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# Real Metamorphosis or More of the Same: Navigating the Practice of Law in the Wake of Ethics 20/20 - Globalization, New Technologies, and What it Means to Be a Lawyer in These Uncertain Times

Jack P. Sahl

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**REAL METAMORPHOSIS OR MORE OF THE SAME:  
NAVIGATING THE PRACTICE OF LAW IN THE WAKE OF  
ETHICS 20/20 – GLOBALIZATION, NEW TECHNOLOGIES,  
AND WHAT IT MEANS TO BE A LAWYER IN THESE  
UNCERTAIN TIMES**

*Jack P. Sahl \**

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## I. INTRODUCTION

The profession and the marketplace for the delivery of legal services are undergoing dramatic changes, having been buffeted by tsunami-like forces during the past several years. Law schools are reducing the size of enrollments, staff, and faculties in the face of declining applications and challenging employment prospects for graduates.<sup>1</sup> Lawyers are experiencing painful rates of unemployment and underemployment.<sup>2</sup> Courts are dealing with limited resources to address increasing demands for their services.<sup>3</sup> Much of the public is still struggling to obtain legal services and continues to be dissatisfied with the cost, delivery, and quality of the services that they do receive.<sup>4</sup>

These challenging developments in the profession often create lawyer stress, dissatisfaction, and withdrawal from the profession – inevitably affecting others, for example, family and friends. These developments also increase the risk that lawyers will become the target of disciplinary proceedings or legal malpractice actions, especially given the complexity of the law and advances in technology that ignore national and transnational borders and reduce the amount of time that lawyers have to reflect on substantive legal matters. This risk is heightened by the increased competition in the bar to deliver legal services in a cost-effective manner, the sophistication of clients who expect competent, efficient, and reasonably-priced services, and the litigious nature of consumers. The risk is further exacerbated by the ever-changing methods of, and rules governing, electronic communication and the storage of information. The magnitude of the risk is underscored by the prediction that law school graduates “will be the subject of three or more claims of legal malpractice before finishing

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1. Joe Palazzolo & Chelsea Phipps, *With Profession Under Stress, Law Schools Cut Admissions*, WALL ST. J., June 11, 2012, <http://online.wsj.com/article/SB10001424052702303444204577458411514818378.html>.

2. See, e.g., Mark Hansen, *Job Market for Would-Be Lawyers Is Even Bleaker Than It Looks, Analysis Says*, ABA JOURNAL, Apr. 1, 2013, [http://www.abajournal.com/news/article/job\\_market\\_for\\_would-be\\_lawyers\\_is\\_bleaker\\_than\\_it\\_looks\\_analysis\\_says/](http://www.abajournal.com/news/article/job_market_for_would-be_lawyers_is_bleaker_than_it_looks_analysis_says/).

3. Daniel J. Hall, *Reshaping the Face of Justice: The Economic Tsunami Continues*, COURT CONSULTING SERVICES 1, [http://www.ncsc.org/Information-and-Resources/BudgetResourceCenter/Analysis\\_Strategy/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Hall.ashx](http://www.ncsc.org/Information-and-Resources/BudgetResourceCenter/Analysis_Strategy/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Hall.ashx).

4. See, e.g., Benjamin Cooper, *Access to Justice without Lawyers*, 47 AKRON L. REV. 205 (2014).

a career.”<sup>5</sup>

On April 4 and 5, 2013, The University of Akron School of Law’s Miller-Becker Center for Professional Responsibility (“MBC”) hosted the symposium, *Navigating the Practice of Law in the Wake of Ethics 20/20 – Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times (Ethics 20/20 – Uncertain Times)*.<sup>6</sup> The symposium examined the myriad of changes and problems confronting the bar, legal education, and the courts. Although law schools,<sup>7</sup> courts, and the organized bar<sup>8</sup> have provided a steady supply of programs addressing the recent changes confronting the profession and legal education, *Ethics 20/20 – Uncertain Times* was the first to examine some of these changes after the American Bar Association (ABA) Ethics 20/20 Commission (Ethics 20/20 Commission) concluded its work.<sup>9</sup> The

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5. Kenneth J. Abdo & Jack P. Sahl, *A Professional Responsibility Primer for Today’s Entertainment Lawyer*, 18-FALL ENT. & SPORTS LAW 3, 3 (Fall 2000) (quoting John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: The Struggle to Reform Ohio’s Disciplinary System*, 68 U. CIN. L. REV. 65, 66 (1999)).

6. There were thirty participants in the symposium, including eighteen distinguished faculty from across the country with one of them having served as the Reporter for Ethics 20/20. Other participants included the Director of the Facultad Libre de Derecho de Monterrey, Mexico (offering a comparative perspective on corporate law and lawyer regulation); a federal appellate and district court judge; and ten attorneys, including the deputy director of the ABA Center for Professional Responsibility, the ABA counsel to Ethics 20/20 and several leading in-house counsel from such companies as The Timken Co., The Eaton Corp., The Lubrizol Corp., and Vitamix. More than 110 people attended the one and one-half day symposium at the University of Akron campus. A significant number of law students attended the symposium, although practitioners constituted the single largest group of attendees. Lawyers from large and small firms attended the program along with public lawyers (e.g., Ohio’s Statewide Disciplinary Counsel).

7. Deanell Reece Tacha, Symposium, *The Lawyer of the Future*, 40 PEPP. L. REV. 337, 337 (2013) (reporting that “[i]ntrospection is the order of the day for legal education and the legal profession” and recommending that the legal profession and legal educators recognize they have “failed to adapt to the changing needs of students, the profession, and the nation.”); Miller-Becker Center for Professional Responsibility (MBC) Symposium, *Lawyers Beyond Borders and Practicing Law in the Electronic Age* (2009) (examining changes in the delivery of legal services). The Association of American Law Schools (AALS) examined some of the recent changes affecting law schools at a special, day-long program titled, *Student Services – Shaping Our Students’ Futures: Critical Issues from Admissions to the Practice of Law* at its 2014 Annual Meeting in New York City.

8. See, e.g., Symposium, *Court Funding*, 100 KY. L.J. 729 (2011) (the American Bar Association (ABA) co-sponsored the event discussing the current crisis in state court funding, featuring lawyers, judges, leaders in business, and policymakers from across the country).

9. ABA President Carolyn Lamm recognized that new technologies and globalization had significantly affected the practice of law since the ABA’s last major review of the Model Rules of Professional Conduct (MRPC) in 2000. AMERICAN BAR ASSOCIATION, *ABA Commission on Ethics 20/20, Introduction and Overview*, Sept. 5, 2013, [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf). At that time, the Ethics 2000 Commission recommended changes to the MRPC that were adopted in 1983. The MRPC constituted a significant change both in format

Ethics 20/20 Commission conducted an almost three-year review of the profession's ethics rules and practice standards in light of new technologies and the increased globalization of the delivery of legal services. *Ethics 20/20 – Uncertain Times* sought, in part, to better understand the challenges confronting lawyers – or “what it means to be a lawyer in these uncertain times” – and whether the Ethics 20/20 Commission's recommendations really helped the profession regarding the challenges of globalization, new technologies, and related concerns (e.g., multi-disciplinary practice (“MDP”)).

## II. THURSDAY AFTERNOON SESSION

On April 4, two panels discussed the ethical and business challenges confronting in-house counsel in light of Ethics 20/20 and recent developments in the delivery of legal services.<sup>10</sup> Panelists addressed a wide variety of issues, including the “unique ambiguities surrounding [lawyer] self-regulation, conflict[s] of interest,” cultivating financial and political support for the law department, and “determining exactly who is one's client as an in-house attorney” – a fundamental but often perplexing question.<sup>11</sup>

### A. *Panel I: Challenges Confronting In-House Counsel (Part One)*

David Nolin spoke first on the panel, *Challenges Confronting In-House Counsel (Part One)*. He discussed some of the differences between serving as in-house counsel and working for a private law firm.<sup>12</sup> As an example, Nolin stated that there is a higher need for in-house lawyers to self-police their work because the corporate client is unlikely to file a professional grievance or to sue them for malpractice if they make a mistake or violate a legal ethics rule.<sup>13</sup> He also said that

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and substance to the 1969 Model Code of Professional Responsibility – the ABA's first Ethics Code. In short, it was again time for the ABA to assess, and probably update, ethics rules to reflect dramatic changes affecting the practice of law.

