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Writing the Rules of Attorney-Whistleblowing: Who Gets to Decide, and How Do We Make the Decision?

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WRITING THE RULES OF ATTORNEY- WHISTLEBLOWING: WHO GETS TO DECIDE, AND HOW DO WE MAKE THE DECISION?

*Alex Bein**

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INTRODUCTION

Consider the following hypothetical situation: a state legislature, seeking to fight back against corporate financial fraud, enacts an amendment to its state whistleblower laws. This amendment requires corporate attorneys to publicly report the past financial frauds of their clients in certain circumstances—even when this reporting involves the disclosure of otherwise confidential client documents.¹ At first glance, the proposal may seem like it would fall within the purview of a state legislature: the amendment deals with financial fraud prevention and correction, and the state’s general economic health, two commonly legislated areas of law. However, the amendment also directly regulates the conduct of practicing attorneys. As such, the amendment would encroach upon the regulatory territory of state judiciary branches, which have traditionally held themselves out as the sole arbiters of attorney conduct.²

1. This hypothetical amendment takes the general form of actual regulations supported by many bar associations, enacted by many state judiciaries, and promulgated by the SEC. *See, e.g.*, 17 C.F.R. § 205.3(d)(2)(iii) (2014); N.Y. RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2014); MODEL RULES OF PROF’L CONDUCT R. 1.6 (2014). Individual iterations of the rule vary widely from state to state, and from institution to institution. *Cf.* N.J. RULES OF PROF’L CONDUCT R. 1.6 (2014); 17 C.F.R. § 205.3(d)(2)(iii); *see also infra* Part II.B.

2. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 77 (2009). Many state judiciaries utilize the “negative inherent powers” concept to support the notion that their power to regulate attorney conduct is exclusive of other branches of government. *See* CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 27 (1986). The negative inherent powers doctrine suggests that because the power to regulate attorney conduct is inherent in the judiciary under the state’s constitution, any attempt at such regulation by a state legislature violates the separation of powers between branches. *See id.* For examples of state courts applying the negative inherent powers doctrine, *see Preston v. Stoops*, 373 Ark. 591, 594 (2008) (holding that a state law penalizing deceptive trade practices did not apply to attorneys due to separation of powers concerns); *State ex rel. Doyle v. Frederick J. Hanna & Associates, P.C.*, 287 Ga. 289 (2010)

Attorney behavioral rules, commonly referred to as “rules of professional conduct” or “ethics rules,” are typically drafted by professional bar associations, which submit these proposed rules to the state’s highest court for approval and enactment.³ The rules do not become authoritative law in the relevant state unless adopted by the state’s highest court, “which is free to draft its own rules, tinker with the bar association proposals, or leave the field unregulated.”⁴ The attorney-regulation process has thus been dominated by bar associations and, to a lesser extent, the courts, whose philosophies and approaches to regulation have controlled the field.⁵

However, this drafting process has suffered from a lack of rigorous public policy analysis.⁶ While public policy concerns such as regulatory effectiveness or economic efficiency have not been wholly ignored, scholars argue that such concerns have been overshadowed by the extraneous effects of politics, compromise, and public opinion.⁷ Rule-makers’ resulting failure to adequately account for the public policy implications of their ethics rules has had two primary effects on those rules. First, this failure has hampered the ability of drafters to maintain the rules’ effectiveness and relevance in a growing and evolving legal industry.⁸ Second, the failure has played a role in the

(relying in part on separation of powers concerns in holding that “only this Court has the inherent power to govern the practice of law in Georgia”).

3. Jason Mehta, *The Development of Federal Professional Responsibility Rules: The Effect of Institutional Choice on Rule Outcomes*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 57, 61 (2007).

4. Zacharias & Green, *supra* note 2, at 94.

5. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 41 (2d ed. 1998) (noting that “courts frequently have deferred or delegated authority to bar associations”); Andrew L. Kaufman, *Ethics 2000—Some Heretical Thoughts*, 2001 PROF. LAW. SYMP. ISSUES 1, 4 (2001) (“For most of the twentieth century, and into the twenty-first century . . . the ABA has controlled the [rulemaking] process”); Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 175 (2010) [hereinafter Wald, *Should Judges Regulate Lawyers?*].

6. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 678 (1989) (providing an analysis of the “rare opportunity [the Model Rules process offers] to study the internal politics of the bar”); see also David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers? Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 466 (1996) (“The dearth of rigorous comparative analysis limited the value of much that was written about professional regulation.”).

7. See generally Schneyer, *supra* note 6 (providing a detailed account of the various institutional influences in the process of making the Model Rules).

8. See Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 243 (2014) [hereinafter Wald, *Resizing the Rules of Professional Conduct*] (arguing that the “one size fits all” nature of the current ethics rules regime

confusing and often contradictory nature of ethics rules as they currently stand.⁹ These difficulties are compounded by the fact that a growing number of rulemaking institutions have independently begun drafting their own regulations governing overlapping areas of attorney behavior.¹⁰

One way in which drafters of ethics rules can overcome these problems—and create more effective and efficient regulations—is by studying potential applications of rules through a form of public policy analysis called “comparative institutional choice microanalysis.”¹¹ The purpose of such analysis is to help rule-makers better understand how to achieve their desired public policy goals on a case-by-case basis.¹² Comparative institutional choice microanalysis informs decision-makers’ choices through the lens of “institutional choice theory” (ICT), which stands for the proposition that the effectiveness of a rule is determined by particular qualities of the institution tasked with drafting or enforcing said rule.¹³ According to ICT, the ability to make informed decisions regarding which institution to entrust with regulatory control is the key to creating successful behavioral regulations.¹⁴

ICT is particularly useful in the area of attorney conduct regulation, where the social interests underlying a given regulation are both varied and complex.¹⁵ ICT suggests that, where individuals may struggle to fully understand and act on those social interests,

made sense for the nineteenth and early twentieth centuries, when the practice of law itself was more homogenous, but the practice is no longer homogenous, and the rules have not adapted to this change); *see also* Wilkins, *supra* note 6, at 479 (noting that while attorney disciplinary controls have evolved since their creation, “those original structures and purposes continue to shape the direction of contemporary developments”).

9. Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 167 (characterizing ethics rules as a “complex web of uncertainty”).

10. *See* Wilkins, *supra* note 6, at 467 (noting that “there are now a large number of institutions that actively assert at least some regulatory jurisdiction over lawyers, and an even greater number that could enter the field in the future”).

11. *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425–27 (1996) (proposing a framework for the comparison of institutions on a context-specific basis).

12. *See id.* at 1425.

13. *See* Gregory Shaffer, *Comparative Institutional Analysis and A New Legal Realism*, 2013 WIS. L. REV. 607, 608 (2013).

14. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994).

15. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 860 (1992) (noting that the relationship between ethics rules’ enforcement and the rules’ underlying social goals can be complex).

rule-making institutions possess a wide variety of characteristics that better qualify them to develop and apply regulations to further those goals. Because no institution is perfect, a public policy analysis applying ICT should consist of *relative* comparisons of the institutions that could regulate a particular behavior. Further, because the conduct governed by attorney ethics rules is so wide-ranging and complex, the best institution to regulate one sub-field of attorney conduct is not necessarily the best institution to regulate all such sub-fields. Thus, a comparison of conduct-regulating institutions should be conducted on a case-by-case, context specific basis, labeled in this Note as “microanalysis.”

Combining these features, “comparative institutional choice microanalysis” is an ideal framework for helping scholars and policy makers to improve the effectiveness, efficiency, and consistency of the rules of professional responsibility. Because this framework must be applied independently to particular regulatory contexts, an effective institutional choice microanalysis must revolve around a specific rule or set of rules, as applied in a specific set of circumstances.¹⁶ Therefore, in providing an example of what a “comparative institutional choice microanalysis” might look like, this Note selects one particular regulatory context which has garnered significant attention and controversy in recent years: confidentiality regulations governing an attorney’s ability to blow the whistle on a corporate client.

Part I of this Note outlines the theoretical foundation for ICT, tracing its development from the “legal realism” movement of the early twentieth century to its more modern form. It then discusses institutional choice theory’s impact on the creation and development of attorney conduct regulations in general, and attorney-whistleblowing regulations in particular. It stresses that this application has so far been rudimentary at best. Part I then introduces a practical framework for applying ICT—comparative institutional choice microanalysis—and discusses how this framework can be applied to analyze the effectiveness of particular attorney conduct regulations from a public policy perspective.

Part II of this Note lays out the basic set of facts required for a thorough institutional choice analysis of attorney whistleblowing regulations. First, because institutional microanalysis is so context-specific, the relevant factual scenario must be understood in

16. See *infra* notes 136–40 and accompanying text.

significant detail.¹⁷ The social goals and interests at stake in that context should then be analyzed.¹⁸ Based on that understanding, the range of institutions which play some role in regulating those social goals and interests must be determined.¹⁹ Finally, the institutional characteristics most relevant to achieving those goals must be set out and understood.²⁰ Part II lays out this required background information for a comparative institutional analysis of the hypothetical legislature-judiciary debate presented by the Introduction to this Note.

Part III of this Note presents the comparative institutional microanalysis itself. To that end, Part III consists of side-by-side comparison of three types of institutional characteristics that affect state high courts and legislatures' ability to create attorney-whistleblowing regulations. First, this Part discusses the two institutions' expertise. Expertise is further divided into two categories—substantive expertise and procedural expertise. Substantive expertise relates to the institutions' knowledge and understanding of particular areas of law or human behavior, and procedural expertise relates to their relative capacities to create rules in general. Part III of this Note then discusses the institutions' impartiality, analyzes their institutional “accountability,” and the public access they provide to their decision-making process.

Part III of this Note argues that, when it comes to drafting attorney whistleblower regulations, state courts have greater substantive expertise, but inferior procedural expertise; state courts are far less “independent” from the target of their regulations; and state courts are far less accountable or accessible to the public throughout the regulation process. Based on this analysis, Part III of this Note concludes that state legislatures would constitute the better institution to regulate attorney whistleblowing conduct.

Significantly, this analysis assumes that all state legislatures and all state courts share the same general characteristics; it does not take into account differences in public institutions that may occur from state to state. This Part notes two jurisdictions in particular—New York and Delaware—where relevant characteristics of the courts and legislatures vary significantly from those of other states.²¹ Part III

17. *See id.*

18. *See infra* notes 38–44 and accompanying text.

19. *See infra* notes 45–55 and accompanying text.

20. *See infra* note 25 and accompanying text.

21. *See infra* notes 296–309 and accompanying text.

suggests additional analyses of these two jurisdictions as a useful topic for further institutional analysis study.

I. INSTITUTIONAL CHOICE AND COMPARATIVE INSTITUTIONAL CHOICE MICROANALYSIS

A. What Is Institutional Choice Theory?

1. Theoretical Background

a. Institutional Choice Theory's "Legal Realist" Roots

Modern institutional choice theory has its foundations in the legal realism movement of the late nineteenth and early twentieth centuries.²² Legal realism stands for the general proposition that the effect of particular laws can only be fully understood in light of their larger social context.²³ For example, legal realism suggests that a party or observer cannot accurately predict the outcome of a case without taking into account the ideology of the judge or trends in society at the time of a ruling.²⁴ While judges are technically not supposed to base judicial decisions on political beliefs or real world experiences, legal realism argues that it is impossible for even the most independent of judges to completely separate himself from such extraneous concerns.

In the same vein, ICT posits that the effect of rules governing particular social behaviors can only be fully understood in light of characteristics of the institutions responsible for enforcing them.²⁵ Proponents of ICT and legal realism argue that behavioral regulations are most effective when based not on pure legal doctrine or precedent, but on an analysis of the practical strengths and weaknesses of the various institutional actors competing for regulatory control over a particular social behavior.²⁶ In other words,

22. Shaffer, *supra* note 13, at 608.

23. See JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 27 (2d ed. 1990). It replaced previously-accepted concepts of "formalism," which treated the development of precedent and doctrine as occurring independently of changing social values and political realities. *See id.*

24. *See id.*

25. *See, e.g.,* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 106 (2009) (noting the view that "judges work in institutional settings that shape their decision making"); *see also* Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1991-92 (1996).

26. Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33-34 (1996) ("A legal process scholar might argue that a

understanding the broader social context of a policy decision is vital in ensuring that its goals can be achieved effectively and efficiently.²⁷

b. Institutional Choice Theory's Social Science Roots

The importance of public institutions in the policy-making process is further supported by social science studies regarding the limitations of individuals' decision-making capacity.²⁸ Among the limitations theorized by scholars is the concept of "bounded rationality," developed by political scientist Herbert Simon.²⁹ The concept of bounded rationality suggests that the rational capacity of an individual is limited by that person's finite capacity to obtain and understand all the information necessary to make informed decisions.³⁰ Rationally "bounded" individuals increase their decision-making capacity by relying on institutions to "simplify and regularize a complex environment" beyond the bounds of their own knowledge and experience.³¹ This reliance better enables them to "reach decisions in a socially coherent manner and to communicate those decisions to other members of society."³² In incorporating this concept, institutional choice theory thus stands for the proposition that members of society most effectively solve complex regulatory problems not by directly choosing their own goals and solutions, but by designating particular institutions to do so on their behalf.³³

2. "Goal Choice" and "Institutional Choice:" Komesar's Two-Part Conceptualization of Modern Institutional Choice Theory

While the concepts behind ICT can be traced back for centuries, its treatment by scholars has seen a reinvigoration in the last several

certain institution, because of its relative ability to gather pertinent information, should perform a regulatory task.").

