DO JUDGES SYSTEMATICALLY FAVOR THE INTERESTS OF THE LEGAL PROFESSION?

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ABSTRACT

This Article answers this question with the following jurisprudential hypothesis: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.

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This Article presents theoretical support from the new institutionalism, cognitive psychology and economic theory. This Article then gathers and analyzes supporting cases from areas as diverse as constitutional law, torts, professional responsibility, employment law, evidence, and criminal procedure.

The questions considered include: why are lawyers the only American profession to be truly and completely self-regulated? Why is it that the attorney-client privilege is the oldest and most jealously protected professional privilege? Why is it that the Supreme Court has repeatedly struck down bans on commercial speech, except for bans on in-person lawyer solicitations and some types of lawyer advertising? Why is it that the Miranda right to consult with an attorney is more protected than the right to remain silent? Why is legal malpractice so much harder to prove than medical malpractice? This Article finishes with some of the ramifications of the lawyer-judge hypothesis, including brief consideration of whether our judiciary should be staffed by lawyer-judges at all.

I. INTRODUCTION

Physicists and law professors (among many others) are in continuous search of a grand theory of everything. Being a relatively adventuresome fellow, I too have engaged in this quixotic search. While I have failed (thus far) to create a legal theory of everything, I believe that I have stumbled upon a heretofore undiscovered theory that explains and predicts decisions in any case that seriously affects the legal profession.

Here is my lawyer-judge hypothesis in a nutshell: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.[1]

Of course, there are many cases that will pit factions of the legal profession against each other,[2] and while there may be certain classes of lawyers that are privileged as a rule over other classes, this theory does not address that question. There are also cases where the pro-lawyer position is so clearly against the weight of precedent that there is actually not much of a decision to be made.

Nevertheless, if there is a clear advantage or disadvantage to the legal profession in any given question of law, the cases are easy to predict: judges will choose the route (within the bounds of precedent and seemliness) that

1. In this Article I use the expressed desires of bar associations as a proxy for what the profession as a whole would prefer, or at least a majority of the members of the profession who are in bar associations. If it strikes you as overreaching to refer to the "interests of the legal profession" in this Article, please add the modifier "as expressed by bar associations."

2. For example, the interests of the plaintiffs' bar and the defense bar (or of prosecutors and defense lawyers) diverge regularly.

benefits the profession as a whole. In support of this hypothesis I offer examples drawn from multiple, distinct areas of the law. In so doing I hope to establish the accuracy of the theory and its far reaching consequences. As a bonus, I also offer a single explanation for a series of puzzling legal anomalies.

For example, why are lawyers the only American profession to be truly and completely self-regulated? Every other profession at least has to push their self-regulatory apparatus through state or federal legislatures.[3] By contrast, lawyers are regulated in the first instance by lawyers/justices from the state supreme courts, often as a result of virtually irreversible state constitutional law or judicial fiat. Predictably, this level of self-regulation has been exceptionally helpful to the legal profession as a whole.

Why is it that the attorney-client privilege is the oldest and most jealously protected of all the professional privileges? The attorney-client privilege has been protected at common law for more than 300 years. By contrast, there was never a common law doctor-patient privilege. That privilege has been largely established by statute.

Why is it that the Supreme Court has repeatedly struck down bans on commercial speech since the 1970s except for in-person lawyer solicitations and some types of lawyer advertising? A ban on in-person solicitation by accountants, by comparison, was struck down.

Why is the *Miranda* right to consult with an attorney protected so much more fervently than the right to remain silent? When a suspect asks to see a lawyer all interrogation must stop until the lawyer arrives or a substantial period of time elapses. By contrast, if a suspect says "I would like to remain silent" the police can wait a period as short as a few hours and resume questioning. This is so despite the fact that *Miranda* protects the Fifth Amendment right to remain silent and not the Sixth Amendment right to counsel.

Why do courts flatly refuse to enforce a noncompete agreement amongst lawyers? By contrast, other professional noncompete agreements are analyzed on a case-by-case reasonableness basis.

Lastly, why is a legal malpractice case so much harder to make out than a medical malpractice case? Why has the doctrinal broadening of liability for doctors (and other tort defendants) been so slow to reach lawyers? In most legal malpractice cases a plaintiff must prove a "case within a case" to satisfy the element of causation. Thus, the plaintiff must establish both negligence and that "but for" that negligence she would have won (and collected on) the underlying case at trial. By contrast, in many states a patient can recover against a doctor for a "lost chance" of survival.[4]

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3. This and the following questions and answers will be covered and fully supported *infra*.

4. In the interests of brevity I have limited myself to these questions. There are numerous other examples, however, including the cozy working relationship between the bankruptcy bar and bankruptcy courts, *see generally* LYNN LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005), the differential treatment of Legal Service Attorney speech and abortion clinic employee speech, *compare* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 548 (2001), *with* Rust v. Sullivan, 500 U.S. 173, 184 (1991), and the treatment of lawyer and non-lawyer

These legal issues cut across professional responsibility, evidence, constitutional law, criminal procedure, employment law and torts. Each has been explained within their own boundaries, but I argue that they are better understood as examples of the lawyer-judge hypothesis in action. These are cases where judges simply found a way to treat lawyers better than other litigants.

There are two remaining questions. First, why does this happen? There are a number of conscious factors that might influence judges in these cases: they are all lawyers, many of their friends and colleagues are lawyers, and (whether they are elected or appointed) they likely have their job in large part because of the efforts of other lawyers on their behalf. Anyone familiar with public choice theory will understand why, on balance, the judiciary would favor the interests of the individuals who they interact with on a daily basis over the public at large.

The conscious factors are only part of the story, however. An additional factor is what some economists have come to call "the new institutionalism," where an institution is not a building or fixed social group, it is a set of norms, thought patterns, and behaviors.[5] In short, a "new" institution is a way of looking at and processing the world, a kind of uber-heuristic. Law professors regularly brag that they teach a law student to "think like a lawyer," a jarring and grueling process that, when successful, actually creates a new way of analyzing and processing the world. This education is only reinforced by years of practice. Judges tend to come from a very select group of individuals who have thrived within the institution of legal thought and practice. As a result judges take a particular set of deeply ingrained biases, thought-processes, and views of the world with them to the bench. These institutions cannot help but color and control judicial thinking and outcomes, and the cases that affect the legal profession as a whole are just one of many cases where the institution of judicial thought plays itself out.

The second question is harder: is this a bad thing, and what, if anything, can be done about it? As a general rule I think most people react negatively to a series of decisions that establish a bias amongst judges for or against any segment of society, so I will assume, for now, that the treatment of the legal profession by the judiciary is, on balance, insalubrious. That being said, any potential cure to this bias might be worse than the problem.

I will return to this question later, but I first turn to making the case that the lawyer-judge hypothesis is correct. Part II lays out a theoretical basis for my hypothesis. Parts III through VIII lay out the examples of the lawyer-

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whistleblowers in employment law, *see* Wieder v. Skala, 609 N.E. 2d 105 (1992).

5. *See, e.g.*, WENDELL GORDON, INSTITUTIONAL ECONOMICS 16 (1980) ("'[A]n institution is a grouping of people with some common behavior patterns, its members having an awareness of their grouping. But in this definition the emphasis is on the institutional behavior pattern. It is not especially helpful to reify institutions in the sense of thinking of them as buildings or groups of people. . . . So, the essence of the institutions is the commonly held behavior pattern.'"); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1176 n.30 (2003) [hereinafter Barton, *Institutional Analysis*].

judge hypothesis listed above. Lastly, Part IX briefly discusses (without coming to any conclusions) the ramifications of the lawyer-judge hypothesis.

II. THE THEORY

In recent years there has been an increasing focus on judicial decision-making processes and the behavior of judges. At its heart this study can be summarized thusly: Judges are people too. They are driven by the same combination of incentives, experiences, and cognitive biases that drive the rest of us. In this vein, political scientists study the "attitudinal model," which argues that political ideology is the single best predictor of judicial decisions.[6] Cognitive psychologists study judicial heuristics.[7] Economists wonder what incentives control judicial behavior.[8]

While some empirical studies have suggested ways these various incentives play out in practice,[9] scholars have had a hard time translating these incentives into substantive law, i.e. finding areas of the law where they apply sufficiently to have a predictive value.[10] In this way the empirical studies have suffered from a "missing link" problem—they have established that judges take certain shortcuts in deciding all cases, but they have not shown a rule that predicts an outcome in any particular type of case. The lawyer-judge hypothesis bridges this gap by establishing predictable legal results from judicial attitudes and incentives.

This Article uses aspects of each of the above areas of study, as well as the sociology of the professions and the New Institutionalism, to discuss why we would expect judicial incentives and proclivities to lead to decisions that favor the legal profession. I start from the least subtle, and most crass, reasons and then proceed to the subtler and more important reasons.[11]

Most studies of judicial incentives ignore compensation effects because a judge's salary is not directly affected by any particular judicial decision. Instead, these studies focus on non-monetary incentives, such as maximizing leisure time, prestige, or opportunities for further judicial promotion.[12] Nevertheless, the lawyer-judge hypothesis shows that at least one class of

6. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

7. *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002).

8. *See, e.g.*, Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

9. *See, e.g.*, Bainbridge & Gulati, *supra* note 7.

10. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 960–64 (1995) (discussing the unpredictability associated with judicial decisions and the necessity of "[a]scertainable decision rules . . . to allow behavior to adjust in expectation of the outcome of a decision.").

11. Much of what comes next is based upon my earlier work on judicial behaviors and incentives in Barton, *Institutional Analysis*, *supra* note 5.

12. Barton, *Institutional Analysis*, *supra* note 5, at 1191 & n.83.

decisions, those that directly affect the legal profession, can have direct and indirect judicial salary effects.

A brief study of judges—who they are, how they are trained, what their jobs are like, and salary effects—leads to the inevitable conclusion that judges will regularly favor the interests of lawyers over other litigants. Lawyers often help judges facing elections or in obtaining appointments.[13] Most state judges are elected (either in contested or retention elections),[14] and lawyers provide most of the elected judiciary's campaign donations.[15] In states where judges are elected, bar associations endorse judicial candidates[16] and publish "bar polls" ranking the judges.[17] In states that feature a judicial merit plan, judges are selected through processes that grant state and local bar associations substantial selection authority.[18] Moreover, judges need a favorable rating from the ABA if they have hopes of being confirmed to the federal bench.[19] Bar associations have further massaged the judicial salary incentive by working tirelessly for higher salaries for judges.[20]

Further, the vast majority of judges were practicing attorneys before taking the bench.[21] Judges are frequently bar association members.[22] Of

13. *Id.* at 1198.

14. *See* DAVID B. ROTTMAN ET AL., STATE COURT ORGANIZATION 1998, at 19 (2000), *available at* www.ojp.gov/bjs/pub/pdf/sco98.pdf (reporting that approximately 84% of state judges face some type of election).

15. Barton, *Institutional Analysis*, *supra* note 5, at 1198–99, 1199 n.113; *see* Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 196 (1996) ("[T]he increasingly expensive nature of elections generally" leads judges to "seek substantial campaign contributions, often from litigants and lawyers with business before the judge at issue.").

16. Barton, *Institutional Analysis*, *supra* note 5, at 1199 & n.114; *see* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 121–32 (1985) (describing effect of bar endorsements).

17. Barton, *Institutional Analysis*, *supra* note 5, at 1199 & n.115; D. Dudley Oldham & Seth S. Anderson, Commentary, *The Role of the Organized Bar in Promoting an Independent and Accountable Judiciary*, 64 OHIO ST. L.J. 341, 346 ("[M]ost bar associations in elective states conduct bar polls or form committees to evaluate the qualifications of judicial candidates.").

18. Barton, *Institutional Analysis*, *supra* note 5, at 1200 & n.116; *see* Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 656 (2002) ("History has shown that trial lawyers and their acolytes have controlled merit selection committees.").

19. Barton, *Institutional Analysis*, *supra* note 5, at 1200 & n.117; *see* Brannon P. Denning, *Empirical Measures of Judicial Performance: Thoughts on Choi and Gulati's Tournament of Judges*, 32 FLA. ST. U. L. REV. 1123, 1139–40 (2005) (describing and critiquing ABA's role).

20. Barton, *Institutional Analysis*, *supra* note 5, at 1198 & n.110; *see, e.g.*, COMM'N ON JUDICIAL SERV., STATE BAR OF GA., FINAL REPORT AND RECOMMENDATIONS 9 (Aug. 2006) (recommending an across-the-board 20% raise for state judges); AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM (2001), *available at* www.abanet.org/poladv/priorities/judicial_pay?fedjudreport.pdf.

21. *See generally* DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM (1986) (describing the gradual replacement of non-lawyer judges with lawyer judges).

22. *See* Barton, *Institutional Analysis*, *supra* note 5, at 1198. In the thirty-six states with a unified bar, all judges are members of the state bar association by virtue of being licensed attorneys, and a majority of states explicitly require state bar membership for their supreme court justices. *Id.* at 1198 n.108 (citing THE COUNCIL OF STATE GOV'TS, STATE COURT SYSTEMS 6–7 (1978)); Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 434 n.16 (2001) [hereinafter Barton, *Economic Analysis*]. At present

course bar association membership and a career as a lawyer really only begins to describe the effects of judicial "membership" in the legal profession. It is both temporally and emotionally accurate to say that judges are lawyers first. Most judges have spent the bulk of their careers and formative working years as lawyers. Their peer group, former colleagues, and many of their friends are all likely to be lawyers. Each of these contacts and experiences work on a conscious and subconscious level. On a conscious level any judge will think hard about the reactions of his or her peer group and friends to a decision that will have a substantial effect on them. Judges also seek to maximize prestige, which typically refers to a judge's standing among lawyers.[23]

Judges also work in a remarkably insulated world. Americans pride themselves on an independent judiciary. As a result judges are sheltered, to the extent possible, from direct lobbying and even much contact with the non-lawyer public at large outside of litigants, witnesses, and jurors. The regular contact between judges and lawyers thus looms even larger in the judicial worldview, and makes judges an easy target for formal and informal lawyer lobbying.

A closer examination of the nuts and bolts of a judge's job also demonstrates how critical lawyers are to the work of judging.[24] In the advocacy system most judges rely on the lawyers to do the great bulk of the work in trying, briefing, researching, or investigating cases.[25] When the system is working properly, the judges sit back and decide cases based on the legal and factual work of the lawyers. I have noted before how this aspect of the judicial incentive structure has led directly to higher barriers to entry, including the requirement of three years of law school and an ever more difficult bar exam—because judges and current lawyers both profit when entry tightens.[26] On a more basic level, most judges probably do not want to face a courtroom of disgruntled lawyers on a regular basis simply because of their ongoing, working relationship.

The above factors consider the many conscious reasons for judges to favor lawyers. The subconscious reasons, however, are at least as important. Here the work of the new institutionalists is particularly instructive.[27] The "new institutionalism" defines institutions as "the rules of the game in a society or, more formally . . . the humanly devised constraints that shape

more than 4000 Judges are members of the ABA. *See* ABA, Judicial Division, http://www.abanet.org/jd/membership.html (last visited Nov. 24, 2007).

23. Barton, *Institutional Analysis*, *supra* note 5, at 1195 & n.99; Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983) (arguing that judges seek to maximize their prestige among litigants and lawyers).

24. *See* Barton, Institutional Analysis, supra note 5, at 1191–92.

25. *See id.*

26. Lawyers profit because of decreased competition and judges profit because the lawyers that appear before them are better qualified. *See id.* at 1189–92; Barton, *Economic Analysis*, *supra* 22, at 443–44 (describing the benefits to existing practitioners of increased entry requirements).

27. *See* Barton, Institutional Analysis, supra note 5, at 1196.

human interaction."[28] Under this definition institutions are groups joined by constraining and defining behaviors and thought patterns.[29]

The judicial "institution" responds to the world and their job of decising cases as *lawyers*.[30] Any lawyer or law student knows well the constraining power of the institution of legal thought.[31] Thus, the well worn trope that law schools teach students to "think like a lawyer" evinces a quite explicit institution-building project.[32] Virtually every Judge has experienced law school and practice, and they process the world, legal cases, and their jobs in a very particular way. [33]

Judges are also likely to have been particularly successful lawyers and are therefore especially apt to be steeped in the institution of legal thought.[34] As a result judges, like everyone else, approach their work with a prescribed set of heuristics, behaviors, and notions about the world.[35] These cognitive institutions likely established their success as lawyers and also can predict their ability as judges.[36] Nevertheless, the imbedded institution of legal thought inevitably leads judges to sympathize especially with lawyers.[37] On a subconscious level, when judges face a question that will impact the legal profession judges naturally react in terms of how it will affect "us" more than "them."

Thus, as a matter of theory, the lawyer-judge hypothesis seems like a natural fit. Nevertheless, lawyers and law professors have had a long-standing blind spot when it comes to judges. We tend to believe that judges are independent adjudicators of the law who disregard their personal preferences and proclivities when they decide cases. Because of this blind spot, theorists have tended to look at the effect of judicial incentives and heuristics around the edges of jurisprudence, looking for evidence of self-interest in judicial short cuts, or administrative duties.[38] The lawyer-judge hypothesis, by contrast, proposes evidence of jurisprudential self-interest: areas of the law where judicial preferences and self-interest actually lead to concrete and otherwise inexplicable results.

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28. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990); *see also* Barton, *Institutional Analysis*, *supra* note 5, at 1176 & n.30 (defining "institutions broadly as 'formal and informal rules that constrain individual behavior and shape human interaction.'" (quoting Thráinn Eggertsson, *A Note on the Economics of Institutions*, *in* EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE at 6, 7 (Lee J. Alston et al. eds, 1996))).

29. *See* Barton, Institutional Analysis, *supra* note 5, at 1176.

