2013

Legal Ethics in a Time of Change: An Assessment of the American Bar Association's Ethics 20/20 Commission

Donald E. Campbell
Mississippi College School of Law, dcampbe@mc.edu

LEGAL ETHICS IN A TIME OF CHANGE: AN ASSESSMENT OF THE AMERICAN BAR ASSOCIATION'S ETHICS 20/20 COMMISSION

*Donald E. Campbell**

Bob Dylan sang "Times They are a-Changin'." A line from that song is "you better start swimmin' or you'll sink like a stone." This could easily be the theme of the 2013 Law Review Symposium. The Symposium was about change. Change that has come, is coming, and will (or should) come to the world of legal ethics and professional responsibility—as well as the consequences of refusing to recognize and adapt to change. The Symposium was prompted by work of the American Bar Association's Ethics 20/20 Commission, established in 2009 by then President Carolyn B. Lamm. The Commission was tasked with evaluating (with 20/20 vision) the ABA Model Rules of Professional Conduct and making recommendations for necessary revisions as a result of "advances in technology and global legal practice developments."[1] The goal of the Symposium was to consider issues addressed by the Commission as well as those left unaddressed. The hope is that these articles continue the discussion and contribute to the debate of how lawyer ethics and professional responsibility should evolve in a world that that is quickly changing.

The Symposium had two components in addition to the articles in this edition. The first was an opportunity for each participant to speak on their topic. The second was a panel discussion and question/answer period. We were honored to have participants who are well-recognized experts in the area of ethics and professional responsibility. Participants (and contributors to this volume) include Professors Judith Maute,[2] Michael Krauss,[3] Grace Giesel,[4] and Charles Doskow,[5] as well as an article co-authored by Nathan Crystal.[6] In addition to these distinguished academics, Ms. Francesca Giannoni-Crystal[7] not only co-authored an article and spoke at the Symposium but also brought her expertise in international practice to the panel discussion. Finally, we were uniquely honored to have Ms. Ellyn Rosen, lead counsel for the Ethics 20/20 Commission, as our keynote speaker

* Assistant Professor of Law, Mississippi College School of Law.

1. *ABA Commission on Ethics 20/20—About Us*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Sept. 25, 2013).

2. The William J. Alley Professor of Law and President's Associates Presidential Professor at The University of Oklahoma College of Law.

3. Professor of Law at George Mason University.

4. The Bernard Flexner Professor and Distinguished Teaching Professor at the Louis D. Brandeis School of Law at the University of Louisville.

5. Professor of Law and Dean Emeritus at University of La Verne College of Law.

6. Distinguished Research Scholar at Charleston School of Law.

7. Founder of Crystal & Giannoni-Crystal, LLC in Charleston, South Carolina.

and panel participant. These contributors brought diverse viewpoints to the debate—from practitioners dealing daily with the challenges of practice in an evolving and more global context, to seasoned academics that have watched and written on the changes that are occurring in the profession. As the Symposium discussion and these pages prove, members of the law review here at MC Law deserve a great deal of credit for bringing these minds together.

It is important to understand that the contributors to this volume are not speaking of historical or past events – they enter in the midst of the fray. These are not arcane debates. The answers to the questions or the outcome of the debates discussed are by no means certain or uncontroversial. Some arguments made here will make traditionalists squirm and seek to cling to the comfort of the familiar. Allowing lawyers to advance medical and living expenses to clients and allowing non-lawyers to have an ownership interest in law firms are two examples where these pages question the status quo. However, the purpose of this Symposium is to challenge us as a profession to do more than cite history or precedent as a reason to follow a particular path, but to ask: what was the justification for adopting this rule in the first place and does that reason still hold today? It is to challenge the assumptions and presumptions of the profession that we take for granted. Of course this is precisely the advice that Justice Holmes provided when he said: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."[8] To put it simply, nothing is off-limits in the debates you find within these pages. There are no arguments glossed over because of the difficulty of the question or third-rails avoided for fear of backlash.

If the theme of the Symposium is need to recognize and respond to change that challenges the status quo, it is perhaps appropriate that the Symposium's key note address (included in this volume) was given by Ellyn S. Rosen—counsel to the 20/20 Commission. Rosen provides pragmatic advice to approaching change. The title of her remarks is "The Art of the Possible"—making it clear that the challenge can be as much in the *process* of seeking change as in the substantive proposals put forward.

