

# ARTICLE: THE PROFESSIONALISM PARADIGM SHIFT: WHY DISCARDING PROFESSIONAL IDEOLOGY WILL IMPROVE THE CONDUCT AND REPUTATION OF THE BAR

December, 1995

**Reporter:** 70 N.Y.U.L. Rev. 1229

**Length:** 20313 words

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## LexisNexis Summary

... When viewed as a paradigm, legal professionalism determines whether lawyer conduct is legitimate and provides the basis for lawyers' exclusive privilege to provide legal services and their autonomy from external regulation. ... Especially in light of the questionable performance of lawyers under the Professionalism Paradigm, increased competition would likely result in better quality services at a lower cost. ... I The Professionalism Paradigm Thomas Kuhn's theory of paradigms explains how, except in rare instances where a paradigm crisis occurs, socially constructed paradigms shape a community's work and restrain inconsistent views. ... As the tension between lawyers' business conduct and the Business-Profession dichotomy changed from a puzzle within the framework of the Professionalism Paradigm to an anomaly challenging the paradigm's competence, the legal profession entered a period of crisis. ... By the 1990s, violations of the Profit-Maximizer taboo had led to the "common perception among legal commentators ... that lawyers were primarily motivated by self-interest and the desire to make money." ... Law firms of all types marketed their services through advertising, direct mail, newsletters to clients and potential clients, and seminars on areas of practice where they sought to develop clients.

## Text

[\*1229]

As "professionals," lawyers historically have achieved autonomy from external regulation, distinguishing themselves from businesspersons because their commitment to clients and to public service surpassed their financial self-interest. Recently, however, commentators have lamented the decline of professionalism in the legal services industry. In this Article, Professor Pearce identifies this shift as a time for hope rather than as a cause for despair. Applying Thomas S. Kuhn's theory of paradigm shifts, Professor Pearce traces the transformation of law practice from a profession to a business. Explaining that the crisis created by the proliferation of business activities in law practice cannot be reconciled with the Professionalism Paradigm, he predicts that a Business Paradigm is emerging. Professor Pearce concludes by suggesting an approach to the Business Paradigm midway between a pure market approach and the re-creation of the status quo. This "Middle Range" approach would continue bar admission while permitting non-lawyers to practice law and substituting market and government regulation for self-regulation. Professor Pearce argues that this approach will likely free law practice of the taint of hypocrisy, foster a realistic community ethic of commitment to the common good, and improve the quality and delivery of legal services. [\*1230]

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That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images ... have lost their meaning.<sup>1</sup>

The policies eliminated here ... free us all to concentrate our efforts on more important matters.<sup>2</sup>

#### Introduction

The legal profession is on the verge of a radical transformation. In the past few years, the best and the brightest of the legal world have chronicled the decline of professionalism and offered prescriptions for its revival.<sup>3</sup> As this Article demonstrates, this attention is but one result of the loss of faith in the distinction between a business and a profession (Business-Profession dichotomy) at the heart of the existing paradigm that organizes our beliefs and values about the delivery of legal services - what I call the "Professionalism Paradigm." But while many commentators describe the current crisis as cause for despair, this Article identifies it as a time for hope. The crisis presents the legal community with an opportunity to move to a new paradigm offering better service to clients and greater benefit to the public.

As the framework for its analysis of the crisis in professionalism, the Article employs Thomas S. Kuhn's theory of paradigms. In his classic work, *The Structure of Scientific Revolutions*,<sup>4</sup> Kuhn described how scientific communities, like other enterprises, use paradigms to maintain conformity regarding the legitimacy of questions, methods, and answers. Kuhn disputed the belief that scientific discoveries resulted from the incremental and progressive increase of knowledge. Instead, he demonstrated that such breakthroughs were relatively rare phenomena occurring only when paradigms had broken down. [\*1231]

Kuhn's concept of paradigms provides a valuable tool for explaining the current state of legal professionalism and anticipating its future. When viewed as a paradigm, legal professionalism determines whether lawyer conduct is legitimate and provides the basis for lawyers' exclusive privilege to provide legal services and their autonomy from external regulation. Like a scientific paradigm, the Professionalism Paradigm is socially constructed. Its authority rests not on its truth in any abstract sense, but in its acceptance by the relevant community.

Created in the late nineteenth century in response to rising concerns that entrepreneurial aspects of law were undermining the profession's reputation, the Professionalism Paradigm rests on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy. The conditions that made this bargain possible and necessary all require distinguishing a profession from a business. Under the paradigm, lawyers differ from businesspersons in that they possess esoteric knowledge inaccessible to lay persons. The paradigm also holds that, in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest. The combination of inaccessible knowledge and altruism makes both impractical and unnecessary the outside regulation of public and market to which businesses are subject.<sup>5</sup>

<sup>1</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* at v (1983); see also Stephen P. Wink & Walter Wink, *Domination, Justice and the Cult of Violence*, 38 *St. Louis U. L.J.* 341, 377 (1993) (discussing Berman quote).