30. *See id.* at 1196.

31. *See id.*

32. *Id.*

33. *See id.* at 1196–97; *see also* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 33–34 (1997) (concluding that a judge's practice and training affects both her goals and thought processes).

34. Barton, *Institutional Analysis*, *supra* note 5, at 1197.

35. *Id.*

36. *Id.*

37. *Id.* at 1197–98.

38. *See, e.g.*, CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION (1995) (discussing judicial incentives and administrative duties); Bainbridge & Gulati, *supra* note 7 (noting judicial short-cuts in securities fraud litigation).

III. LAWYER REGULATION

The necessary starting point for consideration of the lawyer-judge hypothesis is the judicial role in creating and maintaining our system of lawyer self-regulation because the fruits of that self-regulation underlie many of the other examples of the lawyer-judge hypothesis. Since at least *The Wealth of Nations,* economists have theorized that professional self-regulation tends to benefit the profession itself.[39] Virtually every occupational license and regulatory scheme—from barbers' to doctors'—has been dissected to show the underlying self-interest involved.[40] I have also noted the self-interested nature of lawyer regulation and what should be done about it.[41]

The creation and maintenance of the unique self-regulatory apparatus of the American legal profession speaks volumes about the relationship of the bench and bar. The first thing to note is that in all fifty states the state supreme courts, and not state legislatures, govern lawyer regulation.[42] Thus lawyers have the only true claim to professional self-regulation: from top to bottom they are governed by lawyers. Predictably, this control has led to "a degree of self-regulation far beyond either the reality or even the expectations of any other professional group."[43]

The hows and whys of this self-regulation well establish judicial support for the legal profession. It is important to note that it was not always thus. As of the mid-nineteenth century, state legislatures set the general requirements for bar admission and district courts generally governed the administration of admissions.[44] Bar associations were small or non-existent.[45]

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39. *See* ADAM SMITH, THE WEALTH OF NATIONS 165–226 (P.F. Collier & Son 1902) (1776) (describing the dangers of the guild system and other early examples of self-regulation). The most famous quote is: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." *Id.* at 207.

40. *See, e.g.*, Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976) (listing a variety of industries and jurisdictions with licensing requirements and noting that such licensing limits entry into the regulated profession and consequently reduces competition).

41. I addressed this subject in a trio of law review articles, and some of the material in this section is a digested version of earlier discussions. *See* Barton, *Economic Analysis*, *supra* note 22 (laying out the case that a great deal of lawyer regulation could only be explained as a result of lawyer self-interest); Barton, *Institutional Analysis*, *supra* note 5 (arguing that state supreme courts were largely at fault for the regulatory failure because they had ceded almost complete control of lawyer regulation to bar associations and lawyers themselves); Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005) [hereinafter Barton, *Mechanics of Self-Defeat*] (arguing that the regulations would work better if we abandoned our current obsession with black letter rules and returned to the common law approach of the Canons of Legal Ethics.).

42. TASK FORCE ON LAW SCH. & THE PROFESSION, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 116 (1992) ("[J]udicial regulation of *all* lawyers is a principle firmly established today in every state. Today the highest courts of the several states are the gatekeepers of the profession both as to competency and as to character and fitness.").

43. Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 14–16; *see also* Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 707 (1981) ("Thus, unlike other professionals, who are supervised by state regulatory agencies, lawyers remain a virtually self-regulated profession.").

44. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 278 (1950) ("From colonial days on, statutes set down at least the general form of requirements for admission to the

From the late-nineteenth century forward bar associations reformed, [46] and state supreme court control over lawyer regulation eventually became the rule in all fifty states.[47]

The jurisprudential basis for this move was state supreme courts' claim of an "inherent authority" to regulate the practice of law as an outgrowth of the constitutional separation of powers between the legislative and judicial branches.[48] Using this inherent judicial authority, many state supreme courts barred state legislatures from regulating lawyers.[49]

The state supreme courts' inherent authority over lawyer regulation is a curious yet under-theorized doctrine. Essentially state supreme courts hold that state constitutions' creation of a judicial branch presupposes certain uniquely "judicial" powers.[50] These powers range from rulemaking authority to the regulation of lawyers[51] and, in some cases, to judicial funding demands.[52]

The main authority on these cases, Professor Charles Wolfram, describes the inherent authority doctrine as "a flat-earth concept of separation of powers" and "almost laughably wooden and ill-defended."[53] It does seem odd that judges would not at least *share* these regulatory powers, if not take a clear back seat to legislatures, which regulate every other American profession. Nevertheless, many state supreme courts (with strong bar association support) have claimed sole authority over lawyer regulation.[54] Moreover, because the judiciary's inherent authority is claimed as a result of state constitutional law, judicial control over the legal profession can only be challenged by a change in court precedent or a constitutional amendment.[55]

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bar."); Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 533 (1983) (stating that from 1776–1876 courts "often were content to consider individual cases and let the legislature set general rules").

45. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 561 (1973).

46. *See* Barton, *Mechanics of Self-Defeat*, *supra* note 41, at 425–36.

47. Barton, *Institutional Analysis*, *supra* note 5, at 1171, 1173.

48. *See In re* Nenno, 472 A.2d 815, 819 (Del. 1983) (noting that the Delaware Supreme Court "alone, has the responsibility for" lawyer regulation and that the "principle is immutable"). *See generally* Alpert, *supra* note 44, at 536–51 (delineating the history of courts claiming an inherent power to regulate lawyers).

49. *See* Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 6–16 (1989–90) (discussing the "negative aspect" of inherent judicial authority).

50. *See id.* at 5–7.

51. *See generally In re* N.H. Bar Ass'n, 855 A.2d 450 (N.H. 2004) (describing the court's inherent power to regulate the bar); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22–32 (student ed. 1986) (offering the most comprehensive overview).

52. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1875 (2001).

53. Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 212 (2002).

54. *See* WOLFRAM, *supra* note 51, at 23–24.

55. Interestingly, the Arizona legislature has initiated a series of constitutional amendments to curtail the scope of inherent authority in Arizona. *See* Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419, 419 & n.2 (2006).

The results of this inherent authority over lawyer regulation have been predictable. Courts have used their inherent authority to advantage lawyers in a bevy of ways. Some of the uses have been particularly protectionist, ranging from aggressive sua sponte prosecution of the unauthorized practice of law[56] to the creation of mandatory fee scales.[57]

Nevertheless, the use of inherent authority that has most benefited lawyers is the creation of unified bars in the majority of American states. As of 1996, thirty-six states or territories and the District of Columbia had unified bars.[58] In these states a lawyer must be a member of the state bar association to practice law.[59] This mandatory connection between a professional license and membership in a professional organization "is unique to the legal profession."[60] Like a "closed shop" in labor law,[61] this requirement offers unified bar associations unique opportunities for funding, lobbying, and overall group power.[62]

The history of bar unification is particularly instructive. The first state bars were unified by statute,[63] but in 1939 Oklahoma became the first state supreme court to unify by order of a court.[64] Following Oklahoma, the remaining states unified by court action.[65] This granted the legal profession a court-created bar structure (an exceptional lobbying and financial advantage) ready, willing, and anxious to self-regulate.

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56. *See* Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 635–39 (1935) (stating that courts had independently defined the practice of law and pursued unauthorized legal practitioners).

57. *See, e.g.*, Lathrop v. Donohue, 102 N.W.2d 404, 413–14 (Wis. 1960) ("The State Bar recently adopted a recommended minimum fee schedule covering legal services. The present economic plight of the lawyers in this country is one which has disturbed the bench and the bar. Able young men who otherwise might be attracted to entering the legal profession are being discouraged not to because of this.").

58. Barton, *Economic Analysis*, *supra* note 22, at 434 n.16; Terry Radtke, *The Last Stage in Rerofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934–1956*, 81 MARQ. L. REV. 1001, 1001 (1998).

59. Barton, *Economic Analysis*, *supra* note 22, at 434 n.16; *see* DAYTON DAVID MCKEAN, THE INTEGRATED BAR 21–23 (1963); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 1 n.1.

60. Radtke, *supra* note 58, at 1001.

61. In his book, *The Integrated Bar*, Dayton McKean uses this "closed shop" phrase, borrowed from Judge Singleton Bell, as the title of his chapter on lawyer regulation. MCKEAN, *supra* note 59, at 21–29.

62. *See, e.g.*, Ralph H. Brock, *Giving Texas Lawyers Their Dues: The State Bar's Liability Under* Hudson *and* Keller*, for Political and Ideological Activities*, 28 ST. MARY'S L.J. 47, 47–53 (1996) (describing the lobbying influence of the Texas State Bar and other unified bars and the implications of their power).

63. *See generally* MCKEAN, *supra* note 59, at 30–51 (describing the early history of the bar unification movement).

64. *Id.* at 47 (citing *In re* Integration of State Bar of Okla., 95 P.2d 113 (Okla. 1939)). Interestingly, the supreme court actually repealed an earlier state statute organizing the unified bar. *In re State Bar*, 95 P.2d at 113–16. The court held that the legislature lacked the constitutional power to unify the bar, invalidated the statute, and then ordered bar unification under its own inherent authority. *See id.*

65. *See* MCKEAN, *supra* note 59, at 49 ("The process of obtaining integration by court order has proved to be so much easier than lobbying a bill through a legislature against the opposition of other professional associations, perhaps only to meet a governor's veto, that the use of statutes has been all but abandoned since the Oklahoma decision.").

Naturally, state supreme court justices have generally granted unified bar associations much of the court's regulatory power.[66] Even in states without a unified bar, state supreme courts delegate their regulatory authority to lawyers and bar associations.[67] So from the state supreme court justices on down, lawyers are regulated solely by lawyers.

As a general rule foxes make poor custodians of henhouses, and I have argued at length elsewhere that self-regulation has led inexorably to self-interested regulations.[68] Generally these lawyer regulations are defended as a hedge against creeping commercialization,[69] but critics see naked restraints of trade.[70]

My favorite example is the requirements for entry to the practice of law. Bar associations have long considered raising entry barriers mission priority A-1.[71] During the recent era of state supreme court control of lawyer regulation, we have seen an increase in entry requirements from virtually none to the multiple requirements of today.[72] As I have noted before:

> Lawyers, of course, have an excellent reason to favor higher entry standards, namely that such standards decrease the supply of legal services and raise the price for those services. Moreover, the higher prices are a windfall for the current members of the profession lobbying for more difficult standards. . . . they enjoy the higher prices without having to meet the new, higher standards. . . . While rising

66. *See* Barton, *Economic Analysis*, *supra* note 22, at 463–65; Barton, *Institutional Analysis*, *supra* note 5, at 1206–09.

67. For example, state supreme courts have largely ceded the task of drafting rules of conduct to the ABA. *See* AM. BAR ASS'N & THE BUREAU OF NAT'L AFFAIRS, INC., LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:3 to 01:63 (2006). Courts have also given enforcement power to bar disciplinary authorities or separate administrative agencies that are controlled by state supreme courts and staffed by lawyers. *See* Christopher D. Kratovil, Note, *Separating Disability from Discipline: The ADA and Bar Discipline*, 78 TEX. L. REV. 993, 995–97 (2000) (noting that state supreme courts have largely delegated the duty of enforcing conduct regulation to state bar associations).

68. *See* Barton, *Institutional Analysis*, *supra* note 5, at 1247–50. *See generally* Barton, *Economic Analysis*, *supra* note 22.

69. Barton, *Economic Analysis*, *supra* note 22, at 455–56; Barton, *Mechanics of Self-Defeat*, *supra* note 41, at 429–30 (noting commercial concerns were the motivation for the ABA cannons in 1905); *see* William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 325–26, 326 n.4 (1995).

70. *See* Barton, *Economic Analysis*, *supra* note 22, at 455–56; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 702–706 (1981).

71. Barton, *Institutional Analysis*, *supra* note 5, at 1189; *see also* EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 72 (1953) (discerning that legal education and admission to the bar "received more attention" from the ABA during its early years "than any other" issue); *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 601 (1906) (proposing standards of ethical conduct to battle a new breed of lawyers who "believe themselves immune, the good or bad esteem of their co-laborers is nothing to them provided their itching fingers are not thereby stayed in their eager quest for lucre").

72. Barton, *Institutional Analysis*, *supra* note 5, at 1191 & n.81*; see* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 212 (1989) ("Beginning in the 1830s, local authorities lost control over the certification of lawyers to state government and . . . it was not until the post-Civil War era that professionalization of law practice surged."). Bar entry is now centrally controlled in every United States jurisdiction by sizeable bureaucracies. *See* National Conference of Bar Examiners, Bar Admissions Offices, http://www.ncbex.org/bar-admissions/offices/ (last visited Nov. 25, 2007).

> entry standards have multiple benefits to lawyers, there is little evidence that the benefit to consumers is equivalent to the higher cost of services.[73]

It is also interesting to contrast the interests of bar associations and judges in entry barriers with more direct means of controlling errant lawyers such as disbarment or court sanctions. The enforcement of the Rules of Professional Conduct has been notoriously lax.[74] Likewise, courts have been quite reluctant to impose sanctions of any kind on shoddy lawyering in their courts.[75] This reticence is puzzling given that greater enforcement might actually improve the administration of justice and the ease of any particular judge's job. In this case, judicial sympathy for lawyers apparently trumps any individual interest in sanctions.

In sum, state supreme courts have taken a remarkably expansive view of the separation of powers and their inherent authority to gain control over lawyer regulation. These cases arise as a matter of state constitutional law but are best understood as an example of judicial sympathy and empathy for bar associations and the legal profession as a whole.

IV. LAWYER-CLIENT PRIVILEGE

One of the oldest and most ingrained examples of the lawyer-judge hypothesis is the attorney-client privilege. In this Part I seek to demonstrate three things. First, the attorney-client privilege has been accorded a unique and vaunted position among all professional privileges. Second, the primacy of the attorney-client privilege—in comparison to other privileges like those accorded physicians, spouses, or clergy—cannot be justified solely jurisprudentially. Instead, the difference is most likely the inherent sympathy that judges have had for the importance of the attorney-client relationship. Third, the special treatment of the attorney-client privilege, in conjunction with rules of professional conduct requiring confidentiality, makes legal services much more attractive to clients.

The attorney-client privilege is a rule of evidence that protects most attorney-client communications from compelled disclosure. The classic

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73. Barton, *Institutional* Analysis, *supra* note 5, at 1189–90 & nn.75–77, 80; *see also* Barton, *Economic Analysis*, *supra* note 22, at 445–48 (detailing the problems facing bars today with regard to ensuring competent lawyers).

74. *See* Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1512 (2002) (citing examples of lax lawyer discipline); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002) (describing underenforcement and its results in the area of lawyer advertising).

75. *See, e.g.*, Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1343 (1978) (pointing out that judicial reluctance to sanction discovery abuses is likely a result of "judges' understanding [a]s former lawyers"). Further, despite seeing a great deal of shoddy lawyering, judges rarely make complaints to disciplinary authorities. *See* STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT iii (1984) (citing research showing that "judges represent a minority of the complaints even against easily detected serious misconduct directly affecting the administration of justice").

statement of the privilege comes from Wigmore's *Evidence*. The privilege applies

> (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[76]

Courts have long treated the attorney-client privilege as the flagship evidentiary privilege.[77] Courts frequently "wax poetic"[78] about this "most sacred of all legally recognized privileges."[79] It holds "a special position"[80] as "the oldest and most venerated of the common law privileges of confidential communications."[81] It is intended "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[82]

"Thus, it is reasonable to expect that a conversation with attorney would be private."[83] It "is a strong and absolute privilege"[84] (barring waiver and other limited exceptions) and must "receive unceasing protection."[85] It "seeks to protect 'a relationship that is a mainstay of our system of justice.'"[86]

The courts protect the attorney-client privilege by more than just rhetoric, however. A comparison of the treatment of lawyers and other professionals by the courts is quite instructive. As discussed below, of the three longest standing "professions," lawyers are the only one to receive continuous common law protection, and as a result lawyers have been, and are still, in a much better position than their compatriots.

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76. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton ed., 1961).

77. Please forgive the upcoming "Zagat's" approach to case law. The language itself is so telling short quotes speak volumes.

78. EDWARD J. IMWINKELRIED, THE NEW WIGMORE—A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.2.4, at 471 (2002).

79. United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997).

80. *In re* Allen, 106 F.3d 582, 600 (4th Cir. 1997).

81. United States v. Edwards, 303 F.3d 606, 618 (5th Cir. 2002) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

82. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

83. Sherbrooke v. City of Pelican Rapids, No. 05-671 (MJD/RLE), 2006 WL 3227783, at *10 (D. Minn. Nov. 7, 2006) (citing Lanza v. New York, 370 U.S. 139, 143–44 (1962)).

84. Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist., No. S-05-0583 LKK GGH, 2006 WL 2255538, at *3 (E.D. Cal. Aug. 7, 2006).

85. Lanza v. New York, 370 U.S. 139, 144 (1962).

86. Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 656 (Conn. 2005) (quoting Clute v. Davenport Co., 118 F.R.D. 312, 314 (D. Conn. 1988)).

