A Message from the Legal Profession: SOS[1]

While the Commission seems to be addressing a broad range of issues, in my view only one issue really matters. The rest are fellow travelers trying to hitch their unworthy wagons to a sympathetic cause for their own benefit. To what do I refer? The delivery of legal services to the unserved. No one can gainsay the importance of responding to this need. But so many of the "solutions" suggested strike at the fundamentals of lawyering and the special responsibilities of lawyers as officers of the court. That these suggestions might ripen into dramatic changes to our fundamental professional principles cultivated by a blue-ribbon Commission of the American Bar Association is a tragedy beyond comprehension, though one I feared was coming. When William Hubbard first touted the Futures Commission, he repeated the phrase "independence of lawyers" perhaps a dozen times. On the third repetition I started worrying; when he reached double digits I knew professional independence was a likely casualty.

A Personal Detour

I wanted to be a lawyer long before I had any idea what a lawyer was. My father was a lawyer and that was enough for me. Then I went to law school and my pride at becoming a lawyer could not have been greater. Giants at the law – Anthony Amsterdam, Paul Mishkin, Bob Mundheim, Bernie Wolfman – strode the halls at 3400 Chestnut Street, inspiring us to become dedicated professionals defending liberty, ensuring justice. And, after my clerkship on the Pennsylvania Supreme Court, the same group of Penn Law Professors put together the training for the Reginald Heber Smith Community Lawyer Fellowship Program that trained 250 of us "Reggies" to go into the then new and exciting Legal Services Program, at that time part of the

[1] This paper is dedicated to the memory of my client, LT CDR William Kuebler, who died on July 17, 2015. Bill, a JAG officer, represented Omar Khadr, a Guantanamo detainee, and at great personal sacrifice demonstrated why lawyer independence is and will remain critical to the functioning of any effective system of justice. The paper only reflects the views of the author and, in particular, does not necessarily reflect the views of the Section of Litigation.

Office of Economic Opportunity, whose Director was Donald Rumsfeld, a curious fact few remember. Talk about inspiring. We were young crusader rabbits at the dawn of a new era in indigent legal services, bringing test cases and class actions, lobbying for legislative reform, and engaging in community organizing (long before President Obama). "Power to the people" through law.

But alas, private practice beckoned and, casting aside my guilt, I joined Drinker Biddle & Reath, the firm of the late Henry S. Drinker who held a lock on the Chairmanship of the ABA Standing Committee on Ethics and Professional Responsibility for more than a decade. Mr. Drinker had been succeeded on the Ethics Committee by Lewis H. Van Dusen, Jr., the then leader of Drinker Biddle & Reath, who urged me to get involved in the ABA. I enthusiastically did.

Membership and leadership in the ABA made my buttons burst with even more pride as I took an active role in what I view as one of the three pillars of ABA endeavors, the ABA Model Rules of Professional Conduct, (the other two being the review of federal judges and the establishment of standards for the accreditation of law schools).

Pardon my autobiographical exegesis, but one can only understand my pain, my distress, my dismay if one knows my journey and how that shapes my response. For what this Commission is embarked upon could be nothing short of the destruction of our profession as we celebrate it. Irony upon ironies, that untoward result is being rationalized, at least in part, as an attempt to fill the gap in the delivery of legal services to those who cannot afford them. But in my view what the Futures Commission might be contemplating is an abandonment of all the profession, the ABA, and I stand for. Permit me to explain.

Routine Surgery is Surgery on Someone Else

> "Many traditional legal tasks do not demand the training and expense required for bar membership. Advice about a divorce or a landlord-tenant problem, help getting government benefits, and assistance with an immigration issue are examples."

These are the exact words of my friend Stephen Gillers, a professor of ethics at New York University Law School, published two weeks ago in the *New York Times*, of all places.

I guess the body snatchers got him. You do not need a lawyer for a divorce? Please! Divorce involves some of the most difficult and significant legal, emotional and financial issues an individual can face: custody, alimony, child support, visitation, and that is without regard to the need to address property division. Even the most routine divorce can and will cascade out of control.

And landlord-tenant? With the landlord represented by counsel, Professor Gillers would have the ABA tell clients they will be going into court with something short of a lawyer. A fair fight alright. Landlord gets the full body armor. The tenant, a paper maché imitation.

