Kentucky Law Journal

Volume 97 | Issue 4 Article 2

2009

Lessons in Legal Ethics from Reading About the Life of Lincoln

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Kentucky Law Journal

VOLUME 97 2008–2009 NUMBER 4

ARTICLES

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INTRODUCTION

ABRAHAM Lincoln is an icon of American history. He is prominently named in various opinion polls as among the best Presidents in the history of the United States.[2] His stature as a great President is perhaps best reflected currently in the stream of events constituting a national two-year celebration of his 1809 birth.[3] Even before that, however, scholarly and popular interest in Lincoln's life and Presidency continued unabated, as indicated by the steady publication and success of books about him.[4]

1 Thomas P. Lewis Professor of Law, University of Kentucky College of Law; B.A., J.D., University of Minnesota. The author would like to thank Megan McClain, University of Kentucky College of Law, Class of 2007, and Emily Schoen, Class of 2008, for their valuable research assistance in the preparation of this Article.

2 For example, a compilation of various public opinion polls at PollingReport.com includes tables of Gallup and ABC News polls ranking Abraham Lincoln as the "greatest" U.S. President. *See* PollingReport.com, Presidents & History, http://www.pollingreport.com/wh-hstry.htm (last visited Jan. 19, 2009). A 2007 Rasmussen Reports telephone opinion poll of one-thousand randomly selected adult Americans revealed that 92% of the respondents had favorable opinions of Lincoln, a close second only to George Washington (94%). Rasmussen Reports, Washington, Lincoln Most Popular Presidents: Nixon, Bush Least Popular (July 4, 2004), http://www.rasmussenreports.com/public_content/politics/people2/washington_lincoln_most_popular_presidents_nixon_bush_least_popular. Among history scholars, Lincoln is ranked highly as well. A 1999 C-SPAN survey of historians ranked Lincoln first in terms of "performance within context of times." Americanpresidents.org, C-SPAN Survey of Presidential Leadership, http://www.americanpresidents.org/survey/historians/performance.asp (last visited Jan. 21, 2009).

3 That celebration began with opening events in Kentucky, the state of his birth, a full year earlier in February, 2008, and with official events scheduled at least until the end of 2009. Lincoln Bicentennial, List of Events, http://www.lincolnbicentennial.gov/calendar/list/default.aspx?ekmensel=c580fa7b_10_92_btnlink (last visited Jan. 19, 2009).

4 Among the most recent and noteworthy is DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005), for which the author received the Pulitzer Prize. A search of other recent books on Lincoln reveals JOHN E. BOOS, RARE PERSONAL ACCOUNTS OF ABRAHAM LINCOLN (William R. Feeheley & Bill Snack eds., 2005); GABOR BORITT, THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS (2006); WILLIAM H. HERNDON & JESSE W. WEIK, HERNDON'S LINCOLN (Douglas L. Wilson & Rodney O. Davis eds., Univ. of Illinois Press 2008) (1889); LINCOLN IN THE TIMES: THE LIFE OF ABRAHAM

Notable among these works is David Herbert Donald's best-selling biography of our sixteenth President titled *Lincoln*.[5]

Although Mr. Donald's compelling book offers readers knowledge and insight into all aspects of Lincoln's life and Presidency, as a recent reader I was struck by how often the work caused me to think about the subject of contemporary legal ethics. This is not entirely surprising. In addition to his revered position as a preeminent leader of our nation at a critical time in history, Lincoln is also regarded by a number of legal scholars as an icon of American lawyering.[6] He has been described as a model of the sort of lawyer who once embodied the true values of the legal profession,[7] as a standard against which to judge how far today's profession has fallen in its ethics,[8] and as an ideal toward which lawyers should again strive in order to recapture the proper focus and emphasis on professionalism.[9] It is also not too surprising that I, as a long-time teacher of legal ethics,[10] would tend to reflect upon the biography of a leading lawyer from the perspective of that subject. Still, in choosing to inform myself through Mr. Donald's book I had not anticipated that my reactions would so frequently involve digressions into the subject of legal ethics.

In this Article, I offer these insights. Let me clarify that I do not purport, nor am I competent, to review Mr. Donald's book or to provide a broader look into or comment on Lincoln's life, law practice, or role in history.[11] Instead, I intend merely to describe here what lessons I learned or had

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LINCOLN AS ORIGINALLY REPORTED IN THE NEW YORK TIMES (David Herbert Donald & Harold Holzer eds., 2005); HELEN NICOLAY, PERSONAL TRAITS OF ABRAHAM LINCOLN (Stackpole Books 2006) (1912); JAMES OAKES, THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS (2007); JOSHUA WOLF SHENK, LINCOLN'S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS (2005); JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS (2006); TOM WHEELER, MR. LINCOLN'S T-MAILS: THE UNTOLD STORY OF HOW ABRAHAM LINCOLN USED THE TELEGRAPH TO WIN THE CIVIL WAR (2006); RONALD C. WHITE, JR., THE ELOQUENT PRESIDENT: A PORTRAIT OF LINCOLN THROUGH HIS WORDS (2005); DOUGLAS L. WILSON, LINCOLN'S SWORD: THE PRESIDENCY AND THE POWER OF WORDS (2006).

5 DAVID HERBERT DONALD, LINCOLN (1995).

6 Prominent examples include MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 55, 65, 281–82 (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 2–3 (1993); Paul D. Carrington, *A Tale of Two Lawyers*, 91 NW. U.L. REV. 615, 623–629 (1997).

7 KRONMAN, *supra* note 6, at 3 (referring to Lincoln as an example of the author's view of "the lawyer-statesman").

8 GLENDON, *supra* note 6, at 71; KRONMAN, *supra* note 6, at 2–3; Andrew L. Reisman, *An Essay on the Dilemma of "Honest Abe": The Modern Day Professional Responsibility Implications of Abraham Lincoln's Representations of Clients He Believed to Be Culpable*, 72 NEB. L. REV. 1205, 1235 (1993).

9 GLENDON, *supra* note 6, at 108; KRONMAN, *supra* note 6, at 3, 5.

10 The author has taught the subject of professional responsibility at three different law schools over the course of more than twenty-five years.

11 The author does not purport to be a historian, whether legal or any other sort.

reinforced about lawyers' ethics by my reading of Mr. Donald's account of Lincoln's life.

I. BACKGROUND: LINCOLN AS A LAWYER

Abraham Lincoln's prominent place in history, of course, is the result of his role as the sixteenth President in preserving the Union during the Civil War and in ending slavery in our nation. While his accomplishments in his prior career as a practicing lawyer in Illinois in the mid–1800s may be less familiar to many,[12] they are themselves remarkable.

Mr. Donald's biography offers an interesting glimpse into Lincoln's career in the law. In 1834, at the age of twenty–five and otherwise largely uneducated,[13] Lincoln began his legal studies through reading[14] Blackstone's *Commentaries* and other leading works[15] while also serving as the village postmaster of New Salem, Illinois[16] and working as a surveyor.[17] He approached his studies seriously and with almost grim dedication.[18] Lincoln was licensed to practice in Illinois in 1837 and began his practice in Springfield that year.[19]

Except for the single term he served in the U.S. House of Representatives in 1847–49,[20] Lincoln practiced law in Springfield and the surrounding area from 1837[21] until he left Illinois for Washington, D.C. in 1861, after being

12 There are some excellent works and sources offering further discussions and information on Lincoln as a lawyer. Included among these are DAN W. BANNISTER, LINCOLN AND THE ILLINOIS SUPREME COURT (Barbara Hughett ed., 1995); JOHN P. FRANK, LINCOLN AS A LAWYER (1961); and a CD–ROM compilation of Lincoln's legal papers from 1836 to 1861 with narrative descriptions of his cases in THE LAW PRACTICE OF ABRAHAM LINCOLN (Univ. of Illinois Press CD–ROM, Martha L. Benner et al. eds., 2000). For the background and presentation of this discussion, however, the author is relying on Mr. Donald's description of Lincoln's years in practice.

13 Mr. Donald notes that Lincoln had only about one year of formal schooling. DONALD, *supra* note 5, at 29.

14 *Id.* at 53. Reading the law was the primary method of obtaining a legal education at the time, although it was often done in the office of an established lawyer. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2 cmt. c (2000); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 194–95 (1986). Lincoln apparently did his preparation solely by reading the law without the benefit of an established lawyer's regular guidance.

15 DONALD, *supra* note 5, at 55. In addition to Blackstone, the author notes that Lincoln studied "Chitty's *Pleadings*, Greenleaf's *Evidence*, and Joseph Story's *Equity Jurisprudence*." *Id.*

16 *Id.* at 50–51.

17 *Id.* at 51, 57.

18 He is said to have studied so hard that friends were concerned about his physical and emotional health. *Id.* at 55, 57.

19 *Id.* at 64.

20 *Id.* at 119, 142.

21 *Id.* at 64.

elected President the previous fall.[22] Unlike some of his fellow lawyers in the vicinity, his practice was his only source of income and wealth.[23] As a result, he practiced law steadily,[24] although at various intervals his attention was substantially drawn away by his political interests and efforts.[25] While Lincoln practiced in several partnerships during his career as a lawyer, his Springfield partnership with William H. Herndon lasted from 1844[26] until 1861[27] and was the professional setting for much of his growth and success as a lawyer.[28]

Lincoln's practice was as varied as one might expect of a frontier lawyer in the mid–1800s. He represented clients in drafting wills and routine real estate transactions.[29] As a litigator, he represented defendants in criminal cases involving charges ranging from lesser offenses to murder.[30] He also represented parties in all manners of civil cases, including small disputes between neighbors[31] as well as some of the most pressing public issues of the day, particularly those involving local governmental powers over the burgeoning railroads.[32] Lincoln was skilled in trial work[33] but became even more effective and well known as an appellate lawyer,[34] handling approximately three hundred cases before the Illinois Supreme Court.[35]

Mr. Donald's description of these years in practice shows Lincoln to be a successful, respected, and renowned member of the early Illinois bar. That description certainly lends support to the common opinion that Lincoln aptly serves as a model lawyer.

