FUTURE STRUCTURE AND REGULATION OF LAW PRACTICE: AN ICONOCLAST'S PERSPECTIVE*

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When I was asked to speak to you today on the "future structure and regulation of law practice," I was a little surprised when Ted Schneyer[1] told me that he wanted me to address this important topic from the perspective of an "iconoclast." While I certainly have, over the course of my career, been critical of many of the rules currently governing our profession and have been outspoken in my advocacy for more flexibility in the ways that lawyers are permitted to pursue their practices, I had not particularly thought of myself as an "iconoclast." Indeed, the word—defined by Webster as "one who attacks or ridicules traditional or venerated institutions or ideas"[2]—always struck me as pejorative. So, without committing myself to adopting the "iconoclast" label (at least voluntarily), I decided to look into the origins of the term. What I found was not only interesting but, surprisingly, also quite relevant to our discussion at this symposium. (Ted is obviously a much better etymologist than I.)

The term "iconoclast" first arose out of an eighth century controversy that pitted Leo III, the Byzantine-Roman Emperor, against Germanus, the Patriarch of Constantinople and head of the Eastern Church. The controversy involved the practice, by then quite widespread in Byzantine society, of venerating icons—sacred paintings of Christ, the Virgin Mary, and other saints. By the 720s, the practice had taken on near cultic status with devotees ascribing to icons magical powers to heal and protect. Critics of these practices—known as "iconoclasts"—argued that the veneration of icons had, in fact, become idolatrous and that worshippers had forgotten that the icon was but an image of something greater and

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1. Ted Schneyer is the Milton O. Riepe Professor of Law at the James E. Rogers College of Law at the University of Arizona. He was a co-organizer of the Conference on the Future Structure and Regulation of Law Practice.

2. WEBSTER'S NEW WORLD DICTIONARY 370 (Concise ed. 1960).

not an object of veneration in and of itself. Accordingly, they argued that use of icons should be banned, a recommendation that was adopted by Emperor Leo in 726.[3]

Now, you will be relieved to know that I do not intend to discuss the theological implications of the "Iconoclastic Controversy," as it came to be known in Church history. Nor do I intend to explain the actions of Emperor Leo, which (by the way) were probably motivated by politics as much as by theology. What I *do* want to do, however, is focus on a central theme raised by the iconoclasts, and that has to do with the images that we all use to organize the way we think about things.

As rational beings, we humans make sense of the world around us by developing images or models that allow us to deal with the "real" world by categorizing our experiences and our expectations. In every field of human endeavor, these models, which may evolve over very long periods of time and of which we may not even be consciously aware, constitute our set of fundamental assumptions about how the world works; our common framework for thinking about who we are and what we do; if you will, our common worldview or "paradigm" for dealing with reality.

This idea has received much attention over the past forty years or so, thanks primarily to the groundbreaking work of the late MIT Professor Thomas Kuhn. In his 1962 classic work, *The Structure of Scientific Revolutions*,[4] Professor Kuhn pointed to the critical role played by paradigms in the work of scientific communities. As in other areas of human endeavor, scientists working in a particular field use commonly held paradigms to organize their problem-solving efforts, to answer questions, and to explain why systems work in a certain way. When a particular paradigm is no longer able to perform these functions, usually because of serious anomalies in the application of the model to observed data, the scientific community enters a period of uncertainty and consternation that is followed ultimately by the emergence of a new paradigm, a new way of understanding. A good example of this phenomenon is the process by which Newtonian physics gave way to Einstein's theories of general and special relativity, with those theories giving way in turn to quantum physics.

This evolution and shifting of paradigms—this development of new models for thinking about what we do—is an absolutely natural and important part of the human thought process. It is the way we adapt our activities and institutions to the changing needs of the world around us. Although paradigms should not be abandoned lightly—and history teaches us that they certainly are not—failure to adopt new models of thinking when old theories are no longer workable can be counterproductive and, in some cases, even destructive.

