggle with its place and role in a changed and changing world.

This struggle centers on the application of our core professional values to the changed legal practice landscape. Our core values are the qualities that make us a profession and not just some other business or provider of services (although some would claim the latter is really who we are or are becoming). They are, in short: competence, candor, confidentiality, and avoidance of conflicts of interest.

On the one hand you have these core values, and on the other the pressures being exerted by technology, globalization and the economy. The economy has impacted clients. Technology has empowered them. More than ever clients are forcefully challenging our notion of what it means to be a provider of legal services. They have the power of the purse behind them.

The profession’s struggle to figure out how to apply its core values to new and innovative ways to deliver competent and cost-effective legal services makes sense. So are the fears that accompany the need to adjust to

13. ABA Commission on Ethics 20/20 Introduction and Overview Report, at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf (filed May 2012).

anything new. It is a struggle that I believe every member of the Commission grappled with during the last three and one-half years. I know I did.

There are productive and constructive ways to engage in this struggle, and there are counterproductive and destructive ways. In my view, using the profession's core values as a basis upon which to, as Professor Gillers stated, try to impede or slow change ". . . in order to preserve a familiar and comfortable world that seems to be slipping away"¹⁴ is not productive. The Commission agreed.

Cloaking fears of "the other" under hyperbolic accusations that those who seek to facilitate even moderate change are engaging in "standard destroying activity"¹⁵ or do not value what it truly means to be an American lawyer is not productive. Trying to stifle independent study of and free debate about ideas and activities elsewhere (that may or may not lead to change here), simply because you believe that the mere discussion of these issues poses too grave a danger to our core values is not productive. It is, in my personal opinion, dangerous and disappointing—especially when done by lawyers—American lawyers.

Yet the Commission faced this in response to its study of alternative business structures and its inbound foreign lawyer proposals. Future entities will face the same. They should be prepared. The temptation exists to not respond forcefully, because to do so saps energy and focus away from the entity's core mission. But a strong and measured response is necessary, and perseverance pays off.

Here's what happened. Since 2009, the Commission had been studying alternative business structures. It wasn't a secret. The Commission announced it that year.¹⁶ We held hearings. We released an issues paper on the subject in April 2011.¹⁷

Before December 2011, the Commission had already decided not to recommend MDP or forms of alternative business structures like those in Australia, such as publicly traded law firms. That month it released for comment a discussion draft describing one way that the Model Rules could be amended to permit a form of nonlawyer partnership in law firms that was more restrictive than that long allowed in Washington, DC.¹⁸ The Commission made clear that it had taken no position on the issue, but wanted to know what the profession thought about it. Other ABS related issues the Commission continued to study and seek input about were

14. Gillers, *supra* note 8.

15. *Submission by Lawrence Fox* (Oct. 8, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/fox_comment_inbound_foreign_lawyers_revised_draft_proposals.authcheckdam.pdf (last visited Aug. 31, 2013).

16. *ABA Commission on Ethics 20/20 Preliminary Issues Outline*, ABA COMM'N ON ETHICS, at 6 (Nov. 19, 2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

17. *ABA Issues Paper*, ABA (April 5, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper_paper.authcheckdam.pdf (last visited Aug. 31, 2013).

18. *ALPS Discussion Draft*, ABA (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf (last visited Aug. 31, 2013).

choice of law and division of fees between lawyers and sharing of fees with nonlawyers.

In March 2012, before the Commission had even decided whether to make any ABS related resolutions, the Illinois State Bar Association (ISBA) and the ABA Senior Lawyers Division filed Resolution 10A with the House of Delegates.¹⁹ The Resolution itself appeared innocuous enough. But under the guise of reaffirming ABA policy supporting the profession's core values, the supporting Report made clear what the proponents really wanted. That was to stop cold the Commission's ABS related work. They saw danger in mere study and discussion of these issues. What their report lacked, in my personal opinion, was any factual basis for their position. There was no independent examination or analysis of the various forms of ABS permitted in other countries where U.S. licensed lawyers and their clients operate.

Regrettably, the proponents' fear-based arguments held great emotional sway with segments of the bar. The Commission had to expend significant time and energy before and during the August 2012 Annual Meeting of the House of Delegates responding to Resolution 10A. The Commission responded with facts, reason and the recognition that this was a difficult topic about which the profession holds strong views. It reminded the House of Delegates that the last thing the American Bar Association—that American lawyers—should do is stifle open debate and allow an end run around the process it has established for the careful consideration of the pros and cons of any subject. In the end, after considerable debate, the House voted to postpone Resolution 10A indefinitely. But the vote was close.

So what is the lesson to be learned? I think it is this: We cannot allow the politics of fear to allow the public and profession to be sold short. Future Commissions, like this one, must stand up to efforts to cut off discussion of difficult issues because others fear they *might* lead to a result they don't like. This is especially true for the ABA, which has long had responsibility for developing the profession's ethical and professional regulatory standards.

So what about the actions that the Commission did not take? Some might say that in deciding not to file with the House proposals to permit a limited form of ABS or to address the choice of law issues associated with fee division between lawyers and sharing of fees with nonlawyers that the Commission "passed the buck" or caved to political pressure. I disagree with that assessment. It is simply not correct.

Some believe that the mere making of such proposals would have constituted success and progress, even if they were defeated. At the time, I counted myself as one of those people. Parts of me still think there would

19. See http://www.americanbar.org/content/dam/aba/administrative/gpsolo/mo_leaders/council/2012_08_fy_12_attachment_e_resolution_10a.authcheckdam.pdf (last visited Aug. 31, 2013). See also, Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365 (2013).

have been value in the Commission introducing these proposals for debate and an up-or-down vote. But upon reflection (after all, hindsight is 20/20), I ultimately think that the Commission's decision will prove the wiser course of action.

By not making any recommendations now, the Commission provided the ABA and the legal profession with a needed opportunity to learn more about ABS—to let facts overcome fear. The profession can and should learn more about the benefits of ABS, its risks and the scenarios where it might best fulfill its promise of providing more cost-effective legal and other services to clients. I personally believe that those who demonize ABS, ignore it or urge others to do the same do so at their peril.

England and Wales will serve as a laboratory, just as Australia and Canada have been on a smaller scale. Luckily for the U.S., the United Kingdom's Legal Services Board and the Solicitors Regulation Authority have a research budget and have devoted significant resources to evaluating the success of ABS. In the future, the U.S. will have more data and experiential evidence. This data will help us see whether and how the U.S. might ultimately adopt some forms of ABS.

V. CONCLUSION

Nobody—no entity—operates in a vacuum. This Commission was no different. It recognized that it was operating in the real world—a world with externalities and lots of moving parts. In the face of these externalities, the Ethics 20/20 Commission members remained independent, principled and resolute. They also recognized that there were limits to what could be accomplished during the snapshot in time that comprised their tenure. They understood the need to focus on those subjects that required urgent attention and more immediate integration into the professional conduct and regulatory rules, versus those that are pressing but were not quite ripe for action. They understood that the prefect could not become the enemy of the good—the very good in my view. They understood “the art of the possible.” And the profession is better for it.

Thank you again for the privilege of addressing you today.

