

## Do Judges Systematically Favor the Interests of the Legal Profession?

Benjamin H. Barton<sup>1</sup>

*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.*

*The article presents theoretical support from the new institutionalism, cognitive psychology and economic theory. The 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? The 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.*

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.<sup>2</sup>

Of course, there are many cases that will pit factions of the legal profession against each other,<sup>3</sup> and while there may be certain classes of lawyers that are privileged as a rule over other classes,

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<sup>1</sup> Associate Professor of Law, University of Tennessee College of Law. B.A. 1991, Haverford College; J.D. 1996, University of Michigan.

<sup>2</sup> 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 the article, please add the modifier “as expressed by bar associations.”

<sup>3</sup> For example, the interests of the plaintiffs’ bar and the defense bar (or of prosecutors and defense lawyers) diverge regularly.

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 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>4</sup> Every question and answer on this page will be covered and fully supported *infra*.

<sup>5</sup> 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, *cf.* LYNN LOPUCKI,

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. 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 can’t 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 persuading you the lawyer-judge hypothesis is correct. Part I lays out a theoretical basis for my hypothesis. Parts II through VII lay out the examples of the lawyer-judge hypothesis listed above. Lastly, Part VIII briefly discusses (without coming to any conclusions) the ramifications of the lawyer-judge hypothesis.

## I. 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

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COURTING FAILURE (2005) (detailing same), the differential treatment of Legal Service Attorney speech and abortion clinic employee speech, *compare* Legal Serv. Corp. v. Velasquez, 531 U.S. 533 (2001) *with* Rust v. Sullivan, 500 U.S. 173 (1991), and the treatment of lawyer and non-lawyer whistleblowers in employment law, *see* Wieder v. Skala, 80 N.Y.2d 628, 633 (1992).

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.<sup>6</sup> Cognitive psychologists study judicial heuristics.<sup>7</sup> Economists wonder what incentives control judicial behavior.<sup>8</sup>

While some empirical studies have suggested ways these various incentives play out in practice,<sup>9</sup> 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. In this way the empirical studies have suffered from a “missing link” problem – they’ve 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 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.

Most studies of judicial incentives focus on non-monetary incentives, such as maximizing leisure time, prestige, or opportunities for further judicial promotion rather than salary effects, on the assumption that judicial decisions have no effect on salaries.<sup>10</sup> Nevertheless, the lawyer-judge hypothesis shows that at least one class of 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. Many judges rely upon lawyers to get or keep their jobs. Most state judges face some type of election (either contested or retention),<sup>11</sup> and lawyers provide most of the elected judiciary’s campaign donations.<sup>12</sup> In elective states – including merit selection states with retention elections – bar associations frequently endorse judicial candidates,<sup>13</sup> and conduct and publish “bar polls” on the judges.<sup>14</sup> Many judges were selected for their positions through

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

<sup>7</sup> 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).

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

<sup>9</sup> See, e.g., Bainbridge & Gulati, *supra* note \_\_, \_\_\_\_\_.

<sup>10</sup> See Posner, *supra* note \_\_, at 13-23.

<sup>11</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *STATE COURT ORGANIZATION* 1998, at 19 (1998) (estimating that 84% of state judges face some type of election).

<sup>12</sup> See David Barnhizer, “*On the Make: Campaign Funding and the Corrupting of the American Judiciary*,” 50 CATH. U. L. REV. 361, 393 (2001) (delineating the judiciary’s reliance upon lawyer campaign contributions and its deleterious effects); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. 1983) (“It is not surprising that attorneys are the principal source of contributions in a judicial election.”).

<sup>13</sup> 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).

<sup>14</sup> See JAMES H. GUTERMAN & ERROL E. MEIDINGER, *IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES* (1977).

“merit plans” that place substantial selection authority in state and local bar associations.<sup>15</sup> Any judges who hope to join the federal judiciary rely upon the ABA for a favorable rating.<sup>16</sup> Bar associations have further massaged the judicial salary incentive by working tirelessly for higher salaries for judges.<sup>17</sup>

Further, the vast majority of judges were practicing attorneys before taking the bench.<sup>18</sup> Most judges are members of bar associations.<sup>19</sup> Of 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 want to maximize their own “prestige,” which generally means standing among other lawyers.<sup>20</sup>

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. In the advocacy system most judges rely on the lawyers to

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<sup>15</sup> 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.”).

<sup>16</sup> See *The Role of the American Bar Association in the Judicial Selection Process*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. (1989). Unsurprisingly, scholars have noted that ambition plays a part in the judicial utility function. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CINC. L. REV. 615, 631-33 (2000).

<sup>17</sup> The ABA and state bars lobby for higher salaries, better benefits, and improved public opinion of the judiciary. See, e.g., State Bar of Georgia Commission on Judicial Service, *Proposal*, at [http://www.gabar.org/public/pdf/LEG/Commission\\_Judicial\\_Service\\_Proposal](http://www.gabar.org/public/pdf/LEG/Commission_Judicial_Service_Proposal) (last visited January 15, 2007); AMERICAN BAR ASS’N & FEDERAL BAR ASS’N, *FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM* (2001).

<sup>18</sup> See DORIS PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* (1986) (describing the gradual replacement of non-lawyer judges with lawyer judges).

<sup>19</sup> In the thirty-six states with a unified bar, judges are licensed attorneys, and *ipso facto* are members of the state bar association. Twenty-seven states explicitly require their supreme court justices to be members of the state bar. THE COUNCIL OF STATE GOVERNMENTS, *STATE COURT SYSTEMS* 6-7 (1978). Since 1910 the ABA has recognized the importance of recruiting the judiciary and made a concentrated effort to sign up judges, boasting that as of 1915, 85% of the federal judiciary and 56% of state judges were members. See 40 ABA REP. 30 (1915). At present more than 4000 Judges are members of the ABA. See ABA, *Judicial Division*, at <http://www.abanet.org/jd/membership.html> (last visited January 5, 2007).

<sup>20</sup> See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 784-85 (2000) (noting Supreme Court Justices’ interest in reputation); Schauer, *supra* note \_\_, at 627-31 (outlining “the effect of reputation” upon judges).

do the great bulk of the work in trying, briefing, researching, or investigating cases. When the system is working properly the judges sit back and decide cases based on the legal and factual work of the lawyers. I've 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.<sup>21</sup> 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. The “new institutionalism” defines institutions broadly as “formal and informal rules that constrain individual behavior and shape human interaction; *institutional environment* varies with a person’s position in society.”<sup>22</sup> Under this definition institutions are groups joined by constraining and defining behaviors and thought patterns.<sup>23</sup>

Judges, as a defined group and “institution,” respond to the world, and particularly to judicial decisions, as *lawyers*.<sup>24</sup> Legal thinking itself is a powerful and constraining institution.<sup>25</sup> The goal of American law school, to teach our students to “think like a lawyer,” is thus quite explicit in institutionalizing the process of legal analysis.<sup>26</sup> Judges have had the transformative experiences of law school and practice, and approach the world in a very specific way.<sup>27</sup>

Most judges are also likely to be individuals who thrived under the written and unwritten rules of the legal world. Judges thus approach their work with a prescribed set of heuristics, behaviors, and notions about the world. These cognitive institutions are precisely why they succeeded as

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<sup>21</sup> Lawyers profit because of decreased competition and judges profit because the lawyers that appear before them are better qualified. See Barton, *Institutional Analysis*, *supra* note \_\_, at 1189-92.

<sup>22</sup> Thrainn Eggertsson, *A Note on the Economics of Institutions*, in *EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE* 6, 7 (Lee J. Alston et al. eds, 1996) (emphasis in original).

<sup>23</sup> Institutions are a response to transaction costs, and “provide a basis for action in a world that would otherwise be characterized by pervasive ignorance and uncertainty.” MALCOLM RUTHERFORD, *INSTITUTIONS IN ECONOMICS: THE NEW AND THE OLD INSTITUTIONALISM* 81 (1994). Douglass North, in particular, led the study of human institutions as a palliative for transaction costs. See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 27 (1990) (“My theory of institutions is constructed from a theory of human behavior combined with a theory of the costs of transacting.”).

<sup>24</sup> See Charles W. Wolfram, *Toward a History of the Legalization Of American Legal Ethics-II The Modern Era*, 15 *Geo. J. Legal Ethics* 205, 211 (2002) (“[I]n both England and America, there has never been any significant difference between judges and lawyers in their background, training, mutual set of expectations about the nature of the work that each would perform, professional ambitions, or professional culture.”).

<sup>25</sup> Cf. Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads*, 90 *NW. U. L. REV.* 1498, 1501-2 (1999) (“Law is practiced mostly in communities. Those communities forge shared mental models of the law and process cases principally in accord with them.”).

<sup>26</sup> See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 3 (2000) (“[T]he ways of lawyers and judges and students of the law are specialized ways, often so ostentatious in their specialization as to suggest the esoteric flimflam of a jealous guild.”).

<sup>27</sup> See Paul J. Dimaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS*, *supra* note \_\_, at 63, 71 (“[I]ndividuals in an organizational field undergo anticipatory socialization to common expectations about their personal behavior, appropriate style of dress, organizational vocabularies, and standard methods of speaking, joking, or addressing others.”).

lawyers, and why they are valued as judges. Nevertheless, these same factors lead judges to over-empathize with lawyers.<sup>28</sup> 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.<sup>29</sup> 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.

## II. 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.<sup>30</sup> Virtually every occupational license and regulatory scheme -- from barbers' to doctors' -- has been dissected to show the underlying self-interest involved.<sup>31</sup> I have also noted the self-interested nature of lawyer regulation and what should be done about it.<sup>32</sup>

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<sup>28</sup> Consider also Lawrence Baum's discussion of fundamental attribution error: "Some psychologists have argued that the situations in which individuals act have a more critical impact on behavior, and intrinsic traits of individuals less, than most people realize. Indeed, the tendency to give undue weight to intrinsic traits has been labeled the 'fundamental attribution error'." LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 33-34 (1997). Baum thus concludes that the nature of a judge's practice and training has a significant effect upon the judge's goals and thought processes. *See id.*

<sup>29</sup> *See* Bainbridge & Gulati, *supra* note \_\_ (noting judicial short-cuts in securities fraud litigation); CHRISTOPHER E. SMITH, *JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* (1995).

<sup>30</sup> *The Wealth of Nations* has a lengthy chapter describing the dangers of the guild system and other early examples of self-regulation. The most famous quote is "[p]eople of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." ADAM SMITH, *THE WEALTH OF NATIONS* 126-52 (Prometheus Books 1991) (1776).