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22 *Id.* at 273.

23 *Id.* at 151–52.

24 *Id.* at 152.

25 Lincoln's law practice was interrupted by the one term he served in the U.S. House of Representatives in 1847–49, *id.* at 119, 142, as well as by his two unsuccessful campaigns for the U.S. Senate in 1854–55, *id.* at 178–85, and 1857–58, *id.* at 202, 213–14, 227–29, and his campaign for the Presidency in 1859–60, *id.* at 235–41. Mr. Donald notes that these absences did not seem to hurt Lincoln's law practice. *Id.* at 196 (After losing in his effort to be elected by the state legislature to the U.S. Senate in 1856, Lincoln "turned to his law practice with great assiduity, and 1857 became the busiest and most profitable year of his professional life.").

26 Lincoln formed his partnership with William H. Herndon in 1844. *Id.* at 100.

27 Lincoln practiced in partnership with Herndon until February, 1861, when he left Springfield for Washington, D.C., as the President-elect. *Id.* at 272.

28 It was during his partnership with Herndon that Lincoln's practice shifted from smaller, less remunerative cases, to larger matters involving the railroads. *Id.* at 154.

29 *Id.* at 71.

30 *Id.* at 103.

31 *Id.* at 143.

32 *Id.* at 154–55.

33 *Id.* at 98–99, 149–51.

34 *Id.* at 100.

35 *Id.*

II. LINCOLN'S QUESTIONABLE CONDUCT

Certain details Mr. Donald provides in his account of Lincoln's legal career, however, raise questions about Lincoln's professional conduct when judged under current standards of legal ethics.[36] For today's lawyers, therefore, these questions could cause concern about Lincoln's continued suitability as a modern icon of lawyer professionalism.

A. Compliance with the Law Before Becoming a Lawyer?

Mr. Donald notes that Lincoln's interest in the law can be traced back to his days as a young store clerk, when he would attend court sessions held in New Salem, Illinois.[37] Being impressed with the young man, the presiding justice of the peace allowed Lincoln to comment openly in his court on cases being heard.[38] As a result of these public episodes, citizens began seeking legal advice from the young Lincoln and even his assistance in drafting legal documents.[39] Mr. Donald concludes later that Lincoln, after his licensing as a lawyer, made an easy transition into some areas of law practice such as drafting deeds and wills because "he had done a certain amount of this for his neighbors in New Salem even before he was admitted to the bar."[40]

Modern lawyers might be expected to recoil at such conduct occurring today. By legal standards in place since the early twentieth century in most states,[41] Lincoln was engaged in the unauthorized practice of law.[42] Not only is such conduct contrary to our modern notion of professional licensing,[43] it can be enjoined or is deemed a crime throughout this country.[44] Were

36 For purposes of this discussion, as authority for statements of contemporary standards of professional responsibility, the author will use the current version of the American Bar Association's rules of legal ethics, MODEL RULES OF PROF'L CONDUCT (1983), and the American Law Institute's Restatement on the law pertaining to lawyers, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

37 The author notes this to be about in 1831, DONALD, *supra* note 5, at 41, several years prior to when Lincoln began studying for admission to the bar in 1834, *see supra* text accompanying notes 13–19.

38 DONALD, *supra* note 5, at 41.

39 *Id.*

40 *Id.* at 71.

41 Professor Wolfram provides a history of the regulation of the unauthorized practice of law in his treatise, WOLFRAM, *supra* note 14, at 824–26, as does Professor Deborah L. Rhode in her excellent discussion of the prohibition, Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6–11 (1981).

42 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. b (2000).

43 WOLFRAM, *supra* note 14, at 849.

44 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. a (2000) ("A nonlawyer who impermissibly engages in the practice of law may be subject to several

it to occur today, this behavior of Lincoln as a young man would be an inauspicious beginning for a future icon of lawyer professionalism.[45]

Other conduct by Lincoln raises some question about whether his attitude about the law was suitable for someone aspiring to be a lawyer. While he served as the village postmaster in New Salem,[46] Lincoln is said to have used the privilege of his mailing frank, intended only for his own personal use, to pay postage for friends.[47] Mr. Donald seems to approve of such misuse of his public position, noting sardonically that, as postmaster, Lincoln "had the unusual notion that a public servant's first duty is to help people, rather than to follow bureaucratic regulations."[48] Were it known to today's character and fitness committees,[49] however, I am not sure that Lincoln's generosity with the privileges of his position as a federal postal official would be viewed so positively.[50]

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sanctions, including injunction, contempt, and conviction for crime."). The drafters of the *Restatement* note that unauthorized practice of law restrictions have recently been reduced in varying degrees in most jurisdictions, allowing laypersons to offer some services that have formerly been viewed as constituting the practice of law. *Id.* § 4 cmts. a, c. The activities of Lincoln as a store clerk in providing legal advice and document drafting, however, seem likely to raise questions even under more lenient views of what constitutes the unauthorized practice of law. Professor Wolfram notes that state law on the unauthorized practice of law has "[o]n the whole . . . been characterized by its broad sweep and imprecise definition." WOLFRAM, *supra* note 14, at 835.

45 Indeed, as an activity still defined in many jurisdictions as criminal today, Lincoln's unauthorized practice of law could raise questions of his character and fitness if it were known to modern bar authorities. In her interesting 1985 discussion of character as a professional qualification, Professor Rhode's data indicate that 84% of bar administrators considered allegations of unauthorized practice of law as warranting an investigation of a bar applicant, while only 4% believed it would never warrant an investigation. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 532 (1985).

46 DONALD, *supra* note 5, at 50–51.

47 *Id.* There are some additional details about Lincoln's approach to his position as postmaster offered by Mr. Donald. The author also notes observations that in fulfilling his duties, Lincoln was "'very careless about leaving his office open and unlocked during the day.'" *Id.* at 50 (quoting Letter from Matthew S. Marsh (Sept. 17, 1835)). On the other hand, Mr. Donald also concludes that Lincoln kept careful records of his financial dealings as the town's postmaster. *Id.* at 51.

48 *Id.* at 50.

49 Professor Wolfram notes that character and fitness committees generally conduct their reviews through self-reporting by applicants in response to questionnaires. WOLFRAM, *supra* note 14, at 858. Unless Lincoln's misuse of the mailing frank had resulted in some legal, formal action against him or some sufficiently broad question would otherwise necessitate its disclosure, it is unlikely that the conduct would be reported to such a committee.

50 Lincoln's misuse of the mailing frank could be viewed as reflecting negatively on his character. Professor Wolfram notes that "[a]n inventory of traits that emerge from reported cases in which committees or courts have balked at admitting a candidate might include the following: a disposition to be law-abiding; a sense of fairness and honor in financial dealings; an attitude of responsibility that leads the person to fulfill commitments and obligations that have been undertaken or imposed; and a regard for truth and honesty." *Id.* at 861. In today's atmosphere regarding use of governmental positions for personal gain or to benefit friends, the

B. Compliance with the Law as a Lawyer?

One incident that raises interesting and significant professional questions regarding Lincoln's attitudes toward compliance with the law, even after he had become a lawyer, is his near–duel with James Shields, then the promising Democratic state auditor.[51] The underlying dispute began with Lincoln's anonymous letters to a local newspaper, submitted using a female pseudonym, ridiculing Shields both politically and personally.[52] Subsequently, Mary Todd, later to become Mrs. Lincoln, and a friend wrote similar letters using the same pseudonym.[53] Offended by the letters, Shields demanded from the newspaper the disclosure of the true identity of the author.[54] Lincoln authorized the newspaper to name him as the author of all the letters.[55] When Lincoln then refused to offer a retraction, Shields challenged him to a duel.[56] As the party challenged, Lincoln chose broadswords as his choice of weapons and began practicing for the event.[57] Dueling, however, was illegal, being prohibited explicitly by the state constitution of Illinois.[58] In order to evade this prohibition and the Illinois authorities who intended to arrest the men, Lincoln and Shields agreed to meet across the Mississippi River in Missouri.[59] The two contestants met for the duel, but friends were able to resolve the dispute without any violence occurring between the men.[60]

The incident is certainly not among Lincoln's finest hours as a lawyer. Indeed, Mr. Donald notes that "[t]he episode remained one of Lincoln's most painful memories. . . . Of course, he was humiliated to remember that he had acted foolishly, and he was embarrassed that, as a lawyer and officer of the court, he had deliberately violated the law."[61] Today such apparently public and willful disregard for the law might well cause a lawyer to face an ethical inquiry.[62]

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use of the mailing frank in this way by a postmaster would be likely to raise such issues.

51 DONALD, *supra* note 5, at 90.

52 *Id.* at 90–91.

53 *Id.* at 91.

54 *Id.*

55 *Id.*

56 *Id.* at 91–92.

57 *Id.* at 92.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 Model Rule 8.4(b) makes it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's . . . fitness as a lawyer." MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (1983). The Comment to that provision notes that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence . . . are in that category." MODEL RULES OF PROF'L

C. Improper Competitive Practices?

Some of Lincoln's behavior as a lawyer is also troublesome under current standards defining appropriate business–seeking techniques for those in the profession. There is evidence, for example, that Lincoln on occasion directly solicited potential clients, urging them to employ him as their lawyer in anticipated litigation.

By the 1850s, Lincoln had established a reputation in the field of railroad law,[63] an important area of expertise on the frontier, and he had represented the Illinois Central Railroad on some smaller matters.[64] In 1852, the railroad was involved in litigation with McClean County challenging the county's authority to tax the railroad's property and asserting that such taxation was violative of its charter with the state.[65] Learning that Champaign County was considering similar litigation and wanting to be involved as an advocate, Lincoln directly contacted officials of that county seeking to represent it against the railroads.[66] Not hearing from the county, Lincoln then contacted counsel for the Illinois Central Railroad offering his services in the McClean County litigation, which involved similar issues.[67] He was retained by the railroad and subsequently wrote and filed the brief on its behalf before the state supreme court.[68] Indeed, that court largely relied on Lincoln's brief in issuing its decision in favor of the railroad.[69]

Lincoln's conduct in this matter might be expected to at least be troubling to today's disciplinary authorities. Not only does his contact with the Champaign County officials raise issues of solicitation of a potential client,[70] there are interesting conflict of interest issues lurking in these facts.