One of the most common reasons for resisting the evolution of a new paradigm is the mistaken notion that the old model is a "true picture" of the world

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3. For a general description of the "Iconoclastic Controversy" in the early Christian church, see J. HERRIN, THE FORMATION OF CHRISTENDOM 307–43 (1987) and WILLISTON WALKER, ET AL., A HISTORY OF THE CHRISTIAN CHURCH 231–34 (4th ed. 1985).

4. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3rd ed. 1996).

as it really is and thus should not be changed under any circumstances. This confusion of the model with reality is much like the error of the icon worshippers in eighth century Byzantium. In both cases, the proponents forget—as a friend of mine puts it—that the map is not the territory. It is important to remember that our models and paradigms are human constructs, designed to help us respond effectively to the needs of the world around us. When those models and paradigms no longer serve that function, they should give way to newer forms that do.

And that brings me to the central point of what I want to address. It is my thesis that the model or paradigm that we have used for the last 100 years or so as the basis for the structure and regulation of the legal profession is no longer adequate to address the challenges that we face today. A big part of the problem is that our map no longer resembles the territory it was drawn to depict. As a consequence, we have a structure and a regulatory scheme that are under increasing stress and a profession that is deeply divided about its proper role and future direction. I strongly believe, for the benefit of our profession and the society we serve, that it is time for us to abandon our current model and move toward a new one that more accurately reflects who today's lawyers are, where they work, and what they do. If that position makes me an "iconoclast," then—along with my intellectual forebears of eighth century Constantinople—I gladly accept the term!

I submit that the basic model around which the American legal profession has been structured is essentially the image of the English barrister, the great class of English trial lawyers whose origins date back to at least the thirteenth century. At that time, representation by counsel became essential for parties in the English courts as the royal courts of justice expanded their reach through the issuance of writs, royal orders commanding the convening of court sessions to determine the facts of particular cases. The nature and content of these writs were critically important, as they defined the "law" that would be applicable in each case. Each party was afforded an opportunity to argue, in the Court of Common Pleas, for his version of what the writ should say. The rules governing the issuance of writs were, however, bafflingly complex, and the proceedings themselves were first conducted in Latin and later in that peculiar tongue known as "Law French." So, it was impossible for litigants (many of whom were illiterate) to represent themselves. They were required instead to hire personal representatives who were familiar with the complex procedures and fluent in the language of the court.[5]

From these beginnings and evolving over many years, the traditions of the English barrister emerged. By the time of the American Revolution, the role and characteristics of the barrister were firmly fixed. The barrister was, in every respect, an independent, disinterested, personal representative of his client who served as his client's spokesman in court proceedings. To assure the effective operation of the adversary system, barristers were required to take oaths to the courts to conduct themselves objectively and in the best interests of their clients, without any conflicts of interest whatsoever. As a consequence, barristers were required to operate as individuals and were not permitted to be in partnership with

5. *See* COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY, 101–10, 134–53 (1962) (providing an overview of the evolution of the role of the English barrister).

others. They were isolated, even from their own clients (thus the role of the solicitor), and they were sheltered from all pressures that might impinge the independence of their professional judgments (even fees were never discussed directly with their clients). The vision of the English barrister was thus that of an isolated, independent, objective—indeed, almost monastic—practitioner of the art of advocacy in its purest form, unsullied by the corrupting influence of the "real world" in any way.

This model was very different from the dominant vision of the legal profession that prevailed in the United States in the years following the Revolution. In fact, during the first half of the nineteenth century, there was a solid rejection in America of the "learned doctor of laws" model represented by the English barrister, the French *avocat*, or the German *Rechtsanwalt*.[6] This rejection stemmed from two main causes.

