Keynote Address

ABA Canons of Professional Ethics Centennial

Judith S. Kaye*
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I am honored to be here today to join in celebrating the 100th Anniversary of the Canons of Professional Ethics—and what a magnificent centennial celebration this is!

In the great tradition of the American Bar Association, planning for this program actually began two years ago, when the Center for Professional Responsibility issued a call for papers, asking scholars and practitioners from around the world to submit their reflections on how the regulation of the practice of law has changed over the past 100 years. Nine papers were commissioned, covering an amazingly broad range of issues and perspectives, and they will be published later this year in a special edition of *The Professional Lawyer*. Then too, following my remarks there will be a panel discussion, chaired by the incomparable Professor Charles J. Ogletree of Harvard Law School, including panelists from such far-flung places as the United Kingdom, Australia, even Atlanta, Georgia, to look at the evolution of the practice of law and how lawyer ethics rules may need to change in the future. Yes, truly a wonderful celebration.

I want to begin with a look back at history, mindful of words of Friedrich Nietzsche that:

> "Along the journey we commonly forget its goal. Almost every vocation is chosen and entered upon as a means to a purpose but is ultimately continued as a final purpose in itself. Forgetting our objectives is the most frequent stupidity in which we indulge ourselves."

Surely we want to avoid stupidities wherever we can.

A century ago, in August of 1908, the American Bar Association met in Seattle and approved a set of what it believed would be national standards of conduct for all lawyers. Just think—in 1908:

- The average life expectancy was 47 years.
- Only six percent of all Americans had graduated from high school.
- The average worker's annual income was between $200 and $400.
- Only eight percent of homes had a telephone.
- We had 8,000 cars and 144 miles of paved roads in the entire country, and the speed limit in most cities was 10 miles an hour.
- Marijuana, heroin and morphine were available over the counter at the corner drugstore.

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*Judith S. Kaye is Chief Judge of the State of New York.

In short, society has changed radically over the past century. So it's no surprise that much has also changed in the practice of law, and the pace of change has been accelerating dramatically. Our standards of conduct, of course, have also had to change to adapt to the many new situations and new challenges confronting clients and their lawyers.

History of Ethics Regulation

Between 1908 and 1969, the Canons themselves were amended only a handful of times. Then, in 1969, the ABA replaced them, wholesale, with the Model Code of Professional Responsibility. After less than a decade of experience with the Model Code, the ABA saw the need for significant change. A review by the Kutak Commission led to scrapping the Model Code entirely and replacing it with the Model Rules of Professional Conduct. That took place in 1983—the very year I left private practice to join New York State's high court, the Court of Appeals. So it's a Silver Anniversary year for both of us.

When it comes to developing model codes of conduct for lawyers, it's fair to say that the ABA has a great deal to be proud of, but lots more can still be achieved. (Come to think of it, I'll take that as a personal evaluation of my 25-year Court of Appeals tenure as well.)

As I know from my years as a judge of a common law court, statutes—codifications of law, such as ethics codes—are important elements of our legal system. But codes don't exist for their own sake. They don't have lives of their own.

History has taught us that we must continue to review and adapt our laws to changes in society—and that applies to codes of conduct as well. If we are going to consider what our rules of professional conduct should look like 10, 25, 50, even 100 years from now—and that's something we should continually do—we have to begin with an understanding of why we have those rules in the first place.

Actually, the ABA's decision a century ago to develop national ethical standards had several different motivations.

The traditional story is that President Theodore Roosevelt, in a 1905 address at Harvard Law School, criticized the legal profession for following the ethics of the marketplace instead of higher principles of morality. He urged the bar to take affirmative steps to rein in unprofessional elements and thereby raise the standard of conduct for all lawyers.

In response to that challenge, the ABA did what it has always done so well: it created an outstanding committee to study the issue. After two years of work, widespread review and comment by the bar, and some limited debate at the ABA annual meeting (mostly on contingent fees), the ABA approved the Canons in President Neukom's home town of Seattle—a nice coincidence—on August 27, 1908.

Other motivations ascribed to the profession are distinctly less romantic. The United States was in the midst of its largest wave of immigration: more than 15 million immigrants arrived between 1900 and 1915, as many as had arrived in the preceding 40 years. The 1910 census revealed that three quarters of New York City's

population were either immigrants or first-generation Americans, and they—most of them intelligent and industrious—were trying to get ahead in our society, even become lawyers. As the unflattering story goes, leaders of the profession saw this development as a threat, and used President Roosevelt's admonition as an excuse to adopt rules that would rein in the upstarts and perpetuate the elite's monopoly over the provision of legal services. Under that theory, the Canons were adopted to keep people like—well, like most of us in this room—out of the legal profession.

We'll probably never know whether the Canons in fact were the outgrowth of high-minded ideals, base protectionism, bigotry, or some mixture of all of them. But plainly, ethics rules are capable not only of improving the character of the legal profession but also of advancing particular agendas, some justifiable agenda, others manifestly improper. Having been entrusted by society with the privilege of setting and enforcing our own rules, lawyers have a particular obligation to avoid misusing our professional conduct rules.

