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.[184]

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.[185]

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*.[186] *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."[187] If these warnings are not given prior to interrogations any statements taken in violation of *Miranda* generally cannot be introduced at trial.[188]

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."[189] Similarly, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[190]

The Court's treatment of these two rights, however, have diverged radically over time, with *Michigan v. Mosely*[191] and *Edwards v. Arizona*[192] 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

---

[184] *See Brown*, at 235-37.

[185] 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.").

[186] 384 U.S. 436 (1966).

[187] *Miranda*, 384 U.S. at 444.

[188] *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.").

[189] *Miranda*, 384 U.S. at 473-74.

[190] *Id.* at 474.

[191] 423 U.S. 96 (1975).

[192] 451 U.S. 477 (1981).

"right to cut off questioning" must be "scrupulously honored."[193] 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.[194] From the outset, *Mosely* was seen as a significant weakening of *Miranda*,[195] 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.[196]

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.[197] 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.[198] 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.[199]

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.[200] *Edwards* dealt with a situation analogous to that considered in *Mosely*: a suspect had asked for counsel, and before counsel had arrived the police reinstituted their interrogation, and the Defendant eventually confessed.[201] The Arizona Supreme Court relied on *Mosely* and held that if the confession was gained voluntarily during the second interrogation, *Miranda* was satisfied.[202]

---

[193] *Mosely*, 423 U.S. at 104.

[194] *Id.*

[195] 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*).

[196] 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).

[197] *Mosely*, 423 U.S. at 101 n. 7.

[198] 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."

[199] 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 later 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.

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

[201] *Edwards*, 451 U.S. at 479-80.

[202] *State v. Edwards*, 594 P.2d 72, 77-78 (1979).

The Supreme Court reversed, making *Edwards* one of the few decisions to unequivocally embrace *Miranda*'s language and holding.[203] The Court noted that it had "strongly indicated that additional safeguards are necessary when the accused asks for counsel" and held that once an accused asks for counsel she cannot be questioned until she meets with counsel or she herself "initiates further communication."[204] *Edwards* also discussed *Mosley* and made explicit the differential treatment between a request to remain silent and a request for counsel.[205]

Given that *Edwards* is surrounded by *Miranda* cases that refer to the warnings as a non-constitutionally required, prophylactic measure,[206] 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"[207] 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.[208] 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 *Morley*, and this has resulted in a long, slow drift in the federal courts where even the protections offered by *Morley* have been diluted.[209]

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.[210] 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.[211] 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.[212]

In *Minnick v. Mississippi*, the accused requested counsel, met with counsel, and then was questioned by the police without his lawyer present.[213] *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

---

[203] *Edwards*, 451 U.S. at 481-82.
[204] *Id.* at 484-85.
[205] *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.").
[206] *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.").
[207] *Id.* at 485-86.
[208] 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).
[209] *See Custodial Interrogations*, *supra* note __, at 177 n. 568 (2006) (listing recent cases applying *Morley*).
[210] *See* Smith v. Illinois, 469 U.S. 91, 94-100 (1984).
[211] *See* Arizona v. Roberson, 486 U.S. 675, 680-88 (1988).
[212] *Roberson*, 486 U.S. at 683.
[213] Minnick v. Mississippi, 498 U.S. 146, 155-58 (1990).

regardless of your request for an attorney?[214] In this regard, the Justices' experience as lawyers seems extremely relevant. Every lawyer knows and fears the possibility that their client will be talking to opposing parties outside of the lawyer's presence and say something that can never be retracted or fixed.[215]

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.[216] 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,[217] 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.[218] The Sixth Amendment's right to counsel, by contrast, does not attach until "prosecution is commenced" not during the police investigation of a crime.[219]

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."[220]

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."[221] 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.[222] Given that the main protection presented by the lawyer is silence,

---

[214] *Minnick*, 498 U.S. at 152-56.

[215] *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.").

[216] *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.").

[217] *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").

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

[219] *See, e.g.,* Texas v. Cobb, 532 U.S. 162, 167-68 (2001).

[220] Fare v. Michael C., 442 U.S. 707, 719 (1979).

[221] *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).

[222] *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.").

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 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.[223]

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.[224] 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?"[225] This is true for every profession except for lawyers.[226]

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.[227] 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."[228] The opinion

---

[223] 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.

[224] *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).

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

[226] *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).

[227] ABA Comm. on Professional Ethics, Formal Opinion 300 (1961) (hereinafter ABA Op. 300).