First, Americans had a strong disdain for the legal profession, partly because the idea of a learned and elite profession was repugnant to the prevailing political view of Jeffersonian (and later Jacksonian) democracy. At the heart of this view was the democratic notion that, in the new American state, ordinary citizens were fully capable of making, interpreting, and enforcing the laws—learned experts were unnecessary.[7]

Second, the great distances and conditions of travel in the new American republic all but dictated decentralized and local control of virtually everything, including the legal profession. Courts had to be established in every far-flung community of the country, and each of these courts had its own disorganized bar. Standards were lax and largely unenforceable.[8]

So, for at least the first two centuries of our history, lawyers in America were not part of a closed and regulated profession. It is, therefore, quite ironic that, at the end of the nineteenth century and beginning of the twentieth, when the American legal profession began to organize itself on a national basis and promulgate codes of practice, we effectively adopted the model of the English barrister as the defining paradigm of the legal profession in the United States. I don't suggest that this was necessarily a conscious decision. In our struggle to define "professionalism," we may simply have reverted to a model of the profession that was well known to lawyers trained in the Common Law. But the effects, conscious or not, were the same.

Now, I am certainly aware that there are differences between American lawyers and English barristers—not the least of which is the fact that we have a unified profession instead of the bifurcated functions of barrister and solicitor that still exist in the United Kingdom. Nonetheless, I believe that a careful examination of the rules governing the structure and conduct of the legal profession in the

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6. *See* 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, 1165 (2000).

7. *See id.*

8. *See id.* at 1165–66.

United States shows that we have effectively adopted the English barrister as the paradigmatic model for the regulation of law practice in this country.

Our current paradigm sees the prototypical lawyer, much like the English barrister, as an independent, self-employed litigator who, as a generalist, serves as the personal representative of his clients and who, because of his unique skills and devotion to public service, is entitled to an exclusive franchise to a range of activities known as the "practice of law." Clients, under this model, are seen as autonomous individuals who lack the specialized knowledge of the lawyer concerning the processes, requirements, and language of the law and, thus, are vulnerable to the system.[9]

Out of this image of lawyers and clients, we have constructed a set of rules for governing the legal profession that is based on a number of important assumptions:

First, we have assumed that litigation is the "normal"—or at least "normative"—setting for a lawyer's work. Stated differently, we have assumed that partisan advocacy is the norm for resolving all matters and for serving clients' best interests in all settings.

Second, and closely related to the first assumption, we have assumed that clients are only interested in maximizing their legal rights. We force our clients to define every problem in legal terms, and then we impose on ourselves the ethical obligation to maximize every legal advantage. This is an approach that may well neglect the issues of most importance to the clients.[10]

Third, we have assumed that all lawyers in all practice settings must follow the rules established for courtroom confrontations. As Professor David Wilkins has observed, our traditional model "pays relatively scant attention to distinctions in the tasks lawyers perform (*e.g.*, litigation versus ex ante counseling), the subject areas in which they practice (*e.g.*, criminal versus civil), the clients they represent (*e.g.*, individuals versus corporations), or . . . the setting in which they work (solo practice versus firms or other institutions). . . ."[11] Instead, we force all lawyers in all settings into the single mold of rules written for litigation—indeed, primarily for criminal litigation.[12]

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9. This description of the prototypical lawyer under our current paradigm draws on the work of Professor David Wilkins of Harvard Law School and Professor Russell Pearce of Fordham Law School. David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICE AND TROUBLE CASES 68–108 (Austin Sarat et al. eds., 1998); 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).

10. *See* Wilkins, *supra* note 9, at 86.

11. *Id.* at 71–72.

12. Elaborating on the latter point, Professor Wilkins, drawing on the work of Barbara Babcock and Monroe Freedman, writes that

> because . . . [our] few universal mandates apply to all lawyers in all practice areas, they must be set at the level appropriate to the context in which the interests at stake are presented in their starkest form. Given that clients are seen as vulnerable individuals seeking to protect their

Fourth, we have assumed that all lawyers function professionally as autonomous individuals. Our rules focus almost exclusively on defining the rights and obligations of individual lawyers and virtually ignore the organizational settings in which most lawyers work. The implication of this approach is presumably that all lawyers—in whatever setting—function free of influence, supervision, or pressure from those for or with whom they work.