27. See Shaffer, *supra* note 13, at 608; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[T]he key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.").

28. See Rubin, *supra* note 11, at 1414.

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.*; see also MALCOLM RUTHERFORD, *INSTITUTIONS IN ECONOMICS: THE OLD AND THE NEW INSTITUTIONALISM* 81 (1994) ("Institutions provide a basis for action in a world that would otherwise be characterized by pervasive ignorance and uncertainty.").

33. See Rubin, *supra* note 11, at 1414.

decades.³⁴ Of particular importance to this Note's analysis is the comprehensive formulation of modern institutional choice theory developed by Professor Neil Komesar.³⁵ Komesar conceptualizes ICT as a framework for assessing society's pursuit of social goals through various public institutions, each of which skews the decision-making process in unique ways.³⁶ Under this framework, ICT deals with both how society chooses its goals, and how society determines which institutions will be responsible for carrying out those goals. Komesar labels these two related aspects of ICT as "goal choice" and "institutional choice."³⁷

a. "Goal Choice"

Goal choice analysis compares how society selects its social goals and values, prioritizing certain goals over others to achieve a desired outcome.³⁸ Such social goals can include promoting economic growth, efficiently allocating resources, protecting private property rights, and promoting public safety.³⁹ Depending on the particular social context, these goals may be broad or narrow in scope;⁴⁰ they might conflict with each other, or they might complement each other.⁴¹ Public decision-making entities are often faced with choices between such varying goals when determining public policy.

While understanding how an institution chooses from among society's goals is important for evaluating public policy outcomes,

34. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1172 n.16 (2003).

35. Neil Komesar is a professor of law at University of Wisconsin School of Law. *Neil Komesar*, U. WISC. L. SCH., <http://law.wisc.edu/profiles/nkomesar@wi> (last visited May 15, 2015). His work on institutional choice has had a significant impact on diverse areas of legal scholarship, including torts, property, constitutional law, and global commerce. *See* Shaffer, *supra* note 13 at 607. While his work is only one part of a larger reinvigoration of the institutional choice doctrine over the last several decades, it is one of the most influential and comprehensive on the topic, especially as applied to the study of law. *See, e.g.*, Barton, *supra* note 34, at 1172 n.16.

36. *See* Shaffer, *supra* note 13, at 609 (discussing Komesar's work).

37. *See id.* (discussing the relationship between "goal choice" and "institutional choice" in Komesar's work).

38. KOMESAR, *supra* note 14, at 4–5.

39. *Id.* at 5.

40. For example, a court may seek to protect the property rights of all residents of the Hudson River Valley, or the property rights of a homeowner in a particular residential neighborhood.

41. For example, a rule protecting one's property rights may conflict with another's economic interests; on the other hand, a rule protecting the environment may also protect individuals' property rights.

Komesar asserts that mere analysis of a decision-maker's choice of social goal is not enough to understand how effective a policy will be in achieving that desired outcome.⁴² These social goals can be achieved in many ways using a variety of social processes, and a given regulation could be applied in conformity with any one of a broad range of social goals.⁴³ Thus, a decision-maker's reasoned balancing of social goals alone does not allow it to fully understand which rules to apply, or how to apply them, in furtherance of those goals.⁴⁴

b. "Institutional Choice"

According to Komesar, the missing piece of this public policy analysis is the determination of *who* should be responsible for determining what an efficient outcome should look like and how it should be achieved.⁴⁵ Komesar labels the process of deciding who decides as "institutional choice."⁴⁶ Institutional choice analysis connects the choice of goal with the eventual public policy outcome by determining the "best" process to use to achieve that result.⁴⁷

The institutional processes responsible for achieving these public policy goals are wide-ranging and complex.⁴⁸ Komesar focuses on three institutional processes, each of which can be broken down into smaller components: the political process, the adjudicative process, and the market process.⁴⁹ Public institutions responsible for overseeing the political process include city councils, state legislatures, and Congress.⁵⁰ Institutions overseeing the adjudicative process include state courts, federal courts, and some administrative

42. KOMESAR, *supra* note 14, at 5.

43. *Id.* ("Upon close inspection, each social goal bandied about in analyses of law and public policy is generally consistent with virtually any law or public policy outcome."); *see also* Wilkins, *supra* note 6, at 466–67 ("[R]egulatory institutions can pursue [their] goals through a number of interrelated tasks, ranging from drafting rules of conduct to enforcing existing rules and imposing sanctions.").

44. *See* KOMESAR, *supra* note 14, at 5; Wilkins, *supra* note 6, at 466–67.

45. KOMESAR, *supra* note 14, at 5 ("A link is missing . . . in analyses that suppose that a given law or public policy result follows from a given social goal. That missing link is institutional choice.").

46. *Id.*

47. *See id.*

48. *See id.* at 3 ("The alternative decision-makers are not individuals or even small numbers of individuals. They are complex processes . . . in which the interaction of many participants shape performance.").

49. *Id.* at 9 (dividing public institutions into market, political, and adjudicative categories).

50. *See id.* at 9–10 (noting that broad categories of institutions can be broken out into their constituent parts for further institutional analysis).

agencies.⁵¹ The market process refers generally to a reliance on supply and demand and market transactions to achieve social goals.⁵²

“Institutional choice” in this context refers to an actor’s decision to select one regulatory process over another to achieve a particular social goal.⁵³ For example, when a judge decides a case based on the balancing of parties’ interests, he designates a substantial regulatory role to the court system; on the other hand, when a judge applies a narrow rule or exception to a case, he allocates more authority to carry out judicial directives on the markets or legislature.⁵⁴ In this context, an actor’s “institutional choice” decision is just one (albeit the most important) aspect of ICT as a whole.⁵⁵

3. *How “Goal Choice” and “Institutional Choice” Relate to “Comparative Institutional Choice Analysis”*

Because no regulating institution is perfect at its job, the goal-achieving potential of a particular institution cannot be fully assessed without comparing it to other institutions that may share some of the same characteristics.⁵⁶ Thus, no institutional choice decision is fully informed without a side-by-side comparison of the strengths and weaknesses of the different decision-making bodies which could potentially have an impact on the regulatory process.⁵⁷ Komesar calls this form of inquiry “comparative institutional analysis.”⁵⁸

51. *Id.*

52. *Id.*

53. Daniel H. Cole, *The Importance of Being Comparative* M. Dale Palmer *Professorship Inaugural Lecture*, 33 IND. L. REV. 921, 930 (2000) (characterizing Komesar’s conceptualization of institutional choice).

54. *Id.*; see also Nourse & Shaffer, *supra* note 25, at 106–07.

55. NEIL K. KOMESAR, *supra* note 14, at 4–5 (noting that “analysis of goal and value choices, standing alone, tells us ‘virtually nothing’ about these [police] outcomes”); but *c.f.*, Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 988 (1997) (arguing that Komesar’s focus on “institutional choice” at the expense of “goal choice” oversimplifies the public-policy creation process).

56. KOMESAR, *supra* note 14, at 5 (noting that institutional choice “is always a choice among highly imperfect alternatives”).

57. Shaffer, *supra* note 13, at 611–12 (summarizing Komesar’s comparative institutional choice framework).

58. *Id.* at 611. Since the publication of *Imperfect Alternatives*, comparative institutional analysis has been applied across a wide range of disciplines, from tort reform to internet regulation to environmental law. See Neil Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 WIS. L. REV. 265, 327–37 (2013) (collecting institutional choice studies). “Institutional choice *microanalysis*,” as applied by this Note, is simply a case-by-case application of Komesar’s broader “institutional choice analysis” framework.

Comparative institutional analysis is the methodological framework by which scholars and decision-makers can apply the lessons of “goal choice,” “institutional choice,” and ICT in general, to practical real-world situations.⁵⁹

B. Institutional Choice and Attorney Behavior Regulations

1. *The Historical Role of ICT in the Creation of Attorney Conduct Rules*

Application of ICT can be found throughout the history of the development of attorney conduct rules—particularly within the development of rules regarding an attorney’s duty of confidentiality to a sophisticated corporate client.⁶⁰ While ICT-based arguments have provided significant public policy support for particular confidentiality rules, public policy analysis of the process has often been overshadowed by the influences of political dispute, practical compromise, and public opinion (or lack thereof).⁶¹ The following events in the development of confidentiality and attorney-whistleblowing provisions provide examples of institutional choice’s visible, but sometimes limited impact.

a. *The Initial Drafting of Model Rule 1.6*

In 1978, the Securities and Exchange Commission (SEC) proposed a liberal attorney-whistleblower provision based on its complaint in *SEC v. Nat’l Student Mktg. Corp.*,⁶² which argued that attorneys practicing before the SEC could be held liable for failing to disclose the fraudulent activities of their clients.⁶³ However, the SEC decided to table its proposal because the American Bar Association (ABA) was considering the same issues in its Model Rules drafting process.⁶⁴ The ABA drafting committee then sought to craft an attorney-whistleblower provision that would “be tough enough to convince the SEC to back off, yet hedged enough to keep lawyers’ relations with

59. Gregory Shaffer, *Comparative Institutional Analysis and A New Legal Realism*, 2013 WIS. L. REV. 607, 608–09 (2013) (characterizing comparative institutional analysis as critical in applying institutional choice theory to inform “real-life decision making”)

60. See Schneyer, *supra* note 6, at 679.

61. See *generally id.*

62. 457 F. Supp. 682, 704 (D.D.C. 1978).

63. See Schneyer, *supra* note 6, at 705–06.

64. See *id.* at 706.

managers comfortable.”⁶⁵ From an institutional choice perspective, the SEC’s decision to table its own proposal implied a belief that the ABA, not the SEC, was the proper institution for the regulation-drafting role at that time.⁶⁶

In 1983, the American Bar Association revised an earlier version of its primary confidentiality rule, Model Rule 1.6, to allow for disclosure of client confidences to prevent a crime resulting in death or serious injury, but not to prevent or mitigate the effects of financial or property-related crimes.⁶⁷ Believing that the ABA’s final formulation of Model Rule 1.6 created a haven for white-collar criminals, United States Senator Arlen Specter introduced a bill in the Senate that would make the prior version of Model Rule 1.6 (allowing for disclosure of client confidences to prevent financial crimes, not just death or bodily harm) into federal criminal law.⁶⁸

In response, “even the bar leaders who had opposed the amendment to Rule 1.6 in the ABA House of Delegates opposed the Specter bill, arguing that lawyers are and should be regulated at the state level and by courts, not legislatures.”⁶⁹ The bar leaders believed that “Congress, as a matter of policy, should leave even this non-litigation aspect of law practice to the governance of the state supreme courts, which could be expected to show more deference than Congress to the ABA rule.”⁷⁰ The Specter amendment was withdrawn, and states were able to rely on the ABA’s formulation of Model Rule 1.6 in enacting their own binding confidentiality regulations.⁷¹ Here, Congress’ deferral to the ABA’s rule-drafters (and by implication, state courts) acted as an implicit acceptance of the ABA’s leading role in the matter of drafting confidentiality rules for the legal profession. This ICT-based argument in opposition to the Specter amendment clearly played an important role in the ABA’s maintenance of rulemaking authority over attorney-client confidentiality.⁷²

65. *Id.*

66. *See id.*

67. *See id.* at 713.