Responsibilities of the Privilege of Self-Regulation

Just think for a moment about what the privilege of self-regulation means in practical reality.

Lawyers, including so many of you in this room, have participated in the process of drafting the Model Rules of Professional Conduct, and in encouraging implementation of the Rules or variations of them in your own states. I well remember my own days as a member of bar association ethics committees, assiduously reviewing and commenting on revisions to the code of conduct proposed by the ABA.

Lawyers in judicial robes are responsible for deciding whether to adopt recommended rules—a process we are this year engaged in here in New York. We are incidentally the only state with the dubious distinction of still keeping the format of the Code of Professional Responsibility.

Lawyers prosecute lawyers, themselves often represented by still other lawyers, for violations of the rules that have become law. Judges render the ultimate decisions that can and often do have catastrophic effects on the future career of the charged lawyers and on the lawyers' clients. Rarely are lawyers subjected to professional discipline at the hands of individuals who have never been trained in the practice of law.

And finally—just as a small reminder—it is *lawyers* who decide who gets to practice law in the first place through the admission process.

All told, it is a remarkable privilege we have as lawyers in a self-regulating profession.

But again, self-regulation is a privilege, not a right, and the privilege can be lost. We have seen efforts by entities outside of the legal profession to enact laws that govern how lawyers practice law. The interplay between the Securities Exchange Commission and the ABA about client confidentiality rules earlier in this decade is but one example of a government entity outside the judicial branch telling

the legal profession, in effect, "regulate yourself or we will do it for you." And we have seen instances when the profession hasn't been given a choice, so that we have an encroaching overlay of external laws with which lawyers must comply.

Recently, in other common law countries, concerns about restrictions on competition among lawyers and the delivery of legal services to the public have given rise to governmental control of lawyer admission and discipline, taking that privilege away from the bar. In England and Wales, in Australia, and more recently in parts of Canada, lawyers are now regulated by government-created agencies rather than lawyers themselves. Those fundamental changes resulted from the perception that the legal profession was not exercising its privilege of self-regulation carefully and responsibly, and was instead using that power to stifle competition.

Plainly, the legal profession risks losing the incredibly vital privilege of self-regulation if the privilege is not exercised responsibly, if the privilege is not exercised in a way that maintains the respect of the public.

Fundamental Precepts for Self Regulation

Over the past 100 years, the American Bar Association, chiefly through the ABA's Center for Professional Responsibility, has contributed enormously to the goal of responsible self-regulation through the work of its tireless volunteers and outstanding staff. With the support of such resources, the profession can move forward, examine how best to preserve its privilege of self-regulation, ensure that lawyers adhere to the highest standards of professional conduct and command the respect of the public.

As we move forward to face the challenges of the future, I think of three fundamental guiding precepts.

The *first* is to recognize that the principal purpose of having a lawyer code of conduct is to set the minimum standards for attorney conduct, rather than to discipline lawyers for professional misconduct. Of course, disciplinary prosecutors charge lawyers with violations of the rules, and courts interpret and apply those rules when imposing sanctions on lawyers. But as the Model Rules themselves recognize,

> "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings." [MRPC Scope ¶ 16.]

Facilitating voluntary compliance, then, is critical to maintaining the integrity of the Bar. Enabling the legal profession to locate the rules easily and to understand them readily—that is, providing guidance to the vast majority of lawyers who want to fulfill, even exceed, their ethical obligations, as most do—is the predominant goal of our ethics code.

Second, when the rules are in fact used to discipline lawyers, or are relied upon by courts in deciding the many common law issues to which standards of professional conduct are relevant, they must be interpreted and applied in a way that makes sense, and that comports with fundamental principles of procedural and substantive due process. The rules are not a trap for the unwary. Lawyer disciplinary proceedings must be conducted in a way that is consistent with the highest traditions of the American system of justice. That goes for the procedural attributes of the disciplinary system as well as for the fairness of the rules themselves. Lawyers must understand the law governing them as lawyers as they decide what action to take, or not to take, in their day-to-day practice of law. Working together, we must do whatever we can to develop intelligible rules that provide sufficient clarity so that lawyers have the tools with which they can avoid unethical conduct.

Third, those who develop the rules, whether they work through the ABA or through state bars, or in the courts, would do well always to think ahead. By constantly examining the relationships among lawyers, clients, courts and the various other constituents of the legal system—and measuring them against societal changes and analyzing them against changes in the common law—rulemakers are in a position to assess whether old rules have become outmoded, in form or in substance, whether new rules are needed, or whether the structure of lawyer regulation itself needs to be revisited.

Mindful that we must always recall our purpose, our goal, we take this great centennial occasion to look back to our objective in developing national codifications of professional conduct through a bench-bar collaboration. Codifications like the Canons, and the Model Code and Model Rules that have followed them, are among the tools by which we ensure that, for the future, the legal profession maintains the respect of the people it serves. Thus our independent legal profession continues to play a key role in American society, and in the world.