[228] *Id.*

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."[229]

In 1969 the ABA adopted this reasoning in its first formal ethics code, the ABA Model Code of Professional Responsibility, DR 2-108(A).[230] This restriction passed through to the later Model Rules of Professional Conduct in Rule 5.6(a).[231] 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."[232]

Of course, while these ethics opinions and rules may be enforceable as a professional sanction, they are explicitly not meant for court enforcement.[233] 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*.[234] *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."[235] The court held that "[s]trong public policy considerations preclude" using "commercial standards" to gauge the legal profession, and struck down the noncompete clause.[236]

The great bulk of case law followed *Dwyer* and barred noncompete agreements.[237] 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*.[238] 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.[239]

---

[229] *Id.*

[230] 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.

[231] 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).

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

[233] *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.").

[234] 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), *aff'd* 343 A.2d 208 (N.J. App. 1975).

[235] Except, humorously, "perhaps in cases of indigency." *Dwyer*, at 499-500 & n. 1.

[236] *Id.* at 500.

[237] *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).

[238] *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).

[239] *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*).

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 provision that allowed a former partner to compete, but lessened his post-departure compensation.[240] 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."[241]

Lastly, courts have been quite explicit about treating lawyers differently than other professions. For example, *Raymundo v. Hammond Clinic Association*[242] summarily dismissed the argument that medical ethics should prohibit enforcement of noncompete agreements as "self-serving."[243] The New Jersey case of *Karlin v. Weinberg*[244] 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.[245] *Karlin* has been regularly cited by later courts rejecting physicians efforts to invalidate noncompete clauses.[246]

Nevertheless, 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,[247] while other commentators have argued that lawyers should face a reasonableness standard, like doctors and other professionals.[248] 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

---

[240] *See* Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 410-11 (N.Y. 1989).

[241] 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").

[242] 449 N.E.2d 276 (Ind.1983).

[243] Raymundo, 449 N.E.2d at 280-81.

[244] 372 A.2d 616 (N.J. Super. A.D. 1977).

[245] Karlin, 372 A.2d at 618.

[246] *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).

[247] Berg, *supra* note __; Malloy, *supra* note __.

[248] *See* Glenn S. Draper, *Enforcing Lawyers' Covenants not to Compete*, 69 Wash. L. Rev. 161, 180-82 (1994).

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.[249] Moreover, it discourages law firms from training their associates, since any time and money spent on training may be wasted when the associate departs.[250]

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,[251] 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 to 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.[252]

Legal malpractice is generally treated as a tort action based in negligence.[253] 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."[254]

---

[249] *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).

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

[251] *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).

[252] 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.

[253] 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).

[254] North Bay Council, Inc. v. Bruckner, 563 A.2d 428, 430 (1989) (Souter, J.).

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.[255]

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.[256] 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.[257] 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.[258] The case-within-a-case standard has been applied to other, non-litigation areas, like transactional malpractice claims.[259]

The case-within-a-case standard is very, very difficult to meet theoretically and practically.[260] As a theoretical matter the plaintiff faces two huge issues of proof: proving the underlying

---

[255] *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 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.").

[256] *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).

[257] *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).

[258] *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").

[259] "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).

[260] 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*

malpractice, and then proving that she would have won in a trial of a totally distinct cause of action. While causation is always an issue in any tort action, it is the central issue in legal malpractice cases.[261] 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,[262] the Model Rules explicitly allow a lawyer to reveal client confidences to defend a malpractice action.[263]

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.[264] Furthermore, in most jurisdictions a plaintiff cannot pursue a legal malpractice action unless the plaintiff has first obtained post-conviction relief.[265] If that post-conviction relief is based on a claim of ineffective

---

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.

[261] 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.").

[262] *See infra* notes __ and accompanying text.

[263] 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).

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

[265] 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).

assistance of counsel, the odds of relief are slim indeed.[266] As such, legal malpractice for shoddy criminal defense work is rare.[267]

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.[268]

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.[269] 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.[270]

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-

---

[266] *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").

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

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

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

[270] *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");

case requirement.[271] Nevertheless, the few courts to consider the issue courts have consistently denied efforts to extend loss of chance to legal malpractice.[272]

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*[273] 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."[274] 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*,[275] 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."[276]

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*

---

[271] *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).

[272] *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. 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).

[273] 858 S.W.2d 397 (Tex. 1993).

[274] 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).

[275] 805 P.2d 589 (Nev. 1991).

[276] 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).

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 proof to the defendant. For example, in *Haft v. Lone Palm Hotel*[277] 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."[278] 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.[279]

Another classic example is *res ipsa loquitor*. *Res Ipsa* allows a plaintiff to establish a permissible inference of negligence 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."[280] *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.[281]

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.[282] 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 loquitor and other burden shifting techniques are "generally inapplicable to legal malpractice cases."[283] By contrast, *res ipsa* has been available in

---

[277] 478 P.2d 465 (Cal. 1970).

[278] Haft v. Lone Palm Hotel, 478 P. 2d 465, 476 (Cal. 1970).

[279] 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).

[280] 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 loquitor*).

[281] *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.").