<sup>31</sup> *See, e.g.* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 *CHI. L. REV.* 6 (1976).

<sup>32</sup> I addressed this subject in a trio of law review articles. Benjamin H. Barton, *Why do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 *ARIZ. ST. L. J.* 429 (2001) (hereinafter *Justifications*) laid out the case that a great deal of lawyer regulation could only be explained as a result of lawyer self-interest. In Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation – Who Should Control Lawyer Regulation, Courts, Legislatures, or the Market?*, 33 *GA. L. REV.* 1167 (2003) (hereinafter *Institutional Analysis*) I argued 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. Lastly, in 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) I argued 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.

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 state supreme courts, and not state legislatures, govern the regulation of lawyers in all fifty states.<sup>33</sup> 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.”<sup>34</sup>

The hows and whys of this self-regulation well establish judicial support for the legal profession. It’s 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.<sup>35</sup> Bar associations were small or non-existent.<sup>36</sup> From the late 19<sup>th</sup> century forward bar associations reformed, and state supreme court control over lawyer regulation eventually became the rule in all 50 states.<sup>37</sup>

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.<sup>38</sup> Using this inherent judicial authority many state supreme courts barred state legislatures from regulating lawyers.<sup>39</sup>

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. These powers range from rulemaking authority to the regulation of lawyers, and in some cases, to judicial funding demands.<sup>40</sup>

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<sup>33</sup> See Barton, *Institutional analysis*, *supra* note \_\_, at 1171; AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 116 (1992) (“[J]udicial regulation of *all* lawyers is a principle firmly established in every state. Today the highest courts of the several states are the gatekeepers to the profession both as to competency and as to character and fitness.”).

<sup>34</sup> Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 14-16 (1989); Susan A. 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.”).

<sup>35</sup> See Thomas W. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 533-36 (1982) (stating that in the majority of states in the mid-nineteenth century courts “were content to consider individual cases and let the legislature set general rules”); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 278-79 (1950) (“From colonial days on, statutes set down at least the general form of requirements for admissions to the bar.”).

<sup>36</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 562 (1973).

<sup>37</sup> See Barton, *Mechanics of Self-Defeat*, *supra* note \_\_, at 425-36.

<sup>38</sup> See Alpert, *supra* note \_\_, at 536-51 (delineating the history of courts claiming an inherent power to regulate lawyers); *In re Nenno*, 472 A.2d 815, 819 (Del. 1983) (noting that the Delaware Supreme Court “alone, has the responsibility for” lawyer regulation and stating that “principle is immutable”).

<sup>39</sup> See Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation – The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 4-16 (1989-90).

<sup>40</sup> CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 22-32 (1986) offers the most comprehensive overview. See also *Petition of New Hampshire Bar Assoc.*, 855 A.2d 450 (N.H. 2004). For a description of the funding issues, see

The main authority on these cases, Professor Charles Wolfram, describes inherent authority doctrine as “a flat-earth concept of separation of powers” and “almost laughably wooden and ill-defended.”<sup>41</sup> It does seem odd that judges would not at least *share* these regulatory powers, if not take a clear back seat to legislatures, who regulate every other American profession. Nevertheless, many state supreme courts (with strong bar association support) have claimed sole authority over lawyer regulation. Moreover, because the 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.<sup>42</sup>

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<sup>43</sup> to the creation of mandatory fee scales.<sup>44</sup>

Nevertheless, the use of inherent authority that has most benefited lawyers is the creation of unified bars in the majority of American states. The bar is unified (a.k.a. integrated) in 36 states and the District of Columbia.<sup>45</sup> In these states a lawyer must be a member of the state bar association to practice law.<sup>46</sup> This mandatory connection between a professional license and membership in a professional organization is unique to the legal profession.<sup>47</sup> Like a “closed shop” in labor law, this requirement offers these bar associations unique opportunities for funding, lobbying, and overall group power.

The history of bar unification is particularly instructive. The first states were unified by statute, but in 1939 Oklahoma became the first state supreme court to unify by court order.<sup>48</sup> Following

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Helen Hershkoff, *State Courts and the “Passive Virtues:” Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1873-74 (2001).

<sup>41</sup> Wolfram, *supra* note \_\_, at 212-13.

<sup>42</sup> 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, 419-20 (2006).

<sup>43</sup> See Henry M. Dowling, *the Inherent Power of the Judiciary*, 21 ABA J. 635, 636-37 (1935) (stating that courts had independently defined the practice of law and pursued unauthorized legal practitioners).

<sup>44</sup> See, e.g., *Lathrop v. Donahue*, 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.”).

<sup>45</sup> See Terry Radtke, *The Last Stage of Professionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 MARQ. L. REV. 1001, 1001 (1998).

<sup>46</sup> See DAYTON 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. R.J. 1 (1983).

<sup>47</sup> See Radtke, *supra* note \_\_, at 1001.

<sup>48</sup> See *In re Integration of the State Bar of Oklahoma*, 185 Okla. 505 (Okla. 1939). Interestingly, the Supreme Court actually repealed an earlier state statute organizing the unified bar. 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.*

Oklahoma, the remaining states unified by court action.<sup>49</sup> This granted the legal profession a court-created bar structure (an exceptional lobbying and financial advantage) ready, willing, and anxious to self-regulate.

Naturally, state supreme court justices have generally granted these bar associations much of the court's regulatory power.<sup>50</sup> Even in states without a unified bar state supreme courts delegate their regulatory authority to lawyers and bar associations.<sup>51</sup> 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.<sup>52</sup> There are a number of irrefutable examples from the ABA Rules, which include regulations restricting competition through stringent rules on advertising,<sup>53</sup> client solicitation,<sup>54</sup> client referrals,<sup>55</sup> and unauthorized practice in another jurisdiction or assisting in unauthorized practice.<sup>56</sup> These regulations are defended as a hedge against creeping commercialization,<sup>57</sup> but critics see naked restraints of trade.<sup>58</sup>

My favorite example is the requirements for entry to the practice of law. Raising entry barriers has been the *sine qua non* of bar associations and lawyer lobbying.<sup>59</sup> Since state supreme courts have controlled lawyer regulation entry barriers have evolved from virtual non-existence to the

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<sup>49</sup> “The process of obtaining integration by court order has proven 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.” See MCKEAN, SUPRA note \_\_, at 49. I love this quote (from a source generally sanguine about unified bars). To paraphrase: that darn legislative process is such a hassle, why bother? Let’s go get the state supreme courts to do this for us.

<sup>50</sup> See Barton, *Justifications*, supra note \_\_, at 463-65.

<sup>51</sup> For example, state supreme courts have largely ceded the task of drafting rules of conduct to the ABA, See AMERICAN BAR ASSOCIATION, LAWYERS MANUAL ON PROFESSIONAL CONDUCT 01:3 to 01:63 (2000); and enforcing those rules to bar disciplinary authorities or separate administrative agencies controlled by state supreme courts and staffed by lawyers. See Christopher D. Kratovil, *Separating Disability from Discipline: The ADA and Bar Discipline*, 78 TEX. L. REV. 993, 995-96 (2000) (noting that state supreme courts have largely delegated the duty of enforcing conduct regulation to state bar associations).

<sup>52</sup> See Barton, *Economic Analysis*, supra note \_\_; Barton, *Institutional Analysis*, supra note \_\_.

<sup>53</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1, 7.2, 7.3 (2006); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1983).

<sup>54</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1, 7.3 (2006); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, DR 2-104 (1983).

<sup>55</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.2 (2006); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, DR 2-103(B) (1983).

<sup>56</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.5 (1998); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101 (1983).

<sup>57</sup> See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEG. ETHICS 325, 326 & n.4 (1995).

<sup>58</sup> See Barton, *Economic Analysis*, supra note \_\_, at 455-56; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692-706 (1981).

<sup>59</sup> See 29 A.B.A. REP. 601-02 (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”); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 72-75 (1953) (discerning that legal education and admission to the bar “received more attention” from the ABA during its early years “than any other” issue).

complex system of today.<sup>60</sup> Lawyers, of course, have an excellent reason to favor higher entry standards: they 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.<sup>61</sup> While rising entry standards have multiple benefits to lawyers, there is little evidence that the benefit to consumers is equivalent to the higher cost of services.<sup>62</sup>

It is also interesting to contrast the interests of bar associations and judges in entry barriers with more direct means of controlling errant lawyers, *i.e.* disbarment or court sanctions. The enforcement of the Rules of Professional Conduct has been notoriously lax.<sup>63</sup> Likewise, courts have been quite reticent to impose sanctions of any kind on shoddy lawyering in their courts.<sup>64</sup> 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 example of judicial sympathy and empathy for bar associations and the legal profession as a whole.

### III. Lawyer-Client Privilege

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<sup>60</sup> 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 *Bar Admissions Offices*, at <http://www.ncbex.org/Links/AdminOff.html> (last visited Jan. 15, 2007).

<sup>61</sup> Generally, current practitioners are grandfathered (or grandmothered) in under new, more stringent entry regulations. See Simon Rottenberg, *Introduction*, in *OCCUPATIONAL LICENSURE* 1, 5 (Simon Rottenberg ed., 1980) Barton, *supra* note \_\_, at 441-43. The bar exam has continued to become more difficult, and recently passage rates have declined substantially. See Deborah J. Merritt, et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CINC. L. REV. 929, 929 (2001). This explains why every complaint about *current* practitioners is solved by a burden upon *future* practitioners. Consider the growing utilization of the Multistate Professional Responsibility Exam ("MPRE") as a response to claims of unethical lawyers, or the drive to establish the bar examination and legal education as a response to perceived lawyer incompetence. If the worry was over currently incompetent practitioners, raising entry barriers for future lawyers would do little to assist with the immediate problem.

<sup>62</sup> See Barton, *Economic Analysis*, *supra* note \_\_, at 445-48.

<sup>63</sup> 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).

<sup>64</sup> Cf. 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 reticence to sanction discovery abuses is likely a result of "judges' understanding [as] former lawyers"). Further, despite seeing a great deal of shoddy lawyering, judges rarely make complaints to disciplinary authorities. See AMERICAN BAR ASSOCIATION, *STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, 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").