There has never been a common law physician-patient privilege in England or the United States.[87] While the attorney-client privilege was recognized during the reign of Elizabeth I and protected as a "point of honor" for lawyers,[88] the physician-patient privilege was famously rejected in 1776.[89] The doctor at issue refused to disclose "a confidential trust . . . consistent with [his] professional honour."[90] Lord Mansfield replied:

> If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour . . . but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever
>
> and required disclosure.[91]

In fact, the protection of physician-patient communications in this country is as a result of state statutes.[92] This makes the privilege much less powerful than the attorney-client privilege for several reasons. First, there is no statutory protection whatsoever in approximately one fifth of the states.[93] Second, even where the protections exist, the privilege suffers "significant variations and numerous exceptions."[94] Third, the fact that the privilege was not recognized at common law means it is generally inapplicable in federal courts applying federal law.[95]

For a particularly blunt comparison between the attorney-client and physician-patient privileges, it is helpful to look where the rubber meets the road: the wisdom of trial attorneys. In a *Trial* magazine list of testimonial

87. *See* CLINTON DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 9–14 (1958). Moreover, "[n]otwithstanding the fact that, since the sixteenth century, the relationship of attorney and client had been sedulously protected by a privilege of non-disclosure, the courts of England resolutely refused to extend a similar privilege to members of the medical profession." *Id*. at 10–11

88. *See* 8 WIGMORE, *supra* note 76, § 2290, at 542–43.

89. *See* DEWITT, *supra* note 87, at 11–12.

90. Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661, 671 (1985) (quoting Rex v. Duchess of Kingston, 20 Howell's State Trials 355, 572–73 (1776)).

91. *Id.*

92. MCCORMICK ON EVIDENCE § 98, at 155–57 (John W. Strong ed., 5th ed. 1999) (also noting another exception is the Supreme Court's recognition of a psychotherapist-patient privilege in Jaffee v. Redmond, 518 U.S. 1 (1996)).

93. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380, at 1407–20 (Supp. 2007) (listing states and statutes).

94. David Weissbrodt et al., *Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture*, 15 MINN. J. INT'L L. 43, 61 (2006). For example, many statutes state a mandatory duty to report child abuse regardless of confidentiality. *See* Robin A. Rosencrantz, Note, *Rejecting "Hear No Evil Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting*, 8 GEO. J. LEGAL ETHICS 327, 328 (1995) (arguing that mandatory reporting should apply to lawyers too); *see also* Ariz. Dep't of Econ. Sec. v. O'Neil, 901 P.2d 1226, 1227 (Ariz. Ct. App. 1995) (discussing the state statute that "provides that such privileges as the physician-patient and husband-wife privilege are unavailable in cases involving dependent children, but specifically exempts the attorney-client privilege").

95. *See* Jaffee v. Redmond, 518 U.S. 1, 10–15 (1996) (distinguishing doctors from psychotherapists and only granting psychotherapists a privilege in federal courts); Kenneth S. Broun, *The Medical Privilege in the Federal Courts—Should it Matter Whether Your Ego or Your Elbow Hurts?*, 38 LOY. L.A. L. REV. 657, 658–59 (2004) (arguing for creation of a federal physician-patient privilege).

objections the privileges are summarized as follows: "All states recognize the attorney-client privilege . . . . On the other hand, the physician-patient privilege is weak."[96] This warning is echoed in evidence texts that suggest that doctors or psychiatrists hired as experts for trial should examine their patients as part of the legal team so that the more stringent protections of the attorney-client and work product privileges attach to their work.[97]

The clergy-penitent privilege has a similar history. Before the Protestant Reformation there was a priest-penitent privilege that protected priests from testifying.[98] Following the Reformation, however, English courts repudiated the privilege, and American courts followed suit.[99] Similar to the physician-patient privilege, the clergy privilege has grown primarily as a result of state statutes.[100] Furthermore, although the clergy-penitent privilege is recognized in all fifty states, its statutory basis differs state by state, and it is subject to many more exceptions than the attorney-client privilege.[101]

In comparison to accountants, however, the patients and penitents of doctors and clergy have a substantial privilege. There is no federal accountant-client privilege.[102] Likewise, most jurisdictions have refused to recognize an accountant-client privilege as a matter of statutory or common law.[103]

Nevertheless, comparing the justifications for these various privileges with those that historically underpin the attorney-client privilege does not offer a strong argument for the great variation in treatment.[104] Courts and

96. Ashley Saunders Lipson, *Know Your Testimonial Objections*, TRIAL, July 2005, at 70, 71. Humorously, the other privileges do not fare much better: "The psychotherapist-patient privilege (which includes counselors, psychologists, and therapists) is generally stronger than the physician-patient privilege. The parent-child and accountant-client privileges are very weak. The journalist privilege is also subject to extreme variation." *Id.* at 71–72 (footnotes omitted).

97. *See, e.g.*, EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 7.02, at 291, § 7.05(4) (6th ed. 2005).

98. *See* Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 735–36 (1987).

99. *See* John J. Montone, III, Recent Development, *In Search of Forgiveness:* State v. Szemple *and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS L. REV. 263, 268–69 (1995).

100. *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 106–08 (1983). There was an early case that recognized the privilege under the First Amendment Free Exercise Clause, but since that case the application has been through statutes. *See id.* at 104–08.

101. *See* Montone, *supra* note 99, at 283–86 (canvassing various state approaches to clergy-penitent privilege).

102. Couch v. United States, 409 U.S. 322, 335 (1973) ("[W]e note that no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases."); *see also* Thomas J. Molony, Note, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of* Jaffee v. Redmond, 55 WASH. & LEE L. REV. 247, 248–49 (1998) (arguing for a federal accountant-client privilege although ultimately concluding that the federal system is not ready to adopt such a privilege yet).

103. *See* IMWINKELRIED, *supra* note 78, § 6.2.5, at 477. Journalists have also had a hard time establishing a privilege for sources. *See* Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 214–15 (2005).

104. The justifications for the attorney client privilege have been divided into two broad categories, utilitarian (or instrumentalist) and non-utilitarian (or humanistic). The utilitarian approach balances the societal costs and benefits of any privilege; the non-utilitarian approach looks at fundamental values, like

commentators have generally used a utilitarian approach to defending the attorney-client privilege, arguing that the societal benefits outweigh the costs. As the Supreme Court has stated, the privilege's

> purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[105]

Some of the best known historical formulations of this utilitarian justification are particularly telling in terms of the lawyer-judge hypothesis. *Annesley v. Earl of Anglesea*, quoted in Wigmore's Evidence, specifically references the business interests of lawyers in the privilege: "all people and all courts have looked upon that confidence between the party and attorney to be so great that it would be destructive to all business if attornies were to disclose the business of their clients."[106]

Other early courts explicitly recognized the judiciary's need for a fully functioning cadre of lawyers as a justification: the privilege is necessary

> out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings.[107]

Thus the utilitarian defense includes two key aspects of the lawyer-judge hypothesis—an implied concern for the welfare and business of lawyers and a concern over the ease of the administration of justice.

I was always struck by the importance placed on the attorney-client relationship, and the relative disrespect paid to doctors and patients, and other professional relationships. Assuming that it is true that candor between attorneys and clients is so critical that we should protect it in court, is candor between doctors and patients really less important? Just in terms of the so-

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privacy, and decides if the privilege is consistent with those values. *See* IMWINKELRIED, *supra* note 78, § 6.2.4, at 472–77 (dividing justifications into "instrumental" and "humanistic"); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1501–04 (1985) (dividing justifications into "utilitarian" and "non-utilitarian"). This Article will focus on the utilitarian approach because it has been dominant among courts and commentators. *See id.* at 1502–04.

105. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

106. 8 WIGMORE, *supra* note 76, § 2291, at 546 (quoting Annesley v. Earl of Anglesea, 17 Howell's State Trials 1129, 1225, 1241 (Ex. 1743)). Later commentators have noted that the business of law is embedded in the utilitarian justification. *See* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358 (1989) (arguing that "clients will not employ lawyers, or at least will not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret").

107. 8 WIGMORE, *supra* note 76, § 2291, at 546 (quoting Greenough v. Gaskell, (1833) 39 Eng. Rep. 618, 620 (Ch.)).

cietal interests involved, I would think that health frequently (if not always) trumps legal advice in importance. Similarly, the relationship between a worshipper and her clergy-person seems equally worthy of societal support and care.[108]

The physician-patient privilege (among others) was scorned at common law.[109] Wigmore's *Evidence* offers a particularly scathing rebuke.[110] Wigmore applied a four part test to balance the costs and benefits of all privileges[111] and found that certain privileges—husband-wife, jurors-informer and government, priest-penitent, and attorney-client—conformed to all four factors.[112] Wigmore argued vociferously against the physician-patient privilege.[113] Interestingly, one of his main arguments was that doctors did not really need the privilege because people would consult doctors in all candor regardless of any privilege.[114] Moreover, Wigmore made much of the fact that states that had a physician-patient privilege, such as New York, reported no difference in usage of doctors from non-privilege states.[115] It is also humorous that Wigmore carps that "[t]he real support for the privilege seems to be mainly the weight of professional medical opinion pressing upon the legislature."[116] Lastly, commentators have criticized the physician privilege as fostering fraud.[117]

The same questions that were presented in the doctor-patient scenario fit for lawyers and clients: would lawyer-client communication truly be crippled without the privilege? Are many clients actually fully forthcoming with their lawyers regardless of the privilege? I do not ask these questions to

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108. Furthermore, clergy have a much stronger constitutional argument for a privilege than lawyers do. *See generally* Shawn P. Bailey, *How Secrets are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. REV. 489, 491–92.

109. *See supra* notes 87–89 and accompanying text.

110. *See, e.g.*, 8 WIGMORE, *supra* note 76, § 2380a, at 829–32.

111. Wigmore asked a four part question before approving of any privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. § 2285, at 527.

112. *See id.* § 2285, at 528.

113. *See id.* § 2380a, at 829–32.

114. *See id.* § 2380a, at 830 (arguing that its "ludicrous to suggest" a seriously ill person would withhold vital information from a doctor out of fear of later exposure in court).

115. *See id.* § 2380a, at 829–30. Given the utter lack of empirical data to support Wigmore's claims concerning the attorney-client privilege, this complaint is somewhat paradoxical. *See* Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 156 & n.76 (2004). Those darn doctors and their undue influence!

116. *See* 8 WIGMORE, *supra* note 76, § 2380a, at 831.

117. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 105, at 226, 228 (Edward W. Cleary ed., 2d ed. 1972) ("[The physician-patient privilege] runs against the grain of justice, truth and fair dealing. . . More than a century of experience with the statutes has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud.").

argue for the abolition or curtailment of the privilege, but just to note that the empirical and theoretical basis for differentiating between lawyers and doctors (or clergy or accountants) is not nearly as clear as courts have suggested. Instead, when faced with a balancing test between the importance of a professional relationship and the truth-seeking function,[118] courts repeatedly choose the truth-seeking function except for a very narrow group of relationships headlined by the attorney-client relationship.[119] While this choice is defended on jurisprudential grounds,[120] it is better explained by the lawyer-judge hypothesis.

It is also worth noting what an exceptional product the attorney-client privilege allows lawyers to sell to clients. In conjunction with extremely tight professional confidentiality rules and norms,[121] the attorney-client privilege offers clients protection for almost all qualifying disclosures. As Professor Daniel Fischel has noted, the privilege and the ethics rules offer an unbeatable combination.[122] If you are concerned at all about later confidentiality in court and need someone to talk to, you would be well advised to choose a lawyer.[123]

On a final note, the very structure of attorney-client disclosure and waiver rules hints at the privilege's true beneficiaries. Generally, any disclosure to a third person outside the confidential relationship waives the privilege.[124] These rules are particularly stringent for clients: a word about a privileged matter to a friend or relative or even a lack of care with privileged materials can affect a waiver.[125] Two notable exceptions have been made for law firm practice. First, the privilege is not limited only to lawyers, any agents, secretaries or paralegals are included.[126] Second, in a case of inadvertent disclosure during discovery, privilege may be maintained

118. *In re* Grand Jury, 103 F.3d 1140, 1153 (3d Cir. 1997) (discussing importance of the truth-seeking function).

119. *See, e.g.*, *id.* at 1152–54 (refusing to recognize a parent-child relationship); *see also* Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strenth of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 60–64 (2006).

120. *See, e.g.*, *In re* Grand Jury, 103 F.3d at 1153–54.

121. The ABA Model Rules of Professional Conduct provide extraordinary protections for lawyer's confidentiality. S*ee* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006).

122. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1–2 (1998). Professor Fischel goes on to build a powerful case against this iron grip of confidentiality, concluding that "[t]he legal profession, not clients or society as a whole, is the primary beneficiary of confidentiality rules." *Id.* at 3.

123. *See supra* note 97 and accompanying text.

124. 8 WIGMORE, *supra* note 76, § 2311, at 601–03. "The moment confidence ceases . . . privilege ceases." *Id.* § 2311, at 599 (quoting Parkhurst v. Lowten, (1819) 36 Eng. Rep. 589, 596 (Ch.)).

125. *See generally* John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—State Law*, 51 A.L.R. 5TH 603 (1997) (discussing jurisdictional approaches with inadvertent disclosures).

126. *See, e.g.*, United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976) ("Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides.").

under certain circumstances.[127] Last, while courts carefully protect these privileges in most court actions, we shall see that disclosure is allowed to defend a malpractice action or in a fee dispute.[128]

V. THREE *SUI GENERIS* SUPREME COURT CASES

Bar Associations have played a big part in two recent revolutions in American constitutional law: the First Amendment's protection of commercial speech and the reconsideration of the law of takings. In each of these areas the Supreme Court signaled an aggressive new approach and followed with a series of cases that generally drift in the direction of increased constitutional protections for commercial speech and against government takings. In each of these areas small, but important, exceptions to the general thrust of the law were drawn up specifically for lawyers. While the Supreme Court offers a series of justifications for these cases, when taken in light of the state of the law as a whole, they are classic examples of the lawyer-judge hypothesis.

A. Ohralik v. Ohio State Bar Association

Bans on lawyer advertising and client solicitation are practically as old as the profession itself.[129] In America, lawyer regulators began to systematically bar advertising and client solicitation around the turn of the century.[130] These bans were a key part of the bar's professionalization project and mirrored anti-competitive regulations in other professions.[131] The bans were justified as a protection for the unsuspecting public against "ambulance chasers" and other unscrupulous lawyers.[132]

Regardless of the justifications, the results were clearly anti-competitive. Existing practitioners (who were the drafters of these rules) were able to charge inflated prices without worrying about being undercut by competing lawyers advertising or soliciting their clients.[133]

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127. *See* KL Group v. Case, Kay & Lynch, 829 F.2d 909, 914, 917–19 (9th Cir. 1987) (inadvertent production of privileged letter, along with some 2,000 other documents during discovery, did not result in waiver of attorney-client privilege); Transamerica Computer Co. v. Int'l Bus. Machs. Corp., 573 F.2d 646, 649–52 (9th Cir. 1978) (describing the burden of IBM's extensive privilege review procedures as "incredibl[e]" before holding no waiver regarding inadvertent disclosure).

128. *See infra* note 342 and accompanying text.

129. *See* HENRY S. DRINKER, LEGAL ETHICS 210–11 (1953) (reporting the medieval English bar's informal rules against advertising and client solicitation).

130. The ABA Canons of Legal Ethics 27 and 28 prohibited most forms of attorney advertising and client solicitation. *See* CANONS OF PROF'L ETHICS Canons 27, 28 (1908).

131. *See* Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 702 & n.78 (1981) ("A principal force animating any occupation's efforts at self-regulation is a desire to minimize competition from both internal and outside sources.").

132. *See, e.g.*, People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 488 (N.Y. 1928) (Cardozo, C.J.) (describing "unscrupulous minority" of the bar for "[a]mbulance chasing" and other "evil practices").

133. *See* Rhode, *supra* note 131, at 702–06.

Beginning in the 1970s the Supreme Court began to overturn the most blatant of these anti-competitive practices.[134] The bulk of this work was accomplished by the nascent First Amendment commercial speech doctrine. Prior to 1976 commercial speech had not been protected under the First Amendment.[135] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* began a series of Supreme Court cases applying the First Amendment to commercial speech and advertising.[136] The Court's second major commercial speech case, *Bates v. State Bar of Arizona*,[137] held that the State Bar of Arizona could not ban truthful advertising of prices for routine legal services.[138]

Bates followed *Virginia Board of Pharmacy* by one year,[139] and, at first reading, appears compelled by the reasoning of *Virginia Board*, an 8-1 decision that truthful advertising of drug prices could not be banned.[140] Nevertheless, the opinions in *Bates* itself make clear how hard it was for the Court to apply the commercial speech doctrine to the legal profession. The Court split 5-4 on the First Amendment issue,[141] and each of the four dissenters noted the special nature of legal services and the unwelcome and "profound changes" the decision would bring to the practice of law.[142]

A year later the Court decided *Ohralik v. Ohio State Bar Ass'n*,[143] the first of our lawyer-judge hypothesis cases. In *Ohralik*, the Court held a ban on in-person client solicitation by lawyers is constitutional.[144] The Court distinguished *Bates* because of the potential for client abuse from in person solicitation.[145]

In retrospect, *Ohralik* is an unusual commercial speech case. *Ohralik* gives great deference to the interest of the states in regulating lawyers as officers of the court and even notes how a ban on solicitation serves the goal of "true professionalism."[146] This deference to bar association regulation has been a moving target for the Court. In the cases where the Court strikes down bar regulation, it tends to reject arguments based on "professionalism" or the public image of lawyers,[147] but in cases like *Ohralik*, where these regulations are upheld, the Court expressly credits them.[148]

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134. *See, e.g.*, Goldfarb v. Va. State Bar, 421 U.S. 773, 781–82, 792–93 (1975) (holding that mandatory fee schedules violated federal antitrust law).
135. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 758 (1976).
136. *See* 425 U.S. 748, 770–73 (1976).
137. 433 U.S. 350 (1970).
138. *Id.* at 354, 383–84.
139. *Compare Va. State Bd. of Pharmacy*, 425 U.S. at 748 (decided in 1976), *with Bates*, 433 U.S. at 350 (decided in 1977).
140. *Va. State Bd. of Pharmacy*, 425 U.S. at 749, 773.
141. *See Bates*, 433 U.S. at 352, 363.
142. *See id.* at 386 (Burger, C.J., dissenting); *id.* at 389 (Powell, J., dissenting); *id.* at 404–05 (Rehnquist, J., dissenting).
143. 436 U.S. 447 (1978).
144. *Id.* at 449.
145. *Id.* at 457–58.
146. *Id.* at 460–61.
147. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985) (questioning that

Further, *Ohralik* is one of the very few cases where the Court upheld a blanket prohibition on commercial speech because it might sometimes tend towards "fraud, undue influence, intimidation . . . and other forms of 'vexatious conduct.'"[149] As a general rule the Court has been clear that the government can always bar the dissemination of commercial speech that is "false, deceptive . . . misleading," [150] or that proposes an illegal transaction.[151] Nevertheless, *Ohralik* does not ban only false speech. To the contrary, it is precisely the type of "blanket prohibition against truthful, nonmisleading speech about a lawful product" that the Court reviews with "'special care'" and which "rarely survive constitutional review."[152] In fact, outside of *Ohralik* and a few cases from the 1980s that are now widely considered overruled, the Court has not sustained any other general ban on advertising under the commercial speech doctrine.[153]

Moreover, the reasoning of *Ohralik* has only ever been applied to the legal profession. In *Edenfield v. Fane*,[154] the Court expressly refused to apply *Ohralik* to a rule that barred in-person solicitation by certified public accountants (CPAs).[155] The comparison between *Edenfeld* and *Ohralik* is stark and particularly telling. *Ohralik* was an 8-0 decision[156] where the Court seemed to find it obvious that "[t]he state interests implicated in this care are particularly strong"[157] and that in-person solicitation is dangerous and harmful to clients and the profession as a whole.[158] *Ohralik* also accepted the ABA's "three broad grounds" of justification for the in-person

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"the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights"); *Bates*, 433 U.S. at 368–72.

