INTRODUCTION: THE FUTURE STRUCTURE AND REGULATION OF LAW PRACTICE

Ted Schneyer*

Last February, under the auspices of the James E. Rogers College of Law at the University of Arizona, Professor Mona Hymel and I convened a two-day Conference on the Future Structure and Regulation of Law Practice. The impetus for the Conference was the current upheaval in law practice and its regulation in the United States. Although some accounts of the upheaval are exaggerated,[1] American lawyers and their regulators are unquestionably confronted today with profound and destabilizing changes in legal work, lawyers' workplaces, and the market for legal and law-related services. The changes raise many policy issues, but the pace of change presses the bar to approach them piecemeal, in a manner better described as drift than mastery. Accordingly, we did not view the Conference as a quest for answers to specific policy questions, such as whether to allow lawyers to practice together with other professionals in multidisciplinary firms (MDPs).[2] Our aim was

---

* Milton O. Riepe Professor of Law, University of Arizona, James E. Rogers College of Law. Professor Schneyer and Professor Mona Hymel, who together organized the February 2002 Conference that led to the publication of this symposium issue, would like to thank Dean Toni Massaro, Vicki Fleischer, and Donna Ream for all their help with the conference, and would also like to thank the editors of the *Arizona Law Review* for all their work in bringing the Symposium to fruition.

1. According to a recent statement by the American Bar Association (ABA) Futures Committee, for example:

> We are in the midst of the biggest transformation of civilization since the caveman began bartering. The practice of law and the administration of justice are at the brink of change of an unprecedented and exponential . . . magnitude. This Age of Technological Revolution, together with the globalization of business and competition, are transforming our profession and our system of justice with at least the same intensity as they are [changing] everything else . . . . If the law were just another . . . industry about to become obsolete, it would matter little in the overall order of things what, if anything, we do [about it]. But the law is not just another business or industry. It is the foundation upon which our entire society and our system of justice and . . . government are founded.

COMM. ON RESEARCH ABOUT THE FUTURE OF THE LEGAL PROFESSION, AM. BAR ASS'N, WORKING NOTES: DELIBERATIONS ON THE CURRENT STATUS OF THE LEGAL PROFESSION 2 (2001) (on file with the author).

2. MDPs provide legal and other professional services. Nonlawyer providers participate with lawyers in firm ownership and therefore share in the lawyers' fees. MDPs are

more exploratory. We hoped to add to the stockpile of information and organizing concepts with which such issues will be debated in the foreseeable future.

To keep the topic manageable, the Conference gave particular attention to trends affecting the representation of business entities, which, for better or worse, now consume roughly two-thirds of America's private legal services.[3] We invited some of the keenest observers of our profession—practitioners and academics alike—to analyze current issues and speculate about the future. We asked them to assess the implications of developments in technology, in the demand for legal services, in lawyers' work and workplaces, and in professional regulation.

A brief discussion of two such developments may help to convey the tenor of the Conference. First, technological advances are making a vast amount of legal information available to the public with little or no intermediation by lawyers.[4] Coupled with the sheer expense of legal services, these advances may have dramatic implications: more *pro se* representation, more "unbundling" of traditional legal services,[5] greater corporate reliance on nonlawyers such as human relations experts or environmental engineers for regulatory compliance advice, more standardized legal "products" being substituted for client-specific advice, and more Internet exchanges between lawyers and advice-seekers that may or may not trigger all the ethical duties that traditional lawyer-client relationships entail.[6] Technology is also enabling lawyers (and clients) to be "virtually" anywhere. As a result, many lawyers are

---

permitted in parts of Europe but not yet in the United States. In 2001, the ABA rejected proposals to permit law practice in MDPs, but the District of Columbia may soon become the first jurisdiction to permit it. *See* Lance J. Rogers, *District of Columbia Bar Leadership Endorses Amending Rules to Allow MDPs*, 18 Laws. Man. on Prof. Conduct (ABA/BNA) 383 (2002).

3. *See* John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751, 767 (1998) (showing that by 1995 Chicago lawyers spent more than twice as much time on corporate work as they spent on individual clients' matters). The Chicago bar is not wholly representative of American lawyers in this respect, but U.S. Census Bureau data suggest that business clients also predominate outside of large cities. *See id.* at 767 n.23. Nationally, business spending on legal services rose by 555% from 1967 to 1992; individual spending rose by less than half that amount. *See* Marc Galanter, *"Old and in the Way": The Coming Demographics and Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1088.

4. The term "*dis*intermediation" is in vogue. It refers to "the tendency of the Internet to eliminate the role of the 'middleman' in the distribution of information, even highly specialized information, to which access was previously controlled or mediated by professionals." James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1181–82 n.109 (2000).

5. "Unbundling" and "discrete task assistance" refer to legal representation that includes selected tasks from the range of services provided in traditional engagements, but leaves the remaining tasks to the client. *See* Forrest S. Mosten, *Unbundling of Legal Services & The Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994) (discussing the growing importance of unbundling in divorce work).