One of the oldest and most ingrained examples of the lawyer-judge hypothesis is the attorney-client privilege. 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, make 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 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."<sup>65</sup>

Courts have long treated the attorney-client privilege as the flagship evidentiary privilege.<sup>66</sup> Courts frequently "wax poetic"<sup>67</sup> about this "most sacred of all legally recognized privileges."<sup>68</sup> It holds a "special position"<sup>69</sup> as the "oldest and most venerated of the common law privileges of confidential communications."<sup>70</sup> It "serves a salutary and important purpose: 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.'"<sup>71</sup>

"Thus, it is reasonable to expect that a conversation with an attorney would be private."<sup>72</sup> It is a "strong and absolute privilege"<sup>73</sup> (barring waiver and other limited exceptions), and must "receive unceasing protection."<sup>74</sup> It "seeks to protect 'a relationship that is a mainstay of our system of justice.'"<sup>75</sup>

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.

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<sup>65</sup> Cavallaro v. U.S., 284 F.3d 236, 45 (1<sup>st</sup> Cir. 2002) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961)).

<sup>66</sup> Please forgive the upcoming "Zagat's" approach to case law. The language itself is so telling short quotes speak volumes.

<sup>67</sup> EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE, EVIDENTIARY PRIVILEGES § 6.2.4 (2002).

<sup>68</sup> In re Grand Jury Proceedings, 162 F.3d 554, 556-57 (9<sup>th</sup> Cir. 1998).

<sup>69</sup> In re Allen, 106 F.3d 582, 600 (4<sup>th</sup> Cir. 1997).

<sup>70</sup> U.S. v. Edwards, 303 F.3d 606, 618 (2002) (citing Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981)).

<sup>71</sup> Southern Scrap Material Co. v. Fleming, 2003 WL 21783318 (E.D. La. July 30, 2003) (quoting Swindler & Berlin v. United States, 524 U.S. 399, 403 (1998)).

<sup>72</sup> Sherbrooke v. City of Pelican Rapids, 2006 WL 3227783 (D.Minn., November 7, 2006) (citing Lanza v. New York, 370 U.S. 139, 143-44 (1962)).

<sup>73</sup> Fru-Con Const. Corp. v. Sacramento Mun. Utility Dist., 2006 WL 2255538 (E.D.Cal., Aug 07, 2006).

<sup>74</sup> Lanza v. New York, 370 U.S. 139, 143-44 (1962).

<sup>75</sup> Gould, Larson, Bennet, Wells and 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)).

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.

There has never been a common law physician-patient privilege in England or the United States.<sup>76</sup> While the attorney-client privilege was originally recognized during the reign of Elizabeth I and protected as a “point of honor” for lawyers,<sup>77</sup> the physician-patient privilege was famously rejected in 1776. The doctor at issue refused to disclose “a confidential trust . . . consistent with [his] professional honour.” 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 whatsoever” and required disclosure.<sup>78</sup>

In fact, the protection of physician-patient communications in this country is as a result of state statutes.<sup>79</sup> 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.<sup>80</sup> Second, even where the protections exist, the privilege suffers “significant variations and numerous exceptions.”<sup>81</sup> Third, the fact that the privilege was not recognized at common law means it is generally inapplicable in federal courts applying federal law.<sup>82</sup>

For a particularly blunt comparison between the attorney-client and physician-patient privileges it is helpful to look where the rubber hits the road: the wisdom of trial attorneys. In a *Trial* magazine list of testimonial objections the privileges are summarized as follows: “All states recognize the attorney-client privilege. . . . On the other hand, the physician-patient privilege is weak.”<sup>83</sup> This warning is echoed in evidence texts that suggest that doctors or psychiatrists hired

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<sup>76</sup> CLINTON DEWITT, *PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT* 9-14 (1958) (“Notwithstanding 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.”).

<sup>77</sup> See 8 J. WIGMORE, *supra* note \_\_, at § 2290

<sup>78</sup> Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 Sw. L.J. 661, 671 (quoting *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 572-73 (1776)).

<sup>79</sup> 1 McCormick on Evidence § 98, at 397-99 (John W. Strong ed., 5th ed. 1999). One exception is the Supreme Court’s recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1998).

<sup>80</sup> See ARTHUR BEST, *WIGMORE ON EVIDENCE* 2004-2 Cumulative Supplement § 2380, at 1336-49 (2005) (listing states and statutes).

<sup>81</sup> 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. Rosenkrantz, Note, *Rejecting ‘Hear No Evil Speak No Evil: Expanding the Attorney’s Role in Child Abuse Reporting*, 8 GEO. J. LEG. ETHICS 327 (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”).

<sup>82</sup> *Jaffee*, 518 U.S. at 10 (distinguishing doctors from psychotherapists, and granting only 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 (2004) (arguing for creation of a federal physician-patient privilege).

<sup>83</sup> Ashley Saunders Lipton, *Know Your Testimonial Objections*, July, 2005. Humorously, the other privileges do not fare much better: “The psychotherapist-patient privilege (which includes counselors, psychologists, and

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 attaches to their work.<sup>84</sup>

The clergy-penitent privilege has a similar history. Before the reformation there was a priest-penitent privilege that protected priests from testifying.<sup>85</sup> Following the reformation, however, English courts repudiated the privilege, and American courts followed suit.<sup>86</sup> Similar to the physician-patient privilege, the clergy privilege has grown primarily as a result of state statutes.<sup>87</sup> Furthermore, although the clergy-penitent privilege is recognized in all 50 states, its statutory basis differs state by state and it is subject to many more exceptions than the attorney-client privilege.<sup>88</sup>

In comparison to accountants, however, doctors and clergy get off easy. There is no federal accountant-client privilege.<sup>89</sup> Likewise, most jurisdictions have refused to recognize an accountant-client privilege as a matter of statutory or common law.<sup>90</sup>

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.<sup>91</sup> Courts and 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 the administration of justice. The privilege recognizes that sound legal

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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.*

<sup>84</sup> See EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 291, 302 (6<sup>th</sup> Ed., 2005).

<sup>85</sup> See Mary H. 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).

<sup>86</sup> See John J. Montone, Note, *In Search of Forgiveness: State v. Szemple and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS L. REV. 263, 267-69 (1995).

<sup>87</sup> 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 Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 106-10 (1983).

<sup>88</sup> See Montone, *supra* note \_\_, at 283-86 (canvassing various state approaches to clergy-penitent privilege).

<sup>89</sup> See *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.");

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 (1998) (arguing for a federal accountant-client privilege).

<sup>90</sup> See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE, EVIDENTIARY PRIVILEGES* § 6.2.4 (2002). Journalists have also had a hard time establishing a privilege for sources. See Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005).

<sup>91</sup> 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 privacy, and decides if the privilege is consistent with those values. See IMWINKELRIED, *supra* note \_\_, at § 6.2.4 (dividing justifications into "instrumental" and "humanistic"); *Attorney-Client Privilege*, 98 HARV. L. REV. 1501, 1502-4 (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.

advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.”<sup>92</sup>

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*,<sup>93</sup> 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 attorney [sic] were to disclose the business of their clients.”<sup>94</sup>

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.”<sup>95</sup> Thus the utilitarian defense includes two key aspects of the lawyer-judge hypothesis, an implied concern for the welfare and business of lawyers, and 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 societal 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.<sup>96</sup>

The physician-patient privilege (among others) was scorned at common law. Wigmore’s Evidence offers a particularly scathing rebuke. Wigmore applied a four part test to balance the costs and benefits of all privileges<sup>97</sup> and found that only the three privileges that had been recognized at common law -- husband-wife, priest-penitent, and attorney-client -- conformed to

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<sup>92</sup> See *Upjohn Co.*, 449 U.S. at 389.

<sup>93</sup> 17 How. St. Tr. 1129 (Ex. 1743).

<sup>94</sup> *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1129, 1225, 1241 (Ex. 1743) (quoted in 8 WIGMORE, *supra* note \_\_\_, at § 2291, at 546). 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 (1998) (arguing that “clients may not employ attorneys, or at least not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret”).

<sup>95</sup> *Greenough v. Gaskell*, 39 Eng. Rep. 618, 621 (Ch. 1833).

<sup>96</sup> Furthermore, clergy have a much stronger constitutional argument for a privilege than lawyers do. See Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225 (1998).

<sup>97</sup> 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 that in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of litigation. 8 WIGMORE ON EVIDENCE, *supra* note \_\_\_, § 2285, at 527.

all four factors.<sup>98</sup> Wigmore argued vociferously against the physician-patient privilege. 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.<sup>99</sup> 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.<sup>100</sup> 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.”<sup>101</sup> Lastly, the physician privilege has been criticized as fostering fraud.<sup>102</sup>

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 argue for the abolition or curtailment of the privilege, 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, courts repeatedly chose the truth-seeking function except for a very narrow group of relationships headlined by the attorney-client relationship. While this choice has been defended on jurisprudential grounds, 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,<sup>103</sup> the attorney-client privilege offers clients protection for almost all disclosures. As Professor Daniel Fischel has noted the privilege and the ethics rules offer an unbeatable combination.<sup>104</sup> 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.

On a final note, the very structure of attorney-client disclosure/waiver hints at the privilege’s true beneficiaries. Generally, any disclosure to a third person outside the confidential relationship waives the privilege.<sup>105</sup> These rules are particularly stringent for clients: a word about a

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<sup>98</sup> See 8 WIGMORE ON EVIDENCE, *supra* note \_\_, § 2285.

<sup>99</sup> See 8 WIGMORE ON EVIDENCE, *supra* note \_\_, § 2380a (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).

<sup>100</sup> See 8 WIGMORE ON EVIDENCE, *supra* note \_\_, § 2380a. 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 (2004).

<sup>101</sup> See 8 WIGMORE ON EVIDENCE, *supra* note \_\_, § 2380a. Those darn doctors and their undue influence!

<sup>102</sup> See EDWARD W. CLEARY, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 105, at 228 (2d ed. 1972) (“More than a century of experience with the statutes has demonstrated that the [physician-patient] privilege in the main operates not as the shield of privacy but as the protector of fraud. . . . [The privilege] runs against the grain of justice, truth and fair dealing.”).

<sup>103</sup> The Rules of Professional Conduct provide extraordinary protections for lawyer’s confidentiality. See ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.6 (2006).

<sup>104</sup> Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998). Professor Fischel goes on to build a powerful case against this iron grip of confidentiality, concluding that “[t]he legal profession, and not society as a whole, is the primary beneficiary of confidentiality rules.” See *id.* at 3.