148. *Ohralik*, 436 U.S. at 460–61.

149. *Id.* at 462.

150. *See* Friedman v. Rogers, 440 U.S. 1, 9 (1979).

151. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973).

152. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)). Consider also *In re R.M.J.*, 455 U.S. 191, 203 (1982), where the Court seemed to expressly reject the reasoning of *Ohralik* by stating that "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."

153. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 422–24, 426–36 (1993) (upholding a federal law allowing a non-lottery state to bar a foreign state's lottery advertisements); Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 332–33, 340–44 (1986) (upholding a ban on advertising for casinos because of the potential harm that gambling might cause to consumers). Both of these cases are widely considered overruled by *44 Liquormart, Inc.*, 517 U.S. at 516, which held a ban advertising liquor prices unconstitutional. *See* Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons From* Greater New Orleans Broadcasting, 37 AM. BUS. L.J. 587, 642 n.348 (2000) ("*Edge Broadcasting* may not formally have been overruled, but its viability is questionable at best."); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 Liquormart*, and* Bartnicki, 40 HOUS. L. REV. 697, 732–33 (2003) (noting that *44 Liquormart* overruled *Posadas de Puerto Rico* and arguing that the commercial speech doctrine tightened significantly after the 1980s, but in the early 1990s it retreated to providing more protection).

154. 507 U.S. 761 (1993).

155. *See id.* at 774–77.

156. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 448 (1978).

157. *Id.* at 460.

158. *See id.* at 460–62.

ban with little comment.[159] In short, the Court in *Ohralik* shows a particular sensitivity to the concerns of bar associations, and the Court's palpable distaste for in-person solicitation by lawyers pervades the entire opinion.

By contrast, the 8-1 *Edenfield* decision[160] was deeply skeptical of a ban on in-person solicitation for accountants. While *Edenfield* recognized the importance of protecting consumer privacy and discouraging fraudulent solicitation,[161] the Court seemed utterly flummoxed by the assertion that a ban on in-person solicitation could possibly fit those goals.[162] The Court specifically took the Florida Board of Accountancy to task for their lack of underlying evidence supporting a claim of danger to the public,[163] despite accepting similarly "broad" assertions of public danger in *Ohralik*.[164]

Edenfield does attempt to distinguish *Ohralik*, but in so doing basically limits *Ohralik* to lawyers: *Ohralik* is a "narrow" holding that "depend[s] upon certain 'unique features of in-person solicitation by lawyers.'"[165] The main difference appears to be that a lawyer is "a professional trained in the art of persuasion" and thus much more likely to succeed in taking advantage of a potential client.[166] It is ironic that the Court upholds an ethical rule on the assumption that lawyers are uniquely dangerous and unprofessional. Moreover, the distinction between the persuasive powers (and relative ethics) of lawyers and accountants is quite puzzling and is also an example of the Justices using their own impressions of the two professions to come to two totally opposed holdings on a very similar issue.[167]

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159. *Id.* at 461.
160. 507 U.S. 761, 762 (1993).
161. *See id.* at 768–69.
162. *See id.* at 771.
163. *See id.* at 771–73 (noting the lack of any supporting "studies" or other evidence).
164. *See Ohralik*, 436 U.S. at 460–62.
165. *Edenfield*, 507 U.S. at 774 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641 (1985)).
166. *Id.* (quoting *Ohralik*, 436 U.S. at 465–66). *Edenfield* also notes that the clients in *Ohralik* were unsophisticated and had just suffered a personal loss, making them particularly vulnerable to fraudulent, in-person solicitation. *See id.* at 775–76. Nevertheless, because *Ohralik* allows a blanket ban on in-person solicitation, and there was no evidence in *Ohralik* that most (or even many) potential clients are vulnerable, it is inconsistent to rely too heavily on the characteristics of the individual clients in either *Ohralik* or *Edenfield*.
167. It is also worth noting the vote tallies on the two cases (*Ohralik* was 8–0 and *Edenfield* was 8–1), and that the Court considered each case relatively straightforward, regardless of how incompatible they seem. *See Edenfield*, 507 U.S. at 762; *Ohralik*, 436 U.S. at 448. A simple comparison of the vote totals for the lawyer and non-lawyer professional regulation cases is also illuminating. As noted above, *Virginia Board* was an 8–1 decision striking down an advertising ban by pharmacists. *See supra* note 140 and accompanying text. A year later, the Court split 5–4 on a similar ban in *Bates*. *See supra* note 141 and accompanying text. The main difference between the cases was the Court's impression of lawyer advertising as quite distinct from pharmacist advertising. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 365–66 (1977).
Similarly, the Court split contentiously 5–4 (with no majority opinion) in *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), over an attorney letterhead claiming certification as a "civil trial specialist by the National Board of Trial Advocacy." *See id.* at 93, 96. Four years later the Court struck down an accountant rule barring an advertising using the terms "CPA and CFP" by a lawyer 7–2 in *Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136, 137–39 (1994). Again, the main difference in the split appeared to be the Court's greater sensitivity to concerns about lawyer advertising. *See id.* at 144–45, 148–49.

B. Florida Bar v. Went For It

Nevertheless, *Ohralik* can possibly be explained as an early case decided before the Court settled on the more muscular approach of the late 1980s and 1990s. The 1995 case of *Florida Bar v. Went For It, Inc.*,[168] however, is harder to explain, especially in light of the earlier cases *In re R.M.J.*[169] and *Shapero v. Kentucky Bar Ass'n*.[170]

In re R.M.J. dealt with, among other things, a Missouri lawyer sending out professional announcement cards that listed certain qualifications (like membership in bar of the United States Supreme Court) to a broad list of recipients.[171] This mailing violated the Missouri bar's allowed language on qualifications and was mailed outside of the permissible recipients.[172] The Court rejected the Missouri Bar's rules and specifically held that a ban on mailings cannot be sustained.[173]

In *Shapero*, the Court more explicitly held that a state bar association could not ban "truthful and nondeceptive" direct mail solicitations to clients.[174] The Court distinguished *Ohralik*, holding that a mailed solicitation implicated few of the dangers noted of in-person solicitation.[175]

Based on these precedents and *Bates v. State Bar of Arizona*,[176] a Federal District Court and the Eleventh Circuit struck down a Florida ban on direct mailings to accident victims within thirty days of the accident.[177] *Went For It*, however, overturned these courts and upheld the bar rule.[178]

The Court had "little trouble crediting the Bar's interest as substantial" under the governmental interest prong of *Central Hudson*.[179] The interests stated were protecting the privacy of accident victims, "preserv[ing] the integrity of the legal profession" and defending "the reputation of the legal profession."[180] There are a couple of interesting notes about these two justifications. While it is true that *Ohralik* relied on two separate justifications (protecting privacy and potential to mislead), later cases had generally treated *Ohralik* as a high potential for deception case and not a privacy

168. 515 U.S. 618 (1995).
169. 455 U.S. 191 (1982).
170. 486 U.S. 466 (1988).
171. *See* 455 U.S. at 196–98.
172. *Id.*
173. *See id.* at 203–07. One humorous note is the Court's admonition that announcing membership in its own bar is constitutionally protected, but "uninformative" and in "bad taste." *Id.* at 205.
174. *See* 486 U.S. at 479.
175. *See id.* at 475–78.
176. 433 U.S. 350 (1977).
177. *See* McHenry v. Fla. Bar, 21 F.3d 1038, 1039, 1041–43 (11th Cir. 1994), *rev'd sub nom.* Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995).
178. *Went for It*, 515 U.S. at 621–22.
179. *Id.* at 625. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court first stated its intermediate scrutiny test for commercial speech. *Id.* at 566; *see also* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 631–33 (2006) (discussing *Central Hudson*).
180. *Went for It*, 515 U.S. at 624–25 (citations omitted).

case.[181] By contrast, *Went for It* includes no allegation that the advertising at issue was actually or even potentially false or misleading.[182] Instead, the biggest problem seems to be the effect upon the public perception of lawyers.[183]

Moreover, the harm-to-reputation justification[184] is in direct conflict both with the Court's resistance to the suppression of commercial speech on "paternalistic" grounds[185] and earlier holding that lawyer advertising cannot be banned on "the mere possibility that some members of the population might find [the] advertising embarrassing or offensive" or that "some members of the bar might find [it] beneath their dignity."[186] Similarly, in *Bolger v. Youngs Drug Products Corp.*,[187] the Court rejected a government ban on "intrusive" and potentially "offensive" advertisements for contraceptives.[188] The Court stated that a state interest in protecting mail recipients from offensive materials was of "little weight" because the Court has "consistently held that the fact that protected speech may be offensive to some does not justify its suppression."[189] This is especially so in direct mail cases where the recipient can exercise the "short, though regular, journey from mail box to trash can."[190]

The Court thus had a relatively weak factual and legal case on either privacy or consumer protection grounds. Nevertheless, a close reading of the case shows the great credit that the Court gave to bar association worries and evidence about the low public opinion of lawyers.[191] More than any of the other lawyer advertising cases, *Went For It* evinces a patent sympathy for the plight of lawyer public image and a clear deference to the findings and desires of bar associations on these issues. It is hard to imagine that accountants or pharmacists would possibly have received the same treatment, and, just as the ban on in-person solicitation allowed by *Ohralik* has been limited to lawyers,[192] the Court has never upheld an advertising ban like Florida's for any other profession.

Ohralik and *Went For It* thus present a puzzle to students of the commercial speech doctrine. They are now both well known and venerable

181. *See, e.g.*, *In re* R.M.J., 455 U.S. 191, 202 (1982) (using *Ohralik* as an example supporting the proposition that regulation is "permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.").
182. *See Went for It*, 515 U.S. at 623–24.
183. *See id.* at 625.
184. *See id.*
185. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996).
186. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985). Justice Kennedy noted this conflict in his dissent. *Went for It*, 515 U.S. at 638 (Kennedy, J., dissenting).
187. 463 U.S. 60 (1983).
188. *See id.* at 71–72, 75.
189. *Id.* at 71 (quoting Carey v. Population Servs. Int'l., 431 U.S. 678, 701 (1977)).
190. *Id.* at 72 (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449 (2d Cir. 1967)).
191. *See Went For It*, 515 U.S. at 625–28.
192. *See supra* notes 152–59 and accompanying text.

precedents, yet in an area of increasing scrutiny of governmental regulation of advertising, they have basically been limited to their facts. Kathleen Sullivan has noted that *Ohralik* and *Went For It* "are difficult to square with the Court's other advertising decisions."[193]

C. Brown v. Legal Foundation of Washington

The strange constitutional status of lawyer advertising made me wonder whether there were other areas of constitutional law that dealt with lawyers and produced puzzling, *sui generis* results. A recent Fifth Amendment takings case, *Brown v. Legal Foundation of Washington*,[194] struck me as another apt example from a totally distinct area of the law.

The Fifth Amendment takings clause, like the First Amendment's commercial speech doctrine, has recently been a central concern of the Court.[195] In relevant part, the Fifth Amendment states "nor shall private property be taken for public use, without just compensation."[196] This simple injunction contains (at least) three distinct issues: "whether the interest asserted by the plaintiff is property, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the taking."[197]

The Court has recently decided two takings cases concerning state Interest on Lawyers' Trust Accounts (IOLTA) programs.[198] Every State in the Union has an IOLTA program.[199] IOLTA programs take advantage of the fact that lawyers are frequently called upon to handle client funds for a short period of time or in amounts small enough that establishing a separate account would be administratively burdensome.[200] In these situations lawyers are required (or encouraged) to place the client funds in an IOLTA account, and the interest generated from these accounts are used by state bar or supreme court authorities to pay for legal services for the poor.[201]

The first IOLTA takings cases held that the interest on client funds was not "property" under the Fifth Amendment.[202] In *Washington Legal Foun-*

193. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 578 (1998).

194. 538 U.S. 216 (2003).

195. The most notorious of these recent cases is *Kelo v. New London*, 545 U.S. 469 (2005). The Court has also addressed the issue in *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323, 337–41 (2005), *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–48 (2005), and *Franconia Associates v. United States*, 536 U.S. 129 (2002).

196. U.S. CONST. amend. V.

197. Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (Souter, J., dissenting).

198. *Brown*, 538 U.S. at 216; *Phillips*, 524 U.S. at 156.

199. *Brown*, 538 U.S. at 220. The origin of these programs is actually as great example of the unique powers of lawyer self-regulation. They were created in forty-five states under the inherent authority of state supreme courts, and by statute in the other five. *Id.* at 221 n.2. In Indiana and Pennsylvania IOLTA was originally statutory, but the state supreme courts invalidated the statute and created the IOLTA program by court order. *Id.*

200. *See Phillips*, 524 U.S. at 160.

201. *See Brown*, 538 U.S. at 221–23.

202. *See, e.g.*, Cone v. State Bar of Fla., 819 F.2d 1002, 1003–04 (11th Cir. 1987).

dation v. Texas Equal Access to Justice Foundation,[203] the Fifth Circuit of Appeals held that IOLTA interest was property subject to the Fifth Amendment Takings Clause.[204] In *Phillips v. Washington Legal Foundation*,[205] a 5-4 majority of the Supreme Court agreed.[206] The Court held that because "interest follows principal"[207] the interest on client IOLTA funds was the clients' property.[208] Interestingly, the Court did not reach the issue of whether IOLTA funds were actually "'taken' by the State," or what "amount of 'just compensation,' if any, [was] due respondents."[209]

Phillips is thus a weird, incomplete case. On the one hand, it explicitly left open the question of whether IOLTA programs cause a Fifth Amendment taking. On the other hand, it was hard to imagine after *Phillips* that IOLTA programs did not constitute a compensable taking because once the Court has found that the government has taken property from a private party there are few cases where the plaintiffs lost.[210] The Court has found unconstitutional takings even if the damages were minuscule or non-existent, as in *Loretto v. Teleprompter Manhattan CATV Corp.*,[211] where the Court held that, even if a taking increased the value of a property, it might still be compensable.[212]

Further, the Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[213] seemingly foreclosed IOLTA's most promising argument: that the government was not "taking" anything because the interest itself was government-created value that otherwise would not have existed.[214] In *Webb's Famous Pharmacies, Inc.*, a Florida statute allowed a county clerk to collect interest on a court interpleader fund.[215] Without the statute and the clerk's actions the fund would not have earned interest.[216] Nevertheless, the Court cited the familiar maxim that interest follows principal, explicitly rejecting the argument by the Florida Supreme Court that that the court

203. 94 F.3d 996 (5th Cir. 1996), *aff'd sub nom.* Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).
204. *See id.* at 1004.
205. 524 U.S. 156 (1998).
206. *See id.* at 158, 160.
207. *Id.* at 165.
208. *See id.* at 165–72.
209. *Id.* at 172.
210. For an extreme example, see *Hodel v. Irving*, 481 U.S. 704 (1987). In *Hodel*, the property at stake was *de minimus* fractional interests in land that either represented less that 2% of a given parcel or had earned less than $100 in the past year. *Id.* at 709. The challenged federal statute mandated that upon death of the interests' owners, they would escheat back to the tribe and could not be passed down through intestacy or devise. *Id.* Even where the owner had died and the interest cost the tribe more in administrative expenses than its value, the court affirmed the lower court's holding that the statute was unconstitutional as mandating a taking of property without just compensation. *Id.* at 718.
211. 458 U.S. 419 (1982).
212. *See id.* at 436–37, 438 n.15; *see also Phillips*, 524 U.S. at 169–70 (discussing and citing *Loretto* for the same proposition).
213. 449 U.S. 155 (1980).
214. *See id.* at 161–62.
215. *Id.* at 156–57.
216. *See id.* at 162.

