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The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?

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Abstract

The United States Supreme Court considered seventeen cases raising issues related to the role of attorneys and the practice of law during the 2009 Term. This body of cases represents a substantial departure from dockets in recent history, where typically the Court took up less than a handful of cases involving regulation of the legal profession. While some might consider the increased number of cases addressing the law of lawyering a mere coincidence, this article contends that something more is occurring. The Court's decision to devote so much of its limited time to these matters is noteworthy not only for the individual issues resolved, but also for the cases' existence, indeed dominance, on the docket. This article is the first to present a comprehensive overview of the Supreme Court's newest lawyering cases. Broadly speaking, the cases fall into two categories: access to sound lawyering and protection from bad lawyering. The first group of cases addresses access to legal advice, questioning First Amendment protection of attorney advice and advertising, the application of fee-shifting statutes to encourage legal representation for meritorious cases, and the availability of an immediate appeal to preserve attorney-client privilege in the face of a court order to disclose protected materials. The second group of cases involves harms caused by lawyers. These cases include prosecutorial misconduct and ineffective assistance of counsel claims where a criminal defense attorney lacks the requisite experience, offers insufficient mitigation evidence during sentencing, delivers a poor closing argument, gives faulty advice, misses an essential filing deadline, or fails to request a limiting instruction. Part I of this article examines the cases individually and highlights the ways each case presents critical issues related to the practice of law and the regulation of lawyers. Part II turns to a collective reading of the cases, reflecting on the Court's heightened interest in affairs of the legal profession, and suggesting insights that might be drawn by viewing these cases as part of a larger picture, rather than standing alone. Though the full measure of these cases' impact on professional responsibility jurisprudence will be realized only with the passing of time, this article offers three preliminary observations. First, when read together, the cases reveal a troubling pattern of limits on access to legal advice as well as harms caused by bad lawyering. Second, the cases offer fundamental lessons for those involved in future regulation of the legal profession. Third, the cases illustrate the importance of constitutional considerations to the field of lawyer ethics.

Keywords

Access to lawyers, Access to legal advice, *Milavetz, Gallop & Milavetz, P.A. v. United States*, *Holder v. Humanitarian Law Project*, Access to legal representation, Fee-shifting statutes, *Astrue v. Ratliff*, *Hardt v. Reliance Standard Life Insurance Co.*, *Perdue v. Kenny A. ex rel. Winn*, *Belmontes*, *Bobby v. Van Hook*, *Porter v. McCollum*, *Jefferson v. Upton*, *Sears v. Upton*

ARTICLES

THE SUPREME COURT'S INCREASED ATTENTION TO THE LAW OF LAWYERING: MERE COINCIDENCE OR SOMETHING MORE?

RENEE NEWMAN KNAKE*

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INTRODUCTION

The United States Supreme Court's 2009 term presented an unprecedented number of cases—twelve argued cases and five per curiam decisions—raising issues related to the role of attorneys and the practice of law.¹ This body of cases represents a substantial departure from dockets in recent history, where typically the Court took up less than a handful of lawyering cases each term. While some might consider the increased number of cases addressing the law of lawyering a mere coincidence, this Article contends that it is something more. The Court's devotion of so much time to these matters is noteworthy not only for the individual issues resolved, but also for the cases' existence—indeed dominance—on the

1. In a typical term the Supreme Court hears a handful of such cases at most. See *infra* Appendix, and notes 17–22 and accompanying text.

docket. This Article offers the first comprehensive overview of the 2009 cases and their outcomes.