<sup>105</sup> “The moment confidence ceases . . . privilege ceases.” In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1<sup>st</sup> Cir. 1988) (quoting 8 WIGMORE, *Supra* note \_\_, at § 2311).

privileged matter to a friend or relative, or even a lack of care with privileged materials can affect a waiver. 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.<sup>106</sup> Second, in a case of inadvertent disclosure during discovery, privilege may be maintained under certain circumstances.<sup>107</sup> 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.<sup>108</sup>

#### IV. Three *Sui Generis* Supreme Court Cases

Bar Associations have played a bit 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, taken in light of the state of the law as a whole they are classic examples of the lawyer-judge hypothesis.

##### A. *Ohralik*

Bans on lawyer advertising and client solicitation are practically as old as the profession itself.<sup>109</sup> In America lawyer regulators began to systematically bar advertising and client solicitation around the turn of the century.<sup>110</sup> These bans were a key part of the bar's professionalization project, and mirrored anti-competitive regulations in other professions.<sup>111</sup> The bans were justified as a protection for the unsuspecting public against "ambulance chasers" and other unscrupulous lawyers.<sup>112</sup>

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<sup>106</sup> 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.").

<sup>107</sup> See *K.L. Group v. Case, Kay & Lynch*, 829 F.2d 909 (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); cf. *Transamerica*, 573 F.2d at 649-50 (describing IBM's extensive privilege review procedures as "incredibl[e]" before holding no waiver).

<sup>108</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>109</sup> See HENRY S. DRINKER, *LEGAL ETHICS* 23-24 (1953) (reporting the medieval English bar's informal rules against advertising and client solicitation).

<sup>110</sup> ABA Canons of Legal Ethics 27 and 28 prohibited most forms of attorney advertising and client solicitation. See A.B.A. *Canons of Professional Ethics*, Canons 27 and 28 (1908).

<sup>111</sup> Cf. Deborah L. Rhode, *Why The ABA Bothers: A Functional Perspective on Professional Codes*, 59 *TEX. L. REV.* 689, 702 (1981) ("A principal force animating any occupation's efforts at self-regulation is a desire to minimize competition from both internal and outside sources.").

<sup>112</sup> See *Karlin v. Culkin*, 162 N.E. 487, 488-89 (N.Y. 1928) (Cardozo, C.J.) (castigating "unscrupulous minority" of the bar for "[a]mbulance chasing" and other "evil practices").

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.

Beginning in the 1970s the Supreme Court began to overturn the most blatant of these anti-competitive practices.<sup>113</sup> 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.<sup>114</sup> *Virginia Board of Pharmacy* began a series of Supreme Court cases applying the First Amendment to commercial speech and advertising.<sup>115</sup> The Court's second major commercial speech case, *Bates v. State Bar of Arizona*, held that the State Bar of Arizona could not ban truthful advertising of prices for routine legal services.<sup>116</sup>

*Bates* followed *Virginia Board of Pharmacy* by one year, 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. 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, 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.<sup>117</sup>

A year later the Court decided *Ohralik v. Ohio State Bar Association*, the first of our lawyer-judge hypothesis cases. In *Ohralik* the Court held a ban on in-person client solicitation by lawyers constitutional.<sup>118</sup> The Court distinguished *Bates* because of the potential for client abuse from in person solicitation.

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."<sup>119</sup> 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,<sup>120</sup> but in cases like *Ohralik* where these regulations are upheld the Court expressly credits them.

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."<sup>121</sup> As a general rule the Court has been

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<sup>113</sup> For example, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) held that mandatory fee schedules violated federal antitrust law.

<sup>114</sup> See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding that the First Amendment did not restrain a government ban of handbills bearing purely commercial advertising).

<sup>115</sup> *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

<sup>116</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-85 (1977).

<sup>117</sup> *Bates*, 433 U.S. at 386 (Burger, C.J., dissenting).

<sup>118</sup> *Ohralik v. Ohio state Bar Ass'n*, 436 U.S. 447 (1978).

<sup>119</sup> *Ohralik*, 436 U.S. at 460-61.

<sup>120</sup> See *Bates*, 433 U.S. at 368-72; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) (holding that "the State's desire that attorneys maintain their dignity in their communications with the public" is not "an interest substantial enough to justify the abridgment of their First Amendment rights").

<sup>121</sup> *Ohralik*, 436 U.S. at 462.

clear that the government can always bar the dissemination of commercial speech that is false, deceptive, misleading, or that proposes an illegal transaction.<sup>122</sup> 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.”<sup>123</sup> 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.<sup>124</sup>

Moreover, the reasoning of *Ohralik* has only ever been applied to the legal profession. In *Edenfield v. Fane* the Court expressly refused to apply *Ohralik* to a rule that barred in-person solicitation by CPAs.<sup>125</sup> The comparison between *Edenfeld* and *Ohralik* is stark and particularly telling. *Ohralik* was an 8-0 decision where the Court seemed to find it obvious that “the state interests implicated [were] particularly strong” and that in-person solicitation is dangerous and harmful to clients and the profession as a whole.<sup>126</sup> *Ohralik* also accepted the ABA’s “three broad grounds” of justification for the in-person ban with little comment.<sup>127</sup> 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 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, the Court seemed utterly flummoxed by the assertion that a ban on in-person solicitation could possibly fit those goals.<sup>128</sup> 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,<sup>129</sup> despite accepting similarly “broad” assertions of public danger in *Ohralik*.<sup>130</sup>

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<sup>122</sup> See *Friedman v. Rogers*, 440 U.S. 1 (1979) (false and misleading); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) (illegal activity).

<sup>123</sup> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996). Consider also *In re R.M.J.*, 455 U.S. at 203, 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.”

<sup>124</sup> See, e.g., *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), which upheld a ban on advertising for casinos because of the potential harm that gambling might cause to consumers and *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), which allowed a non-lottery state to bar a foreign state’s lottery advertisements. Both of these cases are widely considered overruled by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996), which held a ban on liquor advertising unconstitutional. Cf. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and Bartnicki, 40 *HOUS. L. REV.* 697, 732-40 (2003) (noting that *44 Liquormart* overruled *Posadas de Puerto Rico* and arguing that the commercial speech doctrine tightened significantly after the 1980s); 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.”).

<sup>125</sup> *Edenfield v. Fane*, 507 U.S. 761 (1993).

<sup>126</sup> *Ohralik*, 436 U.S. at 460-63.

<sup>127</sup> *Id.*

<sup>128</sup> *Edenfield*, 507 U.S. at 768-73.

<sup>129</sup> See *id.* at 771-73 (noting the lack of any supporting “studies” or other evidence).

<sup>130</sup> See *Ohralik*, 436 U.S. at 460-63.

*Edenfield* does attempt to distinguish *Ohralik*, but in so doing basically limits *Ohralik* to lawyers: *Ohralik* is a “narrow” holding that depends “upon certain unique features of in-person solicitation by lawyers.”<sup>131</sup> 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.<sup>132</sup> 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 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.<sup>133</sup>

#### 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.*, however, is harder to explain, especially in light of the earlier cases *In re R.M.J.*<sup>134</sup> and *Shapero v. Kentucky Bar Association*.<sup>135</sup>

*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. This mailing violated the Missouri bar’s allowed language on qualifications, and also was mailed outside of the permissible recipients.<sup>136</sup> The Court rejected the Missouri Bar’s rules, and specifically held that a ban on mailings cannot be sustained.<sup>137</sup>

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<sup>131</sup> *Edenfield*, 507 U.S. at 774.

<sup>132</sup> *Id.* at 775. *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. 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*.

<sup>133</sup> 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. 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. A year later, the Court split 5-4 on a similar ban in *Bates*. The main difference between the cases was the Court’s impression of lawyer advertising as quite distinct from pharmacist advertising.

Similarly, the Court split contentiously 5-4 (with no majority opinion) in *Peel v. Disciplinary Comm. of Illinois*, 496 U.S. 91 (1990) over an attorney advertisement claiming NBTA certification as a civil trial specialist. 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. Board of Accountancy*, 512 U.S. 136 (1994). Again, the main difference in the split appeared to be the Court’s greater sensitivity to concerns about lawyer advertising.

<sup>134</sup> 455 U.S. 191 (1982).

<sup>135</sup> 486 U.S. 466 (1988).

<sup>136</sup> *In Re R.M.J.*, 455 U.S. at 193-98.

<sup>137</sup> *Id.* at 205-206. 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.

In *Shapero v. Kentucky Bar Association* the Court more explicitly held that a state bar association could not ban truthful and nondeceptive direct mail solicitations to clients.<sup>138</sup> The Court distinguished *Ohralik*, holding that a mailed solicitation implicated few of the dangers noted of in-person solicitation.<sup>139</sup>

Based on these precedents and *Bates v. Arizona*, 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.<sup>140</sup> *Went For It*, however, overturned these courts and upheld the bar rule.<sup>141</sup>

The Court had “little trouble crediting the Bar’s interest as substantial” under the governmental interest prong of *Central Hudson*.<sup>142</sup> 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.”<sup>143</sup> 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 case.<sup>144</sup> By contrast, *Went for It* includes no allegation that the advertising at issue was actually or even potentially false or misleading. Instead, the biggest problem seems to be the effect upon the public perception of lawyers.

Moreover, the harm to reputation justification is in direct conflict with the Court’s resistance to the suppression of commercial speech on “paternalistic” grounds,<sup>145</sup> and the Court’s earlier holding that lawyer advertising cannot be banned on “the mere possibility that some members of the population might find [the advertising] offensive” or that “some members of the bar might find [it] beneath their dignity.”<sup>146</sup> Similarly, in *Bolger v. Youngs Drug Products, Corp.*<sup>147</sup> the Court rejected a government ban on “intrusive” and potentially “offensive” advertisements for contraceptives. 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.”<sup>148</sup> This is especially so in direct mail cases where the recipient can exercise the “short, though regular, journey from mail box to trash can.”<sup>149</sup>

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<sup>138</sup> *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

<sup>139</sup> *Shapero*, 486 U.S. at 473-78.

<sup>140</sup> *See McHenry v. Florida Bar*, 21 F.3d 1038 (1994).

<sup>141</sup> *See Florida Bar v. Went For It*, 515 U.S. 618 (1995).

<sup>142</sup> *Went For It*, 515 U.S. at 625. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) first stated the Court’s intermediate scrutiny test for commercial speech. *See 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*).

<sup>143</sup> *Id.* at 624-25.

<sup>144</sup> *See, e.g.* *In re R.M.J.*, 455 U.S. at 202 (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.”).