"takes only what it creates."[217] The Court found a taking and required the state to disgorge the interest earned to the recipient of the underlying interpleader funds.[218]

Nevertheless, the first few cases after *Phillips* were a mess, as courts struggled to answer the unsettled question of whether IOLTA constituted a taking, and what, if any, just compensation was due. The main battleground seemed to be whether to apply the per se test for physical takings or the ad hoc *Penn Central* test for regulatory takings.[219]

The choice between the two tests in these cases was much more than academic. In takings cases the choice of the test usually presages the case's outcome. In cases where the per se test is met, the Court always finds a taking[220] and the only remaining question is just compensation.[221] By contrast, cases considered under the ad hoc *Penn Central* standard frequently result in a finding of no taking at all.[222] The post-*Phillips* cases seemed to follow this logic exactly: the cases that applied the *Penn Central* test found no taking, whereas the per se cases found an unconstitutional taking and required either full repayment or suitable equitable relief.[223]

In *Brown v. Legal Foundation of Washington*,[224] however, the Supreme Court broke the mold and found a per se taking of private property for public use but refused to require any compensation.[225] The Court began its analysis with a glowing review of the "public use" requirement, calling IOLTA a "dramatic success" serving the "compelling interest" of providing

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217. *Id.* at 162–63.

218. *Id.* at 164–65.

219. For example, when *Phillips* was considered on remand to the Western District of Texas, the court applied the ad hoc approach and found no taking. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 86 F. Supp. 2d 624, 643–47 (W.D. Tex. 2000). On appeal to the Fifth Circuit, the court overturned that decision and applied the *per se* test. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 186–89 (5th Cir. 2001), *vacated sub nom*. Phillips v. Wash. Legal Found., 383 U.S. 942 (2003). The Ninth Circuit followed a different path. The original panel to rule on an IOLTA program post-*Phillips* applied the *per se* test and found an unconstitutional taking, *see* Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1109–12 (9th Cir. 2001), while a later en banc decision applied the ad hoc approach and found no taking. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 854–61 (9th Cir. 2001) (en banc).

220. Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 786 (2002).

221. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . no matter how small [the compensation due]." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (citations omitted).

222. *See id.* ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'") (citation omitted); Mark Sagoff, *Muddle Or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 849 (1997) ("The Court's ad hoc approach gives prospective litigants a clear idea that plaintiffs will lose absent the special circumstances captured by the per se rules.").

223. *See supra* note 219.

224. 538 U.S. 216 (2003).

225. *See id.* at 235–37.

legal services to the poor.[226] The Court then reiterated its holding in *Phillips* that IOLTA interest was the private property of the plaintiffs and held that "a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis." [227] Thus, the "interest was taken for a public use when it was ultimately turned over to the Foundation," leaving only the question of "just compensation."[228]

The Court held that "'just compensation' . . . is measured by the property owner's loss rather than the government's gain."[229] Because the IOLTA interest is only supposed to be generated when the transaction costs of creating a separate bank account would be more than the interest earned, the Court concluded that the loss was always zero and required no compensation at all.[230]

It is still too early to know if *Brown* will turn out to be a *sui generis* case that stands outside the mainstream of takings jurisprudence the way that *Ohralik* and *Went for It, Inc.* have in the commercial speech area. There are several tell-tale signs that make it seem likely, however. The first is the Court's finding of no compensation whatsoever, despite placing the taking in the per se category.[231] As the Court itself has repeatedly noted, once a per se or "categorical" taking has been found, it applies a "clear rule" and the government must pay damages, "no matter how small."[232] If there is any clear theme from the Court's per se takings cases it is that once a per se taking is found the government will have to pay *something*.[233] In short, once the Court finds a per se taking, the case outcome is generally predetermined. Nevertheless, in *Brown*, the Court found room within its previously relatively uncontroversial "just compensation" doctrines to deny relief.[234]

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226. *See id.* at 232. It is worth noting how closely this section hews to the bar association praise of these programs, even including the statistic that IOLTA funds provide "legal services to literally millions of needy Americans." *Id. Compare id.*, *with* Brief for Am. Bar Ass'n as Amicus Curiae Supporting Respondents at *4–*7, Wash. Legal Found. v. Legal Found. of Wash., 538 U.S. 216 (2003) (No. 01-1325), 2002 WL 31399642. This section also parallels the section in *Went For It*, where the Court uncritically credits each of the bar association factual defenses for the advertising restrictions at issue. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624–25 (1995). One other interesting parallel in these cases is the role of Justice O'Connor. She was a long-time defender of lawyer regulation of advertising and authored *Went For It*. *See id.* at 619; *see also* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 53 n.92 (1995). In *Phillips* she joined a 5-4 majority finding that the interest was the private property of the plaintiffs, *see* Phillips v. Wash. Legal Found., 524 U.S. 156, 158 (1998), but in *Brown* she switched sides to create a 5–4 majority allowing IOLTA programs to continue, *see Brown*, 538 U.S. at 218.

227. *Brown*, 538 U.S. at 235.

228. *Id.*

229. *Id.* at 235–36.

230. *See id.* at 239–40.

231. *See id.* at 240.

232. *See id.* at 233–34.

233. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421, 436–37, 438 n.15 (1982) (finding a taking in a situation where the government action might have actually increased the value of the property overall and assuming that there will be some finding of compensation); Phillips v. Wash. Legal Found., 524 U.S. 156, 169–70 (1998) (citing *Loretto*, 458 U.S. at 437 n.15 and noting that "[t]he government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected").

234. *See Brown*, 538 U.S. at 235–37. It would be an error to call any part of takings jurisprudence

Second, *Brown* is difficult to square with *Webb's Fabulous Pharmacies, Inc.*,[235] especially with regard to the Court's explicit rejection of the government-created value argument. *Brown* distinguishes *Webb's Fabulous Pharmacies, Inc.* by noting that in *Webb's Fabulous Pharmacies, Inc*., the State of Florida collected both a statutory interpleader fee and the interest generated, as well as noting that the IOLTA interest only exists because of the pooling of funds that would otherwise generate no interest.[236] Nevertheless, in *Webb's Fabulous Pharmacies, Inc*., Florida's entire argument was that the state statute itself created the interest at issue and that in the absence of the statute there would be no interest to collect.[237] The *Webb's Fabulous Pharmacies, Inc.* Court rejected that argument, noting that regardless of whether a state statute created the interest, the interest still belonged to the owner of the underlying principal.[238] As a conceptual matter, this argument looks quite similar to an argument the Court accepted in *Brown*: that without the government created system pooling IOLTA funds there would be no net interest.[239] Yet in *Brown*, the Court allowed the government to keep the government-created value.[240]

Lastly, one way to predict that *Brown* will prove to be a *sui generis* holding is the difficulty of imagining another type of per se taking where the government will take something of obvious value that has absolutely no value to the plaintiff. In fact, the Court's holding that just compensation is measured by the loss to the plaintiffs[241] will likely prove a relative side note as the battle over regulatory and per se takings rages on. As Christopher Serkin has argued, *Brown* will not prove "one of the most important valuation cases in recent years," but will instead be treated as a "prosaic" and fact-specific treatment of fair market value.[242]

VI. *MIRANDA*'S RIGHT TO SILENCE AND RIGHT TO COUNSEL

One of criminal procedure's most famous cases provides our next example. In 1966 the Supreme Court revolutionized the law of police interrogations with *Miranda v. Arizona*.[243] *Miranda* required that police officers

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wholly uncontroversial. Nevertheless, prior to *Brown* few of the Court's cases had hinged on the valuation question; the bulk of the work was done on the ins and outs of the taking itself. *See id.* at 241 (Scalia, J., dissenting).

235. 449 U.S. 155 (1980).

236. *See Brown*, 538 U.S. at 237–39, 238 n.10.

237. *Webb's Fabulous Pharmacies*, 449 U.S. at 161–62.

238. *See id.* at 162–63.

239. *See Brown*, 538 U.S. at 230.

240. *See id.* at 235–37.

241. *See id.* at 235–36.

242. Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in* Brown v. Legal Foundation of Washington, 37 IND. L. REV. 417, 421 (2004); *accord* Ronald D. Rotunda, *Found Money: IOLTA,* Brown v. Legal Foundation of Washington, *and the Taking of Property Without the Payment of Compensation*, CATO SUP. CT. REV.: 2002–2003, at 245, 268 ("When one looks closely at [*Brown*], there is much less [to it] than meets the eye.").

243. 384 U.S. 436 (1966).

warn a suspect in custody prior to interrogation "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[244] If these warnings are not given prior to interrogations statements taken in violation of *Miranda*, the statements generally cannot be introduced at trial.[245]

The *Miranda* warnings tell a suspect of two broad rights: the right to remain silent and the right to an attorney.[246] In the *Miranda* opinion itself neither right is favored over the other, and both are treated as critical to safeguarding a suspect's rights.[247] In particular, if a suspect exercises either right, the interrogation must stop. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[248] Similarly, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[249]

The Court's treatment of these two rights, however, have diverged radically over time, with *Michigan v. Mosley*[250] and *Edwards v. Arizona*[251] serving as the two prime examples. In *Mosley*, the Court faced the question of how to handle a second round of questioning after a suspect had already invoked his right to remain silent.[252] The Court cited *Miranda* for the proposition that the "right to cut off questioning" must be "scrupulously honored."[253] Nevertheless, the Court held an interval of "more than two hours," questioning by another officer about a different crime, and a new set of *Miranda* warnings, was sufficiently scrupulous.[254] From the outset, *Mosley* was seen as a significant weakening of *Miranda*,[255] and later cases have made clear that there is no different crime requirement and that the police can scrupulously honor a suspect's right to remain silent by pausing their interrogation for a period as short as an hour or two.[256]

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244. *Id.* at 444.

245. *Id.* at 479. There are, naturally, exceptions to this rule. *See, e.g.*, *Investigation and Police Practices—Custodial Interrogations*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 162, 164 n.523 (2006) ("Exceptions to the *Miranda* rule include good faith, attenuation, independent source, and independent discovery.").

246. *See Miranda*, 384 U.S. at 479.

247. *See id.*

248. *Id.* at 473–74.

249. *Id.* at 474.

250. 423 U.S. 96 (1975).

251. 451 U.S. 477 (1981).

252. *See Mosley*, 423 U.S. at 97–99.

253. *Id.* at 104.

254. *See id.* at 104–05.

255. In dissent Justice Brennan called *Mosley* another step in *Miranda*'s "erosion and . . . ultimate overruling." *Id.* at 112 (Brennan, J., dissenting); *see also* Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62, 83 & n.133 (Vincent Blasi ed., 1983) (noting that *Mosley* would likely allow a waiver in many cases beyond its bare facts and significantly weaken *Miranda*).

256. Some of the cases on this issue are gathered in *Investigation and Police Practices—Custodial*

Mosley is thus notable for both its part in the long-term project of eroding *Miranda*'s protections and its role as the first case to really differentiate between the right to remain silent and the right to counsel. As *Mosley* made clear, its holding on the malleability of a declared desire to exercise the right to remain silent had no effect on the requirements following a request to speak to a lawyer.[257] While the results of an exercise of either right were treated quite similarly in *Miranda* itself, *Mosley* establishes for the first time that the right to remain silent is to be treated less favorably.[258] There are no post-*Mosley* Supreme Court cases on how to treat questioning after an unambiguous request to remain silent, but the other Supreme Court cases on the treatment of silence at trial are generally unfriendly.[259]

Edwards v. Arizona[260] made the distinction between silence and counsel even clearer. *Edwards* was decided in 1981[261] and fell directly during a period of erosion for *Miranda* protections.[262] *Edwards* dealt with a situation analogous to that considered in *Mosley*: a suspect had asked for counsel, and, before counsel had arrived, the police reinstituted their interrogation, and the Defendant eventually confessed.[263] The Arizona Supreme Court relied on *Mosley* and held that if the confession was gained voluntarily during the second interrogation, *Miranda* was satisfied.[264]

The Supreme Court reversed, making *Edwards* one of the few decisions to unequivocally embrace *Miranda*'s language and holding.[265] The Court noted that it had "strongly indicated that additional safeguards are necessary when the accused asks for counsel" and held that once an accused asks for counsel she cannot be questioned until she meets with counsel or she herself "initiates further communication."[266] *Edwards* also discussed *Mosley* and

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Interrogations, *supra* note 245, at 176–77, 177 n.568.

257. *See Mosley*, 423 U.S. at 101 n.7.

258. Anthony X. McDermott & H. Mitchell Caldwell, *Did He or Didn't He? The Effect of* Dickerson *on the Post-Waiver Invocation Equation*, 69 U. CIN. L. REV. 863, 896–97 (2001) ("For the first time, a salient distinction was made between the right to counsel and the right to silence. Those suspects requesting the latter thus warranted less protection from the 'menacing police interrogation procedures' than those who requested the former.").

259. *See generally Investigation and Police Practices—Custodial Interrogations*, *supra* note 245, at 162–86. The Court has also applied less than solicitous treatment to pre-arrest and post-arrest silence. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam) (allowing the use of post-arrest silence if a defendant later takes the stand during his criminal trial); Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (allowing use of prearrest silence). Post-*Miranda* warnings silence, however, cannot be used at trial. Doyle v. Ohio, 426 U.S. 610, 617–18 (1976). It is worth noting that a prosecutor could not use a pre-arrest, post-arrest, or post-*Miranda* warning request for a lawyer as evidence of guilt, despite the fact that some jurors might consider a request for a lawyer to be at least as incriminating as silence. *See* State v. Leach, 807 N.E.2d 335, 338 (Ohio 2001).

260. 451 U.S. 477 (1981).

261. *Id.*

262. *See* Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 745–86 (1999).

263. *Edwards*, 451 U.S. at 478–79.

264. *See* State v. Edwards, 594 P.2d 72, 77 (Ariz. 1979) (en banc), *rev'd sub nom.* Edwards v. Arizona, 451 U.S. 447 (1981).

265. *Edwards*, 451 U.S. at 481–82.

266. *Id.* at 484–85.

made explicit the differential treatment between a request to remain silent and a request for counsel.[267]

Given that *Edwards* is surrounded by *Miranda* cases that refer to the warnings as a non-constitutionally required, prophylactic measure,[268] the stridency of the opinion is striking. The Court states "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation" and creates a bright line requirement that all questioning stop following a request for counsel.[269]

The cases that followed *Edwards* generally built upon this bright line rule.[270] The fact that the Court has followed up on *Edwards*, at all, is noteworthy. The Court kept the right to counsel question salient through multiple cases, strengthening its protections.[271] By contrast, the Court's last real statement on the effect of an unequivocal request to remain silent was *Mosley*,[272] and this has resulted in a long, slow drift in the federal courts where even the protections offered by *Mosley* have been diluted.[273]

In *Smith v. Illinois*,[274] one of the first post-*Edwards* cases, the Court reiterated that once an unequivocal request for counsel is made, all questioning must stop and subsequent statements may only be used to establish a waiver of the right to counsel.[275] In *Arizona v. Roberson*,[276] the Court held that when an accused has requested counsel he may not be questioned later by a new set of detectives about a totally separate crime, even if the second detectives did not know of the request for counsel.[277] The Court recognized the factual similarities to *Mosley* (the second set of detectives investigating a second crime), but again distinguished the import of a request to remain silent.[278]

In *Minnick v. Mississippi*,[279] the accused requested counsel, met with counsel, and was then questioned by the police without his lawyer pre-

267. *Id.* at 485 ("In *Michigan v. Mosley*, the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel.") (citations omitted).

268. *See* Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1337–38, 1337 n.6 (2003) (noting that "[t]hrough a series of cases in the 1970s and 80s, the Court 'deconstitutionalized' *Miranda*," And that the *Miranda* rules were "only 'measures to insure that the right against compulsory self-incrimination was protected.'" (quoting Michigan v. Tucker, 417 U.S. 433, 333 (1974))).

269. *See Edwards*, 451 U.S. at 485–86.

270. The main exception is the series of cases that have required a clear request for counsel to trigger *Edwards*, rejecting more equivocal or unclear requests. *See, e.g.*, Davis v. United States, 512 U.S. 452, 461–62 (1994).

271. *See infra* text accompanying notes 274–284.

272. Michigan v. Mosley, 423 U.S. 96 (1975).

273. *See Investigation and Police Practices—Custodial Interrogations*, *supra* note 245, at 176–78, 177 n.568 (listing recent cases applying *Mosley*).

274. 469 U.S. 91 (1984).

275. *See id.* at 94–100.

276. 486 U.S. 675 (1988).

277. *See id.* at 687–88.

278. *Id.* at 683.

279. 498 U.S. 146 (1990).

sent.[280] *Minnick* has a lengthy passage discussing the efficacy of the bright line *Edwards* rule[281] and well encapsulates a theme that runs throughout all of these cases: what is the point of having *Miranda* rights at all if the police can question you regardless of your request for an attorney?[282] In this regard, the Justices' experience as lawyers seems extremely relevant. Every lawyer knows and fears the possibility that their client will be talking to opposing parties outside of the lawyer's presence and say something that can never be retracted or fixed.[283]

In sum, there seems little doubt that the right to counsel is better protected by *Miranda* and its progeny than the right to remain silent.[284] Aside from the Court's familiarity and natural understanding of the importance of counsel, however, there is not much to support placing the right to counsel above the right to remain silent. To the contrary, the right to remain silent seems to be the more central right protected by *Miranda.*

Insofar as *Miranda* is constitutionally based, it is based squarely on the Fifth Amendment's right to avoid self-incrimination[285] and not the Sixth Amendment's right to counsel.[286] *Miranda* itself referred to self-incrimination,[287] and in *Dickerson v. United States*,[288] the Court noted the many references in *Miranda* and its progeny to the Fifth Amendment in holding that the *Miranda* holding was constitutionally required.[289] The Sixth Amendment's right to counsel, by contrast, "does not attach until a prosecution is commenced"; its protection does not obtain during the police investigation of a crime.[290]

Given that *Miranda* is a Fifth Amendment case, it is somewhat strange that the right to have counsel present during questioning would be elevated above a straightforward and direct invocation of the suspect's right to remain silent. This is especially so since a request for counsel is treated as an invocation of Fifth Amendment rights: "an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."[291]

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280. *Id.* at 148–49.
281. *Id.* at 150–56.
282. *Id.*
283. *See* Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed.").
284. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1481 (2005) ("A defendant's invocation of his right to counsel receives more solicitous treatment than his invocation of his right to remain silent.").
285. U.S. CONST. amend. V.
286. *Id.* amend. VI.
287. *See* Miranda v. Arizona, 384 U.S. 436, 439, 455–457 (1966) (arguing that coercive nature of custodial interrogations threatens the "privilege under the Fifth Amendment . . . not to be compelled to incriminate [one]self" thus requiring "adequate safeguards to protect precious Fifth Amendment rights").
288. 530 U.S. 428 (2000).
289. *See id.* at 439–40, 440 n.5 (listing cases that have described *Miranda* as a Fifth Amendment case).
290. *See* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).
291. Fare v. Michael C., 442 U.S. 707, 719 (1979).