6. *See* Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 149, 247 (1999) (concluding that it is too soon to tell whether a new model of lawyer-client relationships is needed to govern communications of this kind).

pressing for authority to practice beyond the jurisdictions in which they are licensed and many are exceeding their current authority, usually with impunity. In response, the states have begun to loosen their restrictions on multi-jurisdictional practice (MJP) and to assert disciplinary authority over "out-of-state" lawyers who provide services in their jurisdictions.

Second, American lawyers are becoming ever more specialized.[7] Many now practice in one narrowly defined field of law[8] and serve a very limited clientele. "Specialty bars" are proliferating[9] and some of them issue practice guidelines for their fields that are not necessarily consistent with the legal ethics codes governing lawyers generally.[10] The potential implications? The organized bar may become so fragmented that law is no longer viewed as a unitary profession. Legal education may focus on specialty training. Lawyers may increasingly look to private groups for certification as specialists. Nonlawyers may prove to be as capable as lawyers of mastering narrow legal specialties,[11] thereby intensifying both the current pressure to narrow the traditional ban on the unauthorized practice of law ("UPL") and the *counter*-pressure to enforce the ban more aggressively. And specialists such as tax and patent lawyers may conclude that they have more in common with allied professionals than with lawyers outside their field. If so, one might expect mounting interest in forming MDPs, "strategic alliances"[12] with other professional service firms, and ancillary businesses—i.e., law firm affiliates in which both lawyers and

---

7. In Chicago, for example, specialization increased markedly from 1975 to 1995. *See* Heinz et al., *supra* note 3, at 760–61 (reporting on survey data).

8. *Id.* at 760 (indicating that one-third of the Chicago lawyers surveyed in 1995 practiced in only one of forty-two listed fields).

9. *See* Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 508 (1997/98) (estimating that there are over one thousand specialty bars in the nation and observing that the number has risen sharply in recent years).

10. *See ACTEC Commentaries on the Model Rules of Professional Conduct*, 28 REAL PROP. PROB. & TR. J. 865 (1994) (presenting elaboration on the Model Rules by the American College of Trust and Estate Counsel); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002) (discussing the nonbinding standards of the American Academy of Matrimonial Lawyers that urge counsel for parents in custody disputes to take account of the interests of unrepresented children, an exhortation that may sometimes conflict with general ethics rules requiring zealous advocacy on behalf of clients).

11. This is true even for the lawyer's most familiar task—advocacy. Many lay advocates already represent clients in labor grievance arbitrations and in quasi-judicial proceedings before state and federal agencies. For evidence that the lay advocates are as competent and ethical as their lawyer-counterparts, see HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998); *but cf.* Kristina Horton Flaherty, *New Law Takes Aim at Advertising*, CAL. BUS. J., Dec. 2000, at 1, 10 (reporting on a recent California law adopted in response to complaints that lay consultants on immigration law were taking fees from clients with no intention of providing the services requested).

12. Strategic alliances are cross-referral agreements. New York recently amended its ethics code to expressly permit such alliances under certain conditions. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.05-c(a)(2) (2002). As I write, the ABA is poised to adopt similar amendments to the Model Rules of Professional Conduct. *See* COMM. ON ETHICS AND PROF'L RESPONSIBILITY, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2002) (on file with the author).

nonlawyers offer law-related services, such as lobbying, and in which the nonlawyer providers may hold ownership interests.[13]

Specialization may also affect the distribution of regulatory authority. At the state level, where lawyers over the past century have chiefly been regulated by the judiciary, legislatures and agencies may play an increasing role in overseeing practice in specialized fields of administrative practice.[14] At the federal level, where the judiciary has never claimed superior authority to regulate law practice,[15] the Internal Revenue Service, the Patent and Trademark Office, and other agencies already permit nonlawyers to practice before them under the same rules the agencies apply to lawyers.[16] Now Congress itself is increasingly treating legal specialists and allied professionals as two peas in a pod, such as by creating an accountant-client privilege that levels somewhat the playing field on which tax lawyers and tax accountants compete for clients.[17] Moreover, new federal initiatives are emerging to regulate specific fields of law practice. In the wake of recent business scandals, Congress has directed the SEC to formulate its own rules governing corporate and securities lawyers[18]—rules that may clash with state ethics codes and raise constitutional issues

13. More than ten percent of the largest American law firms already market ancillary services on their websites, though some of the services are provided by allied professionals employed (as non-partners) by the firms themselves, rather than through separate businesses. Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step,* 84 MINN. L. REV. 1359, 1373 (2000); *see also* Otis Bilodeau, *Law Firms Leap Into New Ventures*, LEGAL TIMES (Washington), Mar. 12, 2001, at 1, 1 (noting the "widening circle of law firms" in Washington, D.C. that are operating ancillary businesses).

14. Until the early twentieth century, lawyers in the United States were only lightly regulated, chiefly by state legislatures. Since then, the state supreme courts, invoking their "inherent and exclusive" authority under state separation-of-powers principles to regulate law practice, have struck down many statutes and administrative rules purporting to govern law practice, even practice outside the courts. Today, however, the state supreme courts are arguably becoming less aggressive. *See* Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 394–96 (1998) (suggesting that "the glory days" of exclusive judicial authority to regulate law practice are over, partly because lawyers themselves increasingly pursue favorable regulatory treatment in the state legislatures).