10. Panelists for Challenges Confronting In-House Counsel (Part One) were: Mariann Butch, General Counsel, Vitamix; David Nolin, Director Legal Services, The Timken Co.; Eric C. Chaffee, Professor, University of Toledo; Jose Fernandez, Director Facultad de Derecho, Monterrey, Mexico; and Jack P. Sahl, Moderator.

11. Benjamin White, *UA Law Conference Addresses Challenges of In-House Counsel*, AKRON LEGAL NEWS, May 10, 2013.

12. David Nolin is the Director of Legal Services for The Timken Co. in Canton, Ohio. He formerly worked for the legal department of Sherwin Williams and, before that, for the law firm Brouse McDowell in Akron, Ohio.

13. Videotape: David Nolin, *Navigating the Practice of Law in the Wake of Ethics 20/20—Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times*

generally the work of in-house lawyers involves more business ethics than legal ethics considerations.<sup>14</sup> The core values of business ethics being honesty, integrity, and compliance with the laws. These values are also shared by the law profession, but in-house lawyers are not generally involved with a myriad of other professional ethics issues such as solicitation, fees, or communicating with the opposing party. Nolin underscored that delivering legal services to a global organization frequently presents questions about what constitutes the “practice of law” and related concerns about the unauthorized practice of law.<sup>15</sup> He reported that in China and elsewhere, the competition to provide legal services comes from nonlawyer groups, such as employment, counseling, and consulting firms that dispense de facto legal advice.<sup>16</sup> Nolin concluded by discussing conflict-of-interest issues in providing advice to business affiliates that are not wholly owned by Timken.<sup>17</sup>

Panelist Mariann Butch described her extraordinary journey from being a corporate litigator in a large Cleveland firm for fourteen years and walking away from the practice of law to returning as a part-time contract lawyer for a family-owned company, Vitamix.<sup>18</sup> Three months later, Butch became Vitamix’s first general counsel.<sup>19</sup> Butch experienced significant competency issues as she increasingly was asked for advice on a wide variety of legal topics ranging from intellectual property and government regulation to employment and international law.<sup>20</sup> Butch stressed the importance of calling for help from fellow in-house counsel and outside firms and “to stop giving casual advice on matters that [she] did not completely understand.”<sup>21</sup> She also explained that determining who the client is in a family-owned business is not as

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(Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* “Wholly-owned subsidiaries presented no problems, but any company of which Timken held less than full ownership created another grey area. Nolin said conflicts of interest generally materialize when performing anything but the most basic work for partially owned subsidiaries. Recognizing and reacting to potential conflicts of interest can form the toughest ethical challenges even for an attorney at a firm.” White, *supra* note 11.

18. Videotape: Mariann Butch, *Navigating the Practice of Law in the Wake of Ethics 20/20—Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

19. *Id.*

20. *Id.*

21. Transcript of Mariann Butch’s MBC Symposium Remarks (Apr. 4, 2013) (on file with the author); White, *supra* note 11, at 1. Butch recently hired three more in-house lawyers to help her deal with the many business and legal issues that a corporation experiences during a period of rapid domestic and international growth.

simple as when you are a litigator in a large firm and the client is the person you are defending even though an insurance company is paying the bill.<sup>22</sup> Butch said that she was often called upon to give business advice, and it was challenging to explain to her business colleagues why their business discussions were not protected under the attorney-client privilege.

Butch underscored that, unlike her law firm experience, she “had to . . . learn how to make decisions by consensus. I had to learn how to involve my business partners. I had to respect those outside counsel that I hired but who may have [had] different customs and ethics rules in their countries.”<sup>23</sup>

Professor Eric Chaffee argued that in-house and other lawyers must remain diligent in combating transnational corruption. “Despite the fact that the United States Foreign Corrupt Practices Act (“FCPA”) really began as a question of ethics, it really has moved to a question of economics and a question . . . [of] how exactly we’re going to regulate . . . and make sure there is stability in . . . global markets.”<sup>24</sup> The FCPA, an anti-bribery statute passed in 1977, along with other laws, essentially prohibits domestic concerns from actually making or facilitating the paying of bribes to foreign officials and others.<sup>25</sup> He emphasized that the FCPA was the “first of its kind” and “helped to lead to a variety of international agreements when it comes to fighting foreign corruption.”<sup>26</sup> Chaffee concluded by highlighting five specific reasons why corporate counsel should focus on the FCPA. For example, he noted that today there is an “emphasis in the United States on FCPA enforcement,” reflected, in part, by the Securities and Exchange

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22. Butch indicated that family members with any ownership interest, no matter how minor, may believe that they are the client and can speak for Vitamix even though another family member has a fifty-one percent ownership share. Butch Transcript, *supra* note 21.

23. Butch Transcript, *supra* note 21.

24. Transcript of Eric Chaffee’s MBC Symposium Remarks (Apr. 4, 2013) (on file with the author).

25. *Id.* See 1 FOREIGN CORRUPT PRACTICES ACT RPTR. § 1, 2, which states that the: FCPA’s bribery provisions criminalize bribery of a foreign official for business purposes and consist of six main elements: 1) an issuer or domestic concern, an officer, director, employee, or agent of such firm or any stockholder acting on behalf of such firm, or any person; 2) using the mails or any means of interstate commerce; 3) corruptly; 4) in furtherance of an offer, payment, or authorization of payment of any money, or offer, gift promise to give, or the authorization of the giving of anything of value; 5) to any foreign official, political party, candidate for political office, or other person knowing that the payment to that other person would be passed on to one of the other above; 6) for purposes of influencing any act or decision of such foreign official in her official capacity.

26. Chaffee Transcript, *supra* note 24.

Commission's ("SEC") creation of a Foreign Corrupt Practices Unit in 2010 – portending continued enforcement.<sup>27</sup>

Jose Fernandez, an international expert on corporate law from Mexico, provided an interesting comparative perspective on some of the in-house counsel issues raised by other panelists.<sup>28</sup> Fernandez underscored that in-house counsel in Mexico deal with many of the same issues raised by Nolin and Butch. For example, determining “who is the client” poses a difficult dilemma for Mexican in-house counsel attempting to advise the entity.<sup>29</sup> Mexican in-house counsel also have concerns about potential conflicts of interest when they advise corporate subsidiaries that are not wholly owned by their entity-client. Ethics “is a global issue.”<sup>30</sup>

Fernandez reported that Mexico does not have an anti-corruption law like the FCPA in the United States.<sup>31</sup> He emphasized that it is important to remember that the authorization to practice law in Mexico is granted by the university – either the federal or the state government authorizes the university to grant law degrees. As a result, it is very difficult to set and control the ethics standards of lawyers in Mexico. Unlike the United States, in Mexico there is no incentive to be ethical because lawyers can continue to practice law based on their university law degree. Fernandez suggested that this might change as twenty-two law schools in Mexico have proposed to Congress that it amend Mexico's Constitution to require lawyers to belong to bar associations and to be subject to their regulation.<sup>32</sup> He concluded by suggesting that law schools could be doing a better job of “teaching ethical values” because at the end of the day, it is up to each lawyer to act in an ethical and professional manner.<sup>33</sup>

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27. Videotape: Eric Chafee, *Navigating the Practice of Law in the Wake of Ethics 20/20—Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

28. Videotape: Jose Fernandez, *Navigating the Practice of Law in the Wake of Ethics 20/20—Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM). Jose Fernandez is the Director of the Facultad Libre de Derecho in Monterrey, Mexico. He is also the Chair of the AALS Section on International Exchange.

29. *Id.*

30. *Id.*

31. *Id.* Fernandez reported that Mexico does have an anti-corruption law that is specific to contracts related to government services provided by government and deals with specific subjects and issues. *Id.*

32. *Id.* Fernandez reported that the ABA Rule of Law Initiative has helped with this effort to allow Mexican lawyer associations to regulate lawyer ethics.