<sup>145</sup> *44 Liquormart*, 517 U.S. at 497.

<sup>146</sup> *Zauderer*, 515 U.S. at 648.

<sup>147</sup> 463 U.S. 60 (1983).

<sup>148</sup> *Bolger*, 515 U.S. at 638.

<sup>149</sup> *Id.* at 639.

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.<sup>150</sup> 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, 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 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."<sup>151</sup>

### 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*,<sup>152</sup> 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. In relevant part, the Fifth Amendment states "nor shall private property be taken for public use, without just compensation."<sup>153</sup> 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."<sup>154</sup>

The Court has recently decided two takings cases concerning state IOLTA ("Interest on Lawyers Trust Accounts") programs. Every State in the Union has an IOLTA program.<sup>155</sup> 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. In these situations lawyers are required (or encouraged)

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<sup>150</sup> *Went For It*, 515 U.S. at 625-34.

<sup>151</sup> Kathleen M. Sullivan, *the Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 578-79 (1998).

<sup>152</sup> 538 U.S. 216 (2003).

<sup>153</sup> U.S. CONST. Amend. V.

<sup>154</sup> *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (Souter, J., dissenting).

<sup>155</sup> *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. In Indiana and Pennsylvania IOLTA was originally statutory, but the Supreme Courts invalidated the statute and created the IOLTA program by court order. See *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 221 n.2 (2003).

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.<sup>156</sup>

The first IOLTA takings cases held that the interest on client funds was not “property” under the Fifth Amendment.<sup>157</sup> In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, the U.S. Fifth Circuit of Appeals held that IOLTA interest was property subject to the Fifth Amendment Takings Clause.<sup>158</sup> In *Phillips v. Washington Legal Foundation*<sup>159</sup> a 6-3 majority of the Supreme Court agreed. The Court held that because “interest follows principal” the interest on client IOLTA funds was the clients’ property.<sup>160</sup> 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.”<sup>161</sup>

*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.<sup>162</sup> The Court has found unconstitutional takings even if the damages were minuscule or non-existent, as in *Loretto v. Teleprompter Manhattan CATV*,<sup>163</sup> where the Court held that even if a taking increased the value of a property it might still be compensable.<sup>164</sup>

Further, the Court’s decision in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*<sup>165</sup> 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. In *Webb’s Famous* a Florida statute allowed a County Clerk to collect interest on a court interpleader fund. Without the statute and the clerk’s actions the fund would not have earned interest.<sup>166</sup> Nevertheless, the court cited the familiar maxim that interest follows principal, and explicitly rejected the argument that the Florida court “takes only what it creates.”<sup>167</sup> The Court found a taking and required the state to disgorge the interest earned to the recipient of the underlying interpleader funds.<sup>168</sup>

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<sup>156</sup> See *id.* at 220-226.

<sup>157</sup> See *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 975-76 (1st Cir.1993) (listing cases).

<sup>158</sup> 94 F.3d 996 (1996).

<sup>159</sup> 524 U.S. 156 (1998).

<sup>160</sup> *Phillips*, 524 U.S. at 164-72.

<sup>161</sup> *Id.* at 172.

<sup>162</sup> See Tarra L. Morris, *The Dog in the Manger, The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605, 612-15 (noting that IOLTA proponents were “surprised” by their victory in *Brown* and quoting crowing IOLTA opponents “[t]asting victory”).

<sup>163</sup> 458 U.S. 419 (1982).

<sup>164</sup> *Loretto*, 458 U.S. at 437 n. 15; *cf. Phillips*, 524 U.S. at 169-70 (discussing and citing *Loretto* for the same proposition).

<sup>165</sup> 449 U.S. 155 (1980).

<sup>166</sup> *Webb’s*, 449 U.S. at 156-60.

<sup>167</sup> *Id.* at 451-52.

<sup>168</sup> *Id.* at 453-4.

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.<sup>169</sup>

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, and the only remaining question is just compensation.<sup>170</sup> By contrast, cases considered under the *ad hoc, Penn Central* standard frequently result in a finding of no taking at all.<sup>171</sup> 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.<sup>172</sup>

In *Brown v. Legal Foundation of Washington*,<sup>173</sup> 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. 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 legal services to the poor.<sup>174</sup> 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."<sup>175</sup> Thus, the

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<sup>169</sup> 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 *Washington Legal Found. v. Texas Equal Access to Just. 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 *Washington Legal Found. v. Texas Equal Access to Just. Found.*, 270 F.3d 180, 186-189 (5<sup>th</sup> Cir. 2001). 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, 1100-01 (9<sup>th</sup> 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, 854-57 (9<sup>th</sup> Cir. 2001)(*en banc*).

<sup>170</sup> "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, 322-23 (2002).

<sup>171</sup> See 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."); *Tahoe-Sierra*, 535 U.S. at 321-22 ("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.").

<sup>172</sup> See *supra* note \_\_\_\_.

<sup>173</sup> 538 U.S. 216 (2003).

<sup>174</sup> 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." Cf. Brief for the ABA as Amicus Curiae in Support of Respondents, *Brown v. Washington Legal Foundation*, 538 U.S. 216 (2003) (No. 01-1325), 2002 WL 31399642, at \*4-7. 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 *Florida Bar*, 515 U.S. at 624-25. 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*. In *Phillips* she joined a 5-4 majority finding that the interest was the private property of the plaintiffs, but in *Brown* she switched sides to create a 5-4 majority allowing IOLTA programs to continue.

<sup>175</sup> *Brown*, 538 U.S. at 235.

“interest was taken for a public use when it was ultimately turned over to the foundation,” leaving only the question of “just compensation.”

The Court held that “just compensation” is measured “by the property owner’s loss rather than the government’s gain.”<sup>176</sup> 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.<sup>177</sup>

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* 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. 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.”<sup>178</sup> 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*.<sup>179</sup> In short, once the Court finds a *per se* taking, the case is generally all over but the crying. Nevertheless, in *Brown* the Court found room within its previously relatively uncontroversial “just compensation” doctrines to deny relief.<sup>180</sup>

Second, *Brown* is difficult to square with *Webb*’s, especially the Court’s explicit rejection of the government-created value argument. *Brown* distinguishes *Webb*’s by noting that in *Webb*’s 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.<sup>181</sup> Nevertheless, in *Webb*’s 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.<sup>182</sup> The *Webb*’s 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.<sup>183</sup> 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. Yet in *Brown* the Court allowed the government to keep the government-created value.<sup>184</sup>

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<sup>176</sup> *Id.* at 235-36.

<sup>177</sup> *See id.* at 239-41.

<sup>178</sup> *Id.* at 234.

<sup>179</sup> *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 & 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) (cited in *Phillips*, 524 U.S. at 169-70); *Phillips*, 524 U.S. at 170 (“The 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.”).

<sup>180</sup> It would be an error to call any part of takings jurisprudence 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.

<sup>181</sup> *See Brown*, at 238 n. 10.

<sup>182</sup> *Webb*’s, 449 U.S. at 161-62.

<sup>183</sup> *See id.*

<sup>184</sup> *See Brown*, at 235-37.

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 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.<sup>185</sup>

## V. 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*.<sup>186</sup> *Miranda* required that police officers 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 against him, and that he has a right to the presence of an attorney, either retained or appointed."<sup>187</sup> If these warnings are not given prior to interrogations statements taken in violation of *Miranda* generally cannot be introduced at trial.<sup>188</sup>

The *Miranda* warnings tell a suspect of two broad rights: the right to remain silent and the right to an attorney. In the *Miranda* opinion itself neither right is favored over the other, and both are treated as critical to safeguarding a suspect's rights. 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 questioning, that he wishes to remain silent, the interrogation must cease."<sup>189</sup> Similarly, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."<sup>190</sup>

The Court's treatment of these two rights, however, have diverged radically over time, with *Michigan v. Mosely*<sup>191</sup> and *Edwards v. Arizona*<sup>192</sup> serving as the two prime examples. In *Mosely* 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. The Court cited *Miranda* for the proposition that the "right to cut off questioning" must be "scrupulously honored."<sup>193</sup> 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.<sup>194</sup> From the outset, *Mosely* was

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<sup>185</sup> 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*, 2003 CATO SUP. CT. REV. 245, 268 (2003) ("When one looks closely at [*Brown*], there is much less to it than meets the eye.").

<sup>186</sup> 384 U.S. 436 (1966).

<sup>187</sup> *Miranda*, 384 U.S. at 444.

<sup>188</sup> *Miranda*, 384 U.S. at 479. There are, naturally, exceptions to this rule. See, e.g., *Custodial Interrogations*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 162, 164 & n. 523 ("Exceptions to the *Miranda* rule include good faith, attenuation, independent source, and independent discovery.").

<sup>189</sup> *Miranda*, 384 U.S. at 473-74.

<sup>190</sup> *Id.* at 474.

<sup>191</sup> 423 U.S. 96 (1975).

<sup>192</sup> 451 U.S. 477 (1981).

<sup>193</sup> *Mosely*, 423 U.S. at 104.

<sup>194</sup> *Id.*

seen as a significant weakening of *Miranda*,<sup>195</sup> 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.<sup>196</sup>

*Mosely* 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 *Mosely* 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.<sup>197</sup> While the results of an exercise of either right were treated quite similarly in *Miranda* itself, for the first time *Mosely* establishes that the right to remain silent is to be treated less favorably.<sup>198</sup> There are no post-*Mosely* 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.<sup>199</sup>

*Edwards v. Arizona* made the distinction between silence and counsel even clearer. *Edwards* was decided in 1981, and fell directly during a period of erosion for *Miranda* protections.<sup>200</sup> *Edwards* dealt with a situation analogous to that considered in *Mosely*: a suspect had asked for counsel, and before counsel had arrived the police reinstated their interrogation, and the Defendant eventually confessed.<sup>201</sup> The Arizona Supreme Court relied on *Mosely* and held that if the confession was gained voluntarily during the second interrogation, *Miranda* was satisfied.<sup>202</sup>

The Supreme Court reversed, making *Edwards* one of the few decisions to unequivocally embrace *Miranda*'s language and holding.<sup>203</sup> 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

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<sup>195</sup> In dissent Justice Brennan called *Mosely* another step in *Miranda*'s "erosion and . . . ultimate overruling." *Mosely*, 423 U.S. at 112; 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 *Mosely* would likely allow a waiver in many cases beyond its bare facts, and significantly weaken *Miranda*).