Broadly speaking, the cases fall into two categories. The first group of cases focuses on access to lawyers and legal advice. The second group examines harms caused by lawyers. The issues regarding access to legal advice include:

- the First Amendment rights of attorneys to give advice and to advertise;²
- the calculation of attorneys' fees awarded under fee-shifting statutes³ as well as whether an attorney holds a property right in such an award,⁴ and
- the right to an immediate appeal of a challenged attorney-client privilege waiver.⁵

The concerns surrounding bad lawyering include:

- the extent to which a prosecutor may face civil liability for procuring false testimony and introducing it at trial;⁶ and
- the standards for finding ineffective assistance of counsel when a criminal defense attorney lacks the requisite experience,⁷ offers insufficient mitigation evidence,⁸ delivers a poor closing argument,⁹ gives faulty advice,¹⁰ misses a critical filing deadline,¹¹ or fails to request a limiting instruction.¹²

2. Humanitarian Law Project v. Mukasey, 552 F.3d 916, 921 (9th Cir. 2009), *aff'd in part and rev'd in part*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010); Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 792, 794 (8th Cir. 2008), *aff'd in part and rev'd in part*, 130 S. Ct. 1324, 1341 (2010).

3. Hardt v. Reliance Standard Life Ins. Co., 336 F. Appx. 332, 333 (4th Cir. 2009) (per curiam), *rev'd and remanded*, 130 S. Ct. 2149, 2156 (2010); Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209, 1214, 1230–31 (11th Cir. 2008), *rev'd and remanded*, 130 S. Ct. 1662, 1669 (2010).

4. Ratliff v. Astrue, 540 F.3d 800, 801 (8th Cir. 2008), *rev'd and remanded*, 130 S. Ct. 2521, 2524 (2010).

5. Carpenter v. Mohawk Indus., Inc., 541 F.3d 1048, 1052 (11th Cir. 2008) (per curiam), *aff'd*, Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009).

6. McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008), *appeal dismissed*, Pottawattamie County v. McGhee, 130 S. Ct. 1047 (2010).

7. Wood v. Allen, 542 F.3d 1281, 1289, 1292, 1299 (11th Cir. 2008), *aff'd*, 130 S. Ct. 841, 845 (2010).

8. Van Hook v. Anderson, 560 F.3d 523, 525 (6th Cir. 2009), *rev'd and remanded*, Bobby v. Van Hook, 130 S. Ct. 13, 20 (2009) (per curiam); Belmontes v. Ayers, 529 F.3d 834, 848 (9th Cir. 2008), *rev'd and remanded*, Wong v. Belmontes, 130 S. Ct. 383, 391 (2009) (per curiam); Porter v. Attorney Gen., 552 F.3d 1260, 1269 (11th Cir. 2008), *rev'd*, Porter v. McCollum, 130 S. Ct. 447, 448 (2009) (per curiam); Jefferson v. Hall, 570 F.3d 1283 (11th Cir. 2009), *vacated and remanded*, Jefferson v. Upton, 130 S. Ct. 2217, 2223 (2010) (per curiam); Sears v. State, 514 S.E.2d 429 (Ga. 1999), *vacated and remanded*, Sears v. Upton, 130 S. Ct. 3259, 3261 (2010) (per curiam).

9. Spisak v. Mitchell, 465 F.3d 684, 704 (6th Cir. 2006), *rev'd*, Smith v. Spisak, 130 S. Ct. 676, 680 (2010).

10. Commonwealth v. Padilla, 253 S.W.3d 482, 484 (Ky. 2008), *rev'd and remanded*, 130 S. Ct. 1473, 1487 (2010).

11. Holland v. Florida, 539 F.3d 1334, 1336 (11th Cir. 2008) (per curiam) *rev'd and*

Each case addressed critical issues, many of which cut to the core of an attorney's ability to practice competently and in compliance with the profession's ethical obligations. Perhaps even more important than the facts and holdings of the individual cases, however, is the message conveyed by the cases' collective presence on the Court's docket. The Court's devotion of fifteen percent¹³ of its limited time during the 2009 term to cases raising questions about the role of lawyers and the practice of law is remarkable. The law governing lawyers is a sometimes ignored, but vitally important body of law, essential to the proper function of our justice system and our democratic form of government. The outcomes of these cases impact the obligations of attorneys in meaningful ways and, when considered together, signal how the Court may be giving concerns about the law of lawyering a higher priority.