33. *Id.*

*B. Panel II: Challenges Confronting In-House Counsel (Part Two)*

Susan Hackett, founder and CEO of a legal services company, has helped to develop numerous legal ethics and professionalism programs for in-house counsel.<sup>34</sup> Hackett began the second panel, *Challenges Confronting In-House Counsel (Part Two)*, by highlighting some interesting developments concerning the work of in-house corporate counsel.<sup>35</sup> For example, Hackett noted in-house counsel's ability "to drive business relationships with outside counsel" by negotiating alternative fee arrangements or mandating different staffing models and new business practice models that affect in-house counsel's delivery of legal services.<sup>36</sup> In her presentation, *Conflicts of Interest for In-House Lawyers*, Hackett emphasized that the ABA Model Rules of Professional Conduct (MRPC) and most state bar iterations were written with a past practice in mind and that lawyers operate in an "incredibly different world."<sup>37</sup> That new world, according to Hackett, includes the need for in-house counsel to have a heightened awareness of their gatekeeper role and corresponding obligation to aggressively protect their client's interest and ensure compliance with the law.<sup>38</sup>

Hackett reported that every in-house counsel's ethics conversation begins with the classic inquiry, "Who's the client?"<sup>39</sup> Hackett said in-house counsel "have no idea who their client is" given the daily parade of people passing through in-house counsel's office from different business units, sometimes with competing interests that are not always in the client-entity's best interest.<sup>40</sup> In-house counsel can represent anyone in the organization, provided they are acting in the organization's best interests.<sup>41</sup> "But that's a circular problem."<sup>42</sup> "Who defines what's best for the organization?"<sup>43</sup> Hackett underscored the importance of in-house

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34. White, *supra* note 11, at 1.

35. Panelists for *Challenges Confronting In-House Counsel (Part Two)* were: Susan Hackett, CEO, Legal Executive Leadership; William D. Manson, Deputy General Counsel of The Lubrizol Corporation; Terry Szmagala, Vice-President and Deputy General Counsel of Eaton Corp.; and Jose Fernandez, Director Facultad de Derecho, Monterrey, Mexico. Professor Richard Lavoie of the University of Akron School of Law moderated the panel.

36. Videotape: Susan Hackett, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* See also White, *supra* note 11.

42. White, *supra* note 11 (quoting Hackett).

43. *Id.*

counsel “having robust and open conversations with fellow employees about the nature of [the] attorney-client privilege and the many different roles an in-house attorney must play.”<sup>44</sup>

In *Compliance, Ethics and Investigations*, William D. Manson, Deputy General Counsel for Lubrizol Corp., provided an interesting insider’s perspective on corporate compliance and ethics programs. He reported that compliance and ethics programs have been growing in recent years, partly in response to the federal government’s favorable view of them.<sup>45</sup> According to Manson, there are many types of compliance and ethics programs depending on a corporation’s structure and needs. Manson counseled against the notion that there is a “one size that fits all” program.<sup>46</sup> Manson said the ideal compliance and ethics program would have a broad focus with the independence and capability to investigate a wide-range of problems and the authority to implement corrective action.<sup>47</sup> The ideal program would also provide for reporting to the highest levels within the corporation.<sup>48</sup>

Manson discussed some of the concerns about imbedding the ethics and compliance program in the legal department – having the ethics and compliance program report to the legal department or having the chief compliance officer be the general counsel.<sup>49</sup> For example, there is concern by some that the chief compliance and ethics officer “needs to be a full time job and that the position would be diluted if it goes to general counsel.”<sup>50</sup> Manson disagreed and argued that the compliance and ethics program could be part of the legal function, especially given large legal departments in modern corporations. He stated that an experienced in-house counsel is “very well situated . . . to run” the program.<sup>51</sup>

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44. *Id.*

45. Videotape: William D. Manson, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM). Manson said that compliance and ethics programs attracted attention in 1999 and cited a series of government documents that stressed the importance of compliance and ethics programs. *Id.* The documents included the Holder Memo, Thompson Memos, and U.S. Attorney’s Manuals.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Manson videotape, *supra* note 45. Manson acknowledged that there might be some organizational issues, such as the need for some additional resources, involved with imbedding the ethics and compliance program in the legal department. *Id.* Manson suggested that in-house lawyers already bear some of the responsibilities involved in a compliance and ethics program for

Taras Szmagala, Vice-President and Deputy General Counsel for Eaton Corp., concluded the second panel with his presentation, *Adding Value as In-House Legal Counsel*. Szmagala began by noting that fifty years ago a corporation's outside law firm often selected one of its members to serve as in-house general counsel.<sup>52</sup> It was a "pure make versus buy model" – a lineal, top-down organizational approach where authority derived from the title of the position.<sup>53</sup> That model does not work today; all in-house counsel are "really business partners and counselors" who "are expected to understand that business."<sup>54</sup> This new model means in-house counsel should be imbedded in the business where they can best add value to the enterprise.<sup>55</sup> The legal function affects all corporate operations, from human resources and tax to finance and technology.<sup>56</sup> Thus, in-house counsel are well-situated to break down internal, organizational silos and to "connect the dots" – adding important value by "bring[ing] parties together."<sup>57</sup> It is imperative for in-house counsel to develop relationships and trust "to mitigate the control function" – the idea that lawyers are there to prevent action. Szmagala cautioned that constituents within the organization will not use the services of in-house counsel if they are viewed as "blockers."<sup>58</sup>

Szmagala also reported that in-house legal departments are "metrized to the hilt" – everything is measured: "if you don't measure something, you're not going to control it."<sup>59</sup> This is the new business model, and legal departments cannot avoid metrics by claiming they are counselors – "artists" who provide a skill, an art, a special kind of added value that is beyond measurement.<sup>60</sup> According to Szmagala, it is important for legal departments "to get ahead of this metric phenomenon."<sup>61</sup> It is "a dangerous phenomenon" because it may run

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example, the ethical duty to protect the entity's interest and to report up the corporate chain of command when necessary. *Id.*

52. Terry Szmagala, *Attorney as Ethicist*, 47 AKRON L. REV. 31, 32 (2014). See also Videotape: Terry Szmagala, *Navigating the Practice of Law in the Wake of Ethics 20/20 – Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 4, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

53. Szmagala, *supra* note 52, at 32.

54. *Id.*

55. *Id.*

56. *Id.* at 33.

57. *Id.*

58. *Id.* at 32. The term "blocker" refers to someone who is preventing others from pursuing a course of conduct.

59. Szmagala, *supra* note 52, at 34.

60. *Id.*

61. *Id.*

counter to the need for the legal function to be proactive in a corporation by building relationships, accessing insider information, and staying ahead of problems – providing special added value.<sup>62</sup> Szmagala emphasized the difficulty in measuring this kind of special value but warned that metrics influence behavior, so the key is to pick a metric that helps in-house counsel to add value to the corporate enterprise.<sup>63</sup>

Jose Fernandez again provided an international comparative perspective on the issues raised by this panel. Fernandez said that Mexico followed the same custom that Szmagala described about how in-house general counsel in the United States were selected fifty years ago from the company's outside law firm. Mexico has also abandoned that model today. Fernandez reported that Mexico has a new securities law that regulates all public companies in the financial sector, such as banks, insurance companies, and investment firms.<sup>64</sup> The law requires all important corporate officers, including the CEO and in-house general counsel, to provide advice to the parent company's subsidiaries.<sup>65</sup> This same law now requires companies in the financial sector to have a "compliance officer" who is responsible for reviewing all of the company's internal processes.<sup>66</sup> Fernandez said Spain has a similar requirement for compliance officers but it is not limited to financial sector companies.<sup>67</sup> The new securities market law also states that the Secretary to the Board of Directors can no longer be a board member.<sup>68</sup> Thus, lawyers attend the meeting but are no longer the Board Secretary.<sup>69</sup> Fernandez concluded by predicting that in-house counsel's role in Mexico will continue to grow in importance.<sup>70</sup>

### III. FRIDAY MORNING SESSION

#### A. *Panel I: Cross-Border (Multijurisdictional) Practice*

The second day of *Ethics 20/20 – Uncertain Times* began with the panel, *Cross-Border (Multijurisdictional) Practice*.<sup>71</sup> The first speaker,

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62. *Id.*

63. *Id.*

64. Fernandez videotape, *supra* note 28.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Fernandez videotape, *supra* note 28.