15. The very different conception of separation of powers under the federal constitution is one reason why the ABA and state bar associations tend to resist any shift in the regulatory center of gravity from the states to the federal government.

16. Moreover, federal statutes and regulations can preempt state ethics rules and licensing requirements. *See* Sperry v. Florida *ex rel.* Florida State Bar, 373 U.S. 379, 385 (1963) (holding that a state cannot enjoin a nonlawyer who is authorized to practice before the Patent Office from practicing patent law in the state).

17. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, tit. III, 112 Stat. 685 (amending 26 U.S.C. § 7525); Paul R. Rice, *The Wrong Cure for Privilege Envy,* LEGAL TIMES (Washington), May 4, 1998, at 26. Congress has also abolished a lawyers' exemption from regulation as "bill collectors" under the Fair Debt Collection Act. *See* 15 U.S.C. § 1692a (1998).

18. Sarbanes-Oxley Act of 2002 § 307, Pub. L. No. 107-204, 116 Stat. 745 (2000). The SEC recently announced that it would shortly publish for public comment proposed rules to implement the Act. Press Release, Securities and Exchange Commission, SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys (Nov. 6, 2002), *available at* http://www.sec.gov/news/press/2002-

for a federalism-minded Supreme Court. Contextualized practice rules may also be evolving for bankruptcy lawyers[19] and class-action lawyers.[20]

* * *

To disseminate their ideas, Conference speakers wrote fourteen articles for this Symposium issue of the *Arizona Law Review*. The articles fall into five categories. Essays by our keynote speakers serve as a Symposium overture. Both authors are former managing partners at large law firms and have figured prominently in ABA debates on legal ethics and professional regulation. But, they sharply disagree about how lawyers and regulators should respond to the current upheaval.

James Jones, a transactional lawyer and ancillary-business innovator, offers an iconoclast's perspective.[21] He argues that the structure and regulation of the legal profession have long rested on a paradigm, personified by the English barrister, that is inadequate to address new challenges. Barristers are conceived as independent and self-employed trial lawyers, generalists, altruistic professionals rather than profit-

---

158.htm (last visited Nov. 9, 2002). Representatives of the ABA Task Force on Corporate Responsibility recently criticized this federal initiative as a dangerous assault on professional self-regulation with state supreme court oversight. *See* Joan Rogers & Rachel McTague, *SEC Must Issue Attorney Conduct Rules Under New Federal Accounting Reform Law,* 18 Laws. Man. on Prof. Conduct (ABA/BNA) 457 (2002). Hoping to forestall federal intervention, the Task Force has also proposed changes in the Model Rules of Professional Conduct that would encourage corporate lawyers to prevent or rectify wrongdoing by management. *See id.* at 457–58; *cf.* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 705–07 (1989) (noting earlier corporate-bar lobbying for ethics rules tailored to corporate practice that could forestall SEC rulemaking in the field). It is worth noting that self-regulation and SEC regulation without bar influence are not the only choices here. In August, the SEC chairman assured the ABA that the SEC would work closely with the Task Force in drafting its rules. Harvey L. Pitt, Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (August 12, 2002) (transcript available at http://www.sec.gov/news/speech/spch579.htm). This suggests that professional self-regulation may be evolving into a bilateral regime I refer to as "bar corporatism." *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 643, 671–75 (1994) (describing a regulatory regime in which federal agencies *negotiate* practice rules with an ABA body of experts).

19. *See* Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics,* 6 AM. BANKR. INST. L. REV. 45, 46–48 (1998) (arguing that, although bankruptcy lawyers are already governed by some specialized ethics rules in the Bankruptcy Code, the time has come to create a more comprehensive federal law of bankruptcy ethics).

20. Departing from the traditional view that rules of civil procedure should be transubstantive, Congress spelled out in the Private Securities Litigation Reform Act of 1995 how federal courts should select lead counsel for plaintiffs in securities fraud class actions. *See* 15 U.S.C. § 78u(4)(a)(3) (2000). Moreover, in supervising class counsel, the federal courts have elaborated on the meaning of the requirement that classes have "adequate representation." *See* FED. R. CIV. P. 23. For the argument that class counsel should be governed primarily by procedural law governing class actions rather than by rules of legal ethics, see Nancy Moore, *Who Should Regulate Class Action Lawyers?*, ILL. L. REV. (forthcoming 2003) (manuscript on file with the author).

21. James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast's Perspective,* 44 ARIZ. L. Rev. 537 (2002).

driven businessmen, and champions for individual clients who are vulnerable to exploitation. Jones finds this conception at odds with many aspects of current practice. Most American lawyers today are neither litigators nor sole practitioners. Most are specialists. Most are employed by law firms, corporations, and non-profit or government agencies, where their professional autonomy is inevitably limited.[22] Many represent entity clients, whose legal problems often require the attention of experts in several disciplines. And many are entrepreneurial in outlook.