CONDUCT R. 8.4 cmt. 2 (1983). Some modern cases have viewed acts of actual or threatened violence by lawyers as appropriate situations for imposing professional discipline under this standard. Florida Bar v. Kandekore, 766 So. 2d 1004 (Fla. 2000) (lawyer disbarred for felony assault of police officer); *In re* Sutton, 959 P.2d 904 (Kan. 1998) (lawyer publicly reprimanded for stop sign violation and misdemeanor battery of construction worker); *In re* Estiverne, 741 So. 2d 649 (La. 1999) (lawyer suspended for threatening opposing counsel with handgun during deposition). Although Lincoln was never arrested, prosecuted, or convicted for his conduct regarding the duel with Shields, lawyers have been disciplined for criminal conduct despite the lack of such process. *In re* Sutton, 959 P.2d 904 (Kan. 1998) (lawyer disciplined despite charges being dismissed after completion of diversion program); *In re* Karahalis, 706 N.E.2d 655 (Mass. 1999) (lawyer suspended for bribery of Congressman despite lack of prosecution or conviction).

63 DONALD, *supra* note 5, at 154–55.

64 *Id.*

65 *Id.*

66 *Id.* at 155.

67 *Id.*

68 *Id.* at 155–56.

69 *Id.*

70 The contemporary bar has struggled with the topic of solicitation in its professional regulations. Such solicitation was discouraged in the American Bar Association's 1908 Canons

This contact was made at a time when at least one railroad with adverse interests to the county's might have considered itself to be a current client of Lincoln.[71] There is, perhaps, another conflict of interest issue in his subsequent offer to represent that railroad in similar, pending litigation against another county.[72]

Two other instances of behavior by Lincoln pertaining to his competitive practices also appear troublesome under current rules of professional conduct. One was Lincoln's apparent acquiescence in another lawyer's public use of his name in such a way as to suggest a partnership when no such relationship existed.[73] Mr. Donald dismisses this conduct as nothing

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of Professional Ethics, CANONS OF PROF'L ETHICS Canons 27, 28 (1908), and prohibited by that organization's 1969 Model Code of Professional Responsibility, MODEL CODE OF PROF'L RESPONSIBILITY DR 2–103 (1969). The Code prohibitions, and those reiterated in the ABA's original 1983 Model Rules of Professional Conduct were challenged on constitutional grounds in litigation ultimately resolved by the U.S. Supreme Court. Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 459 (1978) (in–person, abusive solicitation for pecuniary gain of person in vulnerable circumstances is not protected commercial speech); *In re* Primus, 436 U.S. 412, 422, 431–32 (1978) (mail solicitation for pro bono representation of potential client for political purposes is protected speech); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472–74 (1988) (mail solicitation for pecuniary gain directed to persons known to be in need of legal services is protected commercial speech). As a result of that litigation, the current professional rules largely prohibit only in–person, live telephone, and certain electronic solicitation for purpose of providing compensated legal work. Model Rule 7.3(a) currently provides:

> A lawyer shall not by in–person, live telephone or real–time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted . . . is a lawyer . . . or has a family, close personal, or prior professional relationship with the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (1983). It is not clear from Mr. Donald's account whether Lincoln's solicitation of the Champaign County officials was in person or by mail, but it certainly was for pecuniary gain.

71 The current rules of legal ethics do not define the existence of a lawyer–client relationship, leaving that issue to "substantive law external to" the rules. MODEL RULES OF PROF'L CONDUCT pmbl. § 17 (1983). Some case law, however, concludes that one can be a "client" for purposes of determining a conflict of interest even when no matters are currently pending with the lawyer, if there has been a pattern of past representation. IBM Corp. v. Levin, 579 F.2d 271, 281 (3d Cir. 1978).

72 Mr. Donald offers no information on the degree to which Lincoln discussed the proposed Champaign County litigation or the pending McClean County litigation with the county officials. Such discussions might have precluded Lincoln from representing the railroad in the McClean County matter, as he subsequently chose to do. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(c) (1983) (A lawyer who has discussed a matter with a prospective client "shall not represent a client with interests materially adverse to those of [the] prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter" without the informed consent of both the affected client and the prospective client.).

73 DONALD, *supra* note 5, at 147–48.

more than a reflection of Lincoln's affection for the other lawyer involved.[74] Under today's professional rules, however, lawyers are not to state or imply that they are practicing in a partnership unless that in fact is the case.[75]

Similarly, when then President–elect Lincoln visited with William Herndon, his long–time law partner, as he was preparing to leave Springfield for Washington, D.C., Lincoln directed Herndon to leave the office sign and name of the firm as "Lincoln & Herndon" after his departure.[76] Lincoln's direction to Herndon, as described by Mr. Donald, is poignant, for it refers both to Lincoln's stated plan to return to his law practice in Springfield after his Presidency and to his recognition that he might not live to do so,[77] as tragically turned out to be the case. Still, the retention of Lincoln's name in the law firm's name while he was serving in the White House would violate current professional rules because Lincoln would not, in fact, be actively engaged in the practice of law during his Presidency.[78]

As a practicing lawyer, therefore, Lincoln is said to have utilized techniques in seeking to obtain business and in representing his practice to the public that would be troublesome under present ethical rules. At a time when some current commentators see the commercialization of law practice as indicative of lawyers' declining professionalism,[79] Lincoln's practices raise questions about the suitability of his continued role as a model lawyer.

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74 *Id.* at 148.

75 The Model Rules provide: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." MODEL RULES OF PROF'L CONDUCT R. 7.5(d) (1983).

76 DONALD, *supra* note 5, at 272.

77 Mr. Donald reports Lincoln to have said, "Let it hang there undisturbed . . . Give our clients to understand that the election of a President makes no change in the firm of Lincoln and Herndon. If I live I'm coming back some time, and then we'll go right on practising [sic] law as if nothing had ever happened." *Id.*

78 The Model Rules provide: "The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." MODEL RULES OF PROF'L CONDUCT R. 7.5(c) (1983).

79 Chief Justice Warren Burger, for example, saw contemporary lawyers' widespread use of professional business–getting techniques, such as advertising after the Supreme Court's decision in *Bates v. State Bar*, 433 U.S. 350 (1977), as an important factor in the decline of the bar's professionalism. Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 5–7 (1993). On the other hand, Professor Roger Cramton notes that the practice of law in this country has always been a commercial enterprise, so that commercialism should not be perceived as necessarily conflicting with the traditional concept of professionalism. Roger C. Cramton, *On Giving Meaning to "Professionalism," in* TEACHING AND LEARNING PROFESSIONALISM 15–16 (1997).

D. Carelessness and Neglect?

According to Mr. Donald's account, Lincoln also had a tendency toward what can only be characterized as carelessness in his law practice. This is reflected in his report of Lincoln's ongoing difficulties in recording fees and expenses[80] and in losing files and papers of clients.[81] This trait was evident at the start of his law practice[82] and persisted throughout his years as a lawyer.[83] Mr. Donald notes Lincoln's regular failure to keep his office organized[84] and particularly his practice of keeping important papers in his pockets and even in his stovepipe hat.[85] Mr. Donald concludes that Lincoln and Herndon "were constantly looking for misplaced letters and documents"[86] and at times had to admit to clients that the materials had been lost.[87]

There also are references to Lincoln having to deal with clients who were concerned that their matters had been neglected.[88] In part, this reflects the fact that politics, campaigning, and service in elected positions were regular parts of Lincoln's law practice in his early years as a partner in the firm of Stuart & Lincoln[89] and later as a partner in Lincoln & Herndon.[90] Absence of a law partner can, and in Lincoln's practice apparently did, lead to errors regarding and neglect of clients' pending matters.[91]

Current professional rules are clear on such conduct. Lawyers are expected to act competently in the representation of their clients[92] and to exercise proper care of clients' property entrusted to them,[93] including their

80 DONALD, *supra* note 5, at 73.

81 *Id.* at 73, 102–03.

82 *Id.* at 73.

83 *Id.* at 102–03.

84 *Id.* at 73, 102–03.

85 *Id.* at 73, 103.

86 *Id.* at 103.

87 *Id.*

88 *Id.* at 73.

89 *Id.* at 74.

90 *Id.* at 103, 185.

91 Other lawyers have faced professional issues arising out of absence from the law office while pursuing political careers. In *McGlone v. Lacey*, 288 F. Supp. 662 (D. Mo. 1968), for example, McGlone, a personal injury client seeking help from Lacey, was told by Lacey's law partner that he was away serving in the legislature but would contact her on his return. Lacey failed to contact the client. *Id.* at 663. Upon McGlone's subsequent contact, Lacey discovered that the statute of limitations had run on McGlone's claim. *Id.* at 663–64. In McGlone's legal malpractice suit against Lacey, however, the court concluded that no lawyer–client relationship had been established. *Id.* at 665–66.

92 MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

93 Model Rule 1.15(a) requires that, when entrusted to a lawyer, the property of clients be "appropriately safeguarded." MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (1983).

papers and documents.[94] Furthermore, neglect of client matters is not only prohibited,[95] it is also specifically recognized in the body of ethical rules as a serious "professional shortcoming."[96] While Mr. Donald's account of Lincoln's lack of tidiness, care, and attention in the managing of his practice may strike the reader as quaint, humorous, or even charming, it does raise professional questions that are not insignificant in the modern practice of law.[97]

E. Questionable Fee Practices?

One interesting episode regarding Lincoln's professional practices described by Mr. Donald involved his fee in a prominent case. Lincoln's representation of the Illinois Central Railroad in its litigation challenging McLean County's legal authority to tax its property, described above,[98] ended with a substantial victory for the railroad, saving it approximately $500,000 per year in county taxes.[99] The result was largely the product of Lincoln's brief to the state supreme court.[100] At the conclusion of the matter, Lincoln billed his client $2000 for the representation, but railroad executives objected to the bill.[101] In response, Lincoln reviewed the bill with other established lawyers, and resubmitted the bill to his railroad client, in

94 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46(1) (2000) (providing that "[a] lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client").