68. *Id.*

69. *Id.*

70. Ted Schneyer, *supra* note 15, at 43.

71. *See id.*

72. *See id.* (noting that “assumptions about the relative competence of the ABA and other standard setters play a vital role in ABA rulemaking”).

b. The Promulgation of SEC Rule 205.3

The SEC and ABA rule-drafters again found themselves at odds in 2002 over the SEC's promulgation of SEC Rule 205.3 and its proposed "noisy withdrawal" provision.⁷³ In the wake of the Enron and Worldcom scandals, Congress passed the Sarbanes-Oxley Act, which mandated in part that the SEC create new attorney confidentiality rules allowing corporate attorneys more leeway in reporting clients' financial frauds.⁷⁴ Pursuant to this delegation of authority, the SEC enacted Rule 205.3(d), which allows attorneys to reveal the confidential information of their clients to prevent or mitigate financial fraud in some circumstances.⁷⁵ Additionally, the SEC proposed a "noisy withdrawal" provision, which would have required corporate attorneys to withdraw from representation of a client, and announce the withdrawal to the SEC, upon discovery of client fraud in certain circumstances.⁷⁶

At the time, the primary ABA Model Rule addressing this conduct (Rule 1.6(b)), allowed attorneys to disclose client confidences to prevent crimes likely to result in death or serious bodily injury, but not crimes resulting in purely financial injury.⁷⁷ In fact, the ABA had recently rejected an amendment of its own that proposed expansion of the confidentiality exception to allow for the reporting of client fraud.⁷⁸ As a result of the outcry connected to the Enron and Worldcom collapse, the ABA agreed to reconsider its position on lawyers' responsibility to report, or "blow the whistle," on clients' fraud.⁷⁹

In a compromise between the SEC and the organized bar, the SEC tabled its "noisy withdrawal" rules pending further consideration.⁸⁰ The SEC limited its finalized regulation, SEC Rule 205.3, to allow for

73. See Clifton Barnes, *ABA, States, and SEC Hash Out Lawyers' Responsibility In Corporate Settings*, A.B.A., http://www.americanbar.org/publications/bar_leader/2003_04/2802/corporate.html (last visited May 15, 2015).

74. *Id.*

75. 17 C.F.R. § 205.3(d)(2) (2014); see also Barry R. Temkin & Ben Moskovits, *Lawyers As Whistleblowers Under the Dodd-Frank Wall Street Reform Act: Ethical Conflicts Under the Rules of Professional Conduct and SEC Rules*, 84 N.Y. ST. B.J. 10, 14 (2012).

76. See Barnes, *supra* note 73.

77. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 80–81 (ed. 2007).

78. See LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 212–13 (3d ed. 2012).

79. *See id.*

80. *Id.*

the reporting of client frauds using confidential information under certain circumstances, but it did not mandate the reporting or “noisy withdrawal.”⁸¹ The ABA, in turn, amended its Model Rule 1.6(b) to correspondingly broaden its exceptions to confidentiality rules by allowing attorneys to report client financial frauds using otherwise confidential client information (rather than only to report crimes resulting in death or serious bodily harm).⁸²

c. The Second Circuit Decision in United States v. Quest Diagnostics, Inc.

The 2013 Second Circuit opinion in *United States v. Quest Diagnostics, Inc.*⁸³ provides a more recent example of how the choice of regulatory institution can affect the creation and application of confidentiality rules.⁸⁴ The plaintiffs in *Quest* brought a federal False Claims Act (FCA) suit against defendant Quest Diagnostics, claiming that the medical diagnostics laboratory engaged in illegal kickbacks by underpricing some of its services in order to obtain other federally funded business.⁸⁵ The principal plaintiff, Mark Bibi, based his kickback allegations in part on confidential information he had obtained from the defendant through his years of service as the defendant’s in-house counsel.⁸⁶ Bibi first argued that the broad disclosure of his former client’s confidential information was permitted under New York’s Rule of Professional Conduct 1.6(b)(2) (NY RPC 1.6(b)(2)), which permits an attorney to “reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime . . .”⁸⁷ However, the court made it clear that Bibi’s disclosures

81. Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1270 (2003) (noting the ABA’s active campaign against the “noisy withdrawal” provision).

82. See LERMAN & SCHRAG, *supra* note 78, at 212–13. It is important to note that, despite the ABA’s broadening of the whistleblowing exceptions to Model Rule 1.6, application of the exceptions is still limited to situations where the attorney’s services were used in furtherance of the fraud. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2)–(3) (2014).

83. See *generally* 734 F.3d 154 (2d Cir. 2013).

84. As will be shown, the *Quest* opinion represents an appellate panel’s choice to entrust regulation of a particular type of attorney behavior to a state judiciary rather than the federal Congress. See *infra* notes 100–01 and accompanying text; see also Nourse & Shaffer, *supra* note 25, at 107 n.205 (noting that judges make “institutional choices” when determining which rule to apply in a given situation).

85. *Quest Diagnostics, Inc.*, 734 F.3d at 159–161.

86. *Id.* at 159–62.

87. See *id.* at 164; N.Y. RULES OF PROF’L CONDUCT 1.6(b)(2) (2014).

went far beyond what would have been “reasonably necessary” under NY RPC 1.6(b)(2), and thus would have constituted a violation of the ethics rule, if it were to apply here.⁸⁸

To the extent that his wide-ranging disclosures went beyond what was permitted under NY RPC 1.6(b)(2) as “reasonably necessary” under the circumstances, Bibi argued that NY RPC 1.6(b)(2)’s “reasonable necessity” limitation should not apply.⁸⁹ This is because, he argued, NY RPC 1.6(b)(2) is preempted by 31 U.S.C. § 3730(b)(2) of the federal False Claims Act.⁹⁰ Rather than limiting potential disclosures to those which are necessary to prevent or disclose fraud, § 3730(b)(2) requires a potential False Claims Act plaintiff to make disclosure of “substantially all material evidence and information the person possesses” as a prerequisite to a successful FCA claim.⁹¹ Bibi argued that the application of FCA’s “substantially all material evidence” standard would allow for the disclosure of a far broader range of confidential information than would be permitted under the New York conduct rules.⁹² In asking the court to apply the FCA standard, Bibi believed he should be allowed to move forward with his FCA complaint based on his broad disclosure of confidential client information.⁹³ Bibi’s argument effectively forced the court to decide whether to apply NY RPC 1.6(b)(2) and its restrictive “reasonable necessity” standard, or the FCA and its broader “substantially all material evidence” standard to Bibi’s disclosures.⁹⁴

In determining which rule to apply, the Second Circuit acknowledged what Komesar would call a “goal choice” problem.⁹⁵ The court noted that “the central purpose of the N.Y. Rules—to protect client confidences—can be inconsistent with or antithetical to federal interests, which under the FCA, are to encourage private individuals who are aware of fraud being perpetrated against the

88. *See Quest Diagnostics, Inc.*, 734 F.3d at 165.

89. *Id.* at 164.

90. *Id.* Preemption creates additional questions of its own, which are beyond the scope of this Note. This Note assumes away any constitutional issues with preemption, and analyzes the state-vs.-federal law issue solely from a public policy perspective.

91. 31 U.S.C. § 3730(b)(2) (2012).

92. *Quest Diagnostics, Inc.*, 734 F.3d at 164–65.

93. *Id.* at 165.

94. *Id.* at 164–65.

95. Komesar recognized a goal choice problem under similar circumstances—where a court was forced to decide between two rules supporting two different social goals. *See KOMESAR supra* note 14, at 14–28 (analyzing *Boomer v. Atlantic Cement Company*, 26 N.Y.2d 219(1970)).

government to bring such information forward.”⁹⁶ The plaintiff asked the court to prioritize the goal of encouraging whistleblowers to come forward in cases like this by applying the FCA’s “substantially all material evidence” standard, while the defendants asked the court to prioritize the goal of protecting stronger lawyer-client confidentiality by applying the more narrow “reasonable necessity” standard.⁹⁷

However, the court did not to enter into a detailed “goal choice” analysis of these competing social interests, nor did it provide its own view regarding which underlying goal should be prioritized in this situation.⁹⁸ Rather, the court merely stated that the New York ethics rule’s “reasonable necessity” standard “implicitly accounts for the federal interests at stake in the FCA,” so it “need not give way to section 3730(b)(2)’s requirement of full disclosure of material evidence.”⁹⁹ Thus, the Second Circuit resolved the problem in *Quest* with what Komesar would call an “institutional choice” decision.¹⁰⁰ The court’s deferral to NY RPC 1.6(b)(2) regarding the proper balance of state and federal interests suggests a belief on the part of the panel that the institution responsible for the drafting of NY RPC 1.6 (the New York state court system) was more competent than Congress, or the panel itself, to regulate lawyers’ behavior in the particular context discussed in *Quest*.¹⁰¹

However, the *Quest* court’s institutional choice analysis appears superficial at best, including only cursory policy analysis in support of its decision.¹⁰² For the *Quest* court to maximize the public policy benefits of its decision regarding “which rule to apply” to Bibi’s behavior situation, ICT would suggest that the court would first need a more rigorous analysis of “which institution should govern”

96. *Quest Diagnostics, Inc.*, 734 F.3d at 163 (internal quotations and citations omitted).

97. *See id.* at 164.

98. *C.f.* KOMESAR, *supra* note 14, at 16–17 (noting the *Boomer* majority and minority’s “goal choice” disagreement).

99. *Quest Diagnostics, Inc.*, 734 F.3d at 164. The court thus chose to apply NY RPC 1.6(b)(2), and held that Bibi’s disclosures violated the rule by being broader than reasonably necessary to prevent the defendant’s alleged fraud. The case was dismissed, and the plaintiffs were barred from bringing any future cases based on Bibi’s disclosures. *Id.* at 165.

100. *C.f.* KOMESAR, *supra* note 14, at 23–24 (noting that the *Boomer* majority and minority’s “goal choice” disagreement was solved by an “institutional choice” decision).

101. *C.f.* Schneyer, *supra* note 26, at 33–34 (presenting the argument that particular institutions should perform certain tasks based on their relative strengths and weaknesses).

102. *See Quest Diagnostics, Inc.*, 734 F.3d at 164 (noting that New York Rule of Conduct 1.6 “implicitly accounts for the federal interests at stake”).

behavior like Bibi's in the first place. Thus, from a public policy perspective, the result would be enhanced by a comparative institutional choice discussion analyzing the following question: What are the relative strengths and weaknesses of the New York state court system, the federal courts, and congress, in weighing the importance of protecting client confidences against the importance of encouraging anti-fraud whistleblowing?

2. *Attorney Conduct Rulemaking Process's Need for More Rigorous Institutional Choice Analysis*

a. *Lack of Rigorous Public Policy Analysis and the Rules' Relevance in a Growing and Evolving Legal Industry*

The legal industry has seen substantial change over time. For example, while legal practice in the nineteenth and early twentieth centuries revolved around litigation, the vast majority of lawyers today rarely see the inside of a courtroom.¹⁰³ Additionally, the unified nature of the legal industry has long since given way to diversification and specialization of individual practice areas.¹⁰⁴ Scholars have noted a drastic shift in the economics of legal practice: where lawyers once possessed specialized legal knowledge unique to members of the bar, many sophisticated corporate clients now have their own law departments and in-house counsel providing them with competing sources of legal advice.¹⁰⁵

However, ethics rules governing the practice of law have failed to keep pace with these structural changes in the legal industry.¹⁰⁶ Scholars argue that, as a result, many aspects of the current ethics

103. Eli Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 153 (quoting Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—the Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 5 (1989–1990)); *see also* Terry Carter, *The Endangered Trial Lawyer*, A.B.A. JOURNAL (Mar. 2, 2009, 04:30 AM), http://www.abajournal.com/magazine/article/the_endangered_trial_lawyer (noting a decrease in both the number of trials and seasoned trial attorneys in recent years).

104. *See* Wald, *Resizing the Rules of Professional Conduct*, *supra* note 8, at 244 (noting that “as the practice of law grows increasingly specialized, even lawyers in the same practice area may have uniquely distinguishable practices”). The practice of personal injury law, for example, now bears little in common with the practice of securities law before the SEC. Similarly, the practice of a modern-day solo practitioner has little in common with the practice of a corporate transactional attorney. *See* Wilkins, *supra* note 15, at 817.

105. Peter C. Kostant, *Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 WAKE FOREST L. REV. 49, 93–94 (2001).

106. *See* Wilkins, *supra* note 6, at 479.

rulemaking regime are based on outdated assumptions of the past, rather than characteristics of the modern legal industry.¹⁰⁷ For example, some scholars criticize the “one-size-fits-all” nature of modern ethics rules, which are intended to apply to every facet of legal practice despite vast differences between specific legal disciplines.¹⁰⁸ To combat such anachronisms in the ethics rulemaking process and develop more relevant and effective rules, decision-makers should pay closer attention to the public policy and institutional choice implications of ethics rules throughout the drafting and application process.¹⁰⁹

b. Lack of Public Policy Analysis in the Confusing and Contradictory Nature of Ethics Rules

The lack of public policy analysis in the drafting of modern ethics rules, combined with the continued maintenance of the “one-size-fits-all” ethics regime, has also played a role in the overwhelming complexity of the current rulemaking regime.¹¹⁰ Ethics rules purport to cover a vast range of attorney behaviors and ethical situations. However, state high courts responsible for adopting the rules are rarely clear about the practical effect those rules should have on lower courts or disciplinary committees when ruling on specific instances of attorney conduct.¹¹¹ Some courts have been hesitant to apply sanctions or hold attorneys liable for their conduct even after conclusively determining that they had violated a particular rule of professional conduct.¹¹² Conversely, others have applied a broad range of sanctions for violations of conduct rules.¹¹³ While ethics rule-

107. *Id.* (noting that, while ethics rules have changed over time, the older and more traditional structure of the industry “continue[s] to shape the direction of contemporary developments” in ethics regulation).