In this environment, Jones argues, clinging to the barrister paradigm is unwise; it exalts litigation over other forms of dispute resolution, downplays the lawyer's counseling role, discourages law firms from using modern principles of business management, moves lawyers to leave the bar and become "consultants," perpetuates legal barriers to passive investment in law firms and to non-traditional forms of practice, and supports a one-size-fits-all ethics code for lawyers working in very different contexts. Believing that it takes a new paradigm to overthrow an old one, Jones also speculates about the features of a more businesslike model that would adapt traditional values to current conditions.[23]

Lawrence Fox, a litigator, counters with a traditionalist's perspective.[24] Rejecting the claim that the bar is in thrall to a barrister paradigm,[25] he points out that current ethics rules expressly address the duties of lawyers in counseling and other non-advocacy roles. At the same time, he stresses the importance of preserving the "core values" that lawyers have long espoused—strict confidentiality, undivided loyalty, independent judgment, and professional self-regulation with judicial oversight. Relaxing the bans on UPL and MDPs, Fox argues, would disserve these values and could even destroy the profession as we know it. To underscore his point, Fox uses the accounting profession's fall from grace after the Enron scandal as an object lesson for the bar.[26] He expresses great relief that accounting firms and their allies in the bar failed in recent years to convince the ABA to adopt ethics rules

---

22. For example, lawyers who work in legal aid offices funded by the Legal Services Corporation sometimes complain that politically-motivated statutory restrictions interfere with their ability to comply with the ethical duty to exercise independent professional judgment on behalf of their clients. *See, e.g.*, Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (striking down a congressional restriction on challenging the constitutionality of welfare reform legislation).

23. For a similar perspective, see Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

24. Lawrence J. Fox, *MDP's Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547 (2002).

25. *Cf.* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1569 (making the broader claim that although sciences such as physics may be governed at any given time by a single paradigm, a profession's ethical outlook is more likely to reflect conflicting conceptions of the professional's role, such as "hired gun" vs. "officer of the court," vying inconclusively for dominance).

26. *Cf. Holding Lawyers Accountable*, N.Y. TIMES, Aug. 15, 2002, at A22 (quoting a speech in which SEC Chairman Harvey Pitt, before his recent resignation, admonished lawyers to take an active role in preventing corporate scandals or risk suffering the "fate visited upon the accounting industry").

permitting lawyers to practice law in MDPs.[27] Noting that ethics rules governing lawyers' conflicts of interest are more exacting than rules governing accountants' conflicts, and that the lawyer's duty of confidentiality is at odds with auditors' disclosure duties, Fox warns that if lawyers were allowed to form MDPs, either their ethical duties would have to be watered down or MDP lawyers would be exposed to new liabilities.[28]

* * *

The next five articles focus on workplaces where legal services are delivered chiefly or wholly to business—large law firms and corporate legal departments. Two articles concern the structure and regulation of practice in large law firms, which have become so prominent in recent decades and seem destined to become more so.[29]

Elizabeth Chambliss and David Wilkins, the Research and Faculty Directors, respectively, of the Harvard Law School Program on the Legal Profession, are conducting empirical research on the control mechanisms or "ethical infrastructure" that law firms, as they grow, must increasingly use to detect and deter misconduct within their walls. Their article[30] is a pioneering account of the emerging role of ethics advisers, general counsel, and other "compliance specialists" in large firms. Drawing on conversations with compliance specialists in firms ranging from seventy-five to over a thousand lawyers, Chambliss and Wilkins discuss the tasks these specialists perform, their practice backgrounds, their place in the governance of their firms, their encouragement by legal malpractice insurers, and their potentially leading role in developing practice standards. Doubting the power of the traditional disciplinary process to control practice in large firms, the authors also express interest in developing a model of "enforced self-regulation" by large firms, a model that deputizes law firms as regulators of their own lawyers and relies heavily on compliance specialists.

---

27. At the time, the Big 5 accounting firms employed thousands of American lawyers as "consultants" on tax and other matters, but could not hold them out to the public as lawyers.

28. For the counter-argument that recent accounting scandals have little bearing on the MDP debate because the lawyer's role and the accountant's role sharply conflict only when accountants serve as auditors rather than consultants, see Laurel S. Terry, *MDPs, "Spinning," and* Wouters v. Nova, 52 CASE W. RES. L. REV. 867, 881 (2002); Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 985 (2002). On this view, the ethical conflicts that may arise in a lawyer-accountant partnership that offers, say, tax-planning advice, are quite manageable. Moreover, accounting firms are no longer permitted to offer legal and public auditing services to the same clients. *See* Wolfram, *supra,* at 986 n.75.

29. *See* Martha Neil, *Holding Steady: Most Large Firms Are Keeping Their Balance in the Choppy Economy*, A.B.A. J., Sept. 2002, at 22 (noting a management consultant's prediction that there will be over 200 law firm mergers in the United States in 2002, which would make 2002 the biggest year ever for law firm mergers).