71. Brian Toohey moderated the panel. He is the former ethics counsel for the international

Carl Pierce, described the evolution of multijurisdictional practice (“MJP”). He noted that the profession’s regulatory structure is premised primarily on physical presence and state licensure.<sup>72</sup> This structure, along with traditionalists who are comfortable with it, has impeded the progress of an evolving MJP. Pierce argued that a further relaxation of limits on MJP would help improve the profession’s poor record of providing access to justice for those unable to afford or otherwise obtain representation.<sup>73</sup> Looking forward fifty years, Pierce predicted several developments, including: fewer brick and mortar law schools with Juris Doctor degrees being conferred virtually;<sup>74</sup> LSAT examinations administered online at any time, currently the case with the GMAT; an online federal bar examination based on a federally prepared bar course that would provide a certificate to practice federal law anywhere in the United States, notwithstanding state laws; and a system that permits lawyers who are admitted in a state to practice in other states after notifying them and taking a preparatory course on local law.<sup>75</sup>

Next, Richard Painter discussed MJP for securities and financial services lawyers and argued that it is wrong to limit their practice to only states in which they have obtained bar admission.<sup>76</sup> The ABA, a trade

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law firm, Jones Day, and the former Chair of the Cleveland Metropolitan Bar Association’s Ethics and Professionalism Committee. Toohey is also a member of the MBC’s Advisory Board.

72. Videotape: Carl Pierce, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

73. Carl Pierce, *At the Intersection of the Multiple Dimensions of the Practice and Professional Regulation of the Virtual Multijurisdictional Practice of Law in America and Beyond as It Was, Is Now, and May Be in the Years to Come*, AKRON L. REV. (forthcoming 2014). See also Carl Pierce, *At the Intersection of the Multiple Dimensions of the Practice and Professional Regulation of the Virtual Multijurisdictional Practice of Law in American and Beyond as It Was, Is Now, and May Be in the Years to Come*, MBC SYMPOSIUM BOOK, NAVIGATING THE PRACTICE OF LAW IN THE WAKE OF ETHICS 20/20—GLOBALIZATION, NEW TECHNOLOGIES, AND WHAT IT MEANS TO BE A LAWYER IN THESE UNCERTAIN TIMES (Apr. 4, 2013).

74. The current ABA Accreditation Standard only permits students to earn twelve credits online. ABA STANDARDS AND RULES FOR APPROVAL OF LAW SCHOOLS 2013-2014 § 306(d), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf).

75. Videotape: Carl Pierce, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM). See also 20 LAW. MAN. PROF. CONDUCT 285, 309 (2013) (providing an example of lawyers admitted in one state who can practice in another state without taking the bar examination).

76. Videotape: Richard Painter, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

organization for lawyers, has opted for uniformity. Its “one-size fits all” set of rules for regulating lawyer conduct overlooks the fact that securities and financial service lawyers and their clients are increasingly governed by national and international regulations.<sup>77</sup> Using several examples, including the Kay Scholer case and its representation of Lincoln Savings and Loan, Painter argued that lawyers should be permitted to opt in to certain ethical regimes or standards for certain types of practice.<sup>78</sup> This would let clients know what they can expect from their lawyers.

Cassandra Burke Robertson concluded the panel by reporting that during the last decade there has been growth in three areas of the legal services market: the number of litigants attempting to represent themselves in court, the number of lawyers offering online legal services through virtual law practices, and the globalization of business practices.<sup>79</sup> Once deterred, or even foreclosed, from legal assistance because of its cost, middle and low-income individuals and businesses have found less expensive ways to obtain legal help.<sup>80</sup> For example, pro se litigants now outsource their work to places such as India for as little as twenty dollars per hour.<sup>81</sup> Still, other consumers have found virtual law firms offering help at a reduced fee because of lower overhead costs.<sup>82</sup> Robertson examined the regulatory challenges involved with these legal service methods, in particular, the need to protect clients from incompetent or unscrupulous lawyers using such services.<sup>83</sup> Robertson stated: “[t]raditional regulatory devices of reciprocal disciplinary proceedings and prosecution for unauthorized practice of law are difficult to apply in interstate legal practice – but they are nearly impossible to apply in international practice.”<sup>84</sup> She provided a thought-

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77. *Id.*

78. *Id.* See, e.g., *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (1995). See also William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW AND SOC. INQUIRY 243, 243 (1998) (discussing the New York law firm, Kaye, Scholer, Fierman, Hays & Handler’s representation of Charles Keating and the Lincoln Savings & Loan scandal; reporting that “[t]he Office of Thrift Supervision (OTS) charged the lawyers with misconduct in a case the [Kaye Scholer] firm settled for \$41 million and injunctive relief.” *Id.* at 244).

79. Cassandra Burke Robertson, *Regulating Electronic Legal Support Across State and National Boundaries*, 47 AKRON L. REV. 37 (2014).

80. *Id.* at 41-42.

81. *Id.* at 45.

82. *Id.* at 44.

83. *Id.* at 45.

84. Cassandra Burke Robertson, *Abstract, Regulating Electronic Legal Support Across State and National Boundaries*, MBC SYMPOSIUM BOOK, NAVIGATING THE PRACTICE OF LAW IN THE

provoking analysis of how “regulatory efforts intersect with the sometimes-competing values of client protection and access to justice.”<sup>85</sup>

*B. Panel II: Ethics 20/20: Its Impact on the Profession and the Delivery of Legal Services – A Ripple or Tsunami of Change?*

Art Garwin, Director of the ABA Center for Professional Responsibility, moderated the next panel, *Ethics 20/20: Its Impact on the Profession and the Delivery of Legal Services – A Ripple or Tsunami of Change?*<sup>86</sup> Panelist Deborah Coleman, a large law firm partner specializing in lawyer ethics, voiced skepticism about Ethics 20/20’s “incremental” accomplishments.<sup>87</sup> Although she lauded the Ethics 20/20 Commission’s adoption of a new Model Rule on Practice Pending Admission, she was disappointed that “many consumer protections and access to justice issues on the [commission’s] preliminary issues list” were not taken up.<sup>88</sup> Like some panelists who followed her,<sup>89</sup> Coleman believed some issues were “too hot to handle,” including “the standards for permissible virtual law practice[,] [n]onlawyer ownership, [and n]ational licensure or uniform admission standards.”<sup>90</sup> Coleman urged that “the ABA needs to demonstrate its continued relevance to the profession by considering some new ways of convening serious conversations about the many difficult issues that face our profession as a result of changes in technology, globalization, and a host of other circumstances . . . .”<sup>91</sup> Coleman noted that we are all painfully aware that we need serious discussions to get to constructive resolutions.<sup>92</sup> She

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WAKE OF ETHICS 20/20 – GLOBALIZATION, NEW TECHNOLOGIES, AND WHAT IT MEANS TO BE A LAWYER IN THESE UNCERTAIN TIMES (Apr. 5, 2013).

85. *Id.*

86. At the time of the Symposium, Art Garwin was the Deputy Director of the ABA Center for Professional Responsibility. He remains a member of the MBC’s Advisory Board.

87. Samson Habte, *Now That Ethics 20/20 Project Is Completed Courts, State Bars Will Determine Its Impact*, 29 LAW. MAN. PROF. CONDUCT 282 (2013).

88. *Id.* The new rule permits a licensed lawyer who has moved to a new state to practice for a year upon notifying the new state of his or her intention to seek licensure. 28 LAW. MAN. PROF. CONDUCT 509 (2013).

89. See, e.g., James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It “Protected, Preserved, and Maintained,”* 47 AKRON L. REV. 149 (2014).

90. Videotape: Deborah Coleman, *Navigating the Practice of Law in the Wake of Ethics 20/20 – Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM) (stating “a lot of resources [were] devoted to this project, but I think it’s hard to say a lot came out of it”).