Professor Gillers recommends government benefits as the next non-lawyer opportunity. Is he kidding us? From Social Security to the Affordable Care Act to Medicaid to food stamps, lawyers must address some of the most complicated, byzantine programs anywhere, governed by regulations that fill volumes, defying both logic and need.

Finally, Professor Gillers lists immigration as a place where we can solve poor peoples' problems with semi-lawyers. Can he do so with a straight face? Did he talk to any immigration lawyers? This field is one of the most sophisticated and dangerous our clients can encounter. The law is contorted beyond rationality and a representation gone wrong finds the client deported or incarcerated.

Now don't get me wrong. There is a place for paralegals and other non-lawyer assistants in helping lawyers be more efficient and cost-effective in delivering legal services. I applaud innovative thinking, even digital contributions. But all clients, particularly the poor, deserve real lawyer supervision, responsibility and control for all that is undertaken on their behalf. And that is because the only routine surgery is surgery that is being performed on someone else, and only a full-fledged lawyer will be able to identify when it is that the legal services required are anything but routine.

In fact, it is the ABA that has established this professional standard for the very best of reasons: the special responsibilities and powers of lawyers as officers of the court in addressing the complexities of the law requires a three-year education at an ABA accredited law school, the passage of a bar examination as well as the MPRE, a character and fitness review, an obligation to observe all of the ABA-established rules of professional conduct and continuing legal education. If we are not going to stand by these requirements, why did we bother in the first place? And once we start chipping away at them, there will be no getting them back. The ratchet goes one way.

Caldwell & Moore Go Public[2]

Once upon a time, the idea of a law firm selling shares to passive investors was either a fairytale or a nightmare. If I am reading the Commission's tea leaves correctly, the former may no longer be true but, for sure, the latter remains. The idea of public ownership of a law firm is as destructive of professional principles as any we can imagine. The problems are inherent and there is no way to avoid them. Once a law firm is a public company, it is immediately conflicted by its simultaneous roles pursuing the best interests of its shareholders and the best interests of

[2] The following was written before Judge Lewis Kaplan's welcomed decision in *Jacoby & Meyers LLP v. The Presiding Justices*, 11 Civ. 3387 (LAK)(S.D.N.Y. July 15, 2015) finding ample support for Rule 5.4's prohibition on non-lawyer ownership of law firms.

its clients. The shareholders are entitled to have the law firm maximize their profits. That is why they invested and that is the law. But our professional rules put clients first and foremost. The conflicting fiduciary duties are profound.

Then there are the conflicts created by the identity of the public shareholders who, as they buy and sell Caldwell & Moore shares, will create real ethics issues. For example, what happens when the law firm clients seek to take positions directly adverse to the interests of the law firm's shareholders? If an adverse party to a client becomes a shareholder mid-way in a representation? If the shareholders insist on no pro bono work? No representation of controversial or, worse yet, unpopular causes? No money wasted on bar association memberships or bar association endeavors?

Next there is the issue of control. The shareholders have the ultimate power, which, of course, includes the right to elect and reject directors of the enterprise, even terminate directors and dismiss executives. The proponents of this brave new world have suggested that the solution to the control issue would be to keep the shareholders in a minority position. But such a "solution" reflects naiveté on the part of those individuals. In a public corporation where the 300 partners of Caldwell & Moore own 51% or even 80% of the shares divided among all of them, the minority could easily control the enterprise. Indeed, in some public companies shareholdings as small as a few percentage points often can exercise complete control.

The question must be asked: How could a law firm operate with public shareholders and the preservation of client confidentiality? Our Rule 1.6 renders everything lawyers know, even information in the public record, as confidential information that may not be disclosed without the client's informed consent. Shareholders of public companies are entitled to material information about the business on a quarterly basis, and more often as to extraordinary events.

And the most important information a law firm investor will want relates to client engagements, "Big Deals" and "Big Suits" in the nomenclature of that first profession-destroyer, "The American Lawyer" magazine, all information that is confidential and much of which is also privileged.