Rosen's contribution is unique. She encourages us to consider not just the Commission's ultimate output but the process leading to those outcomes. Too often scholarly focus is on the results of such bodies without consideration of the sometimes unpleasant or contentious decision-making process. Rosen takes us behind the scenes. She encourages us to consider not only the recommendations the Commission chose to make but also the recommendations that never made it to the ABA House of Delegates—and perhaps more importantly—why certain recommendationsfailed. Her

8. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

article should be required reading for any future such commissions both at the ABA and state level.[9]

Rosen's discussion of the politics of the decision-making process and the need to anticipate and respond to these concerns—even concerns that may be based in attempts to protect a particular group's interest or turf instead of substantive debate on the issues themselves—is informative.[10] She talks about the need to educate stakeholders about the nature of the changing profession as an initial matter before undertaking to recommend substantive changes.[11] This is just an example of how Rosen's practical and pragmatic approach sets the tone for the remaining contributors.

In his article, Professor Krauss argues that we should "free the lawyers" from the prohibition against advancing living and medical expenses to clients. Krauss proposes a "quasi-alienable" property right in a plaintiff to securitize her law suit through alternate litigation financing.[12] Krauss sees the current system as particularly inequitable to plaintiffs. While a defendant can procure liability insurance to cover current and future losses, there are certain losses that a plaintiff cannot contract for in advance—making the desperate plaintiff susceptible to low-ball settlement offers from a defendant.[13] Krauss ably addresses each of the bases of opposition raised with regard to alternate litigation financing and proposes that changes to ethics rules should be made that allow lawyers—who are most familiar with a claim and its value and who are subject to the ethical requirement that a fee be reasonable—to advance living and medical expenses to plaintiffs.

Professor Doskow continues the challenge to the current state of rules by discussing ABA Model Rule 5.4's prohibition on nonlawyers having an ownership interest in a law firm. This was a topic that the 20/20 Commission considered but chose not to bring to the House of Delegates because of the anticipated opposition the recommendation would garner.[14] Doskow argues that the current prohibition was drafted to protect the world of large law firms—which no longer reflects the status of the legal profession.[15] To support his argument in favor of a loosening of the restriction on non-lawyer ownership, Doskow provides a very interesting and informative comparative analysis of three common law jurisdictions—Australia, Great Britain, and the District of Columbia—which allow non-lawyer interests to varying degrees. Utilizing this comparative methodology, Doskow not only evaluates the substantive rules that these jurisdictions employ, but also

9. In fact, Rosen does not limit her remarks solely to the work of the 20/20 Commission but provides explicit advice to future commissions. *See* p. 10 (recommending that future commissions include stakeholders in the decision making process in addition to commission members).

10. *See* Ellyn S. Rosen, *The Art of the Possible: Mississippi Law Review Symposium Key Note Address,* 32 MISS. C. L. REV. 237 (2013).

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* Charles S. Doskow, *Variations On Nonlawyer Ownership of Law Firms: The Full Monty, Accommodation or The (ABA) Stonewall?,* 32 MISS. C. L. REV. 267 (2013).

15. *Id.*

evaluates whether the underlying rationale for the prohibition—the concern that a lawyer's independence or client confidences would be compromised to satisfy the non-lawyer investor—are found to be more prominent in those jurisdictions that have loosened the prohibition. He finds no increase and believes the traditional arguments should not be used as a justification for continuing the prohibition. Echoing back to the pragmatic warnings provided by Rosen, Professor Doskow is aware that his recommendation, which challenges the status quo, may be difficult for the ABA or states to enact. He concludes, however, that change may be inevitable—forced by factors such as competition, globalization, and increasing technological advances.

The contribution co-authored by Professor Nathan M. Crystal and Ms. Francesca Giannoni-Crystal also examines what they see as an opportunity lost by the 20/20 Commission. The authors are critical of the Commission's failure to adopt a rule governing ethics in international arbitration. They argue that the increase in the use of international arbitration and the lack of ethical guidance results in inequities that will cause parties to think twice before entering into arbitration agreements in international disputes. The authors provide examples of situations where, because jurisdictions have widely varying ethical obligations, a lawyer could find herself in a catch 22—committing an ethical violation in one jurisdiction if she acts and committing a violation under the rules of another jurisdiction if she *fails* to act. This is what the authors call the "double deontology" problem.[16] Another problem is the inequality that is created (what the authors call the "inequality of arms") when one lawyer can ethically act to do something while the opposing lawyer cannot because of the difference in ethical rules.[17]