108. *See, e.g.*, Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1381 (2007) (noting that with the vast traditional, ethical, and moral differences within the modern legal profession, “agreeing to a single uniform definition of professionalism becomes impossible”); Wald, *Resizing the Rules of Professional Conduct*, *supra* note 8, at 228 (noting that critics have long called for “the promulgation of rules of conduct more in tune with and sensitive to the increasingly diverse realities practicing lawyers face”).

109. Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 153–54 (noting that “the evolution and growth of law practice demands close scrutiny of judicial regulation of lawyers”).

110. Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 167 (labeling attorney ethics rules as a “complex web of uncertainty”).

111. *See Zacharias & Green*, *supra* note 2, at 77 (noting that state courts often take contradictory approaches when applying ethics rules in particular cases)

112. *See id.*

113. *See id.* at 83.

makers may have legitimate reasons for providing such a wide variety of standards for attorney conduct, the practice can tend to lead to confusing and inconsistent results.¹¹⁴

Problems with the ethics rules' effectiveness, consistency, and relevance are further exacerbated by the presence of a growing number of institutional actors who have assumed some role in attorney conduct regulation.¹¹⁵ For example, in 2002 Congress enacted § 307 of the Sarbanes-Oxley Act, which gave the SEC 180 days to promulgate rules "establishing minimum standards of conduct for attorneys representing public companies before the SEC."¹¹⁶ Pursuant to § 307, the SEC promulgated its own rule, § 205.3, which allows attorneys to report the past financial fraud of corporate clients in certain circumstances.¹¹⁷

This complexity creates a daunting barrier to the effective application of institutional choice analysis to the field of attorney conduct regulation. At the same time, the confusing and unpredictable nature of the current regime of attorney conduct rules is a main reason that an institutional analysis of the field is so important. In describing how best to create or apply an attorney conduct rule to achieve a desired result, institutional choice can help designers of the rules create a more coherent regime of conduct regulation, and help regulators themselves apply the rules more consistently and with greater effect.¹¹⁸

C. Institutional Choice Analysis and Attorney Whistleblowing Regulations

1. *Institutional Choice Analysis on Attorney Whistleblower Regulations, and Need for More Rigorous Analysis*

Choices between competing regulatory institutions have prominent roles in both the creation and application of attorney-client confidentiality rules over the last thirty years. While institutional

114. *See id* at 136.

115. *See* Wilkins, *supra* note 15, at 803 (discussing the rise in alternative systems of lawyer regulation and regulatory enforcement).

116. *See* 15 U.S.C. § 7245 (2002); David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 ST. MARY'S L.J. 873, 875 (2003).

117. *See* 17 C.F.R. § 205.3(d)(2)(iii) (2014).

118. *See* Dzienkowski, *supra* note 111, at 85 (noting that "it is desirable for society to regulate lawyers under a code of ethics that guides lawyers to make consistent decisions when confronted with the same ethical issues; thus, consistency is an important objective of ethics rule design").

choice decisions have helped the ABA, SEC, Congress, and federal courts further their chosen social goals, these examples also suggest that the policy analysis behind such decisions has been far from rigorous. Institutional choice decisions like the ones discussed *supra* have been driven as much by political realities, self-interest, and public opinion, as they have by reasoned public policy analysis.¹¹⁹ Given this need for more thorough public-policy analysis by the relevant institutional decision-makers, and the obvious historical importance of institutional choice theory, it is surprising to find that the body of scholarship actually comparing the relative competence of attorney-conduct-rule-drafting institutions is sparse.¹²⁰

Professor David Wilkins published what is considered by many to be the pioneering study of institutional choice in the legal ethics context.¹²¹ In his 1992 *Harvard Law Review* article, Wilkins argued that scandals like the Lincoln Savings and Loan crisis,¹²² in which lawyer malfeasance was implicated, combined with the significant growth and change of the American legal industry, created a need to rethink the efficacy of the current lawyer-controlled system of attorney conduct regulation.¹²³ Wilkins divided the field of attorney conduct regulation into two distinct sub-categories—rule creation and rule enforcement—focusing his attention on a public policy analysis of the “rule enforcement” category.¹²⁴ He then proceeded to provide a framework for what such a public policy review might look like, further dividing rule enforcement into smaller categories and comparing characteristics of the different institutions which could be responsible for regulation of each aspect of attorney conduct.¹²⁵

Professor Benjamin Barton took up the task of conducting a comparative institutional analysis of rule creation, the second of Wilkins’ two sub-categories.¹²⁶ Barton’s study took a top-down

119. See Schneyer, *supra* note 6, at 677.

120. Barton, *supra* note 34, at 1173–74 (“The few commentators who have addressed this question have approached it as a matter of doctrine, i.e., whether the “inherent authority” claimed by state supreme courts is a proper reading of state constitutional law, or have treated the topic glancingly.”).

121. See Schneyer, *supra* note 15, at 34; Wilkins, *supra* note 15.

122. The Lincoln Savings and Loan crisis involved the rapid collapse of a large bank due to widespread financial fraud. See Wilkins, *supra* note 15, at 868 n.302.

123. See *id.* at 802–03.

124. *Id.* at 803–04.

125. *Id.* Because this Note focuses on the other sub-category of attorney conduct regulation—rule creation—the precise details of Wilkins’ framework are not directly relevant to this study.

126. See Barton, *supra* note 34, at 1167. Benjamin Barton is a professor of law at University of Tennessee College of Law. *Benjamin Barton*, U. TENN. KNOXVILLE,

approach to attorney behavior regulation, analyzing the relative strengths and weaknesses of several institutions which could be responsible for such rule creation as a whole.¹²⁷ He compared the institutions along three interrelated goals of attorney conduct regulation: limiting the potential for rent-seeking, maximizing procedural efficiency, and democratization.¹²⁸ In conclusion, Barton found that “although each institution has substantial weaknesses that likely will result in lawyer dominance of the regulatory process, a legislative body—either Congress or state legislatures—would be more likely to produce public-minded regulation and limit lawyer rent-seeking.”¹²⁹

2. *Framework of Comparative Institutional Choice Microanalysis in Future Institutional Analysis*

As the number of parties involved in the dispute and the complexity of their interaction grows, a court’s institutional choice becomes more and more complicated.¹³⁰ More parties means higher transaction costs and less predictable outcomes, which detracts from the ability of courts to craft efficient regulations over the social behavior in question.¹³¹ The increasing breadth and complexity of the regulated behavior also makes scholars’ institutional choice analysis in those areas more complex.¹³²

Comparative institutional choice analysis thus becomes more challenging to apply to specific factual scenarios as the relevant social issues and institutions grow in complexity.¹³³ This difficulty highlights the limitations of Komesar’s and Wilkins’ analyses, which the scholars have acknowledged.¹³⁴ Their broad frameworks were not intended to

<http://law.utk.edu/people/benjamin-barton/> (last visited May 15, 2015). His work on public policy and the legal industry is widely cited by scholars in many related disciplines.

127. Barton, *supra* note 34, at 1171 (“Given the existence of a regulatory problem, this Article assesses lawyer regulation from the top down.”).

128. *See id.* at 1177.

129. *See id.* at 1175.

130. *See* KOMESAR, *supra* note 14, at 22.

131. *Id.*

132. *See id.*; Rubin, *supra* note 11, at 1425 (“[T]he conceptual complexity of drawing upon several disciplines may become unmanageable unless the range of discourse remains limited.”).

133. Shaffer, *supra* note 13, at 608 (“Komesar’s analytic framework necessarily calls for close empirical understanding and microanalysis of institutional processes in particular contexts.”).

134. *See, e.g.*, Neil K. Komesar, *The Perils of Pandora: Further Reflections on Institutional Choice*, 22 LAW & SOC. INQUIRY 999, 1003 (1997) (“[I]t would be

be applied directly to any given policy decision, but rather were provided as overviews of institutional choice concepts to be further developed and applied to particular situations by future public policy analyses.¹³⁵

Some scholars have argued that meeting the challenge of real-world application requires narrowing the scope of a comparative institutional analysis to very limited, fact-specific contexts.¹³⁶ Professor Edward Rubin,¹³⁷ who terms this context-specific application “institutional microanalysis,” suggests that such narrow application is necessary in applying institutional choice analysis to specific regulatory fields such as attorney conduct regulation.¹³⁸ This is in part because attorney conduct regulations have different results when applied to different factual situations; broad analyses purporting to cover such wide-ranging regulations would be far less effective at predicting a particular regulatory outcome.¹³⁹ For these reasons, this Note adopts Professor Rubin’s “microanalysis” framework in applying Komesar’s, Wilkins’, and Barton’s broader institutional analyses to the specific area of attorney-whistleblowing regulations.¹⁴⁰

impossible for me to set out and examine the virtually infinite number of public policy settings and problems that might be amenable to this analysis. I did not intend the book to be an encyclopedia of institutional choice; I was only writing the preface to that encyclopedia and trying to convince others to contribute various volumes and sections.”).

135. *Id.*; see also Schneyer, *supra* note 15, at 34 (“[R]egulatory institutions now vary so much in structure and operation that if policy makers are to assign tasks wisely, they often need more finely grained comparisons than broad categories allow.”).

136. Rubin, *supra* note 11, at 1425 (“[T]he conceptual complexity of drawing upon several disciplines may become unmanageable unless the range of discourse remains limited.”); see also Shaffer, *supra* note 13, at 608.

137. Edward Rubin is a professor of law and political science at Vanderbilt University Law School. *Edward L. Rubin*, VAND. L. SCH., <http://law.vanderbilt.edu/bio/edward-rubin> (last visited May 15, 2015). His work applying economics and social science concepts to legal and institutional analysis is widely cited and discussed by scholars of legal analysis.

138. Rubin, *supra* note 11, at 1425 (noting that context-specificity is important in institutional choice because “law involves aspects of social institutions that operate at the particularized level”)

139. See David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholer*, 66 S. CAL. L. REV. 1145, 1152 (1993) (criticizing the “broadly stated principles” declared by previous iterations of attorney conduct regulations).

140. Wilkins, *supra* note 6, at 492 (concluding that “the study of the legal profession, therefore, must center around the microanalysis of institutions”) (internal quotations and ellipses omitted).

II. CONDUCTING A COMPARATIVE INSTITUTIONAL MICROANALYSIS OF ATTORNEY-WHISTLEBLOWING REGULATIONS: WHAT DATA DO WE NEED?

As discussed *supra* Part I, some preliminary information is required before a thorough comparative institutional analysis can be conducted. First, because institutional microanalysis is so context-specific, the relevant factual scenario must be understood in significant detail.¹⁴¹ The social goals and interests at stake in that context must then be analyzed.¹⁴² Based on that understanding, the range of institutions which play some role in regulating those social goals and interests must be determined.¹⁴³ And finally, the institutional characteristics most relevant to achieving those goals must be set out and understood.¹⁴⁴ This Part lays out this required background information for a comparative institutional analysis of the hypothetical legislature-judiciary debate presented by the Introduction to this Note.

A. The Regulatory Context to Which this Note's Microanalysis Will Be Applied

The hypothetical situation presented in the Introduction to this Note establishes a situation in which a state's legislature seeks to enact a regulation determining the circumstances under which an attorney must disclose otherwise confidential client information in order to prevent or remedy a client's fraud.¹⁴⁵ The state judiciary, on the other hand, has already enacted a similar rule that does not "require" reporting of such confidences, but only "permits" it under certain circumstances.¹⁴⁶

The context of this Note's "microanalysis" is relatively narrow in that it deals only with the specific sub-field of attorney conduct regulation relating to confidentiality and whistleblowing regulations.¹⁴⁷ However, it is very broad in that the analysis assumes

141. *See supra* notes 137–40 and accompanying text.

142. *See supra* notes 38–44 and accompanying text.

143. *See supra* notes 45–55 and accompanying text.

144. *See supra* note 25 and accompanying text.

145. *See supra* note 1 and accompanying text.

146. While such conflict would inevitably raise additional practical and constitutional difficulties, this hypothetical assumes those issues away for the sake of focusing on the public policy concerns at stake.