30. Elizabeth Chambliss & David Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002).

University of Pennsylvania law professor Geoffrey Hazard and I consider which regulatory methods can best govern practice in large law firms.[31] We explore the issue by comparing the structure, clientele, and characteristic ethical problems of large and small firms. In our view, the disciplinary process deals relatively well with small-firm problems, such as neglecting client matters and mishandling funds.[32] These problems, which often involve client losses that are too modest to justify suing the offending lawyer, stem from both the inability of unsophisticated clients to monitor their lawyers and the lack of internal controls that are available to large firms.

We argue, however, that large-firm problems, including many conflicts of interest, often have a different source. They stem from the fact that the larger the firm, the more the risk/reward ratio that a lawyer associates with her own conduct tends to be at variance with the ratio when viewed from the *firm's* standpoint. Thus, the challenge for a large firm is to deter opportunistic behavior by its own lawyers. Because large firms handle high-stakes matters and the disciplinary process is ill-suited to police them,[33] we believe a regime of civil liability, fee forfeiture, disqualification from litigation, and internal controls[34] is much more likely to deter misconduct in those firms. The fear of incurring liability or forfeiting fees, and the added fear that well-publicized civil suits will harm a firm's reputation, provide the incentive to create internal controls.[35] In this regime, the scope of lawyers' civil liabilities is a more crucial policy issue than the content of ethics rules, which usually only address lawyers individually.[36]

Three articles focus on in-house lawyers and their relationships with outside counsel. Susan Hackett, the general counsel of the American Corporate Counsel Association (ACCA), reports on recent surveys of in-house lawyers.[37] She notes that most respondents work in centralized legal departments and report to their company's general counsel, not to "line" executives. This presumably helps them maintain enough independence to approach matters from the standpoint of their clients as entities.[38] Most general counsel report to the CEO of their company, but a growing

---

31 Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective,* 44 ARIZ. L. REV. 593 (2002).

32. For similar views on this point, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 874 (1992).

33. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL. L. REV. 1, 4–13 (1991) (discussing the shortcomings of the process in policing large-firm practice).

34. The growing use of "compliance specialists" that Chambliss and Wilkins document is a form of internal control.

35. For our purposes, civil suits include administrative and judicial enforcement actions such as those that federal banking agencies brought against large law firms that had represented the thrift institutions that failed in the savings-and-loan crisis in the late 1980s.

36. We recognize, however, that although ethics rules are chiefly enforced in the disciplinary process, they sometimes serve in malpractice suits as evidence of the prevailing standard of care.

37. Susan, Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession,* 44 ARIZ. L. REV. 609 (2002).

38. *See* Lloyd Cutler, *The Role of the Private Law Firm,* 33 BUS. LAW. 1549, 1550–51 (1978) (suggesting that in-house lawyers assigned to an operating division of their company may identify too closely with the more parochial objectives of division management).

number report instead to the CFO, raising the specter that legal advice may too often be trumped by "bottom-line" concerns. The surveys also show that companies with in-house lawyers continue to spend an average of forty percent of their legal budget on outside counsel. Contrary to conventional wisdom, however, many companies are now spreading their work among fewer outside firms. They want continuing relationships with outside counsel who truly understand their businesses.

On the regulatory front, Hackett suggests that in-house lawyers can serve as change agents for the broader profession, because legal and business ethics must often interact in their workplaces, with influence going in both directions. She also notes that moving from a law firm to a corporate law department has long been common, but lawyers now move in the other direction as well, sometimes exposing their new firms to distinctive conflicts of interest in the process.[39] Finally, she observes that the globalization of business raises thorny problems for the growing number of lawyers who work here and abroad for a multinational corporation, because the law governing in-house lawyers is very different in common-law and civil-law countries.[40]

Next, Carl Liggio, formerly a general counsel at a Big 5 accounting firm, recounts the history of in-house counsel and considers the forces that are now shaping their role.[41] He reports that no single model currently exists for in-house counsel or corporate legal departments. Departments, for example, range from full-service internal law firms to units that provide only minor in-house services and mostly retain, monitor, and work with outside counsel. Liggio suggests, however, that general counsel, if not all in-house lawyers, are entering a "platinum age" in which their companies will rely on them more heavily than ever for both legal and business advice. To meet the demand, general counsel will bring an unprecedented array of skills to the job. Factors bringing forth the "platinum age" include high outside counsel fees, chronic law firm inattention to cost containment, growing interest in senior corporate counsel positions among law-firm partners, ready access to legal information without consulting outside firms, and new business complexities that require corporate counsel to have a deep understanding of their client's operations.[42]

---

39. Without client consent, lawyers must decline engagements that are adverse to a former client and substantially related to their work for that client. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2001). When one lawyer in a firm has such a conflict, it is usually imputed to others in her firm. *See id.* at R. 1.10(a). Courts construe the term "substantially related" very broadly where former house counsel are concerned, because those lawyers tend to have especially broad knowledge of their former employer's secrets and likely behavior in a broad range of legal matters. *See* Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law,* 16 REV. LITIG. 537, 554 nn.52–53 (1997) (citing cases).

40. In much of Europe, for example, communications between inside counsel and their clients are not protected by the attorney-client privilege.