95 Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

96 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 (1983) ("Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.").

97 Lawyers' failure to act competently, neglect of client matters, and failure to communicate with clients about the status of their matters continue to be among the most frequent complaints made about lawyers. *See, e.g.*, ARK. SUPREME COURT COMM. ON PROF'L CONDUCT & OFFICE OF PROF'L CONDUCT, 2003 ANNUAL REPORT 8 (2003), *available at* http://courts.state.ar.us/pdf/2003_annual_report.pdf (four of the five most frequently filed complaints about Arkansas lawyers involve lack of competence, diligence, and communication); OR. STATE BAR CLIENT ASSISTANCE OFFICE, 2004 ANNUAL REPORT 5 (2004), *available at* http://www.osbar.org/_docs/ resources/CAO-04.pdf (showing "[n]eglect of legal matter" and "[c]ommunication" to be the two most frequent complaints against state's lawyers); Barbara Ann Williams, *Inside the Bar Counsel's Office*, VA. LAW. REG., Aug.–Sept. 1999, at 7 (during the 1999 fiscal year, in the Virginia bar, "[t]he most common complaints . . . were failure to communicate and general neglect, in that order. These types of complaints have been the most common complaints over the last five years").

98 For this discussion, see *supra* text accompanying notes 63–72.

99 DONALD, *supra* note 5, at 156.

100 *Id.*

101 *Id.*

the amount of $5000, two and one-half times the amount of his original bill.[102] The railroad refused to pay the fee, and Lincoln sued his client.[103] The case was heard by Judge David Davis,[104] who often assigned Lincoln to hear cases in his absence,[105] in McLean County, and the court ultimately entered judgment in the amount of the $5000 fee less the $250 retainer that the railroad had already paid.[106] Interestingly, Lincoln's relationship with the railroad apparently was not negatively affected, and he continued representing Illinois Central in other matters.[107]

The fee dispute with the railroad raises a number of interesting issues regarding Lincoln's conduct. A legitimate question might be raised about the reasonableness of the resubmitted fee and whether it might have been so steeply increased as a product of vindictiveness after the railroad's objection to Lincoln's first fee statement.[108] Furthermore, the organized bar has traditionally viewed litigation to collect a fee as unseemly and something to be utilized only as a last resort.[109] Although Mr. Donald's account of the episode would offer no support for it, some speculation could also be expected about any influence Lincoln might have had over the local court

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102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 146–47.

106 *Id.* at 156.

107 *Id.*

108 Mr. Donald's description of Lincoln's reaction to the client's objection to the fee notes that he consulted "with six other prominent Illinois attorneys" about the propriety of the fee before re-submitting the bill to the client. *Id.* Despite appearances, therefore, this suggests that Lincoln's actions may not have been vindictive in nature.

109 The ABA's 1908 Canons, for example, provided that "lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud." CANONS OF PROF'L ETHICS Canon 14 (1908). Similar sentiments were included in the ABA's 1969 Code. Under a Code Ethical Consideration, a lawyer was urged to "be zealous in his efforts to avoid controversies over fees with clients" and to "attempt to resolve amicably any differences on the subject." MODEL CODE OF PROF'L RESPONSIBILITY EC 2–23 (1969). That provision also stated that a lawyer "should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." *Id.* The current ethical rules seem less opposed to lawyers suing clients for fees, directing them to follow any mandatory fee dispute resolution procedures such as arbitration or mediation and to "conscientiously consider" submitting to any such voluntary proceedings when they are available. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 9 (1983). No other current rule or comment discourages a lawyer from suing a client for a fee. The new *Restatement* also expresses no reluctance to lawyers recovering an appropriate fee through litigation or other dispute-resolution mechanisms. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 42 (2000). Despite the lofty language in the Canons and Code discouraging such litigation, the drafters of the Restatement observe that the reality is that "[s]ince the early 19th century, courts in the United States have recognized actions brought by lawyers to recover fees." *Id.* § 42 cmt. b(ii).

As for Lincoln, the suit against the Illinois Central Railroad was apparently not his only use of litigation against a non-paying client. Mr. Donald notes that Lincoln sued clients for unpaid fees at least six times. DONALD, *supra* note 5, at 104.

that heard the matter, given Lincoln's close personal relationship with the judge.[110] Finally, while the details of Lincoln's work for the railroad during and after his litigation against his client for the fee are not made clear in Mr. Donald's account, questions of conflict of interest are lurking in the seeming ongoing nature of their professional relationship despite this litigated dispute.[111]

F. Adversarial Impropriety?

Lincoln is described by Mr. Donald as an excellent trial lawyer who treated his adversaries fairly[112] and who had a reputation for presenting his arguments to the jury in a logical and readily understandable manner.[113] In defending a friend's son who was accused of murder, however, he did resort to a closing argument that could only have been intended to appeal to the jury's emotions.[114] Given the nature of criminal defense work, this may not seem remarkable, but two factors make Lincoln's argument in this case potentially troublesome. For one thing, from Mr. Donald's account of the trial, the emotional content of the argument seemed unnecessary, for Lincoln had apparently effectively discredited the prosecution's main witness through cross–examination and had emphasized this impeachment during his closing argument.[115] The second troublesome aspect of Lincoln's emotional appeal to the jury is that it focused not on factors related to the defendant but on Lincoln's relationship with the defendant's father.[116] The

110 Lincoln and Davis were friends and political allies in Illinois. Davis managed Lincoln's candidacy for the presidential nomination at the Republican convention in 1860. *Id.* at 246-51. As President, Lincoln appointed Davis, a state trial court judge, to the U.S. Supreme Court in 1862. Biographical Directory of the U.S. Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000097 (last visited Mar. 31, 2009). It is interesting that, even as an Associate Justice of the Supreme Court, Davis remained a political advisor to President Lincoln, Donald, *supra* note 5, at 483, and even managed Lincoln's re-nomination efforts at the 1864 Republican Convention. *Id.* at 504. The current rules prohibit a lawyer from seeking to influence a judge by means prohibited by law and from communicating ex parte with a judge during a proceeding. MODEL RULES OF PROF'L CONDUCT R. 3.5(a)–(b) (1983).

111 Mr. Donald indicates that Lincoln's lawsuit for the fee "did not interrupt his amicable relationship with the Illinois Central Railroad, which he continued to represent in numerous subsequent cases." DONALD, *supra* note 5, at 156. Of course, under current ethical rules, Lincoln could not ethically sue the railroad for the fee while representing it in other matters. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2), (b)(3) (1983). Even after the lawsuit was resolved, there would be some question whether Lincoln's representation of the railroad subsequently would be "materially limited" by the lawyer's interests and actions in the prior litigation, raising some question about the propriety of the later representation of the railroad. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (1983).

112 DONALD, *supra* note 5, at 149.

113 *Id.* at 151.

114 *Id.* at 150–51.

115 *Id.* at 151.

116 *Id.*

closing argument offered the jury an impassioned description of how the defendant's father had taken Lincoln as a very young man into his home and cared for him.[117] The story is described to have moved the jury to tears,[118] and they acquitted the defendant.[119]

Current rules of legal ethics view such histrionics as inappropriate, despite our impression that they are not uncommon. Under those rules, a lawyer is not to "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."[120] That the defendant's father had been generous to the defense counsel years earlier certainly could not be viewed as relevant to the murder trial, nor would evidence of that generosity be admissible in the trial. Indeed, the whole appeal to the jury seems particularly remote from anything involving the facts of the case or traits of the defendant himself. Lincoln's touching description, while both memorable and apparently successful, seems likely to have distracted the jury from its proper function and to have been calculated to do so.[121] In fairness, of course, Mr. Donald presents this episode as being unusual for Lincoln as a trial lawyer.[122] Nonetheless, it does appear to be an instance in which Lincoln's zeal exceeded today's ethical standards, at least as they are embodied in the profession's formal rules.

G. Bouts of Depression?

Sadly, Mr. Donald's account of Lincoln's career as a lawyer also is laced with references to the future President's tendency toward depression. This unfortunate condition is noted as pre–dating Lincoln's admission to the bar. For example, Mr. Donald relates that, while reading for his entrance to the bar, Lincoln "fell into a profound depression" following the death of a young woman in whom he was romantically interested.[123] It was a time when "friends feared for his health."[124]

Mr. Donald also notes that during Lincoln's early years in law practice in Springfield his moods swung "from deep despair to blithe confidence,"[125] but that in these years Lincoln was often "profoundly discouraged"[126] and

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117 *Id.*

118 *Id.*

119 *Id.*

120 MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (1983).

121 *See* DONALD, *supra* note 5, at 151.

122 Mr. Donald notes only that "[*o*]*n rare occasions* he ended with a powerful emotional address to the jury." *Id.* at 151 (emphasis added).

123 *Id.* at 57.

124 *Id.*

125 *Id.* at 66.

126 *Id.*

"experienced his deepest bouts of depression."[127] Mr. Donald characterizes Lincoln's alternating spells of "exuberant self-confidence and almost annoying optimism"[128] as merely reflecting that Lincoln "was still a very young man."[129]

That explanation seems less satisfying, however, as Mr. Donald further describes Lincoln's behavior upon returning to law practice in Springfield from his single term in Congress in 1849,[130] as a forty-year-old man, some twelve years after his difficulties at the start of his practice in the city. The author notes this to be a period during which Lincoln, no longer such a "very young man,"[131] was particularly prone to spells of depression.[132] The description, relying upon the observations of William Herndon, Lincoln's law partner, is telling.