91. *Id.*

92. *Id.* Coleman suggested that Ethics 20/20 did not really look at how technology could increase access to legal services by the underserved. *Id.* This is a serious problem if you consider professionalism to include access to legal services for the underserved with a problem.

emphasized that lawyers are well-suited to finding such resolutions because of their “public service orientation” and “ability to solve disputes.”<sup>93</sup>

Thomas Ross was not officially involved with the Ethics 20/20 Commission but offered what he described as an “outsider’s” perspective on its efforts.<sup>94</sup> In *Tomorrow, and Tomorrow, and Tomorrow: Ethics 20/20 Amidst a Changing Profession*, Ross emphasized how the landscape for practicing law has dramatically changed in recent years.<sup>95</sup> For example, Ross noted that companies like LegalZoom and RocketLawyer now deliver legal services in a “packaged, commoditized way” for very little cost.<sup>96</sup> His examination of Ethics 20/20’s response to this outsourcing, and other “seismic shifts” in the legal services market suggests that the “posture of the Commission and of the ABA elite . . . has been essentially one of accommodation and facilitation, rather than an oppositional stance [to protect the profession’s core values].”<sup>97</sup>

Although Ethics 20/20 addressed some core values, such as protecting the confidentiality of client-lawyer relations, Ethics 20/20 did not engage in a “radical reconstruction” of the Model Rules.<sup>98</sup> According to the Ethics 20/20 Commission, its proposals were simply “clarifications and expansions” on Model Rules’ principles that were still “relevant and valid.”<sup>99</sup> To an “outsider’s eye,” this all looks like an essential capitulation to the realities of the market, in effect a ‘blessing’ by the ABA of the brave new world of lawyering coming,” flying under the “banners of ‘technology’ and ‘globalization.’”<sup>100</sup>

Ross concedes that Ethics 20/20’s proposals may be “sensible responses” to market changes, but he wonders what this “all means for the core professional values” of confidentiality and loyalty that the Commission was charged to preserve . . . .”<sup>101</sup> Ross emphasizes that these core values “draw coherence and meaning from the lawyer-client

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93. *Id.*

94. Thomas Ross, *Tomorrow, and Tomorrow, and Tomorrow: Ethics 20/20 Amidst a Changing Profession*, 47 AKRON L. REV. 51 (2014).

95. *Id.* at 55; Videotape: Thomas Ross, *The Ground Shifting Beneath Our Feet* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

96. Ross, *supra* note 94, at 57.

97. *Id.* at 53.

98. *Id.* at 60.

99. *Id.*

100. *Id.* at 62.

101. *Id.*

relationship.”<sup>102</sup> In the context of radical market changes, he thinks that it is “wishful thinking” to believe “that our core professional values will remain in a constant and familiar form – trust and commitment fully embodied in a meaningful lawyer-client relationship.”<sup>103</sup>

Panelist Myles Lynk, Chair of the ABA Standing Committee on Professional Discipline and a member of the ABA House of Delegates, underscored the “conservative” and “intensely political nature” of the ABA’s rule-making process that affected and ultimately shaped some of the Commission’s recommendations.<sup>104</sup> Ethics 20/20’s inability to recommend more dramatic change regarding controversial issues like nonlawyer ownership of firms should be viewed in light of the ABA’s conservatism and unwillingness to make dramatic policy shifts given its current rule-making process.<sup>105</sup> Lynk, like Coleman, would have liked Ethics 20/20 to address access to legal services for indigents while also addressing big-firm issues.<sup>106</sup>

Lynk questioned whether the ABA’s rule-making approach that establishes a system of rules governing all lawyers and their clients makes sense when the rules affect only a segment of the bar.<sup>107</sup> He speculated about whether it makes more sense to create different rules for different practice areas. Lynk reported that we are moving from “placed-based regulation,” where lawyers are subject to state bar regulators, to “practice regulation,” where lawyers in a particular field are governed by specific rules, like the SEC’s rules regulating SEC lawyers.<sup>108</sup> Lynk wondered how these two regulatory approaches will work together. Lynk argued that Ethics 20/20 should have amended Model Rule 8.5’s “choice of law” rules because its “predominant effect” standard is too fact intensive for practitioners to predict which

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102. Ross, *supra* note 94, at 63.

103. *Id.* at 64.

104. Videotape: Myles Lynk, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM). Conservative refers to an interest in avoiding dramatic policy changes regarding the delivery of legal services.

105. *Id.* It is “important not to underestimate” the importance of this intensely political process on the work of the Ethics 20/20 Commission. *Id.* Lynk also reported that the profession is moving much faster than the organized bar in dealing with effects of technology and globalization on the practice of the law, in part, because of the political nature of the organized bar’s rule-making process. *Id.*

106. *Id.* According to Lynk, this may be unsurprising given big firm representation on the Commission. *Id.*

107. *Id.*

108. *Id.*

jurisdiction's rules will govern their conduct.<sup>109</sup> Ultimately, Lynk questioned whether the ABA Model Rules of Conduct are still viable in today's age of lawyer regulation.<sup>110</sup>

C. *Panel III: What It Means to Be a Lawyer in These Uncertain Times (Part One)*<sup>111</sup>

In the final morning panel, *What It Means to Be a Lawyer in These Uncertain Times (Part One)*, Arthur Greenbaum shifted the symposium's focus from a more global assessment of the process and work of Ethics 20/20 to lawyers who are suspended from law practice before there is a final determination that they violated professional conduct rules.<sup>112</sup> The suspensions have many names – administrative suspensions, interim suspensions, temporary suspensions, or automatic suspensions – but they all involve a temporary loss of practice privileges without a full disciplinary hearing.<sup>113</sup> Like any interruption from the practice of law, administrative or interim suspensions create potential consequences for lawyers, the lawyer's clients, and third parties.<sup>114</sup> Greenbaum explored the rationales underlying these suspensions and whether they are appropriate tools for protecting the interests at stake, ranging, for example, from safeguarding the public from an incompetent or dishonest attorney to punishing a lawyer for failing to pay bar dues or meet CLE requirements.<sup>115</sup> Greenbaum's description and analysis of the world of interim suspensions, whether administrative or disciplinary in nature, is especially timely given the ABA's re-evaluation of the *Model Rules for Lawyer Disciplinary Enforcement* ("MRLDE").<sup>116</sup> His work reveals that interim suspensions are used in a variety of circumstances producing different consequences, depending on the context involved.<sup>117</sup> Greenbaum argued for lesser sanctions wherever possible, such as with pure administrative suspensions, given the potential consequences involved.<sup>118</sup>

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109. *Id.*

110. *Id.*

111. Katharine A. Van Tassel, Professor of Law and Director of the Public Health Law and Science Center and Health Law Program at the University of Akron, moderated this panel.

112. Arthur F. Greenbaum, *Administrative and Interim Suspensions in the Lawyer Regulatory Process – A Preliminary Inquiry*, 47 AKRON L. REV. 65 (2014).

113. *Id.* at 65-66.

114. *Id.* at 69.

115. *Id.* at 77-82.

116. *Id.* at 93-115.

117. *Id.*

118. *Id.* at 66-82.

In *The Client Who Did Too Much*, Nancy B. Rapoport addressed the problem of clients pressuring lawyers to pursue conduct where there is no single client responsible for paying the lawyer's fees, as in bankruptcy cases and other types of fee-shifting cases where non-clients pay some of the fees. For example, in bankruptcy, estate-paid professionals like lawyers, accountants, and financial advisors are paid frequently from estate funds, which often means "unsecured creditors are reaching into their own pockets – on a *pro rata* basis – to pay those professionals."<sup>119</sup> A single, unsecured creditor does not pay the bill but, instead, a collective group of unsecured creditors pay the bill.<sup>120</sup> Rapoport argued that the diffusion of responsibility for paying those bills – unlike the situation where an in-house general counsel is scrutinizing outside legal bills – results in unnecessary or wasteful work and higher bills.<sup>121</sup>

Rapoport noted that lawyers have an ethical obligation to charge reasonable fees and examined whether lawyers have a duty to control client behavior that drives bills upward.<sup>122</sup> Rapoport described various reasons why lawyers do not control client behavior that produces higher bills.<sup>123</sup> The reasons include the pressure from partners to ratchet up billings, the bullying client who threatens to take his work elsewhere, and the obsessive client who needs involvement in the case. Rapoport stated that, "[t]here's a difference between catering to a client's legitimate requests and simply kowtowing to that client out of the fear of losing the client's business."<sup>124</sup> Rapoport conceded it is difficult to know where to draw the line between the two options.<sup>125</sup> Part of that line is crossed for Rapoport when a non-legally trained client who is not

119. Nancy B. Rapoport, *The Client Who Did Too Much*, 47 AKRON L. REV. 121,124 (2014). Rapoport states that sometimes estate funds are paid from a "carve-out of a secured creditor's collateral" instead of from funds that would be distributed to unsecured creditors. *Id.* at 123-24.