This Article proceeds in two parts. Part I opens with a discussion to define what constitutes "the law of lawyering" for purposes here and to provide a brief history of the Court's attention to this area of law over the past decade. Part I then examines the cases from the 2009 term individually, setting forth a summary of the ways in which each presents questions related to the law of lawyering. Part II turns to a collective reading of the 2009 cases, reflecting on the Court's heightened interest in lawyering issues, and suggesting insights that might be drawn by viewing these cases as part of a larger picture. In particular, this Part identifies intersections among the cases as a means for gaining further understanding about how their outcomes may shape the legal profession. To be sure, the influence of these cases on professional responsibility jurisprudence will become more apparent over time. Nevertheless, a careful study of the opinions, as well as the briefs and oral arguments in the cases, reveals three preliminary observations. First, when taken as a whole, the cases evidence troubling limitations on access to legal advice coupled with an inability to fully redress harms caused by bad lawyering. Second, the cases offer helpful lessons for those involved in future regulation of the legal

remanded, 130 S.Ct. 2549, 2554 (2010).

12. *Thompkins v. Berghuis*, 547 F.3d 572, 573 (6th Cir. 2008), *rev'd and remanded*, 130 S.Ct. 2250, 2253 (2010).

13. During the 2009 Term, the Court issued eighty-six merits opinions, sixteen (18.6%) of which included issues related to lawyering. *See supra* notes 2–2 (listing the cases related to lawyering); *see also* Supreme Court of the United States Granted and Noted List October Term 2009, <http://www.supremecourt.gov/orders/09grantednotedlist.aspx> (last visited June 24, 2010) (providing a comprehensive list of cases heard by the Supreme Court in the October 2009 term); SCOTUSblog Final Stats OT09, Summary of the Supreme Court's Workload, October Term 2009, <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf> (last visited July 22, 2010). One lawyering case discussed in the article, *Pottawattamie County v. McGhee*, is not included in this count because the Court did not issue a merits opinion in the case. *See* discussion *infra* notes 205 to 233.

profession. Third, the cases illustrate the importance of constitutional considerations to the field of lawyer ethics. An awareness of these observations will assist scholars and practitioners in appreciating the Court's increased attention to the law of lawyering during the 2009 term.

I. MERE COINCIDENCE? A SUMMARY OF THE CASES

At the outset, it is important to understand what is meant by the law of lawyering, and how the cases discussed in this Article have been collected. The term “law of lawyering” (or lawyer ethics, legal ethics, professional responsibility, law governing lawyers—all other ways to describe a similar body of law¹⁴) encompasses the legal regulations and ethical obligations governing lawyers. These regulations and obligations can be found in sources like the American Bar Association's Model Rules of Professional Conduct and the American Law Institute's Restatement of the Law Governing Lawyers but, as Ted Schneyer observes, “the law of lawyering” consists of “strands of law whose only commonality is their bearing on the work of a diverse profession” which can make the term difficult to define.¹⁵ Furthermore, James Moliterno explains that “[b]ecause defining much of the law of lawyering depends on the norms of practice, so too the law of lawyering varies according to the practice setting in which the affected lawyer's work exists.”¹⁶ As used in this Article, a “lawyering” issue is understood to be a topic covered by leading casebooks in the field and related to the role of an attorney and the practice of law.¹⁷

14. Though these terms often are used interchangeably, they also can be understood to hold specific meanings. *See, e.g.*, DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 4 (2d ed. 1998) (“What is the ‘ethics’ in legal ethics? That in itself is a matter of ethical debate. In a narrow sense, the term refers to the law of lawyering—the formal rules governing attorneys’ conduct. In a broader sense, legal ethics involves application of ethical theory and implicates deeper questions about the moral dimensions of our professional lives.”). For further discussion on the various terms used to describe this area of law, see posting of John Steele to Legal Ethics Forum and related comments, <http://www.legalethicsforum.com/blog/2010/06/-least-analytically-rigorous-and-hence-most-subjective-of-lawschool-subjects-legal-ethics.html> (June 14, 2010, 18:24 EST).

15. Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Compliments?*, 46 OKLA. L. REV. 25, 25 (1993) (explaining that the law of lawyering “has only lately been conceived as a distinct legal field” and consists of “constitutional doctrine, statutory law, and of course the American Bar Association's legal ethics codes as adopted by state supreme courts”) (citation omitted).