> Some days he would arrive at the office in a cheerful mood, but then, as Herndon recorded, he might fall into "a sad terribly gloomy state—pick up a pen—sit down by the table and write a moment or two and then become abstracted." Resting his chin on the palm of his left hand, he would sit for hours in silence, staring vacantly at the windows. Other days he was so depressed that he did not even speak to Herndon when he entered the office, and his partner, sensing his mood, would pull the curtain across the glass panel in the door and leave for an hour or so, locking the door behind him to protect the privacy of "this unfortunate and miserable man."[133]

Like many sufferers from the condition, Lincoln apparently felt that he could deal with his difficulties through reason and effort, but his battle with depression continued throughout his life.[134]

In discussing these episodes, I certainly do not wish to appear critical of Lincoln's history of depression. Indeed, Mr. Donald's account of these episodes and Lincoln's struggles with them can likely only engender

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127 *Id.* at 66–67.

128 *Id.* at 67.

129 *Id.*

130 *Id.* at 162–65.

131 *Id.* at 67.

132 Various explanations for Lincoln's struggles with depression have been offered. Herndon, his law partner, thought it was the result of Lincoln's unhappy marital situation. *Id.* at 164. Others believed the moods reflected Lincoln's other health problems. *Id.* Mr. Donald opines that the primary cause of Lincoln's depression was his frustration and unhappiness that his political career had not been more successful. *Id.* While this might explain Lincoln's depression at the time of his return from serving in Congress, it does not account for his later bouts of depression after he had been elected President. *Id.* at 371, 426, 517. Of course, Lincoln served as President during the most demanding of crises. Additionally, while President, he had to cope with the death of his son Willie, *id.* at 336–37, a serious injury to his wife in a carriage accident, *id.* at 448, and his own bouts with illness and exhaustion, *id.* at 358, 467, 568.

133 *Id.* at 163. Lincoln's recurrent bouts of depression were noticed by other lawyers as well. *Id.* at 163–64.

134 *Id.* at 66–67.

sympathy and compassion in his readers. Today, we have come to understand more about this affliction and to recognize its prevalence in society. Furthermore, various treatment approaches are now available to sufferers from depression that were not available in Lincoln's time. Today we also recognize the impact that depression has on lawyers and, as a result, on their clients' matters.[135] It is possible only to speculate as to whether Lincoln's condition was this severe, but Mr. Donald's descriptions of the episodes certainly raise that as a possibility.

H. Summary

It is interesting to ponder what the bar's reaction would be today to modern lawyers engaging in episodes of conduct like these of Lincoln. What if bar authorities came to learn that an enterprising young person untrained in the law was rendering legal advice and drafting legal documents for others? What if a lawyer was contacting in person potential clients known to be in need of legal services and offering to represent them for compensation in upcoming litigation? What if a lawyer was known to be engaged in criminal behavior involving pending violence? What if a lawyer was acquiescing in another lawyer's apparently false public representations that the two were practicing law as partners? What if a lawyer, as an elected official, agreed to allow his firm to continue to use his name in the firm's title even though he would have no continuing connection with the firm? What if a lawyer had a pattern of misplacing client documents and occasionally neglecting matters entrusted to him? What if a lawyer, in response to a fee dispute with a client, multiplied the fee two and one-half times and then sued the client when further objection was made? What if a defense lawyer in a prominent murder trial appealed to the emotions of the jury by including in his closing statement a moving and distracting description of how the defendant's father had been kind to the lawyer years earlier? What if a lawyer tragically suffered from severe bouts of depression that may have affected the legal services he was able to provide his clients and failed to terminate those representations and seek help?

It is likely that the organized bar would be quite concerned, and the transgressors would be subjected to some uncomfortable, even unpleasant, inquiries and possible legal proceedings. Were all of these things to be done by a single individual today, it is probably safe to say that he or she would not be a likely choice of contemporary lawyers as a model of professionalism.

135 *See infra* text accompanying notes 156–59 for further discussion.

III. Reflections on Lincoln's Questionable Conduct and His Role as an Icon of Professionalism

Judged by current standards of legal ethics, some of Lincoln's conduct as described by Mr. Donald is at least troubling. Having this reaction while reading his book, I was caused to reflect on whether Lincoln deserves his continuing status as a professional icon. Ultimately, however, my reflection turned to focus more on the role of the modern organized bar in regulating lawyers' conduct, on possible broader contextual changes since Lincoln's time, and on the illusive concept of "professionalism" itself.

A. The Role of the Organized Bar

In evaluating our reaction to some of Lincoln's questionable conduct, an important consideration is that at the time he practiced law the legal profession was less organized than it is now. Indeed, the general formation of what we might consider bar associations was still some decades in the future[136] when Lincoln began practicing in 1837. This also means that the organized bar had yet to exert its strong influence on the law pertaining to lawyers and regulating the practice of law. Rather than reflecting poorly on Lincoln's professionalism, therefore, some of his conduct may say more about the direction the organized bar's influence has taken since that time.

1. *The Bar's Anti-Competitive Efforts.*—One distinct characteristic of the regulation of lawyers since Lincoln's time has been the legal barriers the bar has raised to competition from outside the profession. A prime example of this is the broad prohibition on the unauthorized practice of law by non-lawyers. The success of the bar in this effort is evident in the negative reactions that might be felt today to Lincoln's provision of legal services to others before he was licensed as a lawyer.[137]

While the exclusive licensing of lawyers and prohibitions on the unauthorized practice of law are established and common concepts now, this was not the case in our nation generally,[138] or in downstate Illinois specifically,[139] in the 1830s. Thus, Lincoln's unlicensed foray into the

136 Professor Wolfram notes that "[l]ittle formal organization characterized the American bar until after the Civil War." Wolfram, *supra* note 14, at 34. He also traces the origin of the American Bar Association to 1878. *Id.* Some local bar associations existed earlier. The Philadelphia Bar Association, founded in 1802, asserts that it is "America's first chartered metropolitan bar association." Philadelphia Bar Association, About Us, http://www.philadelphiabar.org/page/AboutUs? (last visited Mar. 13, 2009).

137 *See supra* text accompanying notes 37–45 for a discussion of this conduct.

138 Nationally, unauthorized practice statutes are largely the product of bar association efforts in the early twentieth century. Rhode, *supra* note 41, at 6–10.

139 At the time Lincoln was drafting documents and offering legal advice to others as a

legal arena as a young store clerk, as described in Mr. Donald's account, at the time was likely not remarkable at all, let alone illegal.[140] Rather than reflecting negatively on Lincoln's attitudes regarding compliance with the law, therefore, any modern concern about Lincoln's possible unlicensed practice of law highlights the subsequent success of the organized bar in monopolizing the field of providing legal assistance to others and conflating the bar's own interests with those of the public.[141] Indeed, the untrained Lincoln's apparent success in offering such advice and services at least raises suspicions about the need for continuing such broad, self-serving legislation.

Any of today's concerns about Lincoln's commercial practices as a lawyer, particularly his solicitation of clients anticipating litigation,[142] also reflect the bar's current use of "ethical" rules to control competition among

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young store clerk in New Salem, the state of Illinois, like some other states at the time, *id.* at 7, did have in place early statutory limits on the representation of others in appearances before the courts of the state. Such prohibitions reach back to 1819, a year after Illinois became a state, Act of Feb. 10, 1819, 1819 Ill. Laws 9 ("An Act regulating the admission and practice of Attornies [sic] and Counsellors [sic] at law."), and were in place at the time Lincoln began his law practice in Springfield in 1837, Act of Mar. 1, 1833, 1839 Ill. Laws 81–83. In *Robb v. Smith*, 4 Ill. (3 Scam.) 46 (Ill. 1841), the state supreme court interpreted the 1833 statute as generally requiring dismissal of any action brought by a layperson on behalf of another. Broader prohibitions on laypersons providing other legal services in Illinois appear to have arisen through legislation amending the above provision in 1917 declaring that "no person shall receive any pay or compensation for any legal service" unless licensed to do so by the state supreme court. Act of June 11, 1917, § 1, 1917 Ill. Laws 205.

140 Even Mr. Donald's account of Lincoln being asked by the local judge to comment on cases before the court would not suggest a violation of the early Illinois statute unless he was representing a party in doing so. *See supra* notes 38–40 and accompanying text. Lincoln's appearances, consisting of a non-party's commentary solicited by the presiding judge, seem quite literally to be *amicus curiae* rather than representational in form.

141 The legal profession is not alone in this development. Other professions have sought and been granted monopolies over certain practices once provided by others. On the frontier of Illinois in the mid-nineteenth century, for example, it is quite likely that barbers engaged in conduct that would currently be regarded as the practice of medicine. Professor Wolfram notes:

> It has, for example, only recently come to be appreciated that the organization of lawyers into bar associations, the creation of educational and other admission barriers to law practice, the beginnings of a concept of unauthorized practice, and similar "guild" aspects of lawyer organizations were not unique to lawyers. During the same period—roughly 1860 to 1890—that those events were unfolding in the American legal profession, many other professional and working groups experienced parallel development. Indeed, the similarities in the history of lawyers, doctors, educators, and other professional groups are much more striking than their differences.

WOLFRAM, *supra* note 14, at 8.

142 *See supra* text accompanying notes 63–79.

members of the bar. Present standards of legal ethics restrict solicitation,[143] but this was not the case when Lincoln practiced law.[144] Limitations on lawyers soliciting potential clients did not arise until early in the twentieth century.[145] Much like the initial reaction modern–day lawyers might have to Lincoln's unlicensed giving of legal advice, any contemporary negative reaction to Lincoln's solicitation of clients is a measure of how we in today's profession have come to accept such anti–competitive restrictions as necessary legal and even ethical prohibitions.[146] One wonders, however, whether "'benign' solicitation"[147] like that of Lincoln's, even if in person and for pecuniary gain, truly warrants continued regulation.