Furthermore, it is dubious to suggest that protecting the right to counsel will do more to counteract coercion or police questioning. As the Court has repeatedly noted "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[292] In fact, the very first thing any lawyer summoned to a police station by a *Miranda* request will do is find out what the client has already said and strongly advise the client to say nothing further.[293] Given that the main protection presented by the lawyer is silence, should not a direct request to exercise Fifth Amendment rights be treated at least as favorably as a request for the ancillary right to a lawyer during questioning? Instead, a direct request to remain silent requires only a short break in the questioning while a request for a lawyer requires a full stop until a lawyer is consulted and most likely a full stop of all interrogation.[294]

As such, *Edwards* and its progeny stand out as another set of *sui generis* pro-lawyer decisions. While the Court was busily eroding the *Miranda* protections on multiple fronts, it chose to retain quite robust protections for accused who clearly expressed a desire for a lawyer. The advantages to the legal profession are clear: whatever else an accused should know, she should know to request a lawyer first and foremost.

VII. NONCOMPETE AGREEMENTS

Virtually every business and profession in America except for lawyers are treated the same when the question is the enforceability of contractual noncompete agreements: the agreement is subject to a multi-factor reasonableness test, and if found reasonable, is enforced.[295] By contrast, the great majority of courts have a per se rule against enforcing lawyer noncompetes, and a majority of courts refuse to enforce any agreement which discourages free movement of lawyers.[296] This differential treatment is defended on the basis of now familiar public policy concerns that the lawyer-client relationship is special and thus must be treated more solicitously than other professional relationships.

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292. Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (quoting Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring)); *see also* Moran v. Burbine, 475 U.S. 412, 436 n.5 (1986) (Stevens, J., dissenting) (quoting same).

293. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 734–35 (1992) (claiming that, when speaking to her client in the stationhouse, "[v]irtually any competent lawyer would advise his client in the strongest possible terms to remain silent, and it would be a rare client indeed who would disregard such advice.").

294. One obvious difference between a request for a lawyer and a request to remain silent is that the request for a lawyer has a natural ending point (the arrival of the lawyer). Nevertheless, given that *Miranda* is focused on the Fifth Amendment, a request to remain silent should be treated at least as well as a request for a lawyer, i.e. a request for silence should be honored until the suspect invites further communication or is provided with a lawyer.

295. *See infra* notes 298-99.

296. *See infra* notes 300-10 and accompanying text.

At common law noncompete agreements were generally held illegal as a restraint on trade.[297] This changed through the twentieth century, and, under current law, noncompete agreements are analyzed under a reasonableness inquiry: "(1) Does the covenant protect a legitimate business interest of the employer? (2) Does the covenant create an undue burden on the employee? (3) Is the covenant injurious to the public welfare? (4) Are the time and territorial limitations contained in the covenant reasonable?"[298] This is true for every profession except for lawyers.[299]

The development of the law covering lawyer noncompete agreements is quite distinct. It begins with a 1961 ABA ethics opinion which suggested for the first time that a lawyer agreement not to compete was unethical. [300] The opinion noted that "[t]he practice of law . . . is a profession, not a business," "[c]lients are not merchandise," and "[l]awyers are not tradesmen."[301] The opinion also noted that such agreements are "an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status."[302]

In 1969 the ABA adopted this reasoning in its first formal ethics code, the ABA Model Code of Professional Responsibility, DR 2-108(A).[303] This restriction passed through to the later Model Rules of Professional Conduct in Rule 5.6(a).[304] At this point another justification for the rule was explicitly stated: such agreements "limit[] their professional autonomy" and "the freedom of clients to choose a lawyer."[305]

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297. *See* Wm. C. Turner Herbert, Comment, *Let's Be Reasonable: Rethinking the Prohibition Against Noncompete Clauses in Employment Contracts Between Attorneys in North Carolina*, 82 N.C. L. REV. 249, 252 (2003).

298. Weber v. Tillman, 913 P.2d 84, 90 (Kan. 1996).; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

299. *See* Riddle v. Geo-Hydro Eng'rs, Inc., 561 S.E.2d 456, 457–58 (Ga. Ct. App. 2002) (holding noncompete agreement between engineers unenforceable only because the restraint against soliciting former clients was not reasonable); Schott v. Beussink, 950 S.W.2d 621, 623, 625–27 (Mo. Ct. App. 1997) (upholding accountant noncompete agreement); *see also* Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 14–23 (1992) (covering cases upholding doctor noncompetes).

300. *E.g.*, Gary S. Rosin, *The Hard Heart of the Enterprise: Goodwill and the Role of the Law Firm*, 39 S. TEX. L. REV. 315, 327 (1998).

301. ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961) [hereinafter ABA Op. 300].

302. *Id.*

303. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108(A) (1969), *reprinted in* RICHARD ZITRIN ET AL., LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS 453 (2007) ("A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."). Opinion 300 was explicitly cited as a basis for the rule. ZITRIN, *supra,* at 461 n.105.

304. Rosin, *supra* note 300, at 329. Rule 5.6(a) states: "A lawyer shall not participate in offering or making . . . [an] agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." MODEL RULES OF PROF'L CONDUCT R. 5.6(a) (2006).

305. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVOLPMENT IN THE ABA HOUSE OF DELEGATES 167 (1987) (setting forth Rule 5.6 and its justifications).

Of course, while these ethics opinions and rules may be enforceable as a professional sanction, they are explicitly not meant for court enforcement.[306] Nevertheless, courts frequently rely on these sources for persuasive authority; in the case of lawyer noncompete covenants, courts have relied almost completely on the ABA's approach to the issue. The first, and leading, case is *Dwyer v. Jung*.[307] *Dwyer* dealt with a noncompete agreement amongst law partners.[308] It began by noting that "[a] lawyer's clients are neither chattels nor merchandise, and his practice and good will may not be offered for sale" and continued on to defend a client's right to hire "counsel of his own choosing."[309] The court held that "[s]trong public policy considerations preclude" using "commercial standards" to gauge the legal profession and struck down the noncompete clause.[310]

The great bulk of case law that followed *Dwyer* barred noncompete agreements.[311] There are a couple of things to note about these cases. First, while they now tend to emphasize client autonomy, the original justification for barring noncompetes was clearly a worry about *lawyer autonomy*.[312] Second, the discussions of the legal profession generally depend on the familiar bar association arguments that the law is not a business and that commercialization is to be avoided as a matter of public policy.[313]

Third, courts have been so protective of Rule 5.6(a) that they have also invalidated contractual provisions that do not expressly bar competition but may have the effect of dampening competition. For example, in *Cohen v. Lord, Day & Lord*,[314] the court struck down a contractual provision that allowed a former partner to compete but lessened his post-departure compensation.[315] The court quoted New York County Lawyers' Association Opinion 109, noting that "[c]lients are not merchandise" and "[l]awyers are not tradesmen," and barred the provision because it "would functionally and realistically discourage and foreclose a withdrawing partner from serving

306. *See* MODEL RULES OF PROF'L CONDUCT Scope ¶ 20 (2006) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.").

307. 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975).

308. *Id.* at 499.

309. *Id.* at 499–500. Except, humorously, "perhaps, in cases of indigency." *Id.* at 500 n.1.

310. *Id.* at 500.

311. *See* WOLFRAM, *supra* note 51, at 885 n.45 (discussing *Dwyer* and its progeny); Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 924–29 (2000) (same).

312. *See* Linda Sorenson Ewald, *Agreements Restricting the Practice of Law: A New Look at an Old Paradox*, 26 J. LEGAL PROF. 1, 6–12 (2002) (noting the drift from lawyer-centric justifications to client-centered justifications).

313. *See, e.g.*, Corti v. Fleisher, 417 N.E.2d 764, 769 (Ill. App. Ct. 1981) (stating that "[m]embers of the public who seek the services of an attorney cannot be treated by him as mere merchandise or articles of trade in the market place" and citing *Dwyer* (quoting Palmer v. Breyfogle, 535 P.2d 955, 965–66 (Kan. 1975))).

314. 550 N.E.2d 410 (N.Y. 1989).

315. *See id.* at 410–11.

clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel."[316]

Lastly, courts have been quite explicit about treating lawyers differently than other professions. For example, *Raymundo v. Hammond Clinic Ass'n*[317] summarily dismissed the argument that medical ethics should prohibit enforcement of noncompete agreements as "self-serving."[318] The New Jersey case of *Karlin v. Weinberg*[319] followed closely on the heels of *Dwyer v. Jung*.[320] *Karlin* expressly rejected the idea that *Dwyer* applied equally to doctors and went on to apply a reasonableness analysis.[321] *Karlin* has been regularly cited by later courts rejecting physician efforts to invalidate noncompete clauses.[322]

The distinction between lawyers and other professionals is quite difficult to defend. For example, a number of commentators have argued that doctors should be treated as favorably as lawyers[323] while other commentators have argued that lawyers should face a reasonableness standard like doctors and other professionals.[324] Both of those arguments have merit because it is hard to find a meaningful distinction between lawyer noncompetes and those of other professionals. It is hard to imagine that a doctor's patients or an accountant's clients have less of an interest in choosing their doctor or accountant. In fact, the choice of a doctor seems much more personal and much more likely to have serious and life-changing ramifications than the choice of a lawyer.

Commentators have also argued that the per se rule against noncompete agreements have actually made clients *worse* off.[325] This is because it encourages lawyers in law firms to focus solely on building their own practice and keeping their own clients instead of finding ways that the firm as a

316. *Id.* at 411; *accord* Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 530–31 (Tenn. 1991). A few courts have held the opposite. *See, e.g.*, Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 728–29 (Ariz. 2006) (en banc) (holding that "'an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm is enforceable'" (quoting Howard v. Babcock, 863 P.2d 150, 151 (Cal. 1994))).

317. 449 N.E.2d 276 (Ind. 1983).

318. *See id.* at 280–81.

319. 372 A.2d 616 (N.J. Super. Ct. App. Div. 1977), *aff'd*, 390 A.2d 1161 (N.J. 1978).

320. 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975).

321. *See Karlin*, 372 A.2d at 618–19.

322. *See, e.g.*, Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller, 127 P.3d 121, 131–33 (Idaho 2005) (citing *Karlin* and holding that doctor noncompetes are to be closely scrutinized under the reasonableness test). One recent case has created a per se bar to physician noncompetes that is similar to the treatment of lawyers. *See* Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 683 (Tenn. 2005). Other States have done so by statute, *see* COLO. REV. STAT. ANN. § 8-2-113(3) (West 2003); DEL. CODE ANN. tit. 6, § 2707 (2005); MASS. GEN. LAWS ANN. ch. 112, § 12X (West 2003), or by construing state antitrust law, *see* Odess v. Taylor, 211 So. 2d 805, 811 (Ala. 1968).

323. *See, e.g.*, Berg, *supra* note 299, at 41–42.

324. *See, e.g.*, Glenn S. Draper, Comment, *Enforcing Lawyers' Covenants Not to Compete*, 69 WASH. L. REV. 161, 180–82 (1994).

325. *See, e.g.*, Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1735–38 (1998); Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777, 1793–94 (1998).

whole can benefit the client.[326] Moreover, it discourages law firms from training their associates since any time and money spent on training may be wasted when the associate departs.[327]

If the client-centered explanation lacks force, the reasons that cluster around lawyer autonomy and maintaining the law as a profession are weaker. Certainly, a doctor or engineer has an equal interest to a lawyer in choosing where and how she works. Similarly, I assume that the American Medical Association (AMA) would agree that patients are not "chattels" and would decry that much of the medical profession has been reduced to a business. Nevertheless, the AMA and doctors have found most courts rather inhospitable to these arguments.[328]

Further, insofar as courts sometimes invalidate noncompete agreements because of unequal bargaining power,[329] it seems particularly ironic to provide a per se invalidation to lawyers. This is especially so in the various cases which deal with agreements among partners in a law firm. In sum, the differential treatment of lawyer noncompete agreements is probably best explained by the desire of courts to uphold bar association rules, like Rule 5.6(a),[330] as well as a fundamental sympathy for the concerns of lawyer autonomy.

VIII. LEGAL MALPRACTICE

It is much harder to prove legal malpractice than medical malpractice. This is because the legal profession has enjoyed several unique advantages as defendants in malpractice actions, and doctrinal changes that have been applied in medical malpractice have been barred or adopted much more slowly in legal malpractice. Courts have justified many of these differences on the now familiar ground that lawyers are distinct and need distinct treatment.[331]

Legal malpractice is generally treated as a tort action based in negligence.[332] Legal malpractice requires a relationship establishing a duty of care, "skill and knowledge in providing legal services to the client; a breach

326. Ribstein, *supra* note 325, at 1735–36.

327. Schneyer, *supra* note 325, at 1793.

328. *See* Berg, *supra* note 299, at 14–23.

329. *See, e.g.*, Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993) (noting the concern "that employers and employees have unequal bargaining power" in non-competition agreements).

330. MODEL RULES OF PROF'L CONDUCT R. 5.6(a) (2006).

331. Legal and medical malpractice are generally governed by state law, so there will inevitably be variation among the states on both torts. Unless noted otherwise this Article addresses the majority view of each tort.

332. Recently, however, the Supreme Court of Virginia decided that legal malpractice is solely based in contract law and thus refused a plaintiff's request for punitive damages. *See* O'Connell v. Bean, 556 S.E.2d 741, 743 (Va. 2002). Virginia's doctors are subject to punitive damages, as limited by a state statute. *See* Anand, L.L.C. v. Allison, 55 Va. Cir. 261, 268 (Va. Cir. Ct. 2001). Additionally, most jurisdictions bar damages for pain and suffering. *See* Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 477–78 (2002).

of that duty; and a connection of legally recognized causation between the breach and resulting harm to the client."[333]

The questions of duty and breach are proven by expert testimony and concern whether the lawyer exercised the diligence and skill commonly demonstrated by lawyers in the locality.[334]

A. Causation

The single biggest distinction between legal and medical malpractice is the requirements for causation. In a legal malpractice action that arises from a botched litigation the aggrieved former client must prove "but for" causation, i.e. that she would have been successful in the underlying lawsuit except for the attorney's malpractice.[335] This is what is known as the "case-within-the-case" requirement: the legal malpractice plaintiff must first prove that she would/should have won her underlying case and then prove that she did not win the case because of the lawyer's malpractice.[336] The majority of courts add a second caveat as well: the plaintiff must prove that she would have won the underlying judgment and collected it.[337] The case-within-a-case standard has been applied to other, non-litigation areas, like transactional malpractice claims.[338]

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333. N. Bay Council, Inc. v. Bruckner, 563 A.2d 428, 430 (N.H. 1989) (Souter, J.).

334. *See* Richard H. W. Maloy, *Proximate Cause: The Final Defense in Legal Malpractice Cases*, 36 U. MEM. L. REV. 655, 666 (2006). "Various courts have held that the locality may be the community, the county, or the state." Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 757 (1994). This standard is frequently more exacting for legal malpractice than medical malpractice, where the locality rule has been slackened or abandoned. *See* Stephen E. McConnico et al., *Unresolved Problems in Texas Malpractice Law*, 36 ST. MARY'S L.J. 989, 1011 (2005) (The Texas legal malpractice "locality requirement for expert witnesses is in contrast to recent Texas case law in the medical malpractice area. Experts regarding the standard of care in medical malpractice cases do not necessarily have to practice within a particular locality, so long as they can demonstrate expertise with the procedure performed . . . irrespective of locality.").

335. *See, e.g.*, Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1143–44 (1999).

336. *See, e.g.*, Barnes v. Everett, 95 S.W.3d 740, 744 (Ark. 2003) ("To prove damages and proximate cause, the plaintiff must show that, but for the alleged negligence of the attorney, the result in the underlying action would have been different. In this respect, a plaintiff must prove a case within a case, as he or she must prove the merits of the underlying case as part of the proof of the malpractice case.") (citation omitted). The case-within-a-case requirement is the rule in the "vast majority" of states. *See, e.g.*, McConnico et al., *supra* note 334, at 1009. For an example of the minority view, *see Vahila v. Hall*, 674 N.E.2d 1164, 1168–70 (Ohio 1997), refusing to always apply the case-within-a-case standard.

337. *See, e.g.*, Garretson v. Miller, 121 Cal. Rptr. 2d 317, 321 (Cal. Ct. App. 2002) (explaining that "California follows the majority rule that a malpractice plaintiff must prove not only negligence on the part of his or her attorney but that careful management of the case-within-a-case would have resulted in a favorable judgment '*and collection of same* . . . .'") (alteration in original). A minority of courts, however, have held that the burden should be on the defendant attorney to prove—often as an affirmative defense—that the client's putative judgment was uncollectible. *See* Hoppe v. Ranzini, 385 A.2d 913, 920 (N.J. Super. Ct. App. Div. 1978) (holding that "the burden of proof with respect to the issue of collectibility should be upon the attorney defendants, notwithstanding the rule elsewhere that places that burden on plaintiff").