147. There are many levels of specificity at which this "microanalysis" could be conducted. For example, one could chose to analyze a) institutions' capacity to regulate attorney conduct in general; b) institutions' capacity to regulate attorney

that state institutions share common characteristics across all jurisdictions, and is thus meant to apply generally across all U.S. jurisdictions. Thus, where the practice of law and the makeup of governing institutions are shared by individual states, the lessons of this analysis can be generalized across those jurisdictions.¹⁴⁸

B. The Social Goals Implicated by Attorney-Whistleblowing Regulation

1. *A Lawyer's Ethical Duty of Confidentiality*

Current regulations governing attorney-whistleblowing revolve primarily around the doctrine of attorneys' ethical duty to maintain client confidences.¹⁴⁹ The centrality of this ethical duty within the practice of law is discussed in Comment 2 of the American Bar Association's Model Rule of Professional Conduct 1.6, which calls a lawyer's duty to protect client confidentiality "a fundamental principle in the client-lawyer relationship."¹⁵⁰ The ABA broadly defines the scope of confidential information as "all information relating to the representation, whatever its source."¹⁵¹

conduct relating specifically to types of behavior like whistleblowing; or c) institutions' capacity to regulate an attorney's ability to blow the whistle on a past client where that client was also his employer (e.g., the lawyer was in-house counsel). This Note's analysis applies a "middle-level" of specificity to avoid challenges that would arise from either over-specificity or over-generalization: if the analysis is too general, its results could not practically be applied to any particular context; if the analysis is too narrow, then its results would vary drastically case-by-case, leading to conflicting and inefficient results. *See, e.g.*, David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515–17 (1990).

148. Significantly, in the context of creating attorney-whistleblower regulations, several states' institutions do differ materially from others—they may thus merit their own independent analyses. These states, including New York and Delaware, are dealt with in more detail in Part III.

149. *See, e.g.*, 17 C.F.R. § 205.3(d)(2)(iii) (2014); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2014); NEW YORK RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2014).

150. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 2 (2003); *see also* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998) (arguing that "confidentiality is the bedrock principle of legal ethics").

151. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 3 (2003). While the lawyer's duty of confidentiality is often conflated with the related doctrine of attorney-client privilege, this definition makes it clear that the doctrine of confidentiality is far broader in scope than attorney-client privilege. For example, the ethical duty of confidentiality covers "information gained during the course of representation, while the privilege protects only specific "communications between a lawyer and client." *See* STEPHEN GILLERS, *REGULATION OF LAWYERS* 28–29 (6th ed. 2002). Thus, "much information that is ethically protected [by the confidentiality doctrine] will not be privileged because the source of the information was not the client or its agents." *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 3 (2003).

Proponents of strict confidentiality rules argue that such protections are vital to the proper functioning of American legal practice.¹⁵² This is, they assert, in part because advice from lawyers is essential in ensuring that individuals are able to act in accordance with the complex laws and regulations that they might not otherwise appreciate or understand.¹⁵³ Many lawyers argue that this advice is only accurate and effective if clients are able to share the potentially damaging details of their legal situations in confidence.¹⁵⁴ In such situations (argues the ABA), “lawyers know that almost all clients follow the advice given, and the law is upheld.”¹⁵⁵

The most influential formulation of the rule governing an attorney’s ethical duty of confidentiality is the ABA’s Model Rule of Professional Conduct 1.6.¹⁵⁶ Model Rule 1.6 generally requires lawyers to maintain the confidentiality of client information learned during the course of the lawyer’s representation.¹⁵⁷ The full extent of confidentiality protections provided by this rule is made clear by the scope of its exceptions. Model Rule 1.6(b), for example, provides seven such exceptions that potentially limit an attorney’s confidentiality obligations and allow him to disclose the confidential information of a client or former client.¹⁵⁸ Most relevant to this Note are 1.6(b)(2) and 1.6(b)(3), which were added to Model Rule 1.6 in 2003 in the wake of the Enron and Worldcom scandals.¹⁵⁹

Rule 1.6(b)(2) and 1.6(b)(3) deal with a lawyer’s ability to disclose client confidences to prevent a client’s future financial crime, or rectify one that has already taken place. The relevant portions of these provisions read as follows:

152. MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. 3 (2003).

153. See Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, 2013 J. PROF. LAW. 135, 151 (2013) (“Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct.”) (quoting the Comment to Model Rule 1.6 of the 1983 Model Rules of Professional Conduct).

154. MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. 2 (2003).

155. *Id.*

156. See Wilkins, *supra* note 15, at 810; see generally MODEL RULES OF PROF’L CONDUCT R. 1.6 (2014). Even though the Model Rules do not have the force of law in any jurisdiction, many states have enacted the language of Model Rule 1.6 into law as is; others adopted it with minor changes. Wilkins, *supra* note 15, at 810.

157. Temkin & Moskovits, *supra* note 75, at 16 (“The ABA Model Rules require lawyers to maintain the confidentiality of information learned by the lawyer in the course of the representation.”).

158. MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2014).

159. See Temkin & Moskovits, *supra* note 75, at 16; see also *supra* Part I.B.1.b.

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

....

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . .¹⁶⁰

The permissive language of Rule 1.6 (“a lawyer *may* reveal . . .”) provides an attorney with discretion to make her own determination whether to report client confidences and provides the circumstances under which she may do so.¹⁶¹ The rule limits permissible disclosures to those “the lawyer reasonably believes necessary” under the circumstances, which ostensibly provides some guidance as to how much information an attorney may disclose.¹⁶²

Many jurisdictions base the language of their confidentiality rules on the ABA rule's formulation.¹⁶³ For example, New York Rule of Professional Conduct 1.6 is the primary rule regulating an attorney's duty of confidentiality while practicing law in the state of New York.¹⁶⁴ NY RPC 1.6 maintains the permissive language of the Model Rule, but allows for a reporting of client confidences under broader, and less-well-defined circumstances.¹⁶⁵

The relevant portion of the law reads as follows:

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

....

(2) to prevent the client from committing a crime.¹⁶⁶

NY RPC 1.6 is thus both broader and narrower than the ABA Model Rule.¹⁶⁷ Primarily, the New York rule provides for the

160. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2014).

161. See *id.* (emphasis added).

162. *Id.*

163. See Zacharias & Green, *supra* note 2, at 94 (discussing the process by which states formulate their rules of professional conduct).

164. Unlike the ABA Model Rule, which courts look to only as persuasive authority, NY RPC 1.6 has been enacted as law and is thus authoritative in the state.

165. Temkin & Moskovits, *supra* note 75, at 16.

166. N.Y. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2014).

reporting of otherwise confidential information to “prevent the client from committing a crime,” with no requirement that the lawyer’s assistance be used in furtherance, like in the equivalent ABA rule.¹⁶⁸ However, NY RPC 1.6 only allows for disclosure of confidences to prevent a *future* crime, and provides no exception to allow for the mitigation or rectification of *past* crimes.¹⁶⁹

In contrast to the broad discretion provided to attorneys in deciding whether to report client confidences under NY RPC 1.6(b), New Jersey’s relevant confidentiality rule affirmatively *requires* attorneys to report client confidences in certain situations. The relevant provision reads:

(b) A lawyer shall reveal such [confidential] information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another¹⁷⁰

Like the New York rule, New Jersey’s Rule of Professional Conduct 1.6 provides an exception to its confidentiality rule only to prevent future crimes, not to mitigate or rectify past crimes.¹⁷¹ However, its mandatory language also removes all discretion from the attorney in deciding whether or not to make use of this exception in reporting confidences in the face of client fraud.¹⁷²

Another important rule defining an attorney’s ethical duty of confidentiality is ABA Rule of Professional Responsibility 1.13, succinctly titled “Organization as Client.”¹⁷³ Model Rule 1.13 addresses what measures an attorney may take when they discover potentially harmful misconduct occurring within a client organization.¹⁷⁴ It states that, when a lawyer discovers such misconduct in the client organization, the lawyer should first report

167. See Temkin & Moskovits, *supra* note 75, at 16.

168. N.Y. RULES OF PROF’L CONDUCT R. 1.6 (2014).

169. See *id.*

170. N.J. RULES OF PROF’L CONDUCT R. 1.6(b) (2014).

171. See *id.*

172. *Id.*; Temkin & Moskovits, *supra* note 75, at 17.

173. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2014).

174. See Nicole Kroetsch & Samantha Petrich, *Task Force on Corporate Responsibility: Should the American Bar Association Adopt New Ethics Rules?*, 16 GEO. J. LEGAL ETHICS 727, 733 (2003).

such wrongdoing up to the client's top management.¹⁷⁵ If, however, top management fails to act in a timely or appropriate manner to address the issue, and the lawyer reasonably believes that the wrongdoing will result in injury to the client organization, then "the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."¹⁷⁶

Rule 1.13 thus provides an additional, if limited, exception to the Model Rules' confidentiality requirements.¹⁷⁷ It permits an attorney to disclose confidential information by "reporting out," to regulators or courts, but only after meeting Rule 1.13's "reporting up" requirements by bringing his concerns to the client's top management.¹⁷⁸ As can be seen from such examples of confidentiality regulations, states and bar associations have numerous rules governing the attorney's ethical duty of confidentiality. However, the breadth of such rules is limited by the rules' exceptions allowing lawyers to blow the whistle on their clients using that very same confidential information.

2. *Protection of Investors and the Public's Economic Well-Being*

In order to conduct a fully informed institutional choice analysis of attorney-whistleblower regulations, one should also understand society's interest in allowing for greater transparency and disclosure of client confidences that may be harmful to society as a whole. To that effect, attorney whistleblowing regulations also implicate a significant public interest in preventing financial frauds perpetrated against public companies and government institutions.¹⁷⁹ Many whistleblowing provisions cite this public policy justification in encouraging individuals to blow the whistle on clients, employers, customers, or others who commit financial wrongdoing.¹⁸⁰ However,

175. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2014).

176. *Id.*

177. Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 387 (2013).

178. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 1.13 (2014).

179. See S. REP. NO. 99-345, at 6 (2005) (noting that whistleblower laws are necessary for fraud prevention).

180. As one commentator states, "a whistleblower is defined as someone who, believing that the public interest overrides the interest of the organization he serves, publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent, or harmful activity." Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector*

because fraud comes in many forms and has different effects when perpetrated in different economic contexts, the strength of, and need for, anti-fraud whistleblowing regulations varies from context to context.¹⁸¹ Two of the most significant areas of anti-fraud whistleblowing legislation in recent years relate to fraud against government spending programs,¹⁸² and fraud against the investing public.¹⁸³

The qui tam provision of the FCA is the primary whistleblowing provision related to the prevention of fraud against the federal government.¹⁸⁴ The FCA provides a private right of action for individuals, known as relators, to file suit on behalf of the government against anyone who brings a false claim for payment to the federal government.¹⁸⁵ The FCA further provides up to thirty percent of the potential judgment to the relator as a reward for whistleblowing against the fraudsters and prosecuting their fraud.¹⁸⁶ To justify these rewards, Congress cited the growth of “sophisticated and widespread fraud” against the federal government, stating that “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.”¹⁸⁷ As one commentator notes,

Qui tam’s champions point to its rapid growth and spectacular results—some seven thousand cases since 1986 with judgments now

Employees Who Disclose the Wrongdoing of Employers?, 38 S.D. L. REV. 316, 316 (1993) (quoting WHISTLEBLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (Ralph Nader et al. eds., 1972)) (internal quotation marks omitted).

181. Senate reports supporting the passage of these provisions provide some insight into specific policy justifications. *See, e.g.*, S. REP. NO. 111-176, at 110 (2010) (discussing the policy need for a strong securities fraud whistleblower program); S. REP. NO. 99-345, at 2 (discussing the need for stronger whistleblower incentives under the False Claims Act).

182. *See* S. REP. NO. 99-345, at 6 (discussing the magnitude of recent frauds against the federal government, and the importance of the False Claims Act in combating this fraud).

183. *See generally* S. REP. NO. 111-176 (discussing recent securities fraud such as the Madoff scandal, and the need for strong whistleblower protections to combat such frauds).

184. James E. Utterback, *Substituting an Iron Fist for the Invisible Hand: The False Claims Act and Nursing Home Quality of Care—A Legal and Economic Perspective*, 10 QUINNIPIAC HEALTH L.J. 113, 131 (2007) (characterizing the False Claims Act as one of the most important tools for fighting healthcare fraud).

185. 31 U.S.C. § 3730(b)(1) (2012); Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 952 (2007).

186. *See* 31 U.S.C. § 3730(d)(2).

187. S. REP. NO. 99-345, at 2.

approaching three billion dollars annually, easily rivaling and even eclipsing securities and antitrust litigation—as evidence of massive corporate fraud committed against the United States and, in turn, the need for a robust private enforcement role.¹⁸⁸

Thus, the success of the FCA’s whistleblower regime in uncovering fraud against the government presents at least some argument in favor of strong anti-fraud whistleblower incentives and protections in this context.

The primary whistleblower provision regarding fraud against the investing public was established by the 2010 Dodd-Frank Act (Dodd-Frank).¹⁸⁹ Dodd-Frank created Section 21F of the Securities and Exchange Act of 1934, which created a whistleblower bounty program under which individuals are encouraged to bring information about securities fraud to the Securities and Exchange Commission.¹⁹⁰ Under section 21F, if this information leads to a successful SEC enforcement action in which more than \$1 million is recovered, the whistleblower is entitled to ten to thirty percent of that recovery as reward.¹⁹¹

Dodd-Frank’s whistleblower program was created in direct response to the financial crisis of 2008–2009 that nearly crippled the U.S. economy.¹⁹² It was intended by Congress to “motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws,” where federal agencies may have failed during the crisis.¹⁹³ In support, Congress noted that “whistleblower tips were 13 times more effective than external audits.”¹⁹⁴ Thus, whistleblowing by private parties was seen as an important tool in society’s fight against growing securities and financial fraud.¹⁹⁵

188. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1246–47 (2012) (internal citations omitted).