16. James E. Moliterno, *Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum*, 39 WM. & MARY L. REV. 393, 394 (1998); *see also* DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS 1 (4th Ed. 2004) (observing that “the law of lawyering—the codes of conduct and the other bodies of law governing legal practice—structures but by no means limits” the universe of “legal ethics”).

17. In collecting cases from the 2009 term and also the preceding decade, the general contents of three leading casebooks were used as a guide: Rhode & Luban, *supra* note 16 (covering the concept of a profession, the American legal profession, professional independence and professional codes, the advocate's role in an adversary system, confidentiality and attorney-client privilege, criminal defense, prosecutorial ethics, ethics in

These topics include the duty to render candid advice, lawyer advertising, attorneys' fees, attorney-client privilege, prosecutorial ethics, and ineffective assistance of counsel.¹⁸ That some of these cases overlap into

organizational settings, negotiation and mediation, the lawyer's counseling role, conflicts of interest, lawyer-client decision making, market regulation, the distribution of legal services, admission to the bar, discipline and malpractice, and legal education); STEPHEN GILLERS, *REGULATION OF LAWYERS*, (8th ed. 2009) (covering the attorney-client relationship, conflicts of interest, special lawyer roles, avoiding and redressing professional failure, and first amendment rights of lawyers and judicial candidates); and LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* (2d ed. 2008) (covering the regulation of lawyers, lawyer liability, client confidences, attorney-client privilege, relationships between lawyers and clients, conflicts of interest, lawyers' duties to courts, lawyers' duties to adversaries and third parties, regulatory restrictions on law practice, and the provision of legal services).

18. The regulation of judicial conduct is also often encompassed under the law of lawyering umbrella, but for purposes of this Article and the Appendix of cases involving a lawyering issue that follows, cases involving regulation of the judiciary or judicial misconduct have been excluded. *See, e.g.*, *Sao Paolo v. American Tobacco Co.*, 535 U.S. 229 (2002) (per curiam) (judicial recusal); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (judicial election campaigns); and *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (judicial recusal). Likewise some law of lawyering casebooks address lawyers' use of peremptory challenges, and those cases have been excluded from this survey as well. *See, e.g.*, *Johnson v. California*, 545 U.S. 162 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005). It also should be noted that certain aspects of civil procedure may appear in the casebooks, but for purposes here such cases were included only if they also directly addressed the professional or ethical obligations of the attorney involved. For example, *Mohawk Industries, Inc. v. Carpenter* is a case involving civil procedure that was included because it also involved protection of attorney-client privilege (see discussion *infra* notes 171 to 204 and accompanying text), but *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (announcing new "plausibility" standard for complaint to survive a motion to dismiss) was not included. A similar selection process was used for ineffective assistance of counsel cases as well, thus excluding cases like *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (holding "that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted"); *Glover v. United States*, 331 U.S. 198, 204 (2001) (finding prejudice in sentencing error but "express[ing] no opinion on the ultimate merits of Glover's claim because the question of deficient performance is not before us"); *Massaro v. United States*, 538 U.S. 500, 509 (2003) ("hold[ing] that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding"); *Arave v. Hoffman*, 552 U.S. 117, 188 (per curiam) (2008) (granting motion to vacate and dismissing ineffective assistance of counsel case as moot); and *Magwood v. Patterson*, 130 S. Ct. 2788, 2803 (2010) (holding "that Magwood's first application challenging his new sentence . . . is not 'second or successive'" and declining to "address Magwood's contention that the Court of Appeals erred in rejecting his ineffective-assistance claim"). Last, some cases are close calls and open for debate as to whether a "lawyering" issue is raised. For example, during the 2005 term the Court decided *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006), holding that the whistle-blowing activity of a government employee, who happened to be a district attorney, was not protected under the First Amendment. This case is not included in the Appendix because the Court's focus was on Ceballos's speech as a government employee, not a lawyer. Similarly, in 2007 the Court decided *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2007), a case involving paralegal fees that is excluded here. In some instances one might argue for the exclusion or

other areas of law, such as criminal law, civil procedure, or bankruptcy, does not mean that they are not also law of lawyering cases. Indeed, in many ways the law of lawyering permeates all areas of the law.¹⁹