My concerns that Lincoln had engaged in the unauthorized practice of law and had solicited clients for litigation, therefore, dissolved into reflection on the bar's considerable success since Lincoln's day in using its influence over state legislation and its own regulatory power to control competition from non–lawyers and among those in the profession. Indeed, Lincoln's continued stature as a model lawyer, despite his having engaged in such

143 Lincoln's conduct in seeking to be employed by McLean County in the litigation involving county power to tax the railroads would violate the ABA's current version of Model Rule 7.3 to the extent the solicitation was in–person. *See supra* note 70. His subsequent solicitation of the railroad regarding the same litigation may raise confidentiality and conflict of interest concerns, *see supra* notes 71–72, but would not violate Model Rule 7.3 because Lincoln had already represented the Illinois Central Railroad in other matters and thus had a "prior professional relationship" with it. MODEL RULES OF PROF'L CONDUCT R. 7.3(a)(2) (1983).

144 WOLFRAM, *supra* note 14, at 785–86.

145 *Id.* at 785. The ABA's 1908 Canons provided that "[i]t is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." CANONS OF PROF'L ETHICS Canon 27 (1908).

146 To be sure, prohibitions on certain types of potentially abusive solicitation also serve to protect vulnerable potential clients from overreaching by lawyers. Such solicitation is the sort that resulted in the discipline of the lawyer–respondent in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). In terms of those concerns, however, Lincoln's efforts in contacting county officials in hopes of representing the county in important and sophisticated litigation against a large railroad did not involve such risks.

147 The term "'benign' solicitation" is meant here as it was used by Justice Marshall in his separate opinion concurring in both *In re Primus*, 436 U.S. 412, 468–77 (1978) (Marshall, J., concurring) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468–77 (1978) (Marshall, J., concurring). There he defined what he meant by "'benign' solicitation" as:

> [S]olicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.

436 U.S. at 472 n.3.

activities, should raise some questions as to the continued validity of the public interest justification for such anti–competitive restraints today.

2. *The Detailed Regulation of Law Practice.*— Several other areas of Lincoln's conduct that we might question under today's professional standards highlight the bar's increasing level of legalization of the field of legal ethics. This development has been noted and criticized by numerous scholars.[148] Whether one sees it as positive or negative, however, the trend does suggest that some of Lincoln's failings under current professional standards demonstrate the extent of that development rather than raise legitimate concern about his underlying sense of ethics or continuing role as a model lawyer.

For example, Lincoln's impassioned closing argument on behalf of the young defendant in the murder trial discussed above[149] was irrelevant to the proceeding and distracting to the jury and, therefore, presented grounds for objection by the prosecutor, as it would today.[150] Indeed, the adversary process itself might be viewed as a sufficient check on such conduct by lawyers acting openly before a court. The reach of current professional rules additionally to prohibit such conduct, however, illustrates the bar's expansive contemporary use of "ethics" to impose its regulation on a much broader range of lawyer conduct.

A similar conclusion might be drawn about the two instances of Lincoln allowing his name to be used in the names of law firms when, under today's rules, it would be regarded as inappropriate to do so.[151] To be sure, the current prohibitions on such representations help to avoid public confusion and possible deception regarding the nature of lawyers' practices.[152] These

148 Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1125, 1127 (1988); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics–II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 206–08 (2002); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 223 (1993).

149 *See supra* text accompanying notes 114–22.

150 In his treatise, Professor Wolfram discusses the efficacy of judicial control of adversarial excesses through disciplinary rules, contempt citations, and evidentiary and procedural objections, WOLFRAM, *supra* note 14, at 620–22, noting that judicial rebukes and "firm and fair judicial control" may be the best way to reduce inappropriate courtroom behavior by lawyers, *id.* at 622. He concludes that, despite their current existence, disciplinary rules are seldom used for such control. *Id.* at 620.

151 One instance was when a young lawyer acquaintance advertised his partnership with Lincoln when no such partnership existed, discussed in the text accompanying notes 73–75*supra*. The other was the continued use of Lincoln's name in the firm of Lincoln & Herndon after he became President of the United States, as discussed in the text accompanying notes 76–78 *supra*.

152 The public representation of the existence of a law partnership may imply broader expertise, resources, and liability. The involvement of an elected official in the regular practice

professional prohibitions certainly did not exist at the time Lincoln was practicing.[153] That they exist now is indicative of the level of detail that current ethical rules reach[154] more than it is a comment on the ethics of Abraham Lincoln.

In the contemporary milieu of professional regulation, there is the risk that we will equate obedience to the increasingly detailed mandatory standards with "ethical" behavior.[155] Awareness of such a tendency may allow us to understand our modern reaction to some of Lincoln's conduct that strikes us as inappropriate today and remind us to keep those reactions in proper perspective.

3. *The Recognition of the Problems of Impaired Lawyers.*—Our possible contemporary reaction to Lincoln's unfortunate bouts with depression also suggests how the bar's influence over the practice of law has changed since the mid–1800s. The fact that today we might be more protective of clients and, at the same time, more understanding of the difficulties faced by impaired lawyers, is evidence of considerable and laudable progress in our disciplinary process in this respect.

The organized bar has attempted to come to grips with the issue of incapacitated lawyers in three ways. First, the bar's professional rules now expressly recognize that a lawyer's mental or physical condition might

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of a law firm, on the other hand, suggests within the firm the presence of special power and influence in governmental matters. Because of the potential for confusing or misleading potential clients, and arguably to control competition, current ethical rules seek to limit such public representations.

153 The restrictions did not appear until the ABA's first codification of legal ethics, the 1908 Canons, which prohibited the use of misleading firm names. CANONS OF PROF'L ETHICS Canon 33 (1908). The representation of a partnership when none existed could be so viewed. While that Canon did not expressly prohibit the continued inclusion of the name of an elected official when that person was no longer practicing with the firm, that could also be viewed as misleading. The Canon did prohibit the continued use of the name of a member of the firm after that person had become a judge, a situation analogous to the elected official situation. *Id.* The ABA's 1969 Code prohibited lawyers from holding themselves out as "having a partnership with one or more other lawyers or professional corporations" unless that was in fact the case. MODEL CODE OF PROF'L RESPONSIBILITY DR 2–102(C) (1969). Like Model Rule 7.5(c), the Code did prohibit a lawyer from allowing a firm to include his or her name after assuming a "judicial, legislative, or public executive or administrative post or office." *Id.* at DR 2–102(B). As discussed in note 152 *supra*, the current rules help to avoid confusing and even deceiving the public regarding the nature of lawyers' practices.

154 Of course, one possible explanation for this trend is that the increasing legalistic reach of "ethics" rules is a gauge of the decreasing ethical conduct of lawyers. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 944 (1996).

155 One scholar has asserted that such a notion is false. Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law–Based Conceptions of Ethics*, 68 IND. L.J. 101, 104, 130–31 (1992).

require his or her withdrawal from the representation of clients.[156] Second, state supreme courts have begun trying to balance the objectives of the disciplinary system with the needs of lawyers suffering from disorders, including psychological problems and chemical dependency, by defining situations in which such conditions might serve as mitigating circumstances in applying professional sanctions.[157] Third, all state bar associations now have some sort of program to assist impaired lawyers in getting help for their conditions, especially when their impairment involves substance abuse.[158]

We can read Mr. Donald's description of Lincoln's sad affliction with depression and see how unfortunate it was for him and his clients that such an enlightened approach did not exist at the time. Lincoln and his law partner appeared to have done the best they could to cope with his condition, which is all that could have been expected of ethical, conscientious lawyers of the time. Our reaction today to his difficult plight reminds us of the unfortunate frequency of depression within today's legal profession[159] and of the need for the bar to continue to deal with this serious and widespread professional problem.

B. Contextual Changes

Some of our negative contemporary reactions to Lincoln's conduct as a lawyer likely reflect broader contextual changes since the 1830s. Recognition of these changes provide some perspective for our reactions and explain why the same conduct was not perceived as problematic in Lincoln's day.

For one thing, we might speculate that society was more civil[160] and less litigious than it is now. This may explain why under Mr. Donald's

156 MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2) (1983) (A lawyer is required to withdraw from the representation of a client when the lawyer's "mental condition materially impairs the lawyer's ability to represent the client.").

157 This trend is discussed in WOLFRAM, *supra* note 14, at 95–96. Examples of such cases are *In re Kersey*, 520 A.2d 321, 325–28 (D.C. 1987) (holding that disciplinary cases involving alcohol deserve a case-by-case analysis), *In re Johnson*, 322 N.W.2d 616, 617, 618–19 (Minn. 1982) (holding that alcoholism is not sufficient alone to warrant ethics sanctions), and *In re Walker*, 254 N.W.2d 452, 454, 457 (S.D. 1977) (holding that a recovered alcoholic deserved deferred suspension contingent on attorney not using alcohol).

158 Carol M. Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 906 (2005).

159 One scholar has summarized the studies showing the alarming incidence of depression, and other related conditions, among lawyers compared to the public at large. *Id.* at 884.

160 Mr. Donald's account might tempt the reader to conclude that one possible gauge of the difference in civility from Lincoln's time to ours may be the behavior of presidential candidates while campaigning. During his first campaign for the Presidency, after his nomination by the Republican Party at its convention Lincoln played almost no role in the

account Lincoln's clients seem to have expressed so little outrage at his carelessness in handling their papers[161] or at his occasional neglect of their matters when he was away pursuing various political causes.[162] It is likely that our eyebrows are raised today at such failures because we know how poorly they would be received by modern clients.[163] Rather than reflecting a poor sense of ethics, therefore, Lincoln's missteps in managing his practice might be seen to have been within the range of acceptable professional performance in the eyes of the clients of his day.

We might also react poorly today to Mr. Donald's description of Lincoln using the privileges of his mailing frank as a young postmaster to provide free postage for his friends.[164] One might wonder, however, whether this modern, negative reaction to Lincoln's use of the perquisites of the job reflects how alert and sensitive we have become even to minor abuses by public officials. Perhaps, as a result of more watchful media over the past several decades, we are today made more aware of misuse of power by elected officials and bureaucrats at all levels of government. While we may be less tolerant of such abuses today, in Lincoln's day these acts likely were

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campaign. DONALD, *supra* note 5, at 253–54. Mr. Donald notes that:

> Lincoln's one public appearance during the campaign was at a giant rally in Springfield in August, where he expected simply to see the people and to allow himself to be seen. Entreated to address the crowd, he reiterated his policy: "It has been my purpose, since I have been placed in my present position, to make no speeches."