120. *Id.* at 124. In essence, unsecured creditors are reaching into their own pockets to pay the estate-paid professionals. *Id.*

121. *Id.* at 124-26. Rapoport explained that there is a dramatic difference in billed work when there is a "watchdog" around to monitor the work and fees. *Id.* at 124. For example, in the in-house general counsel scenario, there are numerous stories of them not paying for work done by summer associates or new associates "and refusing to allow firms to increase their hourly rates automatically." *Id.* (citing Jennifer Smith, *Law Firms Face Fresh Backlash Over Fees*, WALL ST. J., Oct. 22, 2012, <http://online.wsj.com/article/SB10001424052970203400604578070611725856952.html>).

122. *Id.* at 127. Rapoport became interested in the issue of client-control when she encountered the "phenomenon of the client who constantly redrafts the lawyer's work product, combined with a lawyer who can't tell the client to stop micromanaging his writing." *Id.*

123. *Id.* at 127-33.

124. *Id.* at 129.

125. *Id.* at 129-31.

paying the bill is “‘playing lawyer’ with the lawyer’s drafts.”<sup>126</sup> In this circumstance, there are no checks and balances to keep fees reasonable, and the lawyer should push back against what is a “misallocation of costs.”<sup>127</sup> Rapoport acknowledged that the issue of getting lawyers to push back against a client’s unreasonable request may have “no solution, other than asking lawyers to be hyper-aware of the pressures being put on them to take some action that might be unnecessary and wasteful.”<sup>128</sup>

Judge Jeffery S. Sutton is Chair of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts (Rules Committee). The Rules Committee is reviewing Federal Rules of Civil Procedure (“FRCP”) 26 through 37 – the discovery rules – in hope of making them “relevant to a world that no one imagined when they wrote these rules.”<sup>129</sup> Sutton explained that FRCP 26, “Scope of Discovery,” entitles one to discover anything that might be relevant to the dispute, but more importantly permits discovery for things that might lead to relevant information. Sutton stated, this “leads to an awful lot of discovery,” especially concerning electronically stored information (“ESI”).<sup>130</sup> The “saving problem” is serious for large companies.<sup>131</sup> How do you keep track of and hold all relevant information given that there might be twenty to eighty employees who might have had a relevant e-mail and there are so many portals to access this information ranging from the office laptop to the iPhone? Yet they all have to be saved somehow, and, if they are not, FRCP 37 provides for serious sanctions.<sup>132</sup>

Currently, the civil rules advisory committee is proposing to introduce the term, “proportionality” into FRCP 26(b).<sup>133</sup> It would mean that it is no longer sufficient that information is relevant to the dispute; “if it costs too much to get given the stakes of the litigation, that’s no longer in the scope of discovery.”<sup>134</sup> Sutton emphasized “[t]hat this is a very big deal,” and cautioned that the “soonest this could become part of

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126. *Id.* at 129. Rapoport stated, “we don’t need. . . a client who goes through a line-by-line edit of a lawyer’s draft to change ‘because’ to ‘whereas’ . . . .” *Id.*

127. *Id.*

128. *Id.* at 132-33.

129. Videotape: Jeffrey Sutton, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

the new rules would be at the end of 2015” and that a lot of process remains before that could happen.<sup>135</sup>

The Rules Committee is also reviewing FRCP 37, the sanctions rule.<sup>136</sup> Case law permits a lawyer and a company to be sanctioned for negligently destroying evidence.<sup>137</sup> There is currently a debate about overruling some of that case law to require a showing of bad faith – something more than negligence – before issuing a FRCP 37 sanction.<sup>138</sup>

Sutton suggested that the concept of ESI provides “a way to engage in civil litigation reform,” something more than just changing or adding a rule.<sup>139</sup> He hopes to change some of the rules to speed up the time for discovery and case management conferences with the goal of starting and ending cases earlier. He believes that shortening the timeframes for everything in litigation and limiting extensions to very rare circumstances “will get people to behave reasonably in an ESI world.”<sup>140</sup>

#### D. Keynote Address: What Are Lawyers For?

Daniel Markovits explored several fundamental questions about the legal profession in his keynote address, *What Are Lawyers for?*<sup>141</sup> Besides the question in the title of his remarks, Markovits further asked: “[w]hat social purposes do lawyers serve? What functions underwrite the special obligations and entitlements that accompany the lawyer’s professional role?”<sup>142</sup>

In answering these questions, Markovits argued the controversial proposition that lawyers “do not serve truth or justice, and should not seek them. Instead, lawyers serve to legitimate power” which requires them to “serve their clients.”<sup>143</sup> Markovits noted that American law recognizes that lawyer loyalty, part of a broader, client-centered virtue that he calls “lawyer fidelity,” requires lawyers to “commit their energies in a partisan way in favor of particular clients, rather than

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135. Sutton videotape, *supra* note 129.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Daniel Markovits, *What Are Lawyers For?* 47 AKRON L. REV. 135 (2014). Daniel Markovits is the Guido Calabresi Professor of Law at Yale Law School.

142. *Id.* In answering these questions, Markovits discusses client-centered lawyering and the virtue he calls “lawyerly fidelity.” (emphasis in the original). *Id.* at 136.

143. *Id.* at 135. “Lawyers may not act in the interest of justice directly, all things considered. That’s the role of the judge.” See Benjamin White, *Yale Prof. Presents Keynote at UA Law Ethics Symposium*, AKRON LEGAL NEWS 1, Apr. 12, 2013, at 92 (quoting Markovits).

directly pursuing truth or justice.”<sup>144</sup> Lawyer fidelity promotes the social purpose that lawyers serve, which is to help disputants bridge the gap between them and tribunals by “objectify[ing] and organiz[ing] disputants’ claims, [and] translating particular demands and complaints into the more general and impersonal language of the law.”<sup>145</sup>

In addition to lawyer loyalty, the principle of client-control is an important aspect of lawyer fidelity because it requires lawyers not to serve their client’s interests “but rather the clients’ intentions or, slightly more broadly, the clients’ points of view.”<sup>146</sup> “It is – emphatically – for *clients* to fix the ends of a representation, and lawyers may not substitute their judgments of what ends clients should pursue for the clients’ own” (emphasis in the original).<sup>147</sup> For Markovits, the principles of lawyer loyalty and client control operate against the background norm of “legal assertiveness” – the right of lawyers to pursue legal claims free of the ordinary standards of liability that the law imposes on conduct that harms others.”<sup>148</sup> The right to legal assertiveness stems from the structural division of labor between advocate and tribunal, “advocates representing clients in a partisan manner and judges acting in the interest of justice.”<sup>149</sup>

According to Markovits, political legitimacy depends on the virtue of lawyer fidelity and a transparent and meaningful adjudicative process for disputants – something more than just a pro forma structural opportunity to air grievances.<sup>150</sup> Lawyers “as specialists in the required form of expression” reassure disputants that no matter what the adjudicatory result, their interests will be heard in a more than pro forma way because of lawyer fidelity – in effect, establishing the practical legitimacy of adjudication.<sup>151</sup> Markovits concluded that “[o]nly adversary advocates, who practice [lawyer] fidelity” have the kind of detached lawyer-client relation necessary to “bring the client’s case in a nonjudgmental way to the authoritative institutions of society.”<sup>152</sup> For

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144. Markovits, *supra* note 141, at 137.

145. *Id.* at 145.

146. *Id.* at 137.

147. *Id.*

148. *Id.* at 138.

149. White, *Yale Prof.*, *supra* note 143.

150. Markovits, *supra* note 141, at 143.

151. *Id.* at 145.