189. See 17 C.F.R. § 240.21F (2014); Temkin & Moskovits, *supra* note 75, at 10–11.

190. 17 C.F.R. § 240.21F.

191. *Id.*

192. S. REP. NO. 111-176, at 110 (2010).

193. *Id.*

194. *Id.*

195. It is important to note that SEC Rule 205.3, as discussed above, theoretically works in conjunction with Section 21F to allow lawyers to participate in the Dodd-Frank whistleblower program by loosening confidentiality protections, which might have otherwise precluded their participation as whistleblowers in certain circumstances.

3. *The Relationship Between Society's Interest in Confidentiality Protections and Its Interest in Investor Protections*

Some commentators suggest that maintaining robust protections over the attorney's ethical duty of confidentiality, and minimizing attorney-whistleblowing opportunity, is the best policy to prevent corporate financial fraud.¹⁹⁶ These commentators argue that "for a lawyer to develop the level of trust necessary to provide effective advice, the client must first trust that his "innermost secrets are protected by the lawyer's pledge of silence."¹⁹⁷ The trust that comes from strict attorney confidentiality requirements will encourage more admissions of fraudulent behavior on the part of large corporate clients, where clients would otherwise have hidden wrongdoing even from their own outside representatives.¹⁹⁸ These open and honest attorney-client communications, protected by strict confidentiality rules, will then allow lawyers to more effectively advise corporate clients against further abuse, shaping corporations into law-abiding entities.¹⁹⁹ Any anti-fraud legislation creating greater opportunity for attorneys to blow the whistle on their clients, therefore, would backfire and make fraud even harder to detect and prevent.²⁰⁰ This perspective suggests that confidentiality is a valuable tool for public investor protection and a necessary part of a government's anti-fraud regulations.²⁰¹

However, other scholars and many members of the public do not believe that corporate lawyers play the role of the client's conscience in discouraging fraud to the same extent believed by many attorneys themselves.²⁰² Many believed that attorneys were actually

196. See, e.g., Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281 (2003) ("Independence from the client, however, is generally not a legitimate aspiration for the bar because individuals and organizations need lawyers to owe them a duty of loyalty in whom they can confide with confidence."); Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243, 1246 (2003).

197. Fox, *supra* note 196, at 1246.

198. See *id.*

199. See, e.g., Barnes, *supra* note 73 (discussing the perspective that "when clients fear their secrets are unsafe, they may not seek or obtain the legal advice that heads off behavior that harms the public").

200. Fox, *supra* note 196, at 1247.

201. Spaulding, *supra* note 153, at 162 (noting that confidentiality protections "may give the lawyer unique leverage to counsel compliance" with the law).

202. Koniak, *supra* note 81, at 1237 (noting that lawyers for Enron were responsible for "structuring bogus deals, vouching for nonexistent sales, [and] writing whitewash reports to keep the sheriff fooled and away"); see also *Enron and the*

participating in some clients' financial frauds, rather than seeking to prevent the frauds, particularly after the Enron scandal in the early twenty-first century.²⁰³ In light of the possibility of lawyer complicity in corporate fraud, some commentators placed value on the power of public knowledge to discourage fraud over the power of corporate lawyers to prevent it. This is especially true where lawyers may find themselves too close to the perpetrators of the frauds to remain objective.²⁰⁴ As one commentator has summarized:

“The critical issue now being debated is whether, as a matter of public policy, the need to protect the investing public by imposing a duty on attorneys to reveal evidence of corporate misfeasance and fraud should outweigh the traditional protections afforded to the attorney-client relationship.”²⁰⁵

This perspective takes a more skeptical approach to the attorney-client relationship, suggesting that an attorney's strict ethical duty of confidentiality is fundamentally at odds with the protection of the investing public rather than a necessary tool for its protection.

The relationship between the social goals of confidentiality protection and public investor protection is convoluted at best. Untangling the two requires a deep understanding of the lawyer-client relationship, the functioning and daily operation of corporate entities, the impact of ongoing financial fraud on the economy, and the effect of whistleblowing on such fraud as a whole. The difficulty experienced by individuals in striking the proper balance between the two interests (i.e., in making the proper “goal choice” decision) underscores the important role of institutions in the rule making process. Individuals are only capable of mastering so much information in complex social processes and relationships, such as

Lawyers, N.Y. TIMES, Jan. 28, 2002, at A14. For a response from the legal profession, see Fox, *supra* note 196, at 1243.

203. *Enron and the Lawyers*, *supra* note 202.

204. For a discussion of the close lawyer-client friendship that often develops during the course of representation, see GEOFFREY C. HAZARD ET AL., *THE LAW OF ETHICS AND LAWYERING* 20–21 (3d ed. 1999).

205. Beck, *supra* note 116, at 898. The ABA Task Force on Corporate Responsibility appeared to accept this formulation of the issue in its 2003 report. That report stated in part:

The Task Force believed that where the client abuses the client-lawyer relationship by using the lawyer's services to commit a crime or fraud that results in substantial economic harm to another, the policy of protecting confidentiality is outweighed by the policy of protecting the interests of society and the professional integrity of the lawyer.

AM. BAR ASS'N, *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA RULES OF PROFESSIONAL CONDUCT, 1982–2013*, at 139 (Art Garwin ed., 2013).

those at issue discussed in this Part. As such, larger and more complex decision-making entities (i.e., public institutions) are needed to deal with such issues.²⁰⁶ According to ICT, the role of the individual in this decision-making process is not the untangling and mastering of these inter-related social interests, but the selection of the institution that is most qualified for that role.²⁰⁷ Thus, the purpose of this Note's discussion of the two social interests underlying whistleblowing regulation is to help inform individuals' decision regarding which institution is "best" to regulate those social interests.

C. The Potential Regulating Institutions for Attorney Whistleblowing Regulations

1. *The State Judiciary*

Because state judicial branches dominate the current system of attorney behavior regulation, no institutional analysis would be complete without a comparison of the state judiciary to other potential regulatory institutions.²⁰⁸ While the structures of state judiciaries' attorney regulation systems vary from state to state, many of their most salient institutional characteristics are shared in common. Most basic of these characteristics is the fact that most states' high court holds the primary responsibility for the enactment of rules of professional responsibility.²⁰⁹ Therefore, this Note treats the "state judiciary" label as synonymous with the typical state high court. Notably, all high court judges are lawyers, and most supreme court justices must face election to gain or keep their jobs.²¹⁰

2. *State Legislature*

State legislatures are becoming increasingly involved in many areas of lawyer regulation.²¹¹ While state legislatures have not yet sought to enact rules explicitly regulating attorney whistleblowing, legislatures' practical and historical connection to the issues underlying attorney

206. See *supra* notes 137–141 and accompanying text.

207. See *supra* notes 30–34 and accompanying text.

208. See Barton, *supra* note 34, at 1185 (starting an institutional analysis with the state courts as the primary regulatory institution in this area).

209. Zacharias & Green, *supra* note 2, at 94 (noting that conduct rules must first be adopted by state courts before becoming effective).

210. Barton, *supra* note 34, at 1185–86.

211. See *id.* at 1171 n.15.

regulation make them a logical choice for comparison.²¹² For example, scholars have noted that the current system of attorney regulation was not always dominated by state judiciaries as it is now; state legislatures originally played a much larger role.²¹³ Scholars have argued that the shift to the current, judiciary-centric model of attorney regulation occurred as a result of “history and tradition” rather than purely reasoned public policy.²¹⁴ Because the decision to entrust attorney behavior regulation to state judiciaries was not made as a conscious policy decision, *ex post facto* institutional choice analysis is a necessary part of any argument either for, or against, the judiciary-controlled status quo.²¹⁵

III. A COMPARATIVE INSTITUTIONAL MICROANALYSIS OF STATE COURTS AND LEGISLATURES REGARDING THEIR RELATIVE COMPETENCE TO DRAFT ATTORNEY-WHISTLEBLOWING REGULATIONS

Part III of this Note presents a side-by-side comparison of three types of institutional characteristics that affect state high courts and legislatures’ ability to create attorney-whistleblowing regulations. The purpose of this analysis is to determine which institution is the “best” for this specific regulatory role. First, this Part will compare the two institutions’ expertise. Next, this Part will discuss their impartiality and independence, and finally it will discuss their institutional “accountability” and the public access they provide to their decision-making process.

The determination of which institution is the “best” for a given regulatory role is heavily influenced by the choice of characteristics along which the institutions are compared.²¹⁶ An institutional comparison that values constitutional authority may arrive at a different result than a comparison which values accountability or transparency.²¹⁷ For the results to be significant, therefore, the compared institutional characteristics should be ones relevant to the

212. See, e.g., 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) (noting that “the prevalence of legislative regulation of lawyers remained the accepted arrangement throughout much of the nineteenth century”).

213. See, e.g., *id.* at 211–12.

214. See Kaufman, *supra* note 5; Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 175 (noting that there was not much public interest in the rules of professional conduct during the early years of its development).

215. See Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 175.

216. See Barton, *supra* note 34, at 1177.

217. See *id.*

specific regulatory task in question. In the case of attorney-whistleblowing regulation, the regulatory task involves the balancing of potentially conflicting needs for lawyer-client trust and investor protection. This Note's analysis will compare state legislatures to state judiciaries along three groups of characteristics which impact institutions ability to balance these interests: (1) substantive and procedural expertise, (2) impartiality, and (3) accountability and public access.²¹⁸

Regarding substantive expertise, this Note compares the two institutions' knowledge and experience in the relevant fields of lawyer-client confidentiality and investor protection.²¹⁹ This expertise (or lack thereof) has a significant impact on the institutions' ability to regulate attorney whistle-blowing for two reasons. One reason is effectiveness: if an institution is unfamiliar with the subject matter, it will not be able to monitor that area effectively or achieve desired regulatory results.²²⁰ Another reason is efficiency: "[t]he more familiar policymakers are with the regulated industry, the less time they spend investigating and fact-finding, thus increasing efficiency."²²¹

The procedural expertise category will compare the institutions' relative abilities to promulgate rules in general. It is important to note that the procedural expertise category compares the legislative ability of legislators to the legislative ability of judges. A focus on the legislative ability of courts is relatively unusual in institutional choice analysis, which typically focuses on courts' judicial capabilities.²²² The distinction between a court's legislative and adjudicative functions is significant because many of the characteristics typically ascribed to courts—such as impartiality, independence, and reliance on

218. While these are specific group categories compared in institutional analyses of attorney behavior regulation, the broad outlines of chosen characteristics have more in common than not. *See id.* at 1177–78 (focusing on the institutional characteristics of rent-seeking (or self-interest), procedural efficiency, and democratization); Mehta, *supra* note 3, at 66 (focusing on authority, competence, expertise, and impartiality); *see also* ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 4 (2007) (listing impartiality, accountability, transparency, and deliberation as four of the core values which democratic institutions should serve).

219. In describing particular institutional qualities, this Note relies heavily on previous institutional choice studies and the observations of leading scholars in the field.

220. Mehta, *supra* note 3, at 83–84 (noting that the “‘best’ set of professional responsibility rules will be promulgated when the drafters of the rule have some expertise in drafting these rules and knowing which rules will most likely produce the ‘best’ outcome”).

221. Barton, *supra* note 34, at 1184.

222. *See id.* at 1174.

precedent—relate to courts’ adjudicative role and legislative role in very different (and sometimes contradictory) ways.²²³ Under the “impartiality” characteristic, this Note compares the potentially detrimental effects of regulatory capture and institutional interdependence on the two institutions. And finally, “accountability and access to the public” compares the two institutions’ relative accountability to the public, the transparency of their decision-making processes, and the access they provide into their decision-making process.

For its discussion of the specific qualities possessed by state judiciaries and legislatures, this Note draws on the observations of previous institutional choice analyses which compare their capacity to regulate attorney behavior in general.²²⁴ In particular, this Note builds on the observations of Professor Benjamin Barton’s 2003 study, which concluded that institutional comparison of courts, legislatures, and the market favored legislative control of the legal industry as a whole.²²⁵ Taking into account the current challenges in applying unifying observations across a diversifying legal industry, this Note analyzes and further develops these observations as they relate specifically to the regulation of attorney-whistleblowing, rather than attorney behavior in general.