338. R. Todd Hogan & Franz Hardy, *Defending the Transactional Legal Malpractice Case: Trends and Considerations for Defense Counsel*, 73 DEF. COUNS. J. 332, 333 & n.3 (2006) (listing cases). Hogan and Hardy trace the application, noting that

The case-within-a-case standard is very difficult to meet theoretically and practically.[339] As a theoretical matter, the plaintiff faces two huge issues of proof: proving the underlying malpractice and then proving that she would have won in a trial of a totally distinct cause of action. While causation is always an issue in any tort action, it is the central issue in legal malpractice cases.[340] This is because causation requires the malpractice plaintiff to win two trials: the original litigation and the later malpractice suit.

Proving the underlying case against the original attorney is obviously quite challenging. The original attorney may know the facts, law, and weaknesses of the case backwards and forwards. The original attorney also has access to client confidences, and, despite what we learned earlier about the sanctity of client confidences,[341] the Model Rules explicitly allow a lawyer to reveal client confidences to defend a malpractice action.[342]

Furthermore, if the attorney's lax performance affected the discovery process, the malpractice plaintiff may have an extremely hard time piecing the underlying evidence together years later, especially when the original defendant is not a party to the malpractice action for purposes of discovery.

While the case-within-a-case structure makes civil litigation legal malpractice claims quite difficult to prove, criminal defense malpractice is even more challenging. In the great majority of states a legal malpractice plaintiff who was a criminal defendant must prove more than the-case-within-a-case:

> [c]ourts have more recently been asked whether "case within a case" applies to claims involving transactional malpractice; that is, whether a plaintiff must prove that an excluded or unfavorable term in the underlying agreement would have been accepted by the other negotiating party if the attorney had acted in accordance with his or her duty.
>
> The majority of courts that have addressed this issue have determined that the "case within a case" standard does apply to transactional malpractice claims.

Id. at 333.

339. As Lawrence Kessler has aptly stated: "The rigid rules requiring the plaintiff to meet [the case within a case standard] create an embarrassing aura of special treatment" in legal malpractice actions. Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 492 (2000); *see also* Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181, 1194 n.52 (2003) (calling the case-within-a-case a "formidable, almost unsustainable burden"); Maloy, *supra* note 334, at 677–93 (providing a long list of cases that have been dismissed under the case-within-a-case-analysis).

340. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 148 (1995) ("Much of the expense of legal malpractice litigation results from the 'case within a case' doctrine.").

341. *See* discussion *supra* Part IV.

342. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2006). Consider the following:

> Rule 1.6 creates several moral double standards. It permits attorney disclosure of client confidences to collect from the client a $500 fee. In comparison, the rule does not allow the attorney to protect the future victim of a massive insurance or securities fraud. Moreover, Rule 1.6 recognizes the attorney's right to "every man's evidence" and permits the attorney to sully the reputation of a living former client by revealing potentially devastating personal information while defending against a claim of legal malpractice. Yet the rule denies a potentially innocent third party defendant valuable evidence because *that* revelation might besmirch the reputation of a deceased former client.

Brian R. Hood, Note, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 758–59 (1994).

she must prove that she was actually innocent.[343] Furthermore, in most jurisdictions a plaintiff cannot pursue a legal malpractice action unless the plaintiff has first obtained post-conviction relief.[344] If that post-conviction relief is based on a claim of ineffective assistance of counsel, the odds of relief are slim indeed.[345] As such, legal malpractice for shoddy criminal defense work is rare.[346]

B. Lost Chance

The strict treatment of causation in legal malpractice is in sharp contrast to the general loosening of causation requirements in other areas of tort law. Perhaps the best example is the medical malpractice doctrine of "lost chance." Professor Joseph King describes the lost chance doctrine as follows:

> [W]hen a defendant tortiously destroys or reduces a victim's prospects for achieving a more favorable outcome, the plaintiff should be compensated for that lost prospect. Damages should be based on the extent to which the defendant's tortious conduct reduced the plaintiff's likelihood of receiving a better outcome. . . . In other words, a plaintiff's right to damages for the loss of a chance should not be restricted to situations in which the plaintiff proves that it was more likely than not that he would have received a better outcome in the absence of the tortious conduct.[347]

While the logic of loss of chance applies in multiple areas of the law, in practice in America, it has been largely confined to medical malpractice cases.[348] In a medical malpractice case, lost chance can allow a finding of causation where strict but for causation would not.[349] For example, if a pa-

343. *See* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1030 (2002).

344. *Id.* at 1031; *see also* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 32 & n.170.

345. *See* Duncan, *supra* note 344, at 33; *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 78 (1999) (arguing that the *Strickland v. Washington* standard for ineffective assistance of counsel "has proved virtually impossible to meet").

346. *See* Duncan, *supra* note 344, at 29–30. Legal malpractice for an appellate action is similarly difficult. If a lawyer misses an appellate deadline, a plaintiff must prove negligence and the case-within-a-case. *See, e.g.*, Governmental Interinsurance Exch. v. Judge, 825 N.E.2d 729, 735 (Ill. App. Ct. 2005). In appellate malpractice the merits of the underlying appeal is ruled on as a matter of law by the new district court judge. *See, e.g.*, *id.* at 735–36. Because appellate cases are rarely open and shut, and because the district court must essentially overrule a sister district or appellate court on an issue of law or fact to meet the case-within-a-case requirement, appellate malpractice cases are also extremely hard to win.

347. Joseph H. King, Jr., "*Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*, 28 U. MEM. L. REV. 491, 492 (1998) (footnote omitted).

348. *See* Todd S. Aagaard, Note, *Identifying and Valuing the Injury in Lost Chance Cases*, 96 MICH. L. REV. 1335, 1335 n.5 (1998).

349. *See* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 63–64 (2005) (noting that proof of lost chance generally does not establish but for causation).

tient has cancer and only has a 40% chance of survival, under strict rules of causation there is no recovery when a late diagnosis reduces the odds of survival to 10%: it was more likely than not that the plaintiff would have died regardless. Loss of chance allows a plaintiff to collect damages for the lost chance, even if the original chance was not better than even.[350] Loss of chance has been controversial, but has been adopted in a majority of states for medical malpractice.[351]

The applicability of loss of chance to legal malpractice is obvious, and multiple commentators have suggested that loss of chance would ameliorate much of the unfairness of the case-within-a-case requirement.[352] Nevertheless, the few courts to consider the issue have consistently denied efforts to extend loss of chance to legal malpractice.[353]

Legal malpractice has played a role in the development of loss of chance doctrine, however, as a cautionary example of why it should not be adopted at all, or why it should not be expanded beyond medical malpractice. For example, in *Kramer v. Lewisville Memorial Hospital*,[354] the Texas Supreme Court rejected loss of chance because it is doubtful that it

> could prevent its application to similar actions involving other professions. If, for example, a disgruntled or unsuccessful litigant loses a case that he or she had a less than 50 percent chance of winning, but is able to adduce expert testimony that his or her lawyer negligently reduced this chance by some degree, the litigant would be

350. *See* Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759, 797–98 (1992) (explaining the proportional damages approach in lost chance cases, where the jury finds the appropriate percentage of the plaintiff's original and diminished chance, and providing an example where the plaintiff's original chance was 40%).

351. *See* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 485 (Ohio 1996) (noting that a "majority of states . . . have adopted the loss-of-chance theory").

352. *See, e.g.*, Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1493–1501 (1986); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (1998) (suggesting that loss "of a substantial chance of prevailing" may be recoverable, but citing foreign cases and dicta in one US case as support). *But see* John C.P. Goldberg, *What Clients are Owed: Cautionary Observations on Lawyers and Loss of Chance*, 52 EMORY L.J. 1201, 1208–13 (2003) (noting differences between legal and medical malpractice in support of argument that loss of chance should not be extended to legal malpractice).

353. *See, e.g.*, Daugert v. Pappas, 704 P.2d 600, 605 (Wash. 1985) (en banc). Plaintiffs have had some limited success in avoiding the case-within-a-case by arguing for the reduced settlement value of a case. *See* McConnico et al., *supra* note 334, at 1009–10 (noting that a "few jurisdictions have allowed settlement value damages" when "unique fact patterns are presented" and listing cases). *But see* Beatty v. Wood, 204 F.3d 713, 718–19 (7th Cir. 2000) (rejecting plaintiff's legal malpractice argument "that his ADEA claim would have netted him money in a settlement even if he could not have ultimately succeeded on the merits" and restating "but for" test). Historically lawyers have been protected by a rule of "judgmental immunity" regarding settlement advice. *See* 7 AM. JUR. 2D *Attorneys at Law* §§ 221, 227 (1997); 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 30.41, at 572 (5th ed. 2000). The majority of courts have thus rejected potential settlement value in favor of the case-within-a-case, in part because holding otherwise "renders professionals liable as guarantors, as almost all cases have some value." *See* McConnico et al., *supra* note 334, at 1009 (citing 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 32.8, at 170 (4th ed. 1996)).

354. 858 S.W.2d 397 (Tex. 1993).

> able to pursue a cause of action for malpractice under the loss of chance doctrine.[355]

Similarly, judges have noted the potential application of loss of chance to lawyers in dissenting to its adoption. In *Perez v. Las Vegas Medical Center*,[356] the Nevada Supreme Court adopted loss of chance over Justice Steffen's argument in dissent that loss of chance "would be equally just and applicable in such actions involving other professions, including the legal profession."[357]

The psychology of these cases is quite striking. While courts all over the country have adopted loss of chance for medical patients, the mere mention of applying it to lawyers is enough to convince some judges not to adopt the doctrine at all. In particular, it is worth noting how clearly the judges involved do not identify with the doctors; yet when legal malpractice comes up the idea that a litigant, who would have lost anyway, could sue is viscerally wrong.

C. Burden-Shifting and Res Ipsa Loquitur

One of the critical difficulties in proving a case-within-a-case is that much of the necessary evidence concerning the underlying case resides in the exclusive control of the lawyer defendant.[358] Moreover, many of these cases involve missing a statute of limitations or failing to file a timely appeal, so many legal malpractice actions face problems of lost or forgotten evidence at the time of filing, let alone trial.[359] In some cases the malpractice claimed may include a failure to pursue discovery, which could further exacerbate the evidentiary problems involved.

In similar situations where tort plaintiffs face evidentiary problems, courts work hard to shift burdens or adapt the negligence standards to allow cases to continue. In some cases where the defendant's actions caused the evidentiary difficulties, courts have simply shifted the burden of proof to the defendant. For example, in *Haft v. Lone Palm Hotel*,[360] the California Su-

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355. *Id.* at 406 (footnote omitted). The dissent in *Kramer* countered this argument by citing *Daugert v. Pappas*, 704 P.2d 600 (Wash. 1985), for the proposition that loss of chance has been limited to medical malpractice in Washington. *See Kramer*, 858 S.W.2d. at 410 (Hightower, J., dissenting); *see also* Hardy v. Sw. Bell Tel. Co., 910 P.2d 1024, 1029 (Okla. 1996) (refusing to extend loss of chance outside medical malpractice context and noting *Daugert's* rejection of loss of chance for legal malpractice).

356. 805 P.2d 589 (Nev. 1991).

357. *Id.* at 599 n.3 (Steffen, J., dissenting); *see also* Dumas v. Cooney, 1 Cal. Rptr. 2d. 584, 593 (Cal. Ct. App. 1991) (in not adopting lost chance, within medical malpractice context, the court noted that "the lost chance theory has troubling implications," such as a possible application to lawyers).

358. *See* Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (noting criticism of the case within a case approach, including the difficulties for the plaintiff since he or she would be litigating against "his or her own lawyer, who has superior knowledge about the strengths and weaknesses of the case").

359. *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1559–60 (1994) (noting the common occurrence of statute of limitations claims in legal malpractice suits and the fact that most of these suits involve old evidence).

360. 478 P.2d 465 (Cal. 1970) (en banc).

preme Court shifted the burden of proof on causation to the defendant because "the absence of definite evidence on causation [was] a direct and foreseeable result of the defendants'" negligence."[361] In *Summers v. Tice*,[362] two defendants shot at and hit the plaintiff, but one shot caused almost all of the damages.[363] Because the plaintiff could not prove which defendant was liable, the court shifted the burden of proof on causation to the defendants.[364]

Another classic example is res ipsa loquitur. Res ipsa allows a plaintiff to establish a permissible inference on causation if: "(a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff."[365] Res ipsa is particularly appropriate when the defendant has superior knowledge of the incident, i.e. when the defendant is in a better position to prove or disprove causation than the plaintiff.[366]

Shifting the burden of proof on causation would seem to be a natural response to the case-within-a-case controversy because the defendant-lawyer is in a uniquely strong position to explain why the plaintiff was likely to lose the underlying lawsuit regardless of the defendant-lawyer's negligence.[367] This is especially so because, in each of these cases, the lawyer accepted the employment and pursued the case before it was allegedly lost through her incompetence. If the case was a loser from the start, perhaps the lawyer who agreed to take the case should bear the burden of proving it so. Nevertheless, res ipsa loquitur and other burden shifting techniques are "generally inapplicable to legal malpractice cases."[368] By contrast, res ipsa has been available in medical malpractice since *Ybarra v. Spangard*[369] was decided in 1944.[370] Further, courts have generally resisted shifting the legal

361. *Id.* at 476.
362. 199 P.2d 1 (Cal. 1948) (en banc).
363. *See id.* at 1–2.
364. *See id.* at 4–5; *see also* Eric A. Johnson, *Criminal Liability for Loss of Chance*, 91 IOWA L. REV. 59, 107 & n.258 (2005) (citing *Summers v. Tice* as an example of burden-shifting and how burden-shifting eases problems for plaintiffs with the application of the but-for standard).
365. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1071 (Pa. 2006) (quoting RESTATEMENT (SECOND) OF TORTS § 328D (1965)). Moreover, as the Supreme Court of Pennsylvania noted, "[t]he doctrine of *res ipsa loquitur* originated in Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299, 300–01 (Ex. Ch. 1863)." *Id.* at 1071 n.16.
366. *See, e.g.*, Jerista v. Murray, 883 A.2d 350, 360 (N.J. 2005) ([The doctrine of res ipsa loquitur] "places a strong incentive on the party with superior knowledge to explain the cause of an accident and to come forward with evidence in its defense.").
367. For a fuller version of this argument, see Kenneth G. Lupo, Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 701–02 (1977).
368. Hacker v. Holland, 570 N.E.2d 951, 955 n.5 (Ind. Ct. App. 1991); *see also* Berman v. Rubin, 227 S.E.2d 802, 805 (Ga. Ct. App. 1976) ("Res ipsa loquitur is simply not applicable to suits for legal malpractice.").
369. 154 P.2d 687 (Cal. 1944) (en banc).
370. *See* Jayne De Young, Note, *Toward a More Equitable Approach to Causation in Veterinary Malpractice Actions*, 16 HASTINGS WOMEN'S L.J. 201, 216 (2005).

malpractice burden of proof on causation regardless of the difficulties this burden places on plaintiffs.[371]

D. Privity

The doctrine of privity was one of the pillars of tort law that eventually disintegrated in reaction to the industrial revolution. In the nineteenth and early-twentieth century, courts held that a plaintiff must prove privity–the equivalent of a contractual relationship–with a defendant to proceed in a product liability lawsuit.[372] In the early English case of *Winterbottom v. Wright*,[373] a plaintiff who drove a mail coach manufactured by defendant, but bought by his employer, could not sue the manufacturer for alleged defaults because the plaintiff lacked contractual privity with the manufacturer.[374] This doctrine was translated to legal malpractice in *Savings Bank v. Ward*.[375] *Ward* involved a factual scenario that remains quite familiar today: the lawyers improperly performed a title search.[376] Because the injured party was not the lawyer's client, however, the court dismissed the case for lack of privity.[377]

Over the course of the early and mid-twentieth century the requirement of privity crumbled, and third party liability for tortious conduct became the rule rather than the exception.[378] Although the privity doctrine lasted longer in legal malpractice,[379] the tests for third party liability that replaced the strict privity doctrine still pose substantial challenges to third party plaintiffs.[380]

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371. *See* Paul Gary Kerkorian, Note, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1079 (1990) ("It is surprising, however, to note that even when the attorney's alleged negligence would make the client's proof of causation more difficult . . . the courts generally have remained unwilling to alter the client's burden of proof for causation.").

372. *See generally* David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 274 (1998) (explaining the historical development of the privity requirement in products liability cases).

373. (1842) 152 Eng. Rep. 402 (Exch. Div.).

374. *See id.* at 403–05. "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action." *Id.* at 405.

375. 100 U.S. 195 (1879).

376. *See id.* at 195–96.

377. *See id.* at 205–06. The court noted that "[p]roof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action" and that "in the case before the court the defendant was never retained or employed by the plaintiffs." *Id.* at 198–99.

378. *See, e.g.*, George S. Mahaffey, Jr., *All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, the Final Frontier in Professional Liability*, 35 ARIZ. ST. L.J. 21, 43–45 (2003).

379. *See* John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1004 (1996) (noting that "[s]ome commentators have noted, not without amusement, that privity limitations persisted in the field of legal malpractice even as the courts lifted them in other areas"); Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 695 (2006) (noting that "[t]hree or four decades ago" legal malpractice actions were quite rare). *See generally id.* at 1010–24 (detailing history of privity requirement in legal malpractice).

380. *See* Jennifer R. Rossi, Note, Petrillo v. Bachenberg, 26 SETON HALL L. REV. 1301, 1303–06, 1304 n.7 (1996) (describing the variety of tests for determining liability to third party plaintiffs).