<sup>2</sup> Elimination of Unnecessary Broadcast Regulation, 50 *Fed. Reg.* 5583, 5590 (1985) (policy statement of the Federal Communications Commission explaining, inter alia, its withdrawal from regulation of broadcast advertising on grounds that such regulation was duplicative and beyond the agency's expertise). I would like to thank George Cochran and Jimmy Robertson for drawing this wonderful quote to my attention.

<sup>3</sup> See generally, e.g., Mary A. Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994).

<sup>4</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970). Richard Rorty has recently described this book as "the most influential English-language philosophy book of the last half-century." Richard Rorty, *Untruth and Consequences*, *New Republic*, July 31, 1995, at 32, 33 (reviewing *Killing Time: The Autobiography of Paul Feyerabend* (1995)).

<sup>5</sup> See *infra* Part I.B.

Because lawyers have always earned their living selling their services to private consumers on the market and because much of their work involves representing the interests of businesses, the Professionalism Paradigm had to reconcile those business aspects of law practice with the Business-Profession dichotomy that underlies the paradigm. The paradigm's response was to make the profession responsible for policing the dichotomy by subjecting business conduct to certain taboos. This Article identifies these prohibitions as the "Profit Maximizer" and "Business Servant" taboos. The Profit Maximizer treats law as a commodity by organizing practice like a business, openly marketing services, and seeking large profits. The Business Servant favors clients at the expense of society.<sup>6</sup>

The Professionalism Paradigm also explained why making a living by selling legal services was not inconsistent with the dichotomy. Lawyers' earning of money in exchange for their services was only "incidental" in light of their higher commitment to the greater good. [\*1232] Under the paradigm, the invisible hand of reputation - not efficiency - governed the market for legal services. Consumers who could not understand the esoteric practice of law relied upon a lawyer's reputation, which was earned in the self-policing legal profession by demonstrating excellence and ethical character. When the conduct of lawyers appeared inconsistent with the paradigm, the response was to exhort them to compliance. When a critic challenged the Business-Profession dichotomy and asserted that law was indeed a business, the profession marginalized that perspective.<sup>7</sup>

Today, however, the widespread perception is that law practice is a business. This perception so fundamentally undermines the Business-Profession dichotomy that it has provoked a professional crisis. Even the organized bar, the guardian of the Professionalism Paradigm, has conceded that this conduct threatens the continued viability of the paradigm.<sup>8</sup>

As Kuhn suggests, such a crisis can be resolved by one of three innovations: The community can discover a new way to resolve the anomaly using the existing paradigm; it can bracket the anomaly to be resolved in the future; or it can replace the old paradigm with a new one.<sup>9</sup> The first two alternatives are not available here; the anomaly is too fundamental to the paradigm. That leaves the third alternative.

A new paradigm should explain the anomaly and offer a compelling account of the community's work. An emerging, and simple, new paradigm satisfies this criteria: The practice of law is a business (Business Paradigm). Implementation of the Business Paradigm is open to a variety of approaches, ranging from recreation of the status quo to nearly complete reliance upon the market. This Article proposes a "Middle Range" approach between these two extremes: allowing nonlawyers to provide legal services but retaining a role for the organized bar with bar membership serving as a certificate rather than a license. The Middle Range approach also includes governmental regulation similar to existing rules for lawyer conduct and shared moral commitment to the public good similar to the aspirations of the Professionalism Paradigm.<sup>10</sup>

The Middle Range approach may very well improve the quality of legal services, the administration of justice, and the contribution of lawyers to the public good. Especially in light of the questionable performance of lawyers under the Professionalism Paradigm, increased competition would likely result in better quality services at a lower [\*1233] cost. By making legal services more widely available to moderate and low-income persons, competition would also contribute to improving the administration of justice. While this advance would not fully resolve the tension between the societal aspiration of equal justice under law and the absence of equal access to legal services, the Middle Range approach places the tension squarely and unavoidably before the public, who will hopefully address it.

The Middle Range approach would further promote respect for the legal system by removing the taint of duplicity resulting from the Professionalism Paradigm's assertions of lawyer altruism to a disbelieving public. Removal of this taint would also facilitate the development of a vision of public service that would have greater power to influence the members of the legal community than the Professionalism Paradigm.<sup>11</sup>

Part I of the Article provides an overview of Kuhn's theory of the role of paradigms and describes how legal professionalism functions as a paradigm. Part II describes how in normal discourse the business behavior of lawyers was

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* text accompanying notes 78-84.

<sup>8</sup> See *infra* Part III.A.

<sup>9</sup> See *infra* Part IV.A.