41. Carl D. Liggio, *A Look at the Role of Corporate Counsel: Back to the Future—or is it the Past?*, 44 ARIZ. L. REV. 621 (2002).

42. Because in-house lawyers rely on a single client for their livelihood, some commentators believe they are particularly vulnerable to client pressure to engage in unlawful conduct and should therefore be entitled to sue their employer for wrongful discharge if they are terminated for refusing to cave in to such pressures. *See, e.g.,* Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel,* 1 GEO. J. LEGAL ETHICS 553 (1988). One plausible source of

University of Miami law professor Robert Rosen strikes a different note. He sees no platinum age on the horizon. Examining recent literature on corporate management, he identifies four emerging business strategies that may affect corporate demand for legal services and, in turn, affect corporate legal departments, large law firms, and relations between the two.[43] He argues that these strategies—"downsizing," "outsourcing," "self-managing teams," and "porous borders"—encourage companies to use lawyers as consultants rather than as counselors. As consultants, lawyers have less direct influence on client decisions; their input is integrated with advice and information from other sources for use in risk/benefit assessments by teams of corporate decision-makers. Rosen illustrates this pattern by discussing the changing role of lawyers in corporate mergers and acquisitions. He worries that, if the lawyer-as-consultant model continues to take hold, the impact on corporate conduct could be unfortunate.

* * *

The third set of Symposium articles focuses on three widely-debated regulatory issues in recent years—the extent to which lawyers admitted in one jurisdiction should be allowed to practice in others (the MJP issue), whether lawyers should be permitted to practice in MDPs, and whether bans on unauthorized practice should be repealed, narrowed, or more tightly enforced.

New York University law professor Stephen Gillers was a member of the commission whose proposals[44] for loosening current MJP restrictions were recently approved by the ABA House of Delegates.[45] His article[46] weighs the arguments for and against looser restrictions.[47] Noting a consensus in favor of relaxing the ban on practice by out-of-state lawyers, but less agreement about the appropriate changes,

---

this vulnerability is the fact that a discharged lawyer will have invested heavily in learning the details of the client's business. This specialized form of human capital may not be readily marketable to other companies or to law firms. On the other hand, an inside-counsel's detailed knowledge of her company may make it very costly to replace her. In some cases, this could give her more leverage than outside counsel have in dealing with management. Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 472 n.127 (1988).

43. Robert E. Rosen, *"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637 (2002).

44. *See* COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, REPORT OF THE ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE (2002) (on file with the author) [hereinafter ABA MJP REPORT].

45. *See* Mark Hansen & James Podgers, *House: Thumbs Up to MJP*, A.B.A. J. EREPORT, Aug. 16, 2002 (reporting that the House adopted the Commission's proposals in August 2002).

46. Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Act of Making Change*, 44 ARIZ. L. REV. 685 (2002).

47. Among the arguments for liberalization, Gillers includes the uncertain applicability of UPL bans to many legal tasks, such as communicating on the Internet with clients residing outside one's home state. Among the negative arguments, Gillers cites the costs a host state will incur in regulating the out-of-state lawyers who, if permitted, will practice there temporarily; and the risk that new competition from out-of-state lawyers will reduce the profits of in-state lawyers and thereby lessen their capacity to fulfill their *pro bono* obligations.

Gillers also stresses the need to be pragmatic in matters of bar politics. He makes the case for Commission compromises that, having won ABA approval and the support of the Conference of Chief Justices, are now poised to win broad, if not uniform, approval by the states. The Commission's innovations include UPL exemptions for the following classes of lawyers who are licensed out-of-state: in-house counsel and foreign legal consultants who will not appear for their clients in court; lawyers preparing for a lawsuit for which they will seek *pro hac vice* admission once the case is filed in the "host" state; lawyers participating in alternative dispute resolution proceedings; lawyers working on matters related to their home-state practice; transactional lawyers who affiliate with a local lawyer to work on specific matters; and lawyers performing work that federal law authorizes them to perform outside their home states.[48] Whether such reforms will prevent further federal inroads on state regulation, such as through federal law designed to implement international trade agreements,[49] remains to be seen.

Robert Keatinge, a member of the ABA House of Delegates, treats MDP, MJP, and ancillary business collectively as forms of "multidimensional practice,"[50] on the theory that they are all linked to a broad shift in demand toward legal services that overlap with services provided by nonlawyers or by out-of-state lawyer-specialists. He chronicles the ABA's resistance to multi-dimensional practice in recent years and argues that the bar cannot long withstand market pressure from sophisticated clients who want the option of retaining nonlawyers, out-of-state lawyers, and MDPs to perform legal or law-related tasks. Keatinge argues that a sensible first step in accommodating these wishes is to redefine "the practice of law" for regulatory purposes. He would define "the practice of law" as the provision of professional services to clients who believe the provider is a licensed attorney. With this definition, restrictions on who may "practice law" will turn heavily on client understanding, and policymakers can focus on the fundamental issue of how to empower sophisticated clients to structure their legal and law-related engagements as they wish, while protecting unsophisticated clients from harm.[51]

---

48. *See* ABA MJP REPORT, *supra* note 44, at 16–20.