Id. at 254. Despite his regular desire to participate actively in the campaign, his advisors convinced him not to do so, for one thing because it might suggest fear or desperation on the part of the candidate. *Id.* Even a parade that ended at his front door in Springfield only caused Lincoln to appear and bow silently. *Id.* at 255. Comparing this campaign style to today's mud-slinging advertisements, "swift boat" attacks, and "push polls" might suggest that, on the political front at least, and perhaps more generally, Lincoln's day was a more civil era.

There are reminders throughout Mr. Donald's work, however, that the politics of Lincoln's day were no more civil than those of today. For example, as a member of Congress, Lincoln took the lead in an assault on President Polk over his role in the initiation of the Mexican War in 1846. *Id.* at 123. Likely fueling the partisan aspect of this action specifically and the politics in Lincoln's day generally was the fact that many of the newspapers of the time were recognized as being openly Democratic or Whig in orientation. *Id.* at 124–25. During the off-year northern state elections of 1863, seen as important to Lincoln's support in prosecuting the war effort, Union General Burnside had Democratic candidates imprisoned in Kentucky, and President Lincoln approved furloughs for troops and leaves for government clerks to allow them to travel to their home states to vote. *Id.* at 454–55.

161 *See supra* text accompanying notes 80–87 for this discussion.

162 *See supra* text accompanying notes 88–91 for this discussion.

163 For example, Professor Wolfram notes that "[a]lthough the basic doctrinal content of legal malpractice law has remained intact for decades, the number of successful legal malpractice actions has increased significantly" since the mid-1970s. WOLFRAM, *supra* note 14, at 206.

164 *See supra* text accompanying notes 46–50 for this discussion.

viewed in a more forgiving fashion, indeed in the same way Mr. Donald seems to react to them in his book.[165]

Thus, while some of Lincoln's conduct may be viewed as questionable when measured against contemporary professional standards, it also must be considered in its societal context. The concept of professional ethics is not isolated or static. The organized bar's treatment of the subject has intensified and expanded, all too often to reflect the profession's interests to a greater degree than those of the public and to include subjects that are only minimally related to true ethical concerns. Issues of depression and other impairments have lately received increasing professional attention as the prevalence and degree of these problems have become clearer. At the same time, societal changes cause additional pressures on professional standards. Judging Lincoln's conduct under today's standards can reveal these contextual influences, which help alleviate any initial concerns that his conduct might generate about Lincoln as a lawyer and causing us to focus instead on the nature of the bar's regulatory program itself.

C. "Professionalism" and Lincoln's Role as a Model Lawyer

Contemporary lawyers attempting to square Lincoln's present status as a model lawyer with the instances of his questionable conduct might well find solace in the evolving nature of the bar's regulation of lawyers and in societal changes since Lincoln's time. Even after making the appropriate contextual allowances in this way, however, the question remains whether, given these incidents and the state of professional standards presently, Lincoln deserves his continuing reputation as a model of what lawyers should strive to be in today's profession.

To address this question we cannot look merely at the incidents of Lincoln's conduct that are questionable under contemporary professional standards. Instead, we must also consider the characteristics that elevated him to the status of a professional icon in the first place. Mr. Donald's description of Lincoln's work as a lawyer offers clear evidence of these traits as well.

Foremost among these characteristics would have to be Lincoln's remarkable reputation for honesty. Mr. Donald notes that when Lincoln returned to practice after his single term of service in the U.S. House of Representatives in 1849,[166] he "firmly reestablished his reputation as a lawyer. It was a reputation that rested, first, on the universal belief in his absolute honesty."[167] According to Mr. Donald, Lincoln was regarded as "the lawyer who was never known to lie. He held himself to the highest

165 For Mr. Donald's forgiving, even complimentary, characterization of Lincoln's use of the mailing frank for his friends, see *supra* text accompanying note 48.

166 DONALD, *supra* note 5, at 142.

167 *Id.* at 149.

standards of truthfulness."[168] This reputation undoubtedly played a part in the local judge's reliance on Lincoln to preside over court proceedings when the judge was unable to do so and in the adversaries' apparent acceptance of Lincoln's rulings in the cases he heard.[169] This reputation was also evidenced by his popular and enduring nickname as "Honest Abe" or "Honest Old Abe."[170]

Lincoln's high level of skill and competence as a lawyer must also be recognized as an important component of his reputation as a model lawyer. Mr. Donald notes his "incredible capacity for hard work,"[171] the skill and care shown in his hand-drafting of long pleadings and other documents,[172] as well as his reputation as a skilled trial[173] and appellate lawyer.[174] In addition to his legendary recognition for the fine personal and professional characteristic of honesty, therefore, Lincoln's reputation for his skill in the craft of being a lawyer must be considered to be an important part of his professional stature.[175]

Mr. Donald also notes that Lincoln was a lawyer known for his "fairness to his opponents."[176] This was shown in his reluctance to rely on technicalities in representing his clients,[177] in his willing admission of important facts known by him to be true,[178] and in his restraint in objecting to the admissibility of evidence except when critical to his cases.[179] Mr. Donald's description of Lincoln as an advocate presents him as the antithesis of the modern-day "Rambo" lawyer,[180] who is known for seizing every opportunity to inconvenience, obstruct, and frustrate an adversary. Lincoln was a lawyer held in high professional and personal regard by his peers at the bar as well as by his clients.

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168 *Id.*

169 *Id.* at 146–47.

170 *Id.* at 149.

171 *Id.*

172 *Id.*

173 *Id.* at 151.

174 *Id.* at 100.

175 One must candidly recognize his apparent tendency toward carelessness with clients' papers and records and neglect of matters during his absences, *see supra* text accompanying notes 80–97. On the other hand, Mr. Donald does note that "Lincoln's clients rarely lost a suit because of carelessness or inattention on the part of their attorney." DONALD, *supra* note 5, at 149.

176 DONALD, *supra* note 5, at 149.

177 *Id.*

178 *Id.*

179 *Id.* at 149–50.

180 "Rambo lawyer" is a label commonly used for overly aggressive lawyers using win-at-all-cost tactics, particularly in litigation. The label is taken from the film FIRST BLOOD (Anabasis N.V. 1982), and its sequels, in which Sylvester Stallone plays the character "Rambo," a Vietnam veteran who aggressively and single-handedly battles a small town police force.

Finally, Mr. Donald emphasizes Lincoln's reputation for fairness in the fees he charged for his services. Lincoln recognized that legal fees were an important professional matter, causing him to state once in his notes for a proposed lecture to young lawyers that fees were "important far beyond the mere question of bread and butter involved."[181] Acting on this conviction, his fees were typically modest,[182] and he was known to return parts of legal fees paid to him when he felt the amount was too large.[183]

If we consider Lincoln as being a lawyer known for these traits—for his uncompromising truthfulness, his notable skills in the representation of his clients, his fairness in his dealings with his fellow lawyers, and his reasonableness in setting fees for his services—he deserves his place as an enduring professional role model for today's lawyers. Indeed, it is the perceived lack of these traits among lawyers generally that underlies much of the public and professional discontent with the modern legal profession.[184] If contemporary lawyers were to emulate Lincoln in these four characteristics, they would do much to assuage the longing for higher levels of professionalism currently expressed not only from outside of the legal profession but from within it as well.[185] Thus, by his display of these

181 DONALD, *supra* note 5, at 104.

182 *Id.* at 148. Mr. Donald notes, however, that Lincoln was not shy about pursuing payment from clients when it was not forthcoming. *Id.* at 104. In addition to dunning clients delinquent in their fee payments, Mr. Donald indicates that Lincoln sued clients for unpaid fees six times. *Id.* There remains, of course, the seemingly uncharacteristic episode involving one of these litigated fee matters in his representation of the Illinois Central Railroad against McLean County, *see supra* text accompanying notes 98–111. *See infra* text accompanying notes 203–04 for further discussion.

183 DONALD, *supra* note 5, at 148. At least once, however, when the client insisted on the larger payment to him, Lincoln acquiesced. *Id.* at 185–86.

184 Opinion polls offer evidence that the public feels that traits such as these are lacking among lawyers. One ABA poll indicated that only 22% of respondents believed that the phrase "honest and ethical" accurately describes lawyers, Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 62 (1993), and a 2004 Gallup poll ranking the honesty and ethical standards of various "professions" placed lawyers nineteenth out of twenty-one, placing above only "advertising practitioners" and "car salesmen," David W. Moore, *Nurses Top List in Honesty and Ethics Poll*, GALLUP NEWS SERVICE, Dec. 7, 2004, http://www.gallup.com/poll/14236/Nurses-Top-List-Honesty-Ethics-Poll.aspx?version=print. A 2002 poll prepared for the ABA Section of Litigation found that respondents describe lawyers as "greedy, manipulative and corrupt," with 69% of respondents agreeing with the statement that "lawyers are more interested in making money than in serving their clients." LEO J. SHAPIRO & ASSOCIATES, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS PREPARED ON BEHALF OF THE SECTION OF LITIGATION 8, 18 (2002), http://www.abanet.org/litigation/lawyers/ publicperceptions.pdf. Other public opinion polls indicate similar attitudes about lawyers. *See, e.g.*, Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808–10 (1998); Symposium, *Transcript from Professionalism Conference*, 52 S.C. L. REV. 481, 490 (2001).

185 The extent of the feeling within the profession that lawyers' professionalism is in decline is shown by Susan Daicoff's research in 1997 finding 145 articles in legal periodicals containing the word "professionalism" in their titles. Susan Daicoff, *Lawyer, Know Thyself: A*

traits alone,[186] Lincoln could be said to serve as a suitable role model for today's legal profession despite the incidents of other conduct that would raise questions under today's professional standards.