<sup>10</sup> See *infra* Part IV.B.

<sup>11</sup> See *infra* Part IV.B.2.

a puzzle for resolution under the Professionalism Paradigm. Part III explains how lawyers' business behavior changed from a puzzle within the paradigm to an anomaly that provoked the present crisis. Part IV considers possible conclusions for the crisis and suggests that the most probable result will be the emergence of the Business Paradigm. It further describes how the Middle Range approach to the Business Paradigm may actually do a better job than the existing paradigm in meeting the goals of service to clients and the public.

## I

### The Professionalism Paradigm

Thomas Kuhn's theory of paradigms explains how, except in rare instances where a paradigm crisis occurs, socially constructed paradigms shape a community's work and restrain inconsistent views. The Professionalism Paradigm serves this function for the legal community. The paradigm relies on the Business-Profession dichotomy to provide the grounds both for normative assessment of lawyer conduct and for the profession's control of the delivery of legal services.

#### A. Kuhn's Theory of Paradigms

In *The Structure of Scientific Revolutions*, Kuhn demonstrates that the work of science is socially constructed much like other human [\*1234] endeavors, such as art and politics.<sup>12</sup> He rejects the notion that the history of science reveals a logical, progressive, and incremental growth in knowledge.<sup>13</sup> Instead, he shows that emotional and other non-rational factors play a major role in the development and acceptance of scientific discoveries.<sup>14</sup>

Kuhn finds that scientific communities use paradigms to organize their problem-solving efforts.<sup>15</sup> In what Kuhn describes as "normal science,"<sup>16</sup> practitioners who "have undergone similar educations and professional initiations"<sup>17</sup> use their shared paradigm as the determi- [\*1235] nant of "legitimate methods, problems, and standards of solution."<sup>18</sup> In normal science, the community rejects ideas inconsistent with the paradigm, often without even evaluating their significance.<sup>19</sup>

<sup>12</sup> See Kuhn, *supra* note 4, at 208 (noting that "periodization in terms of revolutionary breaks and style, taste, and institutional structure" is common to science as well as literature, arts, and political developments); see also *id.* at 93 (discussing "genetic aspect of the parallel between political and scientific development").

<sup>13</sup> *Id.* at 208-09.

<sup>14</sup> Commentators disagree as to whether Kuhn rejects the notion of preexisting reality altogether. Compare, e.g., Joyce Appleby et al., *Telling the Truth About History* 165 (1994) (asserting that Kuhn "remained true to essentially realist assumptions about the relationship between what the scientist can know and how scientific laws mirror nature") with Dennis Patterson, *Postmodernism/Feminism/Law*, 77 *Cornell L. Rev.* 254, 275, 307 (1992) (describing Kuhn as a postmodernist). Kuhn's comments on this point are equivocal. Compare Kuhn, *supra* note 4, at 126 (finding it "impossible to relinquish entirely [the] viewpoint" that "sensory experience [is] fixed and neutral") with *id.* at 172-73 (noting that the development of scientific knowledge "may have occurred, as we now suppose biological evolution did, without benefit of a set goal, a permanent fixed scientific truth"). This Article need not resolve Kuhn's understanding of preexisting reality. Professionalism, unlike the speed of light, is quite evidently a social construction.

<sup>15</sup> Steven Winter notes that Kuhn acknowledges three different uses of the term "paradigm." Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 *Stan. L. Rev.* 639, 647 n.44 (1990). These are uses as a "disciplinary matrix," an "exemplar," and a "model." *Id.*; see also Kuhn, *supra* note 4, at 174-91 (discussing "disciplinary matrix" and "exemplar"); Thomas S. Kuhn, *Second Thoughts on Paradigms*, in *The Essential Tension: Selected Studies in Scientific Tradition and Change* 293, 297-98 (1977) (describing use of paradigm as "model").

<sup>16</sup> Kuhn, *supra* note 4, at 5, 144. Richard Rorty describes "normal science" as "the practice of solving problems against the background of consensus about what counts as a good explanation of the phenomena and about what it would take for a problem to be solved." Richard Rorty, *Philosophy and the Mirror of Nature* 320 (1979).

<sup>17</sup> Kuhn, *supra* note 4, at 177.

<sup>18</sup> *Id.* at 48. The paradigm "provides a map whose details are elucidated by mature scientific research." *Id.* at 109.