49. *See, e.g.*, Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1072–75, 1085–87 (2001).

50. Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business after Enron*, 44 ARIZ. L. REV. 717 (2002).

51. Ethics rules and opinions construing them increasingly support distinct treatment for relationships between lawyers and "sophisticated" clients. *See, e.g.*, Arthur D. Burger, *Advance Waivers and Common Sense*, LEGAL TIMES (Washington), July 29, 2002, at 15 (defending ethics opinions that treat a corporate client's advance waiver of outside counsel's unspecified future conflicts of interest as a proper and enforceable means of honoring client choice as long as the client's in-house lawyers reviewed the waiver). In deciding whether to allow legal service providers and sophisticated clients to govern their relations largely by private agreement, however, regulators must keep in mind that they do not regulate solely to protect clients. Especially where powerful clients are concerned, lawyers must also be deterred from pursuing clients' goals by intruding unlawfully on third-party interests. Another complication for Keatinge's position is the fact that no well-defined test exists as yet for determining which clients are "sophisticated." *Cf.* C. Edward Fletcher, III, *Sophisticated Investors Under the Federal Securities Law*, 1988 DUKE L.J. 1081, 1084 (asserting that courts

Linda Galler, a Hofstra University law professor and recent chair of the ABA Tax Section's Committee on Standards of Tax Practice, examines the difficulties of defining and policing the unauthorized practice of law.[52] She sees good reason to continue to discourage nonlawyers from practicing law,[53] but criticizes the ABA for linking its recent rejection of MDPs with a resolution urging the states both to sharpen their definitions of law practice and to enforce UPL bans more aggressively. Galler argues that UPL enforcement proceedings cannot deter further growth of *de facto* MDPs, which are, after all, organizations in which *lawyers* provide legal services. True, providing a lawyer's services to clients through a "lay intermediary" (e.g., a trust company that employs lawyers to prepare its customers' wills) has long been viewed as unauthorized practice on the *intermediary's* part. And MDPs, especially when owned by a majority of nonlawyers, would seem to be lay intermediaries. Nevertheless, Galler doubts that the bar today can convince courts to shut down *de facto* MDPs on UPL grounds in the absence of complaints from the public (and not just from competing lawyers) about the competence or ethics of MDP lawyers. She also fears that exhorting the states to redefine the practice of law will lead to *narrower* definitions,[54] something Mr. Keatinge would presumably welcome. Ironically, if her fear is well founded, the ABA resolution could ultimately embolden *more* lawyers to work as "consultants" in professional service firms run by nonlawyers and to deny that the rules of legal ethics apply to their work.[55]

* * *

Our fourth set of articles concerns other regulatory issues. University of Texas law professor Charles Silver defends the capacity of market forces and private ordering to govern many facets of lawyer-client relationships.[56] Despite a documented history of overregulation in matters such as lawyer advertising, Silver argues, state bars and supreme courts remain all too ready to regulate private law practice without

---

and commentators have failed for decades to adequately define an analogous term—the "sophisticated investor").

52. Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773 (2002).

53. In contrast to the United States, many countries permit nonlawyers to provide most "legal services" so long as they do not designate themselves as lawyers. American lawyers might be surprised to learn, for example, that the legal profession's share of the Dutch legal services market "amounts to between 35 and 50%." Terry, *supra* note 28, at 874 n.29, *quoting* Case C-309/99, Wouters v. NOVA, 2002 E.C.R. I-01577 ¶ 125 (2002) (advisory opinion submitted in a case before the European Court of Justice).

54. As supporting evidence, Galler cites recent events in Texas. After a federal district court enjoined the sale of certain self-help legal software on UPL grounds, the Texas legislature quickly amended the statutory definition of law practice to exclude such conduct. Galler, *supra* note 52; *see also* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999) (vacating and remanding the district court decision in light of the amended statute).

55. Galler recognizes, however, that the definition of law practice for purpose of enforcing UPL bans against nonlawyers need not also be the definition of services that constitute the practice of law when performed by a lawyer. Galler, *supra* note 52.

56. Charles Silver, *When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs*, 44 ARIZ. L. REV. 787 (2002).

evidence that market forces exert inadequate control or encourage misconduct. To make his point, Silver focuses on a current controversy in the insurance-defense field. To hold down litigation costs, liability insurers use several methods to control the work of the lawyers they hire to defend their insureds. By contract, for example, they often require defense counsel to adhere to "litigation guidelines," such as limits on the hours that counsel may devote to research without seeking special permission to do more. Many ethics opinions and some state court decisions have declared it unethical for lawyers to acquiesce in such limits, on the ground that the guidelines compromise counsel's ability to exercise independent judgment on behalf of the insureds they are hired to represent. Silver thinks these intrusions, which regulate insurers no less than lawyers, are insupportable without evidence that insureds are being harmed. Because any liability within policy limits will be borne by the insurers, Silver sees no reason to suppose that their litigation guidelines will be penny-wise and pound-foolish.