The article does more than criticize, however. The Crystals' set out various ways that the ethical obligations could be determined, discuss the pros and cons of each[18] and ultimately recommend what they style the "contractarian approach." Under this approach, the parties have the right to decide the ethics rules that would apply in the arbitration and make the selection explicit as a term of the contract. The authors provide six steps to take to determine what ethics rules should apply—giving primacy to the rules selected by the parties.[19] The Crystals conclude by noting that they believe the contractarian approach is consistent with the current Rule 8.5 even though the 20/20 Commission did not specifically address the issue in their recommendations.[20] It will be interesting going forward to see if bar

16. *See* Nathan M. Crystal & Francesca Giannoni-Crystal, *"One, No one and One Hundred Thousand" . . . Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 MISS. C. L. REV. 283 (2013).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

associations (which have largely been absent from regulation of issues related to international arbitration) are also willing to read Rule 8.5 to include the possibility that the ethical rules selected by the parties should be honored.

The next two articles—by Professors Giesel and Maute—ask us to consider action that the 20/20 Commission did take and the consequence of those actions both in the world of legal ethics as well as in the larger world of professional responsibility.

Professor Giesel's article forces us to confront one of the most vexing issues in the area of lawyer client relations: technological advances. Websites and other social media outlets—where communications can be instantaneous and unilateral—can create a twilight zone in which categorizing the relationship between the lawyer and client can be difficult. In these virtual communications, when does an attorney client relationship commence? Giesel praises the ABA's adoption of Rule 1.18 and its category of "prospective client." She argues that the recognition of this new category likely will have an impact on how courts evaluate the lawyer-client relationship. Giesel challenges courts to reevaluate (she uses the technological term "reboot") when the attorney-client relationship is formed as a matter of law. Professor Giesel predicts that the ABA's recognition of the status of "prospective client" and the obligations associated with that definition will likely lead courts to move beyond the dichotomous contract law approach (where the only choice is "client" or "non-client") and be willing to recognize a middle relationship—where the full panoply of professional responsibility obligations may not attach, but certain critical obligations such as confidentiality will be owed to the prospective client. She encourages courts to adopt this more fluid understanding of the attorney-client relationship—based on the "honest and reasonable belief of the possible client . . . ."[21]—as opposed to the current tendency of courts to rely on a contract law approach to determining whether an attorney-client relationship has been formed.

Continuing the theme of evaluating proposals made by the 20/20 Commission, Professor Maute analyzes two resolutions put forth by the Commission: 105A and 105B. These propose changes to the model rules relating to lawyers' use of technology, confidentiality, and advertising. The proposals were adopted by the ABA House of Delegates and have been incorporated into the ABA Model Rules. Maute provides an overview and analysis of the amendments, pointing out the uncontroversial but necessary revisions to reflect technological advances—for example, replacing "electronic communication" with "email" in the terminology section.[22] She also analyzes the changes that are more substantive and controversial as well.

21. Grace M. Giesel, *The Attorney-Client Relationship in the Age of Technology*, 32 MISS. C. L. REV. 319 (2013).

22. Judith L. Maute, *Facing 21st Century Realities*, 32 MISS. C. L. REV. 345 (2013).

Maute's article should be required reading as jurisdictions across the country form committees to study adoption of the 20/20 Commission amendments. Her insightful analysis and normative suggestions for how jurisdictions should approach these issues provides a solid foundation to begin discussions about the necessity for amending and updating ethical rules to ensure that the legal profession, in Maute's words "get with the technological program or risk obsolescence."[23]

In 2011, Chief Justice John Roberts commented that law review articles have become disconnected from and irrelevant to the legal profession.[24] This volume certainly challenges that assertion. The participants' comments in the panel discussion and their contributions to this volume tackle some of the thorniest and most controversial issues facing practicing lawyers today. I am sure that practitioners, academics, as well as policy makers in the realm of legal ethics from around the country will find these articles beneficial as they contemplate changes to their rules of professional responsibility and consider both the amendments adopted as a result of the work of the 20/20 Commission as well as those areas where the Commission chose not to make recommendations. For my part, it was a pleasure to moderate the Symposium panel discussion and to read the contributions to this volume, and I thank everyone involved for making the Symposium a success.

23. *Id.*

24. The comments were made at the Annual Fourth Circuit Court of Appeals Conference. *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN.ORG (June 25, 2011), http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/.