152. See White, *supra* note 143. Reporting that “[t]hough some attorneys notoriously use professional detachment as a shield to deflect moral criticism, Markovits said it proves necessary to legitimate dispute resolution at the practical level. He cited studies which indicated that disputants find the resolution process most legitimate when they believe the tribunal clearly heard and weighed

Markovits, “lawyer fidelity lies at the very center of the law’s claim to legitimacy.”<sup>153</sup>

*E. Panel IV: Regulating the Legal Profession in a Time of Change: Do Ethics Rules or Marketplace Realities Govern New Behavioral Norms (and Does It Matter)?*

Ellyn Rosen, the ABA Counsel to the Ethics 20/20 Commission, moderated the first afternoon panel titled, *Regulating the Legal Profession in a Time of Change: Do Ethics Rules or Marketplace Realities Govern New Behavioral Norms (and Does It Matter)?*.<sup>154</sup> Andrew Perlman, the first panelist and chief reporter for Ethics 20/20, began by exploring two difficult questions. The first question was really an empirical inquiry: What causes lawyers’ behavioral norms to change?<sup>155</sup> Is it the marketplace for the delivery of legal services or ethics rules?<sup>156</sup> Perlman described the second question as a more provocative and normative one: should the ABA play a different role in shaping behavioral norms?<sup>157</sup>

Regarding the first question, Perlman stated that marketplace developments are the “predominant” reason for changes in behavioral norms and that “ethics rule changes reinforce those normative developments in the marketplace and may even cause some changes in the marketplace.”<sup>158</sup> Perlman does not think “it’s a one-way direction” and that “there is a back and forth iterative effect [in the] relationship” between changes in the marketplace and ethics rules.<sup>159</sup> This point is nicely illustrated by some of Ethics 20/20’s work according to Perlman. For example, he reported that Ethics 20/20 was asked to address globalization in light of changes in client demands that increasingly

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their points of view.” *Id.*

153. Markovits, *supra* note 141, at 146.

154. In addition to having served as the Ethics 20/20 Commission’s Counsel, Ellyn Rosen is the Deputy Director of the ABA Center for Professional Responsibility and an internationally recognized expert on lawyer discipline, having served as Regulation Counsel to the ABA Standing Committee on Professional Discipline. She also advises the ABA Task Force on International Trade in Legal Services. Prior to joining the ABA, Rosen was a senior litigation counsel with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois.

155. Videotape: Andrew Perlman, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times* (Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

require lawyers to cross state and international borders. Ethics 20/20 responded to these marketplace developments by changing some ethics rules. For example, the Model Rule on Practice Pending Admission will make it easier for a lawyer to move to another jurisdiction and begin practicing there immediately.<sup>160</sup> Also, the liberalization of the Model Rule on Admission by Motion will facilitate lawyer movement from one jurisdiction to another without sitting for the bar examination.<sup>161</sup>

Considering the second question about changing the ABA's role in shaping behavioral norms, Perlman concluded it would be a "mistake" to "rethink the ABA's role in the regulation of lawyers."<sup>162</sup> The ABA's regulation may involve a lot of flaws but "it's not entirely clear it can be done any better" by changing its role.<sup>163</sup> According to Perlman, the ABA has provided the most effective service on issues involving technical ethics – "nitty gritty details" of daily practice in areas of conflicts of interest, conflicts detection, and engaging in outsourcing.<sup>164</sup> The ABA does a "less good job" on business of law issues, for example, non-lawyer ownership of law firms, lawyer advertising, or multijurisdictional practice – issues that really affect the profession on a more general level.<sup>165</sup> Perlman concluded by recommending that states experiment more than they have with ethics rules like the District of Columbia, which permits limited non-lawyer ownership of law firms.<sup>166</sup> Change on the state level can lead to more change at the ABA level.

The next panelist, James E. Moliterno, notes in his article, *Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, and Maintained,"* that

[w]e credit the greatest lawyers with being able to anticipate and predict the course of the law's change and the readiness of society for

160. *Id.* New ABA Model Rule on Practice Pending Admission (formerly proposed Model Rule 5.5(d)(3)) and Amendments to ABA Model Rule 5.5, available at <http://www.abanow.org/2012/06/2012am105d/>.

161. Perlman videotape, *supra* note 155. New ABA Model Rule on Admission by Motion, available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model\\_rule\\_admission\\_motion.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_admission_motion.authcheckdam.pdf). Perlman cited changes to the inbound foreign lawyer rules as another example of Ethics 20/20 creating rules to build upon or react to marketplace realities. Like globalization, Ethics 20/20 studied advances in technology that represented another important market reality. Perlman said that Ethics 20/20 rules changes concerning technology were really just a reaction to the reality of the marketplace and new uses of technology.

162. Perlman videotape, *supra* note 155.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

change. The legal profession has been a poor lawyer by this measure. The legal profession, as an institution, most often stays blind to change that is happening all around it.<sup>167</sup>

Moliterno chronicles the profession's history and concludes that the legal profession has resisted change and, when it has occurred, it has often been caused by forces outside the profession.<sup>168</sup> Moliterno examines various reform efforts by the profession and argues that the profession all too often looks inward and seeks to preserve the status quo instead of looking outside its market niche and membership for creative vision.<sup>169</sup> The profession needs to be more willing to embrace change and to avoid regulating primarily in response to a crisis.<sup>170</sup> Consistent with the profession's past, Moliterno argues that much of Ethics 20/20's recommendations were modest and often reflected changes that have already occurred in the marketplace for the delivery of legal services.<sup>171</sup> Evaluating the significance of the work of Ethics 20/20, Moliterno concludes it did little to change the law governing lawyers and closes on an ominous note.<sup>172</sup> "Unless the profession changes its change-game, it will do as it has always done and be washed over and passed by with every major development."<sup>173</sup>

Peter A. Joy explored the role law schools should play in helping to shape the norms of the legal profession and how law schools have largely ignored calls to better prepare students for the practice of law.<sup>174</sup> In *Law Schools and the Legal Profession: A Way Forward*, Joy begins by discussing all of the "laments" about there being "too many lawyers [and] too many law schools."<sup>175</sup> He further noted the high cost of law

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167. Moliterno, *supra* note 89, at 150.

168. *Id.* at 150-62. Moliterno noted the profession's decades-long effort to protect confidentiality even in the face of corporate fraud as a prime example of the profession's resistance to change. *Id.* at 161. He noted that the ABA's effort "finally collapsed in the post-Enron era when change in the Model Rules' [confidentiality provisions] was largely driven by SEC regulations adopted over the profession's objections." *Id.*

169. *Id.* at 161-62. Moliterno states that the profession should "welcome the views of non-lawyers" and "see outside itself with open eyes rather than suspicious ones." *Id.* at 162.

170. *Id.*

171. *Id.*

172. *Id.* at 172-75. Underscoring this point, Moliterno predicts that casebook and treatise authors "can make the Ethics 20/20 induced changes to their next editions in thirty minutes or less." *Id.* at 160.

173. *Id.* at 176.

174. Peter A. Joy, *Law Schools and the Legal Profession: A Way Forward*, 47 AKRON L. REV. 177 (2014).

175. *Id.*

school and the lack of jobs.<sup>176</sup> He concluded that these laments stem from more than simply a mismatch between too large a supply of new lawyers and the weak demand for their services. Joy argued that “[i]t is also a mismatch between what legal employers, law students, and clients need from law schools and what too many legal educators want to give.”<sup>177</sup> Joy examined the disengagement of law schools from the legal profession in much of its scholarship and through its teaching and why some state bar regulators are imposing admission requirements to address the failure of law schools to better prepare students for law practice.<sup>178</sup> He discussed some of these admission requirements<sup>179</sup> and then urged law schools to be forward looking and to incorporate changes that will better prepare students for practice today, and to anticipate future needs for change – to “proactively and positively influence the norms of the legal profession.”<sup>180</sup> Law schools will have to become more like other professional schools emphasizing “professional lawyering competencies as part of their core mission.”<sup>181</sup> Joy discussed ways for law schools to accomplish this by reallocating resources to experiential learning courses, like in-house clinical or externship offerings. This could be done by possibly offering fewer sections of some doctrinal courses or offering them every other year to free resources, “becom[ing] smarter” about the large amount of time and money devoted to scholarship, and increasing teaching loads.<sup>182</sup> Joy ended by emphasizing that law schools must commit to better prepare their students for practice and “to become involved with and seek guidance from practicing lawyers, judges, bar admission authorities, and others to improve their curricula.”<sup>183</sup>

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176. *Id.* at 177-79.

177. *Id.* at 178.

178. *Id.* at 180 (stating “Most law schools continue to sit on the sidelines rather than be engaged in a meaningful way with the legal profession about the changes taking place and the role that law schools should play” in shaping the profession’s norms.)

179. *Id.* at 186-93. As an example of new bar admission requirements, Joy discusses New York’s rule requiring bar applicants on or after Jan. 1, 2015 to have completed 50 hours of qualifying pro bono services. Chief Judge Lippman of the New York Court Appeals “explained the purpose of this requirement as twofold: ‘to address the state’s urgent access to justice gap, and at the same time *helping prospective attorneys build valuable skills and imbuing in them the idea of working toward the greater good.*’” *Id.* at 187-88. (emphasis in original).