Fifth, we have assumed that lawyers work in only one geographic place. Our rules scarcely contemplate the possibility that a lawyer could work almost simultaneously in numerous different jurisdictions.

Sixth, we have assumed that clients determine their interests and objectives autonomously, free of any interference or influence by their lawyers. That allows us to make careful distinctions between the "ends" of legal representation—which we envision as solely the responsibility of the client—and the "means" of representation—which we see as at least partially the purview of the lawyer. The lawyer, in other words, bears no responsibility (legal or moral) for the choices of his client.

Taken together, these assumptions define our model of the prototypical American lawyer. And it's this model, this paradigm that shapes the way we think about our profession and ourselves. The problem is that, on almost every point, the factual assumptions underlying our current paradigm are seriously flawed. Simply put, our map no longer matches our territory.

For example, our paradigm assumes that the prototypical lawyer is a litigator, but most lawyers in America no longer engage in litigation. Beginning with the rise of the "corporate lawyer" in the 1890s—and spurred on by the extraordinary growth of administrative and regulatory law in the mid-twentieth century—the percentage of lawyers that might be classified as litigators has been constantly shrinking. By the 1980s, litigation was no longer the dominant form of legal practice in this country.[13]

Our paradigm also assumes that lawyers are either solo practitioners or independent principals who are capable of autonomous decisions. The fact is, however, that most lawyers in America are now "employees"—either non-partners in law firms or in-house counsel in corporations or government agencies-and it is naïve to think that their "independent judgment" is not constrained as a result.[14]

Our current paradigm also assumes that lawyers are generalists, able to address all areas of the law equally well. In point of fact, we all know of course that this assumption cannot be correct, as no one can be an expert in everything.

> legal rights, rule makers generally assume that this context is criminal defense. The duties and practices of criminal defense lawyers, therefore, are the troubling case against which all professional duties must be measured.

Id. at 77–78. *See* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

13. *See* Jones & Manning, *supra* note 6, at 1174–75.

14. *See id.* at 1174.

Moreover, most American lawyers—by a fairly substantial percentage—now regard themselves as specialists and not generalists. The fact is that the "general practitioner" is a rapidly dying breed.[15]

Our present paradigm envisions the lawyer's key activity as litigating before a given court. Consequently, it assumes that a lawyer's work can be geographically confined, and it has spawned a complex web of restrictions to make sure that lawyers don't practice outside their permitted geographic areas. As amply demonstrated in the *Birbrower* case,[16] these rules make little sense and do not comport with the reality of how most American lawyers work, particularly in an age when technology has made geographic location almost irrelevant.

Our current paradigm also assumes that lawyers work in isolation on "legal" problems alone. Again, however, we know that this just isn't true. Given the complexity of most of the problems facing our clients today, we are acutely aware that the "legal" issues are only one part—and sometimes not even the most important part—of solving the clients' problems. Increasingly, lawyers must be familiar with a wide range of non-legal subjects and willing to work with professionals from other disciplines in serving the real needs of their clients.[17]

And, speaking of clients: our current paradigm assumes them to be generally lacking in legal knowledge, wholly dependent on their lawyers, and vulnerable to the vicissitudes of the legal system. As we all know, this is not an accurate picture of substantial numbers of clients in the real world. By the mid-1970s, corporate clients consumed more than half of all legal services in the United States; today, it's substantially more.[18] Many of these clients are quite sophisticated, with capable in-house counsel who well understand the legal issues facing them and who have a strong sense of how they want their matters handled. Our prototypical view of the befuddled criminal defendant cowering in the dock is simply not an accurate image for the clients of most American lawyers.