In the Professionalism Committee's recent book, *The Relevant Lawyer*, the argument is advanced that we already have non-lawyer ownership of law firms in the form of insurance companies' in-house lawyers representing insureds. That anyone would advance this argument as a reason for permitting public ownership of law firms is nothing short of flabbergasting. Insurance companies' control of in-house law firms that provide legal services to their insureds has turned out to be a troubling professional responsibility concern. Time and time again, lawyers have been forced to compromise what they believe to be in the best interests of the insureds (hiring experts too late; limiting depositions) because of strict guidelines imposed on those lawyers by the non-lawyer, un-disciplinable owners of the firms. California, for example, has adopted a whole new breed of lawyer, *Cumis* counsel, to address this problem. Surely, no one on the Commission would want to compound the compromises that can befall clients of those insurance company law firms by extending the non-lawyers' intermeddling to other practice settings, particularly when public ownership is totally unnecessary.

We are told that there is now public ownership of a few law firms in Australia and one in the United Kingdom, and we in the United States have to remain competitive. But this is one competition we should not enter because public ownership of law firms is a beginning of a race to the bottom, compromising professional values all along the way.

I looked into the public law firm in England. I have searched far and wide and have found nothing in the history of that law firm that suggests for a moment that, as a result of the

firm going public, legal services for the indigent have improved or pro bono services by that law firm have increased. In fact the clash between the best interests of the shareholders and any lawyer's desire to provide pro bono services is a head-on collision, not likely to make the lawyers in the public law firm dedicate more time to the indigent. And the fact that these lawyers are now sharing profits with the folks who invested $47 million in the venture is hardly encouragement for those lawyers to undertake more pro bono hours, particularly for unpopular clients and cases.

Finally, there is the argument that by going public these law firms would be able to more easily raise capital. One look at the Big Law firms in the United States, the firms most likely to go public, and one can be sure that their top ten lists of needs do not include the need to raise capital. After all, the real capital of these law firms is the personnel who go down in the elevator every evening, not in capital equipment to make their work more efficient. And after Dewey LeBouef, let us hope we see no more "investment" in lawyers in the form of fixed, seven-figure compensation contracts with incoming laterals.

Requiescat in Pacem: MDP Redux[2]

The next potential change that has been suggested is that lawyers be permitted, even encouraged, to form multidisciplinary practices in which the owners of the enterprise include both lawyers and non-lawyers. I thought this multidisciplinary idea was one that had been given the appropriate internment after Arthur Andersen and Enron demonstrated what happens when one mixes a profession like auditing with a business like consulting. But MDP appears to be raising its ugly head one more time. All that is unfortunate about multidisciplinary practice can be seen in a snippet from former President Carolyn Lamm's chapter in *The Relevant Lawyer*. There she observes in passing – without affect– that among the largest law firms in Europe are now the Big Four accounting firms, which are happily practicing law along with all of their other

endeavors like auditing, tax planning and consulting. There is no limitation on such multiple mixed services in most of the European countries. But we all know that the only way these enterprises can operate is if the rules of professional conduct are jettisoned to accommodate their "special needs."

Back during the last debate on multidisciplinary practice the accountants were arguing that they had conflict of interest rules just like ours. But we quickly found out that was not the case. The accounting firms have been able to grow as large as they are and employ as many service providers as they do because all conflicts are personal to the individuals who are delivering the services. So too with their legal services. As a result, in one fell sweep, the Final Four eviscerate our professional rules of conduct governing conflicts by abandoning imputation entirely and limiting any recognition of conflicts to the individual service provider.

Now I know that this is the dream of many of the big law firms. Thirty-three of their general counsels had the temerity to demonstrate their dim view of client loyalty by submitting just such a proposal to the Ethics 20-20 Commission. And just two days ago (I am writing this on July 9) we read with interest that Dentons has taken the position that its lawyers in Canada can sue a client of its lawyers in the United States because the law firm is organized into a Swiss Verein, and the lawyers handling these matters are in different subsidiaries of the Verein, even though a look at the firm's website makes it clear Dentons is one firm in servicing its clients, calling on legal talent in any of its subsidiaries, each of its highly touted practice areas drawing expertise from any of its offices dotting the globe. So we now recognize that the first casualty of multidisciplinary practice will be the loyalty that lawyers currently owe their clients.

The second casualty, just as in the publicly-owned law firm, is control. If lawyers can partner with non-lawyers, how long will it be before those non-lawyers insist on significant, if

not complete, control of the overall enterprise? And one need not be very imaginative to conjure up the many scenarios that are likely to arise that result in the law firm being under complete control of non-lawyers, as the Goldman Sachses of the world take MDP's public.