<sup>196</sup> Some of the cases on this issue are gathered in *Custodial Interrogations*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 162, 177 n. 568 (2006).

<sup>197</sup> *Mosely*, 423 U.S. at 101 n. 7.

<sup>198</sup> 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.")

<sup>199</sup> The Court has also applied less than solicitous treatment to pre-arrest and post-arrest silence. See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (prearrest silence); *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam) (allowing the use of post-arrest silence if a defendant takes the stand during his criminal trial). Post-*Miranda* warnings silence, however, cannot be used at trial. *Doyle v. Ohio*, 426 U.S. 610 (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.

<sup>200</sup> Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 745-86 (1999).

<sup>201</sup> *Edwards*, 451 U.S. at 479-80.

<sup>202</sup> *State v. Edwards*, 594 P.2d 72, 77-78 (1979).

<sup>203</sup> *Edwards*, 451 U.S. at 481-82.

“initiates further communication.”<sup>204</sup> *Edwards* also discussed *Mosley* and made explicit the differential treatment between a request to remain silent and a request for counsel.<sup>205</sup>

Given that *Edwards* is surrounded by *Miranda* cases that refer to the warnings as a non-constitutionally required, prophylactic measure,<sup>206</sup> 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”<sup>207</sup> and creates a bright line requirement that all questioning stop following a request for counsel.

The cases that followed *Edwards* generally built upon this bright line rule.<sup>208</sup> 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. By contrast, the Court’s last real statement on the effect of an unequivocal request to remain silent was *Mosley*, and this has resulted in a long, slow drift in the federal courts where even the protections offered by *Mosley* have been diluted.<sup>209</sup>

In *Smith v. Illinois*, one of the first post-*Edwards* cases, the Court reiterated that once an unequivocal request for counsel is made all questioning must stop, and later equivocal statements about wanting a lawyer were of no consequence.<sup>210</sup> In *Arizona v. Roberson* 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.<sup>211</sup> 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.<sup>212</sup>

In *Minnick v. Mississippi*, the accused requested counsel, met with counsel, and then was questioned by the police without his lawyer present.<sup>213</sup> *Minnick* has a lengthy passage discussing the efficacy of the bright line *Edwards* rule, 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?<sup>214</sup> In this regard, the Justices’ experience as lawyers seems extremely relevant. Every lawyer knows and fears the possibility that their client will be

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<sup>204</sup> *Id.* at 484-85.

<sup>205</sup> *Id.* at 485 (“In *Michigan v. Mosley*, 423 U.S. 96 (1975), 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.”).

<sup>206</sup> See Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1337-38 & n. 6 (“Through a series of cases in the 1970s and 80s, the Court ‘deconstitutionalized’ *Miranda*.”).

<sup>207</sup> *Id.* at 485-86.

<sup>208</sup> 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. U.S.* 512 U.S. 452 (1994).

<sup>209</sup> See *Custodial Interrogations*, *supra* note \_\_, at 177 n. 568 (2006) (listing recent cases applying *Mosley*).

<sup>210</sup> See *Smith v. Illinois*, 469 U.S. 91, 94-100 (1984).

<sup>211</sup> See *Arizona v. Roberson*, 486 U.S. 675, 680-88 (1988).

<sup>212</sup> *Roberson*, 486 U.S. at 683.

<sup>213</sup> *Minnick v. Mississippi*, 498 U.S. 146, 155-58 (1990).

<sup>214</sup> *Minnick*, 498 U.S. at 152-56.

talking to opposing parties outside of the lawyer's presence and say something that can never be retracted or fixed.<sup>215</sup>

In sum, there is now little doubt that the right to counsel is better protected by *Miranda* and its progeny than the right to remain silent.<sup>216</sup> 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, and not the Sixth Amendment's right to counsel. *Miranda* itself referred to self-incrimination,<sup>217</sup> and in *U.S. v. Dickerson* the Court noted the many references in *Miranda* and its progeny to the Fifth Amendment in holding that the *Miranda* holding was constitutionally required.<sup>218</sup> The Sixth Amendment's right to counsel, by contrast, does not attach until "prosecution is commenced" not during the police investigation of a crime.<sup>219</sup>

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."<sup>220</sup>

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."<sup>221</sup> 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.<sup>222</sup> Given that the main protection presented by the lawyer is silence, shouldn't 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

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<sup>215</sup> Cf. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result) ("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.").

<sup>216</sup> 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.").

<sup>217</sup> See, e.g., *Miranda*, 384 U.S. at 439 (arguing that coercive nature of custodial interrogations threatens the "privilege under the Fifth Amendment ... not to be compelled to incriminate [oneself]"); *id.* at 457 (requiring "adequate safeguards to protect precious Fifth Amendment rights").

<sup>218</sup> See *Dickerson v. U.S.*, 530 U.S. 428, 440 & n. 5 (2000) (listing cases that have described *Miranda* as a Fifth Amendment case).

<sup>219</sup> See, e.g., *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001).

<sup>220</sup> *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

<sup>221</sup> See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964) (quoting *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result); *Moran v. Burbine*, 475 U.S. 412, 436 n. 5 (1986) (quoting same).

<sup>222</sup> See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 734-35 (1992) ("Virtually 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.").

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.<sup>223</sup>

As such, *Edwards* and its progeny stand out as another *sui generis* pro-lawyer decision. 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.

## VI. 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. 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. 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.

At common law noncompete agreements were generally held illegal as a restraint on trade.<sup>224</sup> 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?”<sup>225</sup> This is true for every profession except for lawyers.<sup>226</sup>

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.<sup>227</sup> The opinion noted that the practice of law “is a profession, not a business,” “[c]lients are not merchandise,” and “[l]awyers are not tradesmen.”<sup>228</sup> 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.”<sup>229</sup>

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<sup>223</sup> 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.

<sup>224</sup> See Turner Herbert, *Let's Be Reasonable: Rethinking the Prohibition Against Noncompete Clauses in Employment Contracts Between Attorneys in North Carolina*, 82 N.C. L. REV. 249, 252-54 (2003).

<sup>225</sup> *Weber v. Tillman*, 913 P.2d 84, 90 (Kan. 1996); accord RESTATEMENT (SECOND) CONTRACTS § 188 (1985).

<sup>226</sup> See, e.g., Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 6-29 (1992) (covering cases upholding doctor noncompetes); *Schott v. Beussink*, 950 S.W.2d 621, 625 (Mo. App. 1997) (accountant); *Riddle v. Geo-Hydro Engineers, Inc.*, 561 S.E.2d 456, 457-58 (Ga. App. 2002) (engineer).

<sup>227</sup> ABA Comm. on Professional Ethics, Formal Opinion 300 (1961) (hereinafter ABA Op. 300).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

In 1969 the ABA adopted this reasoning in its first formal ethics code, the ABA Model Code of Professional Responsibility, DR 2-108(A).<sup>230</sup> This restriction passed through to the later Model Rules of Professional Conduct in Rule 5.6(a).<sup>231</sup> At this point another justification for the rule was explicitly stated: such agreements “limit professional autonomy” and also limit “the freedom of clients to choose a lawyer.”<sup>232</sup>

Of course, while these ethics opinions and rules may be enforceable as a professional sanction, they are explicitly not meant for court enforcement.<sup>233</sup> Nevertheless, courts frequently rely on these sources for persuasive authority, and 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*.<sup>234</sup> *Dwyer* dealt with a noncompete agreement amongst law partners. 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.”<sup>235</sup> The court held that “[s]trong public policy considerations preclude” using “commercial standards” to gauge the legal profession, and struck down the noncompete clause.<sup>236</sup>

The great bulk of case law followed *Dwyer* and barred noncompete agreements.<sup>237</sup> 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*.<sup>238</sup> 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.<sup>239</sup>

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* the court struck down a contractual

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<sup>230</sup> ABA MODEL CODE OF PROF’L RESPONSIBILITY, DR 2-108(A) (1969) (“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 relation created by the agreement, except as a condition to payment of retirement benefits.”). Opinion 300 was explicitly cited as a basis for the rule. *See Id.* n. 93.

<sup>231</sup> 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 RULE PROF’L CONDUCT 5.6(a)(2006).

<sup>232</sup> CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 167 (1987) (setting forth rule 5.6 and its justifications).

<sup>233</sup> *See* MODEL RULE PROF’L CONDUCT preamble (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.”).

<sup>234</sup> 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), *aff’d* 343 A.2d 208 (N.J. App. 1975).

<sup>235</sup> Except, humorously, “perhaps in cases of indigency.” *Dwyer*, at 499-500 & n. 1.

<sup>236</sup> *Id.* at 500.

<sup>237</sup> *See* 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 (discussing *Dwyer* and its progeny); WOLFRAM, *supra* note \_\_, at 885 n.45 (same).

<sup>238</sup> *See* Lisa Sorenson Ewald, *Agreements Restricting the Practice of Law: A New Look at an Old Paradox*, 26 J. LEGAL PROF. 1, 11 (noting the drift from lawyer-centric justifications to client-centered ones).

<sup>239</sup> *See, e.g.,* Corti v. Fleisher, 417 N.E.2d 764, 769 (Ill. App. 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*).

provision that allowed a former partner to compete, but lessened his post-departure compensation.<sup>240</sup> The court quoted DR 2-108(A), noted 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 clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.”<sup>241</sup>

Lastly, courts have been quite explicit about treating lawyers differently than other professions. For example, *Raymundo v. Hammond Clinic Association*<sup>242</sup> summarily dismissed the argument that medical ethics should prohibit enforcement of noncompete agreements as “self-serving.”<sup>243</sup> The New Jersey case of *Karlin v. Weinberg*<sup>244</sup> followed closely on the heels of *Dwyer v. Jung*. *Karlin* expressly rejected the idea that *Dwyer* applied equally to doctors, and went on to apply a reasonableness analysis.<sup>245</sup> *Karlin* has been regularly cited by later courts rejecting physician efforts to invalidate noncompete clauses.<sup>246</sup>

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,<sup>247</sup> while other commentators have argued that lawyers should face a reasonableness standard, like doctors and other professionals.<sup>248</sup> 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. 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 whole can benefit the client.<sup>249</sup> Moreover, it discourages law firms from training

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<sup>240</sup> See *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 410-11 (N.Y. 1989).

<sup>241</sup> *Cohen*, 550 N.E.2d at 411. Other courts have found similarly, see, e.g., *Spiegel v. Thomas, Mann, & Smith*, P.C., 811 S.W.2d 528, 530 (Tenn.1991). A few courts have held the opposite. See *Fearnow v. Ridenour, Swenson, Cleere & Evans*, 138 P.3d 723 (Ariz. 2006) (holding that “an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm is enforceable”).