As I said, our map no longer matches our territory, and the consequences of this mismatch are serious—for ourselves, for our profession, and for the clients and society we serve. Let me give you some examples of what I mean.

I believe that our myopic focus on litigation as the normative behavior of lawyers has caused us to neglect not only other forms of dispute resolution, but also the important roles that lawyers can play as counselors, mediators, and peacemakers. Our near obsession with aggressively maximizing every available and arguable advantage that a client may have has increasingly led to a "pit bull culture" in which legal combat is the norm and even seasoned litigators bemoan the growing lack of civility. It is little wonder that we have produced a legal system that is too costly, too time consuming, and too unpredictable—a system that is, in other words, dysfunctional in many important ways.

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15. *See id.* at 1176.

16. Birbrower, Mantalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (Cal. 1998).

17. *See* Wilkins, *supra* note 9, at 87–89.

18. *Id.* at 83.

It is also arguable that our focus on litigation has undermined our sense of the lawyer as a force for moral good in our society. By defining almost every legal problem as "an adversary, winner-take-all contest,"[19] we have created the notion that lawyers merely serve the interests of their clients and bear no moral responsibility for the actions or positions their clients take. Not only does this view seriously undervalue the key role that lawyers often play in helping their clients decide on what actions or positions they *should* take, but it also undercuts the lawyer's important obligation to serve the public interest. Roscoe Pound described the "primary purpose" of a profession as the "[p]ursuit of the learned art in the spirit of a public service."[20] I fear that we have strayed quite far from that concept, to the detriment of both our clients and our society.

But the system has not worked much better for lawyers themselves. Fixated with the "pure model" of the English barrister, we have erected artificial barriers to prevent lawyers from engaging in practice in non-traditional settings. Although justified in the name of "professionalism," these guild-like rules have looked suspiciously more like "protectionism" in both their origins and their effects. And the effects have been serious, for these rules have literally driven thousands of lawyers out of our profession. The classic example is, of course, the tax lawyer who resigns from his law firm and, the next day, becomes a partner in an accounting firm where he performs exactly the same functions as he did the day before, perhaps even for the same clients. And yet, our model requires us to say that on the first day he was a lawyer subject to the ethical and disciplinary rules of our profession, while on the second day he was not. You don't have to be a trained ethicist to know that that result makes no sense—either for the profession or for our clients.

The focus on the English barrister as our prototypical lawyer has also led to the adoption of rules of practice that are difficult and sometimes simply unworkable in the context of large, modern law firms or non-litigation practices. Our conflicts rules, for example, assume that the same principles should apply in litigation and non-litigation settings, despite the significant differences that may exist in the relationships of the parties in those two circumstances. And the same rules assume that conflicts—even imputed positional conflicts—can be easily identified and avoided in law firms with hundreds of lawyers scattered throughout the world. Still other examples: our rules against unauthorized practice of law are used (or perhaps misused) to inhibit the activities of lawyers who work routinely in multijurisdictional settings; we continue to prohibit law firms from accessing the capital markets as other businesses do, thus forcing substantial (and sometimes unhealthy) reliance on debt; and we continue to impose anachronistic restrictions on the marketing of legal services, like the bizarre prohibition of in-person solicitation until recently contained in Model Rule 7.3.[21]

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19. *Id.* at 93.

20. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

21. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, 499–509 (3rd ed. 1996). The strict prohibition of in-person solicitation of non-clients was eased in amendments to the Model Rules recently adopted by the House of Delegates of the

These various restrictions also suggest, however, a subtler problem arising from our current paradigm, and that has to do with the false dichotomy that we have drawn between the law as a "profession" and the law as a "business." Reminiscent perhaps of the English barrister's complete—almost monastic—isolation from the pressures or conflicts of the real world, we have tended to denigrate the applicability of modern principles of management and planning and marketing to the increasingly large and complex organizations in which we practice. This tendency has resulted in serious organizational and management problems in many law firms, as managing partners and practice leaders have struggled with deeply entrenched individual fiefdoms and stout resistance to any kind of centralized management. It is not an exaggeration to say that law firms, on the whole, are among the most poorly managed businesses in our economy, a surprising fact considering that the market for legal services in the United States is well in excess of $100 billion per year.[22]