<sup>19</sup> In normal science, "the research worker is a solver of puzzles, not a tester of paradigms." *Id.* at 144. Kuhn observed that "normal science ... often suppresses fundamental novelties because they are necessarily subversive of its basic commitments." *Id.* at 5. The community generally rejects research challenging or disregarding the paradigm "as metaphysical, as the concern of another discipline, or sometimes as just too problematic to be worth the time." *Id.* at 37. The community even rejects ideas that may form the basis of a later paradigm. Kuhn notes that in the transformations he studied, the new paradigms "had been at least par-

At the same time that a paradigm constrains discourse, its problem-solving nature ensures the paradigm's eventual demise.<sup>20</sup> The task of problem-solving will inevitably result in identification of a problem that is not susceptible to problem-solving efforts under the paradigm.<sup>21</sup> That problem becomes an "anomaly" that provokes a crisis.<sup>22</sup> A time of crisis is one of "extraordinary science"<sup>23</sup> where the paradigm itself comes into question.<sup>24</sup> In this "period of pronounced professional insecurity,"<sup>25</sup> consensus regarding the constitution of the governing paradigm disintegrates, proposals for new paradigms proliferate, and the community "turns" to philosophy as it revisits first principles.<sup>26</sup>

When the scientific community cannot resolve the crisis by solving the problem under the paradigm or bracketing the problem for the [\*1236] future, it replaces the old paradigm with a new one in what Kuhn calls a revolution.<sup>27</sup> The new paradigm proposes to "solve the problems that have led the old one to a crisis."<sup>28</sup> Whether the new paradigm succeeds in a revolution depends more on the power of conversion than logical argument.<sup>29</sup> No "logical" choice is available between competing paradigms that "disagree about what is a problem and what a solution."<sup>30</sup> Newer members of the community tend to be more open to new paradigms and more senior members tend to be more resistant.<sup>31</sup>

Kuhn and other commentators have not limited this analysis to scientific communities. Any definable community

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tially anticipated during a period when there was no crisis in the corresponding science; and in the absence of crisis those anticipations had been ignored." *Id.* at 75.

<sup>20</sup> *Id.* at 181 (describing crisis as "a self-correcting mechanism which ensures that the rigidity of normal science will not forever go unchallenged"); see also Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1523 (1988) (observing Kuhn's acknowledgment that "normal-scientific practice is always in some degree nurturing the development of its own impending transformation").

<sup>21</sup> At some point, "a normal problem, one that ought to be solvable by known rules and procedures, resists the reiterated onslaught of the ablest members of the group within whose competence it falls." Kuhn, *supra* note 4, at 5. This problem can arise either from influences inside or outside of the scientific community. *Id.* at 181.

<sup>22</sup> See *id.* at 6 (noting that anomalies lead to scientific revolutions). At the point where "an anomaly comes to seem more than just another puzzle of normal science, the transition to crisis and to extraordinary science has begun." *Id.* at 82.

<sup>23</sup> *Id.* at 82.

<sup>24</sup> See *id.* at 82-83 (noting that "formerly standard solutions of solved problems are called in question").

<sup>25</sup> *Id.* at 67-68.

<sup>26</sup> The crisis period involves "frequent and deep debates over legitimate methods, problems, and standards of solution" that are "almost non-existent during periods of normal science." *Id.* at 47-48; see *id.* at 80-88 ("In periods of acknowledged crisis ... scientists have turned to philosophical analysis as a device for unlocking the riddles of their field."); see also Winter, *supra* note 15, at 679-80 (quoting Kuhn).

<sup>27</sup> Kuhn, *supra* note 4, at 84, 92.

<sup>28</sup> *Id.* at 153. The new paradigm "need not, and in fact never does, explain all the facts with which it can be confronted." *Id.* at 18.

<sup>29</sup> See *id.* at 151, 159 (discussing how new paradigms ultimately find favor through change in generations, not from unqualified acceptance). Kuhn describes how scientists "often speak of the 'scales falling from the eyes' or of the 'lightning flash' that 'inundates' a previously obscure puzzle." *Id.* at 122; see also *id.* at 158 (explaining that conversion relies on "faith that the new paradigm will succeed with the many large problems that confront it, knowing only that the older paradigm has failed with a few"). Indeed, the old paradigm is likely to offer advantages in problem solving. See *id.* at 154 (stating that, when proposed, "Copernicus' theory was not more accurate than Ptolemy's").

<sup>30</sup> *Id.* at 109. Without agreement on "evaluative procedures," "logic and experiment alone" cannot establish the superiority of either paradigm. *Id.* at 94; see also William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 *Tul. L. Rev.* 907, 909-10 (1988) (discussing how, under Kuhn's model of revolution, "scientific revolutions are ... functions of nonrational faith").

<sup>31</sup> The process of transforming the profession "begins with one or a few individuals" whose perspective differs from "most other members of their profession." Kuhn, *supra* note 4, at 144. For one, they have "intensely concentrated upon the crisis-provoking problems." *Id.* In addition, they are "committed ... less deeply than most of their contemporaries to the world view and rules determined by the old paradigm" often because they are "so young or so new" to the field. *Id.* The "first supporters" of the paradigm then "develop it to the point where hardheaded arguments can be produced and multiplied." *Id.* at 158.