<sup>242</sup> 449 N.E.2d 276 (Ind.1983).

<sup>243</sup> *Raymundo*, 449 N.E.2d at 280-81.

<sup>244</sup> 372 A.2d 616 (N.J. Super. A.D. 1977).

<sup>245</sup> *Karlin*, 372 A.2d at 618.

<sup>246</sup> See, e.g., *Intermountain Eye and Laser Centers, 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 Medical Clinic, P.A. v. Udom*, 166 S.W.3d 674 (Tenn. 2005). Other States have done so by statute, see *Colo.Rev.Stat. Ann. § 8-2-113(3)* (2003); *Del.Code Ann. tit. 6, § 2707* (1993); *Mass. Gen. Laws Ann. ch. 112, § 12X* (1991) or as a matter of state antitrust law. See *Odess v. Taylor*, 211 So.2d 805 (Ala. 1968).

<sup>247</sup> *Berg*, *supra* note \_\_; *Malloy*, *supra* note \_\_.

<sup>248</sup> See Glenn S. Draper, *Enforcing Lawyers’ Covenants not to Compete*, 69 Wash. L. Rev. 161, 180-82 (1994).

<sup>249</sup> See Larry Ribstein, *Ethical Rules, Agency costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1735-39 (1998); Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777, 1793-94 (1998).

their associatees, since any time and money spent on training may be wasted when the associate departs.<sup>250</sup>

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 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.

Further, insofar as courts sometimes invalidate noncompete agreements because of unequal bargaining power,<sup>251</sup> 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), as well as a fundamental sympathy for the concerns of lawyer autonomy.

## VII. 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 because 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.<sup>252</sup>

Legal malpractice is generally treated as a tort action based in negligence.<sup>253</sup> Legal malpractice requires a relationship establishing a duty of care, “skill and knowledge in providing legal services to the client; a breach of that duty; and a connection of legally recognized causation between the breach and resulting harm to the client.”<sup>254</sup>

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.<sup>255</sup>

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<sup>250</sup> Robert Parker, *Noncompete Agreements Between Lawyers: An Economic Analysis*, 40 RES GESTAE 12, 15-18 (1996).

<sup>251</sup> 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).

<sup>252</sup> 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.

<sup>253</sup> Recently, 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, 742-73 (Va. 2002). Virginia’s doctors are subject to punitive damages, as limited by a state statute. See *Anand v. Allison*, 55 Va. Cir. 261 (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, 478-91 (2002).

<sup>254</sup> *North Bay Council, Inc. v. Bruckner*, 563 A.2d 428, 430 (1989) (Souter, J.).

<sup>255</sup> See Richard 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, *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 757 (1994). This standard is

## 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.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup> The case-within-a-case standard has been applied to other, non-litigation areas, like transactional malpractice claims.<sup>259</sup>

The case-within-a-case standard is very, very difficult to meet theoretically and practically.<sup>260</sup> 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

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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.”).

<sup>256</sup> *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).

<sup>257</sup> *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.”). The case-within-a-case requirement is the rule in the “vast majority” of states. *See* McConnico, et al., *supra* note \_\_, at 1009 & n. 99 (2005). *But see* Vahila v. Hill, 674 N.E. 2d 1164, 1168-69 (Ohio 1997) (refusing to always apply the case-within-a-case standard).

<sup>258</sup> *See, e.g.*, Garretson v. Miller, 99 Cal. App. 4th 563, 568-69 (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”). 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. 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”).

<sup>259</sup> “The majority of courts that have addressed this issue have determined that the ‘case within a case’ standard does apply to transactional malpractice claims” and held that, for example, “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.” 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).

<sup>260</sup> 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 Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 492 (2000); 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, 1193 n. 52 (2003) (calling the case-within-a-case a “formidable, almost unsustainable burden”). Maloy, *supra* note \_\_, at 677-93 provides a long list of cases that have been dismissed under the case-within-a-case-analysis.

malpractice cases.<sup>261</sup> 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,<sup>262</sup> the Model Rules explicitly allow a lawyer to reveal client confidences to defend a malpractice action.<sup>263</sup>

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: she must prove that she was actually innocent.<sup>264</sup> Furthermore, in most jurisdictions a plaintiff cannot pursue a legal malpractice action unless the plaintiff has first obtained post-conviction relief.<sup>265</sup> If that post-conviction relief is based on a claim of ineffective assistance of counsel, the odds of relief are slim indeed.<sup>266</sup> As such, legal malpractice for shoddy criminal defense work is rare.<sup>267</sup>

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<sup>261</sup> 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.").

<sup>262</sup> See *infra* notes \_\_ and accompanying text.

<sup>263</sup> ABA RULE OF PROFESSIONAL CONDUCT 1.6(b)(5). 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, *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).

<sup>264</sup> See Joseph H. King, *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WILLIAM AND MARY L. REV. 1011, 1030 (2002).

<sup>265</sup> Meredith J. Duncan, *The (so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 30-31 & n. 159 (2002).

<sup>266</sup> See 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").

<sup>267</sup> See Duncan, *supra* note \_\_, 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 then the case-within-a-case. 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., *Gov't Interinsurance Exch. v. Judge*, 825 N.E. 2d 729, 735-36 (Ill. App. Ct. 2005). Because appellate cases are rarely open and shut, and because the district court must essentially overrule a sister district or appellate court on an

## 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.<sup>268</sup>

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.<sup>269</sup> In a medical malpractice case lost chance can allow a finding of causation where strict but for causation would not. For example, if a patient has cancer, and only has a 40% 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. Loss of chance has been controversial, but has been adopted in a majority of states for medical malpractice.<sup>270</sup>

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.<sup>271</sup> Nevertheless, the few courts to consider the issue courts have consistently denied efforts to extend loss of chance to legal malpractice.<sup>272</sup>

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issue of law or fact to meet the case-within-a-case requirement, appellate malpractice cases are also extremely hard to win.

<sup>268</sup> Joseph H. King, *Reduction of Likelihood: Reformulation and Other Retrofitting of the Loss-of-Chance Doctrine*, 28 U. MEMPHIS L. REV. 491, 492 (1998).

<sup>269</sup> See Todd S. Aagard, *Identifying and Valuing the Injury in Lost chance Cases*, 96 MICH. L. REV. 1335, 1335 n. 5 (1998).

<sup>270</sup> 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");

<sup>271</sup> See Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479 (1986); cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (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).

<sup>272</sup> See *Daugert v. Pappas*, 704 P.2d 600 (Wash. 1985); cf. *Beatty v. Wood*, 204 F.3d 713, 718-19 (7th Cir. 2000) (rejecting legal malpractice plaintiff's 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). 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 \_\_ at 1009-1010 (noting that a “few jurisdictions have allowed settlement value damages” when “unique fact patterns are presented, and listing cases). Historically lawyers have been protected by a rule of “judgmental immunity” regarding settlement advice. 7 AM. JUR. 2d Attorneys at Law § 201; 4 RONALD E.

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*<sup>273</sup> the Texas Supreme Court rejected “loss of chance” because it is doubtful that it “could prevent its application to similar actions involving other professions . . . for example, [if] 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 able to pursue a cause of action for malpractice under the loss of chance doctrine.”<sup>274</sup> 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*,<sup>275</sup> the Nevada Supreme Court adopted “loss of chance” over Justice Steffen’s dissent’s argument that loss of chance “would be equally just and applicable in such actions involving other professions, including the legal profession.”<sup>276</sup>

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*

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. 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. In some cases the malpractice claimed may include a failure to pursue discovery, which further exacerbates 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

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MALLEN AND JEFFREY M. SMITH, LEGAL MALPRACTICE § 30.41 (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.” 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 32.8 (5th ed. 2000).

<sup>273</sup> 858 S.W.2d 397 (Tex. 1993).

<sup>274</sup> *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 406 (1993). The dissent in *Kramer* countered this argument by citing *Daugert v. Pappas* for the proposition that loss of chance could be, and has been, limited to medical malpractice. *See id.* at 410 (Hightower, J., dissenting); *see also Hardy v. Southwestern Bell Telephone Co.*, 910 P.2d 1024, 1029 (Okl. 1996) (refusing to extend loss of chance outside medical malpractice context and noting *Daugert v. Pappas*’ rejection of loss of chance for legal malpractice).

<sup>275</sup> 805 P.2d 589 (Nev. 1991).

<sup>276</sup> *Perez v. Las Vegas Medical Center*, 805 P.2d 589, 599 n. 5 (Nev. 1991) (Steffan, J., dissenting); *see also Dumas v. Cooney*, 1 Cal. Rptr. 2d. 584, 593 (Cal. App. 1991) (noting that “the lost chance theory has troubling implications,” such as a possible application to lawyers).

proof to the defendant. For example, in *Haft v. Lone Palm Hotel*<sup>277</sup> the California Supreme 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 defendant's negligence.”<sup>278</sup> In *Summers v. Tice* two defendants shot at and hit the plaintiff, but one shot caused almost all of the damages. Because the plaintiff could not prove which defendant was liable the court shifted the burden of proof on causation to the defendants.<sup>279</sup>

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.”<sup>280</sup> *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.<sup>281</sup>

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.<sup>282</sup> 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.”<sup>283</sup> By contrast, *res ipsa* has been available in medical malpractice since *Ybarra v. Spangard* was decided in 1944.<sup>284</sup> Further, courts have generally resisted shifting the legal malpractice burden of proof on causation regardless of the difficulties this burden places on plaintiffs.<sup>285</sup>

#### D. Privity

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<sup>277</sup> 478 P.2d 465 (Cal. 1970).

<sup>278</sup> *Haft v. Lone Palm Hotel*, 478 P. 2d 465, 476 (Cal. 1970).

<sup>279</sup> *Summers v. Tice*, 199 P.2d 1 (1948); *see also* Eric A. Johnson, *Criminal Liability for Loss of Chance*, 91 IOWA L. REV. 59, 107 & n. 258 (2005) (discussing *Summers v. Tice*).

<sup>280</sup> *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1071 (Pa. 2006) (quoting Rest. (Second) Torts § 328D); *see also* *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. Ch. 1863) (announcing original rule of *res ipsa loquitur*).

<sup>281</sup> *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.”).

<sup>282</sup> For a fuller version of this argument, *see* Kenneth G. Lupo, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 694-95 (1977).