As you can see, our current paradigm has not served us well. The model or image of the prototypical lawyer on which it is constructed is simply no longer adequate to describe who American lawyers are, what they do, or how they do it. The consequences of our continuing use of this outmoded paradigm have been serious for our profession, our clients, and our society. As the iconoclasts of eighth century Byzantium could have told us, images matter.

Unfortunately, however, the resolution of our problem is not easy. While our current paradigm is seriously flawed, a new one has not yet evolved. Consequently, we find ourselves in a period of considerable stress as a profession, with deep and heartfelt differences about the proper role and functions of lawyers in our society. The recent debate in the ABA about multidisciplinary practice—like the debate in the early 1990s about ancillary business—provides ample evidence of the serious divisions within our profession on these kinds of issues.

Unfortunately, this kind of anxiety is a normal part of any paradigm shift. Professor Kuhn's work suggests that we are likely to continue in this mode until a new paradigm emerges that commands sufficient support in the profession to replace the former model.[23] We do not yet know what that new model will be, although it is possible to say some important things about it.

First and foremost, the new model will not simply abandon the values and precepts of the old—that's not how paradigm shifts work. The new model will instead embody and redefine the old, adding to it those elements necessary to deal with present realities. (Einstein, after all, did not *negate* Newtonian physics; he built on it, redefined it, and added to it.) Thus, I am absolutely convinced that we can rebuild our professional paradigm without sacrificing our key values or ethical

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American Bar Association. MODEL RULES OF PROF'L CONDUCT R. 1.11–1.14 (2002). However, the old version of Model Rule 7.3 continues to be the law in many states.

22. The revenues for the "legal services" sector of the U.S. economy totaled $101.1 billion in 1992. By 1997, the figure had risen to $122.6 billion. UNITED STATES CENSUS BUREAU, 2001 STATISTICAL ABSTRACT OF THE UNITED STATES, 483, tbl. 722 (2002), *available at* http://www.census.gov/prod/2002pubs/01statab/stat-ab01.html (last visited Oct. 26, 2002).

23. KUHN, *supra* note 4, at 77–91.

commitments. The call for a new paradigm is not a call for the abandonment of our values and traditions, but rather for a re-visioning of them to preserve the best of our past in the face of new realities.

I believe that the new paradigm will, in all likelihood, be less litigation oriented, less individually focused, less parochial vis-à-vis other professions, and less intrusive in the choices that lawyers make respecting their modes of practice. In some sense, it is likely to be more "businesslike." My hunch is that the new paradigm will also build on the role of the lawyer as "advisor and counselor" rather than the role of the lawyer as litigator. But whatever the form the new model takes, it will offer us a unique opportunity to renew and reinvigorate our profession.

What we desperately need at this time is the focus and attention of the best minds among us on these important questions. Instead of the accusations and hyperbole that have often characterized recent debates on these issues, we need a serious and thoughtful dialogue. The stakes—for our profession and for society—are simply too high to settle for anything less. I invite—indeed, I challenge—each of you to become actively engaged in this great effort. We have important work to do to re-fashion our profession to meet the changing needs and demands of the society we serve, but we will all need to take at least some lessons from the "iconoclasts" if we are to succeed.

I would like to close with an intriguing and challenging quote that I ran across a few months ago: "In a time of drastic change, it is the learners who inherit the future. The learned find themselves equipped to live in a world that no longer exists."[24]

24. Roberta R. Katz, Back to the Future: A Look Back at Science, Technology & the Law in the Third Millennium, Address at the Annual Meeting of the American Bar Association (August 4, 2001).