The third casualties are confidentiality and the privilege. This takes at least four different forms. First, by mixing service providers in with lawyers in a firm delivering mixed services to clients, the special privilege that attaches to lawyer-client communications will be compromised by the presence of non-lawyers during these communications or as recipients of them in written form. Second, if non-lawyers are privy to those communications, the topic must be something other than legal advice, and therefore not protected. Third, if these MDP's become public companies, the same confidentiality-defying disclosure obligations will attach to the public company's obligation to report to the SEC and its shareholders on a regular and episodic basis. Fourth, if accountants form MDP's with lawyers, you have a direct confrontation between the auditors' duty of disclosure to the public and the lawyers' duty of confidentiality to their clients.

During the last debate on this topic I wrote a piece that described the annual meeting of the Association of Multidisciplinary Pros ("AMP"). I imagined an AMP convention in Chicago in August where the Law Related Section of this great new trade association was assigned a marginal hotel, close to McCormick Place, where among the Goliaths of financial service providers, the lawyers could have their own little conclave. I think the analogy is as apt today as it was then. Instead of being a proud profession, committed to our fiduciary client protections, reflecting lawyer's roles as officers of the court, ersatz legal service providers (including a few remaining real lawyers) will become a marginalized part of the consulting business, just another cog in the free enterprise wheel, compromising the privilege and serving clients based on the priorities of the leaders of their multidisciplinary practices.

Finally, the last thing one would expect from permission for lawyers to form partnerships with non-lawyers is that suddenly the legal services needs of the indigent will be enhanced by these developments. If anything, after placing lawyers in these compromising positions with non-lawyer partners dedicated to high finance and sophisticated business consulting, the needs of the underserved will be diminished by the competitive standards of the market place. When Wall Street "rolls up" law firms, merges them with other service providers and then takes the new enterprises public, do not say we had no notice where our profession would meet its untimely end.

Pipe Dream Alternatives

If I reject the solutions offered by the proponents it is my obligation to suggest how we might make real strides in improving access to justice. My proposals might seem outside our reach, but I think, until we try them and fail, we must reject the idea of second-class lawyers for the poor, public ownership of law firms, sharing fees with non-lawyers and any other solutions that compromise lawyer independence, loyalty, confidentiality or the privilege, in the name of providing legal services to those of limited means.

Learning from the NRA

The ABA's support for legal services for the indigent is in some ways our proudest accomplishment. Year in and year out we have lobbied Congress, given awards to our friends, celebrated the Legal Services Corporation and preserved some semblance of a federal program, while supporting state and local programs through IOLTA, dedicated court fees and other fundraising efforts. It was, in fact, my idea to start ABA Day in 1997 (though at the time we were not allowed to call it that). And the idea of civil Gideon has been endorsed and supported by the ABA in a few test cases. But today support for legal services at the federal level is at a

dollar level dramatically lower in real dollars from decades ago. In other words, try as we may, we have failed, treating a ten gallon need with the resources found in an eye-dropper.

My view is that we have not let ourselves think boldly or expansively enough. The right to counsel in civil matters should be supported like the right to medical care or the right to a public education. Rather than endorse quasi-lawyers lite, we should be proud of what we do and support its expansion to all regardless of the ability to pay . To accomplish that will require an expensive, lengthy, clever, persuasive national campaign, organized and funded like the teacher's union and the physicians and Emily's list and, yes, the NRA, support their causes. It means national advertising and, hold onto your seat, campaign contributions rewarding our legislative friends and funding the friendly opponents of our legislative detractors. It requires thinking about spending millions and committing to a decade-long initiative. It means doubling our staff and knocking on foundation doors. It means abandoning our narrow view of what we can accomplish. It means hiring a national spokesperson like our soon-to-be retired first lady or her husband. It means getting behind a program that every lawyer can support, not just those who dream of ending the professional responsibility standards that make us a profession. It means getting Justices Scalia and Ginsburg to be Honorary Co-Chairs. Or the Chief himself. And it means one more huge item.