[282] 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).

[283] *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.").

medical malpractice since *Ybarra v. Spangard* was decided in 1944.[284] Further, courts have generally resisted shifting the legal malpractice burden of proof on causation regardless of the difficulties this burden places on plaintiffs.[285]

D. Privity

The doctrine of privity was one of the pillars of tort law that eventually disintegrated in reaction to the industrial revolution. In the nineteenth and early-twentieth century courts held that a plaintiff must prove privity -- the equivalent of a contractual relationship -- with a defendant to proceed in a product liability lawsuit. 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.[286] This doctrine was translated to legal malpractice in *National Savings Bank of District of Columbia v. Ward.*[287] *Ward* involved a factual scenario that remains quite familiar today: the improperly performed title search.[288] Because the injured party was not the lawyer's client, however, the court dismissed the case for lack of privity.[289]

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.[290] The privity doctrine lasted longer in legal malpractice,[291] 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.[292]

---

[284] *See* Ybarra v. Spangard, 154 P.2d 687 (1944).

[285] *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.").

[286] *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.").

[287] 100 U.S. 195 (1879).

[288] *See* Ward, 100 U.S. at 195-98.

[289] *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").

[290] 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).

[291] *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).

[292] *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

There are several different ways that courts have allowed third-party legal malpractice suits. California uses a multi-factor test.[293] Other states basically use the contract law of third-party beneficiaries. If the primary purpose of the attorney-client relationship was to benefit the third party, she is a proper legal malpractice plaintiff.[294] Some courts have found that third parties may sue if their reliance upon the lawyer's advice or actions was foreseeable.[295]

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

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*,[299] nine states retain a strict privity rule in legal malpractice actions.[300] Given that the privity

---

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.").

[293] 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").

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

[295] *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.

[296] *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).

[297] *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).

[298] *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 medications side effects). Some courts have limited accountant third-party liability in a manner consistent with lawyers, *see* Jay M. Feinman, *Liability o Accountants for Negligent Auditing: Doctrine, Policy, and Ideology*, 31 FLA. STATE L. REV. 17, 20 (2003).

[299] 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").

[300] *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).

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,[301] the fact that nine states have retained it is quite striking.

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

> [T]he rule protects the attorney's duty of loyalty to and effective advocacy for his or her client. While the testator/client is alive, the lawyer owes him or her . . . a duty of complete and undivided loyalty. . . . [C]ourts [also] fear that absent the strict privity rule there would be no limit as to whom a lawyer would be obligated. . . . In threatening the interests of the attorney, the interests of potential clients may also be compromised; they might not be able to obtain legal services as easily in situations where potential third party liability exists.[302]

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.[303]

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.[304] 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

---

[301] *See, e.g.*, Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992).

[302] 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.").

[303] 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.

[304] *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.

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

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."[307]

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.[308] 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.[309] On the flip side, some courts have held that the Rules of Professional conduct are flatly inadmissible in a legal malpractice action.[310] Notably, lawyer-defendants always "retain the right to introduce ethical standards in defense of their actions."[311]

---

[305] *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).

[306] This same justification has been used to reject damages for pain and suffering in legal malpractice actions. *See* Kessler, *supra* note __, at 488-91.

[307] ABA MODEL RULES OF PROFESSIONAL CONDUCT Preamble and Scope.

[308] *See* Marc R. Greenough, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions after* Hizey V. Carpenter, 68 WASH. L. REV. 395, 400 (1993).

[309] 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)).

[310] *See* Ex parte Toler, 710 So.2d 415, 416 (Ala.1998); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366, 369 (Ark. 1992); Hizey v. Carpenter, 830 P.2d 646, 653-54 (Wash. 1992). Courts have also held that the Rules can

Overall, the structure and treatment of legal malpractice further establishes that judges have analyzed and designed the tort with a unique understanding of, and sympathy for, the lawyer defendants before them -- a clear example of the lawyer-judge hypothesis. The law is noticeably more favorable to lawyers than other professions, 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.[312]

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.[313] Perhaps that is a better model.

---

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).

[311] Developments in the Law, *supra* note __, at 1567.

[312] *Cf.* Barton, *Economic Analysis, supra* note __, at 477-81 (rejecting a similar justification for biased lawyer regulations).

[313] 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).

Moreover, the idea that only lawyers should be judges is of relatively recent vintage in the United States. In the 18th, 19th, and early 20th century many judges and justices of the peace were not lawyers (and many current justices of the peace are still non-lawyers).[314] Predictably, bar associations were at the forefront of the (largely successful) effort to eliminate lay judges.[315] 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.[316] Nonlawyer judges can also be defended on populist or egalitarian grounds.[317] 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.

---

[314] 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 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).

[315] *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).

[316] 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 __.

[317] *See* Vermeule, *supra* note __, at 6.