180. *Id.* at 181.

181. Joy, *supra* note 174, at 195.

182. *Id.* at 193-99.

183. *Id.* at 202.

F. *Panel V: What It Means to Be a Lawyer in These Uncertain Times (Part Two)*<sup>184</sup>

Ben Cooper highlighted the serious access-to-justice problem in the United States for many low-income and middle class persons in his presentation, *Access to Justice Without Lawyers*.<sup>185</sup> He examined three ways in which consumers are increasing their access to the justice system without resorting to lawyers. The first way involves the adoption of standardized forms by courts for use by pro se litigants and the use of technology to improve the pro se experience.<sup>186</sup> He noted that LegalZoom and other companies are facilitating consumers opting for the “do-it-yourself” approach to representation.<sup>187</sup> The other two ways involve New York’s adoption of a mandatory pro bono requirement for bar admission applicants, beginning Jan. 1, 2015,<sup>188</sup> and Washington State’s approval of a limited-practice rule authorizing nonlawyers, “legal technicians,” to provide legal services in limited contexts.<sup>189</sup> Although there are some concerns with each of the three ways, Cooper argued that they merit retention when balanced against the nation’s serious access-to-justice problems.<sup>190</sup> The seriousness of the access-to-justice crisis “calls for experimentation.”<sup>191</sup>

Susan Carle provided a critical examination of legal education in *What It Means to Be a Lawyer in These Uncertain Times: Some Thoughts on Ethical Participation in the Legal Education Industry*. She began by noting that the popular media has presented a critical and “sensationalist image” of many of the changes and problems occurring in legal education and the profession.<sup>192</sup> Although there are problems that have prompted such sensational coverage, Carle highlighted some of the positive developments occurring in legal education and the

184. Janet Green Marbley, a national expert on client security fund matters and a member of the MBC Advisory Board, moderated this panel.

185. Cooper, *supra* note 4, at 205-06. Cooper reports that “[i]n 2011, the World Justice Project issued a Rule of Law Index . . . rank[ing] the United States twenty-first out of the sixty-six countries studied in providing access to civil justice and a woeful twentieth out of twenty-three countries in its income group.” (citing Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index*, THE WORLD JUSTICE PROJECT 1, 111 (2011), [http://worldjusticeproject.org/sites/default/files/WJP\\_Rule\\_of\\_Law\\_Index\\_2011\\_Report.pdf](http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf)).

186. Cooper, *supra* note 4, at 209-10.

187. *Id.* at 211-13.

188. *Id.* at 214-17.

189. *Id.* at 217-20.

190. *Id.* at 221.

191. *Id.*

192. Susan Carle, *What It Means to Be a Lawyer in These Uncertain Times: Some Thoughts on Ethical Participation in the Legal Education Industry*, 47 AKRON L. REV. 223, 224 (2014).

profession. She concluded that the sensationalist image is inaccurate: the reality is a much more “mixed” picture.<sup>193</sup>

Carle created two categories, one for those aspects of legal education that work and the other for those functions that require change or elimination.<sup>194</sup> For example, in the “still working” category, Carle emphasized that legal education is still “providing pathways for socio-economic advancement for law students” at a time when “such [pathways] are becoming even scarcer.”<sup>195</sup> An obvious example of the “not working or needs reform” category concerned the “allegations that some law schools manipulate their post-employment statistics and other relevant data, such as those regarding the ongoing availability of financial assistance after the first year, post-graduation debt burdens, salary statistics, [and] bar passage rates.”<sup>196</sup> Carle concluded by recommending that law schools should “engage in a great deal of more thoughtful reflection about what we are doing, where we should be heading, and how best to get there.”<sup>197</sup> This reflection should focus on one’s own institution and less on other schools, and should be concerned with the “justice-promoting aspects of the legal education enterprise.”<sup>198</sup>

Judge Benita Pearson concluded the final panel’s discussion by stating that Cooper’s ideas supporting limited practice by nonlawyers, the use of LegalZoom, and standardized forms to assist pro se litigants were “intriguing, insightful and optimistic but from a judicial officer’s perspective, we need lawyers in court . . . . [These] are good threshold measures, but at the end of the day, we need lawyers in court.”<sup>199</sup> She

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193. *Id.* at 226. Carle delves into National Association of Law Placement (“NALP”) data to argue that while tens of thousands of law students have found professionally and financially rewarding careers, law schools must develop strategies to deal with the almost ten percent unemployment rate for new law graduates. *Id.* at 227-34. The strategies should “increas[e] the demand for the skills and talents of new law graduates – such as by creating new kinds of fulfilling work for them in a society plagued by huge unmet needs for legal services – possibly shrinking the supply of new law graduates and/or rechanneling it into area of employment demands.” *Id.* at 234. Carle concedes that “how and in what combinations these several strategies can and should be used remains far from clear,” and she offers some insights for answering these questions by examining aspects of legal education. *Id.*

194. *Id.* at 235, 247.

195. *See id.* at 240, 235. Carle relies, in part, on work of former ABA Foundation president, Bryant Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC’Y REV. 1 (2007).

196. Carle, *supra* note 192, at 248.

197. *Id.* at 253-54.

198. *Id.* at 254. (referring, in part, “to the need to expand[] venues for graduates to deliver legal services to underrepresented populations”).

199. Videotape: Benita Pearson, *Navigating the Practice of Law in the Wake of Ethics 20/20 — Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times*

asked how these efforts, for example, requiring fifty hours of pro bono work by bar applicants, aid judges in fulfilling their judicial responsibilities.<sup>200</sup> Pearson maintained that we cannot have two tiers of justice where some persons can only obtain the services of a legal technician while others have access to lawyers.<sup>201</sup> She feared that in these situations judges might have to fill the justice gap.<sup>202</sup> Pearson expressed concern about increasing the number of pro se litigants in the courts, cautioning that it might bring the court's docket to a "crawl."<sup>203</sup> Pearson also noted that she is increasingly seeing lawyers withdraw from cases because their clients have not paid them.<sup>204</sup>

Pearson shared her fellow panelists' optimism about the future while recognizing a problem with the economy and for entering law students seeking employment.<sup>205</sup> She said such challenges are not new and it is important to keep them in perspective.<sup>206</sup> Pearson urged a more collective approach to helping law graduates while noting that law schools bear a special responsibility in preparing and supporting them. She said that most federal judges at the trial level hire their clerks for two years and many for eighteen months. Many magistrates hire their clerks for four years. If every judge rotated his or her clerks every year, it would increase the number of judicial law clerks who have this valuable experience to better prepare them for employment in the community. Pearson indicated her willingness to adopt such a policy.

#### IV. CONCLUSION

*Ethics 20/20 – Uncertain Times* covered a broad array of issues affecting law schools, the legal profession, and the judiciary. It clarified and highlighted some of the more pressing challenges and problems confronting each of these groups as well as provided a roadmap for

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(Apr. 5, 2013), [http://www.youtube.com/watch?v=2pf\\_MxxQdCM](http://www.youtube.com/watch?v=2pf_MxxQdCM).

200. *Id.* Pearson concurred with Cooper regarding his idea that professors should provide more pro bono legal assistance. *Id.* Pearson reported that Professor Dean Carro of the University of Akron has set an outstanding example of this. *Id.* She described a case in which Carro and law students had obtained relief for a prisoner who claimed he was beaten in jail. *Id.* She emphasized that the Northern District of Ohio came to rely on Professor Carro and his students. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* Pearson recounted that Justice Ginsburg, Justice Thomas, and Justice O'Connor graduated from law school and could not find jobs and then described her own challenges as a nontraditional student who worked and sacrificed to start her career.

resolving them in many instances. Several of the symposium's experts also addressed the important issue of the public's interest in greater access to justice. To be sure, significant challenges lie ahead for the profession, but a recurring theme throughout *Ethics 20/20 – Uncertain Times* was the belief that the profession was quite capable of overcoming these challenges. In doing so, however, many of the speakers emphasized the need for the profession to shift from being reactive to becoming more proactive and also to collaborate with others, including non-lawyers, in finding workable solutions.