Lawyer Contributions – Tithing/10

This program needs the support of those who have succeeded beyond anything they could have imagined – the titans of Big Law and the General Counsel of the Fortune 500 – to give at a level commensurate with their good fortune. Only that way can we go to our clients and the Foundations seeking millions more in support of the right to a lawyer for anyone who cannot afford one. Only that way can we point with pride to what we lawyers have done for the cause.

Today, the level of lawyer charitable support is an embarrassment. Firms with profits per partner of seven figures congratulate themselves for supporting legal services programs at a level of $300 or $500 per lawyer or some miniscule fraction of one percent of their revenues. But think of the fund we could create if just one percent of lawyer gross national product were contributed to the cause.[3] Legal services is a $221 billion dollar slice of the United States economic pie. Just one percent is over two billion dollars.

Mandatory Pro Bono

Fifteen years ago, when the Ethics 2000 Commission was in high gear reviewing the model rules one by one, we came to Rule 6.1, the pro bono rule. After a lengthy discussion, the Commission voted, basically two-to-one, not to change the rule to mandate pro bono services. That night one of our Commission members, Dick Mulroy, then general counsel of Mutual of New York, reconsidered his view. And when he appeared at our meeting the next day, he pointed to the Preamble of the Model Rules of Professional Conduct and, in particular, the phrase, "a lawyer … is … a public citizen having special responsibility for the quality of justice." Dick argued that we could not continue to include that phrase without mandating a pro bono obligation for each lawyer. And so that Commission launched mandatory pro bono as a trial balloon, one that was met with a firestorm of objection. As a result, the rule remained hortatory, as it is today.

But since then, there have been some encouraging developments. Law schools have adopted mandatory pro bono for their students. The New York Court of Appeals, in what I consider a counterintuitive approach, has mandated pro bono for incoming lawyers, though not

[3] We see the same embarrassing level of support for vital bar association activities, with the American Bar Association being reduced to literally begging Big Law to join the only organization that represents all lawyers everywhere (even lawyers in the territories) at a heavily discounted price, lawyers who could easily pay ten times as much, if their obsession with profits per partner were not so intense.

for those who are seasoned and could make the greatest contributions if pro bono services from law firm partners were required. In any event, it seems to me that we should mandate pro bono service by all lawyers to help fulfill this legal services need long before we decide to jettison our professional responsibility standards in the name of letting non-lawyers and paralegals deliver legal services to do so.

The Relevant Lawyer

This cry in the night cannot conclude without acknowledging the so-called "reimagination of the legal profession" reflected in this publication of the American Bar Association: I read it, not surprisingly with dread. A review of the authors told me that much. But that was not my most important reaction. Rather, it was depression. Maybe all the ideas, movements and forces reflected in the book will come to pass. Maybe the profession, as we know it, will disappear, become extinct. Maybe it is inevitable. But what is proposed offers no joy, no cause for celebration, no pride in lawyering, no reason to continue to use the word "profession" at all. Rather, I read smug descriptions of the unstoppable forces before which we are asked to lay prostrate, with not one word about the downsides, what we will have lost, as if economics and world-wide competition must be accepted on their own terms, a profession that has sold out to the investment bankers, a profession that is swallowed by the accountants, a profession that worships at the altar of Silicon Valley, a profession that solves the failure to deliver affordable legal services to all by compromising our standards for who can deliver those services, a profession that thinks so little of its special role and responsibility that it accepts eliminating the concept of the unauthorized practice of law and the protection it offers the public as simply, well, anticompetitive.

All this from the American Bar Association, which used to launch the very best fireworks on behalf of lawyer independence, lawyer loyalty, lawyer confidentiality, lawyers as officers of

the courts, lawyers as a self-governing profession through bar associations and the courts, lawyers as a true reflection of American exceptionalism, an Association that celebrated the differences between our lawyers and those of other countries, seeking to export the fundamental values of our profession, not try to achieve the lowest common denominator to be sure we can compete. For this group of "relevant" writers, things must change so much, and such change is so welcomed, that the words "core values," "loyalty," "conflicts of interest," "confidentiality," or "attorney-client privilege" do not even make the index and, unless I missed it, the text.

Conclusion

Let us think big. Let us think united. Let us think of preserving, rather than destroying, the profession as the vehicle for achieving affordable legal services for all. The American Bar Association leading the way to achieving affordable legal services – delivered by a full-fledged lawyer – for all. I can hear the right to counsel flag snapping in the breeze now.