Of course, that conclusion might be less compelling if our view of "professionalism" is broader and more demanding of lawyers.[187] For example, some commentators have urged that professionalism compels lawyers to shed their "hired gun" image by owing their primary allegiance to the procedures and institutions of the law rather than to their clients' interests.[188] With such a view of "professionalism" it would seem that Lincoln might have a difficult time preserving his professional icon status. During his law practice, for example, Lincoln argued cases both on behalf of and against slavery.[189] Mr. Donald notes that Lincoln's advocacy for both sides of that issue should not be taken as indicative of his personal views on the institution of slavery, for "his business was law, not morality."[190]

Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 AM. U. L. REV. 1337, 1347 n.33 (1997).

186 A fifth trait, less clearly emphasized by Mr. Donald's description of Lincoln's years in law practice, might be added to the list of four professional traits. One leading scholar has pointed to Lincoln's "wisdom" as displayed in his efforts to preserve the Union during the immense calamity of the Civil War. Dean Anthony Kronman sees this trait as a major component of the "lawyer–statesman" ideal, to which the modern lawyer should aspire. KRONMAN, *supra* note 6, at 3. Dean Kronman notes:

> In the years before the Civil War, as he struggled to find a way to save the Union and democracy too, Lincoln had no formula to guide him. He possessed no technical knowledge that could tell him where the solution to American's dilemma lay. He had only his wisdom to rely on—his prudent sense of where the balance between principle and expediency must be struck.

Id. One could not deny that those in today's legal profession should strive to possess and exercise even a fraction of Lincoln's wisdom. Even falling short of that lofty goal, however, it would seem that the public's opinion of the profession and its members' own view of themselves would certainly be improved if they could better achieve the above mentioned four qualities that made Lincoln a lawyer of great stature.

187 A discussion of the range of ways in which the term "professionalism" is used is found in Cramton, *supra* note 79, at 14–17.

188 Professor Cramton sees this as the true meaning of "professionalism." *Id.* at 7–8. He associates his view of professionalism with Professor Robert Lawry's vision of the "central moral tradition of lawyering," to the effect that a lawyer's first obligation is to the "processes, procedures and institutions of the law" rather than to the client. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 320–21 (1990). The author has examined this professionalism approach further in Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693 (2006).

189 DONALD, *supra* note 5, at 103–04.

190 *Id.* As a litigator, Lincoln argued both sides of other issues in sequential cases. Indeed, at times he found himself arguing against precedents he had helped establish in earlier cases. Three of these instances are noted in BANNISTER, *supra* note 12, at 54–55, 74–79, 113–15.

For some commentators, such an approach would not comport with the demands of their view of "professionalism."

Other commentators have tied the perceived modern decline in lawyers' "professionalism" to the increasing commercialization of the practice of law. In particular, some urge lawyers to abandon certain business-getting techniques such as advertising and solicitation[191] and to view the practice of law as a "calling" rather than a money-making trade.[192] Under such a view of "professionalism" Lincoln may also not serve as a particularly apt role model. As noted above, Lincoln viewed his law practice as a commercial enterprise[193] and engaged in some of the business-getting practices now frowned on by some critics of the legal profession.[194] If "professionalism" is to be viewed as inconsistent with law practice as a commercial and money-making enterprise,[195] Lincoln will not serve as a suitable role model.

Finally, some commentators urge lawyers to demonstrate greater commitment to "ethical deliberation" in approaching troubling professional issues and, therefore, in enhancing professionalism.[196] Mr. Donald's account of Lincoln's years in law practice does not offer much insight into this aspect of his subject's approach to issues, nor could it. His apparent adherence to the zealous advocate role in representing clients in cases involving both sides of the slavery issue,[197] however, suggests that Lincoln embraced a form of role-differentiated morality not favored by proponents of the deliberative approach.[198] This indicates that Lincoln might not be the most

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191 Chief Justice Warren Burger was of this opinion. Burger, *supra* note 79. For a list of sources decrying the effect of the commercialization of law practice on lawyers' professionalism, see Daicoff, *supra* note 185, at 1344 n.17.

192 Roscoe Pound's classic definition of a "profession" included among its criteria the concept of "a common calling in the spirit of a public service" in which "[g]aining a livelihood is incidental, whereas in a business or trade it is the entire purpose." ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). Such assertions continue. Anthony T. Kronman, *Chapman University School of Law Groundbreaking Ceremony*, 1 CHAP. L. REV. 1, 3 (1998).

193 As was noted above, Lincoln's law practice was his only source of income. *See supra* text accompanying note 23.

194 For example, Lincoln engaged in solicitation of clients. *See supra* text accompanying notes 63–72.

195 Some argue against this contention. Professor Cramton, for example, views professionalism and commercialism within legal practice as not being inconsistent. Cramton, *supra* note 79, at 15–16.

196 For a discussion of this theory, see Gaetke, *supra* note 188, at 706–11. Included among scholars urging greater ethical deliberation among lawyers are Simon, *supra* note 148, at 1083, and Feldman, *supra* note 154, at 885.

197 Discussed *supra* text accompanying notes 189–90. Other instances of arguing both sides of issues exist. *See* BANNISTER, *supra* note 12, at 54–55, 74–79, 113–15.

198 There is other evidence of Lincoln's embrace of role-differentiated morality. While Lincoln apparently had a reputation for honesty in the practice of law, there is some evidence that he was able to distinguish the need for absolute honesty in other contexts. In the political arena, for example, Mr. Donald notes that Lincoln made an 1856 speech at the Republican

likely professional role model for those seeing professionalism in terms of lawyers' broader ethical deliberation.

On the other hand, for those of us who would be encouraged, even if not fully satisfied, to see a profession made up of lawyers who were more honest, more competent, more civil with their adversaries, and more reasonable in setting fees, Lincoln does indeed continue to serve as a compelling model of professionalism. To a great extent, this modest view of professionalism only demands that lawyers adhere to professional rules of long standing,[199] rather than urging lawyers to do and be more than the standards compel.[200] While not reflecting the most ambitious view of the concept of professionalism, success in adherence to these four tenets of Lincoln's practice would do much to enhance the public image of today's bar and, perhaps, the career satisfaction of those within it.

It must also be noted that to regard Lincoln as a continuing model of lawyer professionalism for his fine traits of honesty, competence, fair treatment of adversaries, and reasonable fees, is not to ignore that Lincoln had his faults, both personal and professional. Even if much of Lincoln's questionable conduct under modern professional standards can be condoned by considering its legal and societal context, as suggested above, there remain some lingering concerns. In reading Mr. Donald's account of Lincoln's career as a lawyer, I was most troubled by his involvement in the duel with Shields, actions that were clearly illegal as well as potentially violent.[201] It gives me some comfort that Lincoln himself considered this episode to be the most painful of his memories of being a lawyer.[202] His response to the Illinois Central Railroad's objection to his fee in the

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convention indicating falsely that some northern Democrats were now accepting the argument of some Southerners that slavery should be extended to white laborers. DONALD, *supra* note 5, at 191–92. Lincoln was also less than candid with Edward Bates in offering him the position of Attorney General in the new administration. *Id.* at 264–65. Similarly, the context of war may have provided justification for Lincoln to be less than honest. Mr. Donald suggests that in negotiating an end to the Civil War the President indicated that the end of slavery might not be a condition of peace. Mr. Donald suggests that this might have been "a campaign of misinformation" to appeal to some followers of Jefferson Davis. *Id.* at 559–60. This is not to be critical of Lincoln but to note that his devotion to honesty may have had contextual limits.

199 Truthfulness, competence, reasonableness in setting fees, and a certain level of civility are all required by the ABA's Model Rules. Rule 1.1 (competence), Rule 1.5(a) (fees), Rule 3.1(non–frivolous actions), Rule 3.3 (candor to tribunal), Rule 3.4 (fairness to opposing party and counsel), Rule 4.1 (truthfulness), Rule 4.4 (respect for rights of third persons), Rule 8.4 (conduct involving dishonesty or that is prejudicial to the administration of justice), MODEL RULES OF PROF'L CONDUCT (1983).

200 Commentators proposing greater "professionalism" among lawyers often see the concept as requiring lawyers to be more "ethical" than the formal rules require. For further discussion of this aspect of the professionalism approach to lawyers' ethical problems, see Gaetke, *supra* note 188, at 701–06, 711–14.

201 *See supra* text accompanying notes 51–62.

202 DONALD, *supra* note 5, at 92.

McLean County litigation[203] also strikes me as out of character for Lincoln and not consistent with his otherwise professional approach to fees. It appears that the action did not seem to bother the railroad that much, since it continued to use Lincoln's services,[204] but his subsequent substantial increase in and lawsuit for the fee strike me as almost certainly affected, if not solely motivated, by impulses of anger and vindictiveness, not the best of professional motives.

Professional icons, however, are not perfect. Ultimately, we must recognize that we choose our role models for certain admirable but usually isolated qualities, and we must accept them with their inevitable shortcomings as well. That Lincoln was not perfect in his behavior as a lawyer or citizen should not prevent us from considering him to be a continuing icon of professional behavior.

CONCLUSION

Mr. Donald's book offers readers an informative and interesting look into Lincoln's years as a practicing lawyer, as well as into all aspects of his subject's life and Presidency. When viewed from the position of a modern lawyer, some of Lincoln's conduct in practice can raise concerns about his continuing status as a model of professionalism, as he is so often characterized. Ultimately, however, those concerns can be seen to say more about the nature of the organized bar's current regulation of lawyers—particularly its self-serving nature and increasing scope and technicality—and about changes in society than about Lincoln's underlying sense of professional ethics. In light of his reputation for honesty, for skilled representation of his clients, for respectful civility in dealing with his adversaries, and for setting reasonable fees, Lincoln continues to stand as a compelling role model for those of us in the legal profession today.

203 *See supra* text accompanying notes 98–111.

204 *See supra* text accompanying note 107.