A. Institutional Expertise

It is generally accepted that “the ‘best’ set of professional responsibility rules will be promulgated when the drafters of the rule have some expertise in drafting these rules and knowing which rules will most likely produce the best outcome.”²²⁶ Thus, while lack of institutional expertise can be offset by strength in other areas, expertise in the subject being regulated remains a substantial factor in an institution’s capacity for successful regulation. The related “procedural expertise” category analyzes the institution’s relative technical competence in the rulemaking process itself. It is important to keep in mind that this category compares the legislative capacity of legislatures to the legislative capacity of courts.

223. *See id.*

224. *See generally id.*

225. *Id.* at 1241–42.

226. Mehta, *supra* note 3, at 83–84 (noting that “academics and thought-leaders consider ‘institutional expertise’ an important factor, if not, the most important factor, in considering the appropriate actor to spearhead a government action”).

1. *State Judiciary*

a. *Substantive Expertise*

State supreme court judges have been described as “generalists” whose expertise is in the “methodology of the common law.”²²⁷ This general expertise deals with the technical development of the structure of law rather than any particular substantive field.²²⁸ That being said, judges on state supreme courts are all former lawyers, and often have gained substantial experience in the practice of law prior to joining the bench.²²⁹ In part because of this fact, “[t]here has been a long-standing assumption that the courts have particular expertise in knowing what the proper scope of attorney conduct rules should entail.”²³⁰ Some scholars suggest that this expertise includes a general understanding of the legal market, and the effects that a courts’ regulations would have on that market.²³¹

The assumption of judicial expertise over attorney behavior is particularly strong regarding litigation and trial conduct.²³² This is logical, as the focus of a judge’s career is overseeing of the litigation process itself.²³³ Since the early twentieth century, however, the central role of litigation-based practice has been steadily shrinking in relation to other practice areas.²³⁴ The industry has diversified to where a significant percentage of lawyers rarely see the inside of a courtroom.²³⁵ Thus, there are growing areas of the law in which many experienced state high court justices have little practical exposure.²³⁶

227. Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 592 (1986).

228. *See id.*

229. Barton, *supra* note 34, at 1196–97.

230. Mehta, *supra* note 3, at 87. While Mehta’s study focuses on federal rather than state judicial expertise, justices of state high courts are viewed in this context with similarly high regard. *See* Barton, *supra* note 34, at 1210. State trial courts, not dealt with in this Note, may be another story entirely.

231. *See* Barton, *supra* note 34, at 1210.

232. *See id.* at 1210 n.161 (“Most justices come to the bench from a litigation background. Their knowledge of the practices of other areas of specialty, such as tax or transactional law, might be limited.”).

233. *See id.*

234. Charles Wolfram, *supra* note 103, at 5.

235. *Id.* (“The average lawyer no longer spends very much time in court. In fact, the great majority of lawyers would starve if they had to make their living out of court appearances.”).

236. *See, e.g.*, Barton, *supra* note 34, at 1247–50; Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993) (asserting that additional ethical codes are necessary for nonlitigators).

Further minimizing judicial expertise in this context is the lawyer-centric worldview that often results from judges' natural connection to the legal community.²³⁷ This limited judicial worldview makes it more likely that judges' generalized institutional expertise covers confidentiality aspects of attorney-whistleblower regulations in the broadest sense, but may not cover the economic concerns implicated by such rules.²³⁸ While some judges may have such broad-based expertise based on personal experience, this is likely not the case in general; the election process by which most judges on state supreme courts obtain and keep their jobs does not select based on expertise in these areas.²³⁹ Rather, politics and other non-merit-based considerations often come into play.²⁴⁰ Because of this, state judiciaries as a whole are not likely to possess substantive expertise regarding both attorney confidentiality *and* public investor protection—the two topics most relevant to attorney-whistleblowing regulations.²⁴¹

b. Procedural Expertise

Maintenance of a state high court's rulemaking expertise is motivated in part by a desire to meet the needs of the courts on which those judges serve: when the lawyers practicing before them meet

237. Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) (noting that judges' prior experience in the legal system "is likely to align their preferences with the preferences [and interests] of the legal community as a whole. Consequently, judges are likely to view procedural rules that maximize the demand for lawyers' services as socially desirable . . .").

238. Wald, *Should Judges Regulate Lawyers?*, *supra* note 5, at 158 (arguing that the further removed a specialty is from court, the less expertise judges will have in that field). While the argument for lack of judicial expertise in particular areas of law is a broad generalization across state court systems, there may be exceptions to the rule. *See, e.g.*, *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 163 (2d Cir. 2013) (noting that New York's rule of professional conduct governing attorney whistleblowing, N.Y. Rule 1.6(b), is consistent with both economic and legal-industry interests); R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 854 (2003) (noting the expertise of Delaware courts in corporate law matters).

239. *See* Barton, *supra* note 34, at 1185–86.

240. *See id.* (arguing that because most state judges face election, state courts "typically are much less independent from voter sentiment than federal courts").

241. *See* Macey, *supra* note 237, at 643 (noting that judges have substantive expertise in procedural norms, but little substantive expertise in finance and economics).

higher standards of conduct, the judges' own jobs become easier.²⁴² However, state high court judges' primary role is adjudicating, not legislating. Because of this, judges spend far less of their time and energy on developing the rules of professional conduct than they do on adjudicating the common law cases before them.²⁴³

The judicial system's natural focus on adjudication has a negative effect on its procedural rulemaking expertise for several reasons. First, fewer resources devoted to rulemaking means less opportunity to develop institutional capacity to make rules, and creates a greater motivation to delegate the task of rule-drafting to others.²⁴⁴ Because this lack of procedural capacity has led courts to delegate their rulemaking role to the bar to such an extent that state high courts now play only a nominal role in the rule drafting process, much of the substantive expertise that the judges may have otherwise brought to bear on the subject of ethical duties of confidentiality has been nullified.²⁴⁵

Further, to the extent that high courts do develop their own drafts of conduct regulations, an analysis of their regulatory procedure is hampered by the opacity of the judicial regulatory process. In general, judges' internal deliberation processes are not well publicized, and are not well understood by the public.²⁴⁶ This not only inhibits a full analysis of state courts' procedural expertise, but also detracts from the democratic nature of its rulemaking process.²⁴⁷

242. See Barton, *supra* note 34, at 1210 (“[T]he regulation of lawyers is at least partially motivated by a desire to meet the needs of the courts, and supreme courts are in an excellent position to determine those needs.”).

243. See *id.* at 1207 (arguing that judges would be expected to delegate away as much of their rulemaking role as possible in order to “preserve leisure and to maximize the time and energy they have to spend on their primary job, deciding cases”).

244. See *id.*

245. *Id.*; see also Zacharias & Green, *supra* note 2, at 94 (noting that state high courts' failure to take a more active role in attorney conduct regulation has led practitioners to treat the rules as “non-authoritative”).

246. Zacharias & Green, *supra* note 2, at 104 (noting the public's difficulty in determining how judges make their decisions).

247. For a discussion of the accountability of state courts' rulemaking procedure, see *supra* Part II.C.

2. State Legislatures

a. State Legislatures' Substantive Expertise

State legislatures have a substantial disadvantage in institutional expertise.²⁴⁸ For one thing, a substantial proportion of state legislators are non-lawyers.²⁴⁹ Term limits and resource constraints also generally preclude any individual state legislature from developing expertise in specialized areas like attorney regulation over long periods of time.²⁵⁰ On the other hand, as Professor Barton notes, “regulating lawyers is not rocket science. State legislatures certainly can handle debates over the unauthorized practice of law or the scope of lawyer confidentiality without complicated or technical explanations.”²⁵¹ Thus, while the average state legislator likely does not have substantial expertise in lawyer confidentiality, legislators should be able to handle debates covering the topic without significant trouble.

b. State Legislatures' Procedural Expertise

Regarding the importance of procedural expertise, “it seems natural to prefer the institution that has been designed for, and is practiced in, regulating rather than adjudicating.”²⁵² Thus, where the state supreme courts' lack of procedural expertise inhibits their capacity to apply their substantive expertise in attorney conduct regulation,²⁵³ this situation is reversed regarding state legislatures. Legislatures' strong procedural tool-kit and expertise in rulemaking more than make up for their lack of substantive expertise in any particular area of law. As one scholar notes, “[t]he legislative process provides many opportunities for gathering relevant information and deliberating about it.”²⁵⁴ For example, legislatures can hold formal committee meetings and floor debates, as well as informal discussions with constituents, lobbyists, officers of the

248. Barton, *supra* note 34 at 1227.

249. *Id.* at 1224.

250. Kenneth B. Davis, Jr., *Epilogue: The Role of the Hostile Takeover and the Role of the States*, 1988 WIS. L. REV. 491, 509 n.70 (1988).

251. Barton, *supra* note 34, at 1228.

252. *Id.* at 1224.

253. *See supra* Part II.A.1.b.

254. Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 435 (1998).

executive branch, and subdivisions of state governments.²⁵⁵ They can also conduct studies, and hear testimony from experts in a given field.²⁵⁶ Use of these tools over a period of weeks or months helps to ensure better drafting of legislation and “builds institutional knowledge throughout the legislature and the expertise of at least a few legislators and staff members.”²⁵⁷ As a result, “the legislative process reduces the dangers of manipulation, misunderstanding, or misguided and unworkable policies. If a consensus cannot emerge, at least a compromise might. And if nothing productive results in the short run, the legislative door remains open in the future.”²⁵⁸

Consequently, where legislatures may lack substantive knowledge of their own regarding a particular subject, the deliberate consideration of information “carefully gathered” from outside sources may provide legislators with the background necessary to pass an informed bill on the subject.²⁵⁹ Thus, where a lack of substantive knowledge leads state high courts to delegate the regulation-drafting task into the hands of lawyers themselves, legislatures are able to obtain the necessary substantive knowledge without delegating the rulemaking task to the legal industry.

B. Impartiality

The next characteristic to be compared, impartiality, analyzes the impact of regulatory capture on each institution. “Agency capture” refers to the tendency of a regulating institution to submit to the lobbying influence of the regulated industry.²⁶⁰ The more influence an industry has over the creation of the rules governing its own operation, the more those rules will be biased in favor of that industry—even at the expense of the rest of society.²⁶¹ In the context of attorney-whistleblower regulations, regulatory capture takes the

255. *See id.* (discussing several procedural tools available to state legislatures).

256. *See id.*

257. *Id.* at 436. Considerable attention is often given to information collected using these tools. *Id. But c.f.*, 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, 452–53 (2006) (discussing a law passed by Arizona’s state legislature where the legislature heard little testimony from opponents, considered no empirical data, and did not adequately understand the topic before the law’s enactment).

258. Frickey, *supra* note 254, at 436.

259. *See id.*

260. *See* Barton, *supra* note 34, at 1179.

261. *See id.* at 1178 (“[G]overnment regulation and regulators frequently serve the interests of a regulated industry ahead of the public at large . . .”).

form of the regulating institution delegating the primary role in drafting conduct rules into the hands of the regulated industry itself.²⁶²

1. State High Courts

As a starting point for analysis of the regulatory capture of state supreme courts, two observations must be noted: first, all state high court judges are lawyers; and second, most high court judges must face election to gain or keep their jobs.²⁶³ As lawyers themselves, judges may be partial to the legal industry at the expense of other sectors of society.²⁶⁴ And because elections for judicial office are typically of low salience and visibility in the public eye, judges often rely on the organized bar to promote their election campaigns and lobby on their behalf.²⁶⁵

Further, many of the institutional characteristics that help maintain the state judiciary's neutral, independent status as a dispute adjudicator do not protect the institution from lobbying and self-interest in its legislative rule-making role.²⁶⁶ In its adjudicative role, for example, a court's power is limited to ruling on the facts of the case before it. Judges are bound by past precedent, seek to conform to norms of judicial behavior, and are generally required to make their logic and reasoning public through written opinions.²⁶⁷ These qualities do not play a role in the legislation of attorney conduct rules, making state high courts far more open to self-interested lobbying in their legislative rulemaking capacity than in their adjudicative capacity.

This lack of institutional independence, combined with the courts' tendencies to delegate rulemaking to bar associations, means that court-approved ethics rules will inevitably be developed with significant legal industry and bar association input.²⁶⁸ The courts' role in the process is merely to "supervise the limits of bar association

262. *See id.* at 1208, 1218 (noting the circumstances under which the legal industry has exercised control over both courts' and legislatures' attempts to regulate that industry).

263. *See id.* at 1185–86.

264. *See id.* at 1189 (noting some of the shared interests uniting judges and practicing lawyers). Judges' status as lawyers plays a role in analyzing their potential expertise as well as potential for regulatory capture by the legal industry. *See supra* Part II.A.

265. *See id.* at 1201–02.

266. *See id.* at 1198–1200.

267. *See, e.g.,* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 968–69 (1995).