The area of trusts and estates has been particularly ripe for these types of controversies because the injured party is almost always not the client: the injured party is typically an intended beneficiary who received less or nothing due to the lawyer's negligence.[381] The requirement of contractual privity to bring a legal malpractice claim made will-drafting a virtual malpractice-free zone before the privity requirement began to weaken in the 1960's.[382]

There are several different ways that courts have allowed third party legal malpractice suits. California uses a multi-factor test.[383] Other states basically use the contract law of third party beneficiaries. If the primary purpose of the attorney-client relationship was to benefit the third party, she is a proper legal malpractice plaintiff.[384] Some courts have found that third parties may sue if their reliance upon the lawyer's advice or actions was foreseeable.[385]

The first thing to note about each of these doctrines is the extent to which they rely upon contract or quasi-contract types of reasoning to establish third party liability. The second thing to note is that they are vastly narrower than traditional tort law of third party liability, which generally utilizes a broad foreseeability standard.[386] Last, doctors have fared much worse than lawyers on third party liability.[387] In fact, doctors and psychiatrists frequently find themselves on the cutting edge of plaintiff-friendly foreseeability decisions.[388]

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381. *See* Alexander M. Meiklejohn, *UFOCS and Common Law Claims Against Franchise Counsel for Negligence*, 25 FRANCHISE L.J. 45, 67 (2005).

382. *See Developments in the Law*, *supra* note 359, at 1560–61 ("Prior to the 1960s, the 'American rule' was that attorneys would be liable for professional negligence only to those individuals with whom they established contractual privity—or, in other words, an attorney-client relationship. . . . The privity rule, however, sometimes operated to deny a cause of action to the only party affected by the attorney's negligence. This result might happen if, for example, the attorney was hired to draft a will for the express benefit of a third party not in privity of contract with the attorney.") (footnote omitted).

383. Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (considering "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm").

384. *See, e.g.*, Pelham v. Griesheimer, 440 N.E.2d 96, 100 (Ill. 1982); Schreiner v. Scoville, 410 N.W.2d 679, 681–83 (Iowa 1987).

385. *See e.g.*, Williams v. Ely, 668 N.E.2d 799, 805–06 (Mass. 1996); *see also* Anthony E. Davis, *Legal Opinion Letters and Audit Letters: Minimizing Risk*, N.Y. L.J. July 1, 2002, at 3, 3. For an overview of this case law, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. f, Reporter's Notes (2000).

386. *See* W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 921–22 (2005). One exception is torts that involve only economic loss, like negligent misrepresentation. In those cases courts take a more limited view of third party liability. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977). Some will-drafting cases do resemble negligent misrepresentation cases (when they deal with bad advice instead of bad drafting, for example).

387. *See* Dale L. Moore, *Disparate Treatment of the Allocation of Power Between Judge and Jury in Legal and Medical Malpractice Cases*, 61 TEMP. L. REV. 353, 358–72 (1988).

388. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342–48 (Cal. 1976) (en banc) (finding that a psychiatrist has duty to warn third parties about dangerous patients when a "special relationship" exists between the doctor and either the patient or victim); *see also* Gregory G. Sarno, Annotation, *Liability of Physician, for Injury to or Death of Third Party, Due to Failure to Disclose Driving-*

Nevertheless, the states that apply one or all of these standards of third party liability are actually the liberal states for purposes of legal malpractice. Nearly a hundred years after the American law of privity was first reversed by Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*,[389] nine states retain a strict privity rule in legal malpractice actions.[390] Given that the privity requirement has fallen into widespread disuse in other areas of tort and has been subject to both general derision and quite specific criticisms in the area of legal malpractice,[391] the fact that nine states have retained it is quite striking.

The justification is the potential harm to clients if third party liability were allowed and the fear of unlimited liability for lawyers:

> [T]he rule protects the attorney's duty of loyalty to and effective advocacy for his or her client. While the testator/client is alive, the lawyer owes him or her "a duty of complete and undivided loyalty." . . . [C]ourts [also] fear that absent the strict privity rule there would be no limit as to whom a lawyer would be obligated. . . . In threatening the interests of the attorney, the interests of potential clients may also be compromised; they might not be able to obtain legal services as easily in situations where potential third party liability exists.[392]

This reasoning is striking on several levels. First, the reliance on protecting the wishes of the original client is quite disingenuous in the area of wills because the original client is dead and can no longer sue the attorney. If, in fact, the third party is correct about the lawyer's malpractice, it is hardly helpful to say that courts are protecting the original client's interests

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Related Impediment, 43 A.L.R. 4TH 153, § 4[a] (1986) (detailing physician's liability to third parties for failure to warn about a medications side effects). Some courts have limited accountant third party liability in a manner consistent with liability for legal malpractice, *see* Jay M. Feinman, *Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology*, 31 FLA. ST. U. L. REV. 17, 20 (2003).

389. 111 N.E. 1050, 1053 (N.Y. 1916); *see also* Murray H. Wright & Edward E. Nicholas, III, *The Collision of Tort and Contract in the Construction Industry*, 21 U. RICH. L. REV. 457, 465–67 (1987) (describing *MacPherson* in addition to noting its rapid acceptance such that "[b]y 1966, the rule established in *MacPherson* had been adopted throughout the United States").

390. *See* Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357, 384 (2004) (listing the nine States—Alabama, Arkansas, Maine, Maryland, Nebraska, New York, Ohio, Texas, and Virginia, and citing supporting statute (Arkansas) or cases).

391. *See, e.g.*, Roger M. Baron, *The Expansion of Legal Malpractice Liability in Texas*, 29 S. TEX. L. REV. 355, 360 (1988).

392. Noble v. Bruce, 709 A.2d 1264, 1270 (Md. 1998) (quoting John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1006–06 (1995)); *see also* Robinson v. Benton, 842 So. 2d 631, 636–37 (Ala. 2002) ("'At common law, an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client. Without this "privity barrier," the rationale goes, clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability. . . . 'This [rule ensures] that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.'" (quoting Barcelo v. Elliott, 923 S.W.2d 575, 577–79 (Tex. 1996))).

when the work of the lawyer flies in the face of that client's stated desires.[393]

Second, note that the court relies on an original argument defending privity—the concern of unlimited liability to third parties[394]—that was rejected repeatedly as courts displaced the privity requirement.[395] Yet somehow when the possibility of unlimited liability for lawyers is at issue, the courts find a serious and cognizable harm.

Third, the worry about clients is quite telling, as the same arguments have been utterly disregarded in the doctor-patient scenario.[396] The possibility of third party liability could certainly affect the doctor-patient relationship or cause the doctor to worry more about third parties than her own patients.[397] Courts generally consider this effect a *benefit* of third party liability for doctors and psychiatrists: the whole point of third party liability is to make doctors consider risks outside the patient-doctor relationship.[398] The relationship between a lawyer and client, however, is so sacrosanct that future lawsuits by injured non-clients are barred out of the chance that allowing those suits might disrupt the relationship.

Lastly, the worry that clients "might not be able to obtain legal services as easily in situations where potential third party liability exists"[399] is also one that has been explicitly rejected in other tort areas, notably products liability and medical malpractice. One of the tort reformers favorite criticisms is that court decisions have greatly reduced or eliminated access to health care and certain products.[400] Tort advocates consider this a feature of

393. In some, or even many, cases the third party may have a specious claim. That is an issue for proof, however. The blanket rule of privity means that even clearly meritorious claims of negligence are barred at the door.

394. *See* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 405 (Exch. Div.) (worrying that "if th[is] plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action")

395. See MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) ("Yet the defendant would have us say that [there was only] one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage-coach do not fit the conditions of travel to-day."). Note that given the intermediate third party liability available under the negligent misrepresentation approach, *see supra* note 386, this argument is especially disingenuous.

396. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976) (en banc) (holding that public interest in confidential communications between psychotherapist and patient must be weighed against the public interest in safety).

397. *See generally* Rahul Rajkumar, *A Human Rights Approach to Routine Provider-Initiated HIV Testing*, 7 YALE J. HEALTH POL'Y L. & ETHICS 319, 364 (2007) (observing that physicians often have a "dual loyalty" simultaneously to both their patient and a third party in performing many of their functions).

398. *See, e.g.*, Pate v. Threlkel, 661 So. 2d 278, 279, 282 (Fla. 1995) (holding that standard of care requiring doctor to warn patient of the hereditary nature of her existing disease was for the benefit of specific third parties, namely the plaintiff's children).

399. Noble v. Bruce, 709 A.2d 1264, 1270 (Md. 1998) (quoting John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1006–06 (1995)).

400. *See, e.g.*, Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 58 FLA. L. REV. 265, 276 (2006) (observing that tort reform advocates often point to the diminution in output of vaccines and small aircraft in response to litigation cost during the 1980s).

the system—unsafe products are priced correctly or eliminated altogether.[401] Again, when lawyers are involved the courts are suddenly worried that certain services will be unavailable to clients.[402]

E. The Rules of Professional Conduct

As noted earlier, one of the keys to the success of the legal profession's self-regulation was the weight that state supreme courts have given to the ABA's Model Rules of Professional Conduct (Model Rules).[403] Because courts have adopted the Model Rules as the governing conduct regulations for the profession and have used the Model Rules to decide cases in areas as diverse as noncompete agreements among lawyers,[404] lawyer advertising,[405] and client confidences,[406] the Model Rules are much closer to a set of binding statutes or regulations than general guidance to lawyers.[407]

This is true, of course, with the exception of malpractice actions. The Scope section of the Model Rules states quite clearly that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[408]

Courts have been mixed in how they apply the Model Rules in malpractice actions. The majority of courts have presented a compromise position: the Model Rules cannot stand in as the duty of care, a violation of the Model Rules is not negligence per se, but they can be considered as evidence of a breach.[409] A few courts have allowed the Model Rules to inform the duty of care question more directly, some by creating a rebuttable presumption of a breach of duty if the Model Rules are violated.[410] On the other hand, some courts have held that the Model Rules are flatly inadmissible in a legal malpractice action.[411] Notably, lawyer-defendants always "retain the right to introduce ethical standards in defense of their actions."[412]

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401. *See id.* at 274–80 (discussing the tort reformers arguments and the defenders' arguments).

402. This same justification has been used to reject damages for pain and suffering in legal malpractice actions. *See* Kessler, *supra* note 332, at 488–91.

403. *See supra* notes 66–67 and accompanying text.

404. *See supra* notes 308–16 and accompanying text.

405. *See supra* notes 144–48, 159 and accompanying text.

406. *See supra* note 121 and accompanying text.

407. *See supra* notes 67 & 306 and accompanying text.

408. MODEL RULES OF PROF'L CONDUCT Scope ¶ 20 (2006).

409. Marc R. Greenough, Note, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions after* Hizey v. Carpenter, 68 WASH. L. REV. 395, 400 (1993).

410. Evans v. Dickstein, No. 252791, 2005 WL 1160621, at *1 (Mich. Ct. App. May 17, 2005) ("This Court has previously rejected the argument that violation of the Rules of Professional Conduct is negligence per se. Instead, this Court has favored the proposition that a violation of the Rules of Professional Conduct is rebuttable evidence of malpractice and does not relieve a plaintiff 'of the obligation to present expert testimony.'" (quoting Beattie v. Firnschild, 394 N.W.2d 107, 110 (Mich. Ct. App. 1986))).

411. *See Ex parte* Toler, 710 So. 2d 415, 416 (Ala. 1998); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366, 369 (Ark. 1992); Hizey v. Carpenter, 830 P.2d 646, 653–54 (Wash. 1992) (en banc). Courts have also held that the Rules can never be used to support a third party suit. *See* Brody v. Ruby, 267 N.W.2d 902, 906–07 (Iowa 1978); Hill v. Willmott, 561 S.W.2d 331, 333–34 (Ky. Ct. App. 1978);

Overall, the structure and treatment of legal malpractice further establishes that judges have analyzed and designed the tort with a unique understanding of, and sympathy for, the lawyer defendants before them—a clear example of the lawyer-judge hypothesis. The law is noticeably more favorable to lawyers than other professions; even in the areas where legal malpractice has begun to catch up, it lags other areas of the law significantly, and outlier courts remain.

IX. RAMIFICATIONS

At this point I hope that some or all of you are convinced that the lawyer-judge hypothesis explains a diverse subset of cases and doctrines that directly effect the legal profession. Assuming you are convinced, you may still ask "so what?" It may be that while judges treat lawyers differently—and better—this treatment is justified. Maybe lawyers are, in fact, special. Lawyers do play an important role in our society and legal order, but does that justify certain jurisprudential latitudes? To me it is self-evidently insalubrious to have the judiciary favor one group of persons over others. Further, the collection of regulatory and case law advantages listed above are hardly calibrated to further the lawyer's role as an officer of the court.[413]

Assuming the phenomenon exists, and that it is deleterious, can anything realistically be done about it? First, gathering the cases, making the argument, and shedding light on the trend may be enough to shift the law in some of these areas. As Part I's discussion of the underlying theory noted, some or all of this effect is the result of unconscious judicial bias toward their own experiences and naturally increased empathy for litigants who share similar backgrounds and experiences. Perhaps pointing out the cumulative effects of these unconscious decisions will lead to some reforms.

Second, it may be that our system of selecting judges from the ranks of lawyers is the best possible model for our legal structure and society, and therefore the costs associated with it are bearable. Again, recognizing those costs and weighing them against the benefits is worthwhile.

On the other hand, it may be that the costs of the current system outweigh the benefits. Given the general public distrust and dislike of lawyers,[414] there may be many other objections to their dominant role in the judiciary aside from any bias towards lawyers in general.

I do not think it is obvious that all judges should be lawyers. To the contrary, it may be right that no lawyers should be judges. In many civil law

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Spencer v. Burglass, 337 So. 2d 596, 600–01 (La. Ct. App. 1976); Drago v. Buonagurio, 386 N.E.2d 821, 822 (N.Y. 1978).

412. *Developments in the Law*, *supra* note 359, at 1567.

413. *Cf.* Barton, *Justifications*, *supra* note 22, at 477–81 (rejecting a similar justification for biased lawyer regulations).

414. Society's apparent general dissatisfaction with the legal profession has been widely noted. *See, e.g.*, John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994).

countries judges are trained and educated separately from lawyers.[415] Perhaps that is a better model.

Moreover, the idea that only lawyers should be judges is of relatively recent vintage in the United States. In the eighteenth, nineteenth, and early twentieth century, many judges and justices of the peace were not lawyers (and many current justices of the peace are still non-lawyers).[416] Predictably, bar associations were at the forefront of the (largely successful) effort to eliminate lay judges.[417] These efforts occurred simultaneously to the bar's overall professionalization movement that included the push for a bar examination, required legal education, and the unified bar.[418] Given the potential benefits to the profession, and the key role that the judiciary played in the success of the professionalization movement, bar associations clearly made a wise choice.

Aside from history and international precedents, Adrian Vermeule has recently argued that there should be at least one non-lawyer justice of the U.S. Supreme Court and possibly more.[419] Nonlawyer judges can also be defended on populist or egalitarian grounds.[420] It is beyond the scope of this Article to build a complete defense or indictment of the primacy of lawyer judges. Instead, I will note that it does add another wrinkle to a larger ongoing debate about the structure and nature of our judiciary.

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415. *See* Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, IND. J. GLOBAL LEGAL STUD., Winter 2004, at 139, 142–44 (describing civil law system for training judges separately from lawyers).

416. For some historical descriptions of non-lawyer judges, see JOHN P. DAWSON, A HISTORY OF LAY JUDGES (1960); JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 22 (2004), noting two New Hampshire justices in the late eighteenth century who were formally trained as ministers, not lawyers. *See also* Robert Little, *Don't Miss a Move: Making Rules 5 and 5.1 Work for Your Clients in General Sessions Court*, TENN. B.J., Mar. 2001, at 12, 13 ("The frontier era criminal defendant was faced with an available Justice of the Peace, usually a non-lawyer, or an unavailable Circuit Court judge, a circuit rider covering multiple counties."). For discussions of the prevalence of current non-lawyer judges, see Goodson v. State, 991 P.2d 472, 472–74 (Nev. 1999), holding that a misdemeanor trial before a non-lawyer justice of the peace was constitutional under the state constitution; Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1572–73, 1573 n.8 (2006).

417. *See* PROVINE, *supra* note 21, at 1–60; THE TASK FORCE ON THE ADMIN. OF JUSTICE, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 34–36 (1967). There are some great old articles and speeches by scions of the bar denouncing justices of the peace. *See, e.g.*, SIMEON E. BALDWIN, THE AMERICAN JUDICIARY 129 (1905) ("The weakest point in this system of judicial organization is the vesting of jurisdiction of small civil causes in justices of the peace."); Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 327 (1913) (same); Chester H. Smith, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118, 140 (1927) (calling "justice of the peace system . . . an anachronism in our jurisprudence the perpetuation of which cannot be justified").

418. *See supra* notes 58–65, 71–73 and accompanying text.

419. The U.S. Constitution prescribes minimum age and citizenship qualifications for Congressmen, Senators, and Presidents. U.S. CONST. art. I, § 2, cl. 2 (Representatives); *id.* art I., § 3, cl. 3 (Senators); *id.* art. II, § 1, cl. 4 (Presidents), but imposes no particular qualifications for federal judges. Vermeule argues that because non-lawyers would bring different expertise to deciding cases the overall quality of the judgments would rise if a court had some lay judges as opposed to no lay judges. *See* Vermeule, *supra* note 416, at 1571.

420. *See, e.g.*, Vermeule, *supra* note 416, at 1582.

Nevertheless, the lawyer-judge hypothesis established herein proves that lawyers have enjoyed preferential treatment. The severity of the problem and what should be done about it, if anything, are ultimately issues for further contemplation and study.