<sup>283</sup> *See* *Hacker v. Holland*, 570 N.E.2d 951, 955 n. 5 (Ind. App. 1991); *see also* *Berman v. Rubin*, 227 S.E.2d 802, 805 (Ga. App. 1976) (“*Res ipsa loquitur* is simply not applicable to suits for legal malpractice.”).

<sup>284</sup> *See* *Ybarra v. Spangard*, 154 P.2d 687 (1944).

<sup>285</sup> *See* Paul G. Kerkorian, *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.”).

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. So, in the early English case of *Winterbottom v. Wright* 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.<sup>286</sup> This doctrine was translated to legal malpractice in *National Savings Bank of District of Columbia v. Ward*.<sup>287</sup> *Ward* involved a factual scenario that remains quite familiar today: the improperly performed title search.<sup>288</sup> Because the injured party was not the lawyer's client, however, the court dismissed the case for lack of privity.<sup>289</sup>

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.<sup>290</sup> The privity doctrine lasted longer in legal malpractice,<sup>291</sup> and the tests for third-party liability that replaced the strict privity doctrine still pose substantial challenges 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 a decedent who received less or nothing due to the lawyer's negligence. 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.<sup>292</sup>

There are several different ways that courts have allowed third-party legal malpractice suits. California uses a multi-factor test.<sup>293</sup> 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

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<sup>286</sup> See *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842) ("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.").

<sup>287</sup> 100 U.S. 195 (1879).

<sup>288</sup> See *Ward*, 100 U.S. at 195-98.

<sup>289</sup> *Id.* at 198-99 (holding 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").

<sup>290</sup> 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).

<sup>291</sup> See John H. Bauman, 37 S. Tex. L. Rev. 995, 1004-14 (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" and detailing history of privity requirement in legal malpractice); Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 695 (noting that "[t]here or four decades ago" legal malpractice actions were quite rare).

<sup>292</sup> See Developments in the Law, *Lawyers' Responsibilities to the Client: Legal Malpractice and Tort Reform*, 107 HARV. L. REV. 1557, 1560-61 (1994) ("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.").

<sup>293</sup> *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").

party, she is a proper legal malpractice plaintiff.<sup>294</sup> Some courts have found that third parties may sue if their reliance upon the lawyer's advice or actions was foreseeable.<sup>295</sup>

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.<sup>296</sup> Last, doctors have fared much worse than lawyers on third-party liability.<sup>297</sup> In fact, doctors and psychiatrists frequently find themselves on the cutting edge of plaintiff-friendly foreseeability decisions.<sup>298</sup>

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*,<sup>299</sup> nine states retain a strict privity rule in legal malpractice actions.<sup>300</sup> 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,<sup>301</sup> 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

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<sup>294</sup> See, e.g., *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982); *Schreiner v. Scoville*, 410 N.W. 2d 679 (Iowa 1987).

<sup>295</sup> See *Williams v. Ely*; 668 N.E.2d 799, 805 (1996); Anthony E. Davis, *Legal Opinion Letters and Audit Letters: Minimizing the Risk*, 227 N.Y. L.J. at 3 (July 1, 2002). For an overview of this case law, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51cmt. f and Reporter's Notes.

<sup>296</sup> See, e.g., 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) TORTS § 552. Some will-drafting cases do resemble negligent misrepresentation cases (when they deal with bad advice instead of bad drafting, for example).

<sup>297</sup> See Dale L. Moore, *Disparate Treatment of the Allocation of Power Between Judge and Jury in Legal and Malpractice cases*, 61 Temp. L. Rev. 353, 358-72 (1988).

<sup>298</sup> See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 339-48 (Cal. 1976) (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); Gregory G. Sarno, Annotation, *Liability of Physician, for Injury to or Death of Third Party, Due to Failure to Disclose Driving-Related Impediment*, 43 A.L.R. 4th 153 (1986) (detailing physician's liability to third parties for failure to warn about a medication's side effects). Some courts have limited accountant third-party liability in a manner consistent with lawyers, see Jay M. Feinman, *Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology*, 31 FLA. STATE L. REV. 17, 20 (2003).

<sup>299</sup> 111 N.E. 1050 (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) (noting rapid acceptance of *MacPherson*, and that "[b]y 1966, the rule established in *MacPherson* had been adopted throughout the United States").

<sup>300</sup> 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).

<sup>301</sup> See, e.g., Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992).

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.<sup>302</sup>

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, when the work of the lawyer flies in the face of that client's stated desires.<sup>303</sup>

Second, note that the court relies on an original argument defending privity – the concern of unlimited liability to third parties – that was rejected repeatedly as courts displaced the privity requirement.<sup>304</sup> Yet somehow when the possibility of unlimited liability for lawyers is at issue the court finds 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. 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. 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. 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” 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. Tort advocates consider this a feature of the system – unsafe products are

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<sup>302</sup> Noble v. Bruce, 709 A.2d 1264, 1270 (Md. 1998); See also Robinson v. Benton, 842 So. 2d 631, 636-37 (Ala. 2002) (quoting Barcelo v. Elliott, 923 S.W.2d 575, 577-79 (Tex.1996)) (“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.”).

<sup>303</sup> 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.

<sup>304</sup> Compare Winterbottom, 152 Eng. Rep. at 402 (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.”) with MacPherson v. Buick Motor Co., 111 N.E. 1050, 1058 (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 today.”). Note that given the intermediate third-party liability available under the negligent misrepresentation approach, see *infra* note \_\_\_, this argument is especially disingenuous.

priced correctly or eliminated altogether.<sup>305</sup> Again, when lawyers are involved the courts are suddenly worried that certain services will be unavailable to clients.<sup>306</sup>

#### 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. Because courts have adopted the Rules as the governing conduct regulations for the profession and have used the Rules to decide cases in areas as diverse as noncompete agreements among lawyers, lawyer advertising, and client confidences, the Rules are much closer to a set of binding statutes or regulations than general guidance to lawyers.

This is true, of course, with the exception of malpractice actions. The "preamble and 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."<sup>307</sup>

Courts have been mixed in how they apply the Rules in malpractice actions. The majority of courts have presented a compromise position: the Rules cannot stand in as the duty of care and a violation of the Rules is not negligence *per se*, but they can be considered as evidence of a breach.<sup>308</sup> A few courts have allowed the Rules to inform the duty of care question more directly, some by creating a rebuttable presumption of a breach of duty if the Rules are violated.<sup>309</sup> On the flip side, some courts have held that the Rules of Professional conduct are flatly inadmissible in a legal malpractice action.<sup>310</sup> Notably, lawyer-defendants always "retain the right to introduce ethical standards in defense of their actions."<sup>311</sup>

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

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<sup>305</sup> See Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 58 FLA. L. REV. 265, 274-77 (2006) (discussing the tort reformers arguments and the defenders' arguments).

<sup>306</sup> This same justification has been used to reject damages for pain and suffering in legal malpractice actions. See Kessler, *supra* note \_\_, at 488-91.

<sup>307</sup> ABA MODEL RULES OF PROFESSIONAL CONDUCT Preamble and Scope.

<sup>308</sup> See Marc R. Greenough, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions after Hizy v. Carpenter*, 68 WASH. L. REV. 395, 400 (1993).

<sup>309</sup> *Evans v. Dickstein*, 2005 WL 1160621, at \*1 (Mich.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, 109 (1986)).

<sup>310</sup> 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); *Hizy v. Carpenter*, 830 P.2d 646, 653-54 (Wash. 1992). 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 (Iowa 1978); *Hill v. Willmott*, 561 S.W.2d 331 (Ky.App.1978); *Spencer v. Burglass*, 337 So.2d 596 (La.App.1976); *Friedman; Drago v. Buonagurio*, 386 N.E.2d 821 (1978).

<sup>311</sup> *Developments in the Law*, *supra* note \_\_, at 1567.

more favorable to lawyers than other professions, and even in the areas where legal malpractice has begun to catch up, it lags other areas of the law significantly, and outlier courts remain.

### VIII. 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.<sup>312</sup>

Assuming the phenomenon exists, and it is bad, 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 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 countries judges are trained and educated separately from lawyers.<sup>313</sup> 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 18<sup>th</sup>, 19<sup>th</sup>, and early 20<sup>th</sup> century many judges and justices of the peace were not lawyers (and many current justices of the peace are still non-lawyers).<sup>314</sup> Predictably, bar

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<sup>312</sup> Cf. Barton, *Economic Analysis*, *supra* note \_\_\_, at 477-81 (rejecting a similar justification for biased lawyer regulations).

<sup>313</sup> Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 *IND. J. GLOBAL LEGAL STUD.* 139, 142-45 (2004) (describing and praising civil law system for training judges separately from lawyers).

<sup>314</sup> For some historical descriptions of non-lawyer judges, *see* JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* (1960); Robert Little, *Don’t Miss a Move*, *TENN. B.J.*, March, 2001, at 12 (“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.”) and John Phillip Reid, *Controlling the Law: Legal Politics in EARLY NATIONAL NEW HAMPSHIRE* 22 (2004) (noting that two of the three Justices of the 1798 New Hampshire Supreme Court were

associations were at the forefront of the (largely successful) effort to eliminate lay judges.<sup>315</sup> 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. 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.<sup>316</sup> Nonlawyer judges can also be defended on populist or egalitarian grounds.<sup>317</sup> 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.

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.

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ministers, not lawyers). For a discussion of the prevalence of current non-lawyer judges *see* Adrian Vermeule, *Should We Have Lay Justices* (working draft on file with author) 3 & n. 7; *Goodson v. State*, 991 P.2d 472, 444-45 (Nev. 1999) (holding that a misdemeanor trial before a non-lawyer Justice of the Peace was constitutional).

<sup>315</sup> *See* DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* 1-60 (1986); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE COURTS, TASK FORCE REPORT* (1967). There are some great old articles and speeches by scions of the bar denouncing justices of the peace. *See, e.g.*, Chester H. Smith, *The Justice of the Peace System in the United States*, 15 Cal. L. Rev. 118, 140-41 (1927) (calling lay judges an "anachronism in our jurisprudence the perpetuation of which cannot be justified"); SIMEON BALDWIN, *THE AMERICAN JUDICIARY* 129 (1906) ("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 (1912-13) (same).

<sup>316</sup> 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.* § 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. *See* Vermeule, *supra* note \_\_.

<sup>317</sup> *See* Vermeule, *supra* note \_\_, at 6.