It also is important to understand the methodology employed in this Article for analyzing the Court's treatment of the law of lawyering.²⁰ This Article is not intended to offer a comprehensive empirical analysis, and leaves that endeavor for another day. Rather, the Article looks back at the past decade in an effort to assess whether the Court's selection of seventeen cases involving lawyering issues during the 2009 term was, in fact, unusual. In order to provide a meaningful comparison with the previous terms, all merits opinions issued by the Court since the 1999 term were reviewed. Opinions touching on an issue related to the law of lawyering, as defined above, were included in the count for each term, with the exception of several categories such as cases dismissed as improvidently granted and cases involving judges.²¹ While the survey of cases conducted here is not intended to be a complete quantitative examination of the Court's attention to the law of lawyering, the survey does provide a sufficient background to appreciate just how unusual it is for seventeen cases involving lawyering issues to find their way to the Court during a single term. Moreover, though this Article examines only the previous decade, others suggest that earlier terms have been even more sparse in their inclusion of cases involving lawyering issues.²²

inclusion of a particular case that did or did not make the list contained in the Appendix. Even so, adding or omitting one or two cases for a particular term does not impact the ultimate conclusion that the 2009 docket presented an unusually large number of cases involving lawyering issues.

19. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 4 (2d ed. 1998) ("Legal ethics deserves discussion in all substantive areas [of the law] because it arises in all substantive areas."). For further discussion of the structure and history of lawyer regulation, see *id.* at 40–50.

20. This survey expands on the analysis of Supreme Court cases contained in the author's online essay previewing the 2009 term, Renee Newman Knake, *Prioritizing Professional Responsibility and the Legal Profession: A Preview of the United States Supreme Court's 2009–2010 Term*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2009), portions of which are incorporated in this Article. The initial analysis relied on the classification of cases by sources such as the Findlaw Supreme Court Case Index and database searches in Lexis and Westlaw using several queries. For the list that appears in the Appendix, all merits opinions were reviewed for lawyering issues as described *supra* notes 14–19; *infra* 21–22 and accompanying text. The list contained in the Appendix resulted in a slight increase (no more than three) in the number of lawyering opinions for two of the terms.

21. For further explanation about the collection of cases included in this survey and listed in the Appendix, see *supra* notes 17–20.

22. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.15 (1983) (noting that over the course of twenty-five years the Supreme Court granted review of state court decisions on attorney bar-related matters on only eight occasions); see also Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 627 (1990) (estimating that from 1975–1990 the Supreme Court considered the professional conduct of lawyers in only ten cases).

During the ten years before the 2009 term, the Supreme Court heard no more than a handful of cases addressing issues related to the role of an attorney and the practice of law in any term.²³ The lawyering cases on the Court's docket in 2009 were at least triple the number on previous dockets over the past decade. Thus one might conclude, simply based on this sizeable increase in quantity alone, that the Court's attention to lawyering issues must be more than mere coincidence. Yet the cases heard in the 2009 term are remarkable for more than just their quantity; their substance also must be considered. For example, the Court decided significantly more cases touching on lawyering issues in ineffective assistance of counsel cases than in previous terms (ten in 2009 compared to approximately two or three at most in previous years).²⁴ The Court also took up a number of cases addressing access to lawyers and legal advice, as discussed more fully in Part I.A. of this Article. Of further note is the dominance of cases involving constitutional issues.²⁵

Two questions necessarily follow. First, why this sudden spike in cases related to the legal profession? Second, what lessons or conclusions might be drawn from the particular issues raised and the outcomes of the cases? As to the first question, perhaps the upsurge is simply a reflection of an increased number of petitions presenting questions related to law practice,²⁶ or the fact that the most recently appointed Justices have more law practice experience than their predecessors.²⁷ Or it may be that the larger movement toward increased scrutiny of attorney regulation, particularly in the wake of recent corporate²⁸ and government²⁹ scandals involving

23. See Appendix listing cases. See also notes 17–21 and accompanying text.

24. See Appendix listing cases by term and identifying lawyering issues.

25. See discussion *infra* Part II.C.

26. Although beyond the scope of this Article, a historical review or survey of petitions for certiorari addressing issues related to the legal profession and their dispositions would be an interesting area for future research and might lend further insight into the significance of the Court's lawyering focus during the 2009 term.