Silver's broader aim is to expose the biases that can impair public policymaking through the process of professional self-regulation. The bar and the courts defend their attack on litigation guidelines as a campaign to protect the interests of insureds as defendants. Yet, the attack has been launched not at the behest of insureds, but of defense counsel, who earn less under the guidelines. Many insureds are never sued and all have an interest as consumers in holding down insurance premiums. Consequently, they might reasonably conclude, at least *ex ante*, that litigation guidelines serve their interests. But the courts and the insurance defense bar are surely less sensitive to their interest as consumers than the market is.

Since the 1960s, the ABA and the state supreme courts have frequently amended the rules of legal ethics, either piecemeal or in complete overhauls. In his article,[57] University of San Diego law professor Fred Zacharias traces the often-felt need to return to the drawing board to a reluctance on the rulemakers' part to question certain "fictions" and "false assumptions" about lawyers, clients, and professional regulation. These include the assumptions that lawyers are not in "business"[58] and that all lawyers (and clients) are equally competent. Zacharias tries to show how current ethics rules reflect such assumptions and he calls for a new realism in ethics rulemaking. If realism prevails, he predicts, rulemakers will be more sensitive to differences between practice contexts and more modest in their expectations of what traditional ethics rules and disciplinary enforcement can accomplish in comparison with other regulatory techniques.

Next, my colleague Mona Hymel considers the growing use of "protocols" in governing lawyers, a regulatory trend that substantially narrows the role of lawyer

---

57. Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002).

58. *Cf.* Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993) (criticizing as purely symbolic the ABA debate in the early 1990s concerning whether to allow lawyers to own and operate ancillary businesses; much of the debate centered on the "implications" of an ill-defined distinction between lawyer "professionalism" and business ethics rather than on the social costs and benefits of ancillary businesses themselves).

discretion.[59] Protocols are rules so highly specialized or detailed as to be the virtual antithesis of traditional ethical standards. The Treasury Department's extensive regulations governing lawyers (and nonlawyers) who practice before the IRS provide many examples.

Protocols, their sources, and lawyers subject to them are all growing in number. The trend both reflects and contributes to the contextualization of lawyer regulation that Professor Zacharias calls for. Some protocols emanate from government regulators, but many emanate from private "regulators," including specialty bars, malpractice insurers, and law firms seeking to control their own personnel. Professor Hymel explores the conditions that encourage the production of protocols, including ever-greater specialization and the vagueness and generality of traditional ethics rules. She also identifies some of the functions of protocols, such as facilitating rule enforcement, providing safe harbor for lawyers who would otherwise be uncertain whether regulators would find their conduct acceptable *ex post*, counteracting lawyer biases that skew the exercise of discretion, codifying what experience suggests is the "best practice" in performing a particular task,[60] and coordinating interactions among lawyers or between lawyers and others. Finally, she invites readers to consider whether the proliferation of protocols is a desirable regulatory development or an ominous one that could turn professionals into automatons.

* * *

Our final article is in a category of its own and serves as a fitting coda for the Symposium. In a frankly speculative piece,[61] Herbert Kritzer, a professor of law and political science at the University of Wisconsin, predicts that steady erosion in the bar's legal services monopoly, the relentless trend toward specialization, and the growing accessibility of legal information will continue to transform the "legal services industry" into something that was once unimaginable. Kritzer foresees a new division of labor between three kinds of "law workers"—Legal Information Engineers (LIEs), Legal Processors (LPs), and Legal Consultants (LCs). He also considers the implications of this division for legal education and professional credentialing.

LIEs will design and maintain systems that routinize legal services. They will also facilitate access to legal information for both LPs and "end users." LPs will provide routine services that either cannot be automated or are sought by clients who prefer not to use automated tools. They will also use protocol-based triage procedures

---

59. Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873 (2002).

60. As Professor Hymel notes, protocols of this sort superficially resemble the protocols or best-practice guidelines that have become prominent in medicine. In principle, those guidelines are validated by scientific studies. *See* Lars Noah, *Medicine's Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community*, 44 ARIZ. L. REV. 373, 416–21 (2002) (noting the rapid development of such guidelines and explaining why many of them have a less secure grounding in science and statistical analysis than one might expect). Legal protocols, of course, can rarely be grounded on more than anecdotal evidence.

61. Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002).

to decide whether a prospective client's problem requires an LC's attention. LCs will handle novel, complex, and highly specialized matters and will develop new protocols for implementation by LIEs and LPs. The fact that many legal services are no longer within the economic reach of people of modest means suggests that this division of professional labor would be especially helpful to them.

Readers who find Professor Kritzer's speculations implausible will have to reckon with his evidence that the structure and regulation of the legal profession as we have known it do not jibe well with the emerging "legal services industry." They would also do well to keep in mind how greatly the American and English legal professions have evolved in the past in response to new social conditions and competitive forces.[62]

62. For an excellent treatment of this theme, see Andrew Abbott, *Jurisdictional Conflicts: A New Approach to the Development of the Legal Professions*, 1986 AM. B. FOUND. RES. J. 187.

* * *