268. Zacharias & Green, *supra* note 2, at 110.

power-to accept the valid aspects of the proposals, but to avoid ‘capture’ by the bar.”²⁶⁹ However, the ability of a state court to avoid capture in this process decreases dramatically when the courts’ position on a proposed rule or policy is antithetical to the organized bar’s core principles—its “normative vision” of how the law should be practiced.²⁷⁰

Regulation of attorneys’ ethical duty of confidentiality is one rulemaking area where a state judiciary’s interests may come in conflict with the core “normative vision” of the bar, further limiting its institutional independence.²⁷¹ This is in part because the concept of confidentiality is so central to the identity of the bar that it views an attack on confidentiality protections as an attack on the profession as a whole.²⁷² In fact, “it is confidentiality, and particularly the duty to keep client confidences from the state, more often than any other norm, that triggers the obligation to resist competing state norms and that justifies the passage of ethics rules to ‘undo’ state pronouncements.”²⁷³ Because of the heightened attention and support that the bar provides to confidentiality protections, “the eventual confidentiality rules enacted by state judiciaries would reflect the will and influence of the regulated industry to a much greater extent than in other areas of regulation.”²⁷⁴ Thus, a state judiciary’s ability to maintain independence from the target of its confidentiality regulations—the legal industry—is practically nonexistent in this context.

2. State Legislatures

Similarly, state legislatures have been called the “poster children” for regulatory capture by lobbying groups.²⁷⁵ Legislatures rely on special interest groups for campaign finance, public support, and input on particular areas of legislation.²⁷⁶ However, because relatively few state legislatures are practicing lawyers, and legislatures do not

269. *Id.*

270. See Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1391–92 (1992); see also Dzienkowski, *supra* note 111, at 86 (listing “core principles” prioritized by the bar, including “the lawyer’s duty to disclose another lawyer’s misconduct,” as well as loyalty, confidentiality, and “communication in light of a lawyer’s fiduciary duties to the client”).

271. Koniak, *supra* note 270, at 1391.

272. *Id.* at 1427.

273. *Id.*

274. *Id.*

275. See Barton, *supra* note 34, at 1217.

276. See *id.*

rely on lawyers for their day-to-day functioning, legislators do not share the same tendency for regulatory capture by the legal industry, as seen in state court systems.²⁷⁷ Rather, state legislatures are “open to lobbying and contributions from all comers and have no natural reason to expect or rely particularly on the bar for political support.”²⁷⁸ Thus, where lawyers may wield undue influence over the rulemaking process managed by state high courts, lawyers find themselves placed on more equal footing with the rest of the public when dealing with state legislatures.²⁷⁹

C. Accountability and Accessibility

The “accountability and accessibility” category compares several aspects of the institutions’ democratic nature, such as their responsiveness to the needs of the public, and the transparency of their decision-making process.²⁸⁰ These concerns are important for effective and efficient regulation of attorney behavior in general for several reasons.²⁸¹ On an ideological level, open and accessible institutions further the constitutional aims of maintaining a functioning “deliberative democracy.”²⁸² On a practical level, a more open and democratic regulatory process helps to prevent regulatory capture by particular interest groups and increases economic efficiency.²⁸³

1. State High Courts

In general, state courts are not lobbied by the public.²⁸⁴ Rather, they are organized specifically to minimize the effect of public opinion and lobbying on judges.²⁸⁵ For example, “[t]he public cannot just stop by a justice’s chambers to complain about lawyer regulation, nor are justices provided with staff to respond to constituent

277. *See id.* at 1220.

278. *Id.* at 1219.

279. *See id.* at 1220–21.

280. *See id.* at 1177–78.

281. *See id.*

282. *Id.* at 1177 n.36; *see also* Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 264 (2005) (arguing that deliberativeness, representativeness, and accessibility are three of the most salient characteristics of the American legislative process that give it its democratic legitimacy).

283. Barton, *supra* note 34, at 1178–80 (discussing the impact of an institution’s accessibility on its potential for regulatory capture).

284. *See id.* at 1201–02.

285. *See id.* at 1201.

complaints or lobbying.”²⁸⁶ Because of this, the general population can exert very little influence on the decision-making process of state court judges.

While such independence and immunity from public opinion is lauded in the context of resolving legal disputes, these qualities become “problematic” when dealing with lawyer regulation.²⁸⁷ Not only does judicial inaccessibility detract from the democratic legitimacy of the process, but it also skews the balance of influence over the rule-making process dramatically in favor of lawyers themselves.²⁸⁸ This is true in part because lawyers have natural access to judges through their day-to-day work as well as through bar associations on which both lawyers and justices serve.²⁸⁹ This fact makes state court judges “an easy target for formal and informal lawyer lobbying.”²⁹⁰ Combined with the fact that judges pride themselves on their isolation from the influences of other parties and public opinion, it would appear that lawyers have much greater access and influence over the process than any other group.²⁹¹

2. State Legislatures

Compared to state courts, “legislatures are open by design.”²⁹² Individual legislators generally make an affirmative effort to make themselves available to their constituents for contact and comment on legislative functions.²⁹³ This quality is rooted deep in the “ethos” of American democracy, which generally includes “following the will of the electorate” and necessarily requires a broad range of input from the voting public.²⁹⁴ According to this democratic ethos, “all are deemed to have a right to know about and influence decision making” in the American legislative process.²⁹⁵ Rulemaking by judges—

286. *Id.*

287. *See id.*

288. Zacharias & Green, *supra* note 2, at 96 (noting that “[o]ne should not casually dismiss the validity of the perceptions that rule-making courts have been captured by bar committees and that the professional codes reflect the interests of the legal profession”).

289. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 458 (2008) (“[T]he vast majority of judges were practicing attorneys before taking the bench. Judges are frequently bar association members.”).

290. *Id.* at 459.

291. *Id.*

292. *See* Barton, *supra* note 34, at 1222.

293. *See id.*

294. *See id.*

295. Heminway, *supra* note 282, at 271.

trained to isolate themselves from the public—thus provides far less opportunity for public input or dissent.

D. Conclusion of the Comparative Institutional Choice Microanalysis

As is suggested by this Note's hypothetical application of comparative institutional microanalysis, the status quo of judiciary and lawyer dominated legal industry regulation is not the "best" method for the creation of conduct rules relating specifically to attorney-whistleblowing. State courts, far more than legislatures, tend to defer to the whims of the legal industry in creating favorable rules for its regulation; this effect is compounded when dealing with regulation of core values of the legal industry, such as confidentiality. With state courts in control of attorney confidentiality and whistleblowing regulation, the regulatory process substantially favors the legal industry over the public and the wider economy. If legislatures were given greater control of attorney-whistleblowing regulation, on the other hand, rule-makers would have use of the organized bar's expertise in the form of expert testimony and reports, but would also have greater capacity to weigh evidence from other facets of society for or against particular regulatory language favored by the bar.

In addition, because state high courts are organized to minimize the effects of public opinion on the decision-making process, the public has little influence over the courts' legislative role in the attorney-whistleblowing-regulation process. This lack of public influence leads to a relatively undemocratic rulemaking process that prioritizes the interests of practicing lawyers rather than the needs of the economy or the public at large. Lodging rulemaking authority with a more publicly accountable institution like state legislatures would ensure that ethics rules are based on public need rather than lawyer self-interest.²⁹⁶

E. Further Narrowing the Context of Institutional Microanalysis Raises Questions for Future Study

Even applied to the factual context of attorney-whistleblowing regulations, however, the results of a comparative institutional

296. See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2599 (2014).

analysis are far from definitive. The results of individual institutional choice microanalyses may vary depending on the choice of institutions discussed, the relevant characteristics compared, and the broadness or specificity of the context in which the institutions are being compared. Here, the chosen context is a “mid-level” of specificity, analyzing a sub-category of attorney conduct regulation—attorney whistleblowing regulations regarding client fraud.²⁹⁷ On the other hand, the chosen categories of institutions to be compared (state courts and state legislatures) actually aggregate fifty independent court systems and fifty independent legislative systems into two overarching categories.²⁹⁸ While many of their practical differences are immaterial to this Note’s comparison, several states do possess courts and legislatures whose relevant characteristics vary significantly from those of other states.

In particular, state courts in New York and Delaware differ dramatically from their counterparts in other states regarding their expertise in economic issues.²⁹⁹ On one hand, it is widely accepted that judges lack significant expertise when it comes to the regulation of complex non-legal activities like investor protection or financial fraud prevention.³⁰⁰ However, Delaware goes against this trend, and Delaware courts have in fact been noted for their expertise in business and corporate matters.³⁰¹ Additionally, New York’s courts’ balancing of corporate and legal-industry interests has, unlike the

297. *See supra* note 147 and accompanying text.

298. To demonstrate the impact of aggregating all state judiciaries and all state courts into two categories, compare this Note’s analysis to Professor Ted Schneyer’s 2006 comparative institutional microanalysis of Arizona courts and legislatures regarding their relative competence to regulate attorney confidentiality. *See generally* Schneyer, *supra* note 257 (analyzing institutional characteristics unique to Arizona and its politics, and concluding that based on a comparison of such characteristics, Arizona’s state courts were best qualified to regulate attorney confidentiality).

299. *See supra* Part II.B (discussing the impact of a courts’ economic expertise on its ability to regulate attorney-whistleblowing behavior).

300. *See, e.g.*, Barton, *supra* note 34, at 1210 (noting that “justices are more familiar with the lawyer’s perspective than with the perspectives of other players in the system”); Lawrence Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 212 (noting that federal judges bring limited economics expertise to the bench).

301. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1078 (2000) (“Delaware chancery judges are known for their expertise in business matters, and the court has developed a reputation for its sophistication in corporate law.”).

balancing of other state courts, received the stamp of approval of the federal judiciary.³⁰²

Several characteristics unique to Delaware make its distinctive economic and corporate-law expertise possible. For example, a substantial proportion of the country's corporations are chartered in Delaware.³⁰³ Because of this, many Delaware judges see a high concentration of corporate cases relative to other types of cases.³⁰⁴ The high concentration enhances the economic expertise of Delaware courts in two ways: first, judges themselves obtain expertise from the substantial proportion of corporate-law case before them.³⁰⁵ Second, judges are able to obtain significant corporate-law expertise by working as attorneys in the Delaware legal system prior to reaching the bench in the first place.³⁰⁶ The fact that Delaware's high court selects its members based on merit rather than popular election only adds to the concentration of expert judges on the Delaware bench.³⁰⁷

While the economic expertise of judges in New York is not as prominent as the expertise of judges in Delaware, New York state courts have nevertheless been recognized for competence in the area of commercial law.³⁰⁸ New York courts' expertise likely derives in large part from the state's large overall population and major commercial hub—New York City. As one scholar notes, states with large populations see a broader range of cases, and are more likely to develop specialized case law in particular substantive areas over time.³⁰⁹ While simply being a large state may not be enough to guarantee specialization in a particular substantive area of law, the presence of a major commercial hub like New York City also creates a concentration of commercial cases in New York courts in and

302. *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 164 (2d Cir. 2013) (noting that N.Y. RPC 1.6(b) is consistent with both economic and legal-industry interests).

303. Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 589 (1990).

304. *Id.* (“Because of Delaware’s small size and its many corporate charters, Delaware judges see a high proportion of corporate cases, and develop corporate expertise.”).

305. *Id.*

306. *Id.* (“[B]ecause corporate lawyers are prominent in the Delaware bar, many judges come to the bench with corporate law experience.”).

307. *See* Fisch, *supra* note 301, at 1094.

308. D.A. Jeremy Telman, *The Business Judgment Rule, Disclosure, and Executive Compensation*, 81 TUL. L. REV. 829, 842 (2007) (noting the “remarkable and varied commercial expertise” of New York’s specialized commercial courts).

309. Black, *supra* note 303, at 589.

around the city.³¹⁰ Further institutional analysis comparing those states institutions will be necessary, however, in order to better understand the effects that these unique qualities have on the two states' attorney-regulating institutions.

CONCLUSION

Throughout the history of the drafting of confidentiality and attorney-whistleblower regulations, public policy considerations have taken a back seat to the influences of political compromise, self-interest, and reactions to public opinion or sudden economic events. While the resulting regulations, such as New York Rule of Conduct 1.6 and SEC Rule 205.3, are not necessarily rendered inefficient or ineffective as a result, little effort has been expended by the relevant decision-makers to determine whether or not these rules are, in fact, as effective as they could be from a public policy perspective.

To this end, institutional choice analysis has been used to develop at least some public policy support for the rules throughout the course of their development. However, this analysis has been conducted only in a cursory and "intuitive" fashion, and could greatly benefit from a more rigorous comparative institutional microanalysis of the public policy benefits of particular rules. Through further analysis focusing on the public policy concerns surrounding regulations, like those governing attorney confidentiality and whistleblowing, rule makers will be able to draft regulations that are more consistent in their application and more effective in achieving their public policy goals.

310. Ira Pilchen, *New York Tries Commercial Cases Separately*, 76 JUDICATURE 266 (1993) (noting that New York's specialized commercial courts are assigned cases arising primarily out of Manhattan).