27. See, e.g., Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1117 n.66 (2005) ("All nine of the Justices of the late Rehnquist Court were graduates of elite schools with either little practice experience or practice experience largely limited to constitutional litigation or defense-side civil litigation."). To compare, the most recent appointees to the Court all have significant experience engaging in the practice of law. See Angie Drobnic Holan, *Sotomayor's Experience Does Not Significantly Outstrip Other Justices*, POLITIFACT, May 26, 2009, <http://www.politifact.com/truth-o-meter/statements/2009/may/26/barack-obama/sotomayors-experience-does-not-significantly-outst/> (listing law practice experience of Supreme Court justices).

28. See, e.g., Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1205 (2009) (observing that "in the wake of several major scandals, such as the savings-and-loan crisis and the Enron collapse, . . . lawyers . . . were found to have actively enabled frauds that resulted in huge losses"); Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1265 (2009) (observing that "[a]fter the early twenty-first-century financial scandals, many pointed a blaming finger to

lawyers, has led to a greater sensitivity to these issues. Regardless of the cause, the Court's heightened interest at a minimum is reflected in, if not influenced by, the popular momentum for attorney regulation reforms. Inclusion of so many cases involving lawyering issues on the 2009 docket demonstrates the Supreme Court's prioritization of concerns about the role of attorneys and the practice of law.

As for the second question, the remainder of this Article is devoted to identifying themes and reflecting on lessons that might be drawn from the Court's attention to lawyering issues. Before turning to these observations, however, the individual cases deserve attention. Two broad themes can be drawn from the cases taken up by the Supreme Court during the 2009 term: access to lawyers and harm caused by lawyers. The cases are summarized below.³⁰

A. Cases Addressing Access to Lawyers

1. Access to legal advice

One of the more important aspects of access to legal advice facing the Court during the 2009 term was the degree of First Amendment protection warranted (if any) when Congress limits lawful legal advice. An attorney's ability to deliver complete and competent advice, and a client's right to receive such advice, goes to the very heart of access to the law. Traditionally, governance of attorney advice has been left to the highest court in each state, and professional conduct rules provide direction for

the attorneys who had worked for the fallen corporations, arguing that the "[l]awyers' negligence almost certainly contributed to the wave of corporate scandals that shook the securities markets in 2001 and 2002" and referencing new regulatory efforts) (quoting *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2227 (2004)).

29. See, e.g., Judge Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, 86 DENV. U. L. REV. 865, 878–79 (2009) (considering modern ethics regulation and stating that "distrust of lawyers . . . is not at all surprising given the steady drumbeat of scandals involving business people, government figures, lawyers and judges. One only need reflect on recent scandals that embroiled prominent leaders (many of whom were lawyers): President Bill Clinton, U.S. Congressmen Randy Cunningham and Robert Ney, Illinois Governor Rod Blagojevich, Attorney General Alberto Gonzalez, Alaska Senator Ted Stevens and the justice department attorneys that prosecuted him, as well as a variety of federal and state judges"). For further discussion of attorney involvement in corporate and government scandals, see W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1175 (2005) (discussing the involvement of lawyers in cases where legal advice facilitated or permitted client wrongdoing, and suggesting as a possible cause the fact that the lawyers "expected some degree of secrecy, either through the audit lottery (in the case of tax shelters), the cover provided by byzantine transactions and obfuscated disclosures (the Enron manipulations), or geographic isolation and covert activities (the interrogations at Guantanamo Bay and Abu Ghraib)").

30. It should be noted that while several of the cases discussed in this Article present additional important questions not related directly to the law of lawyering, the focus here is limited to concerns bearing on the practice of law or the relationship between attorneys and clients.

attorneys regarding their duties and obligations to render guidance to clients. For example, the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) require that an attorney “provide competent representation,”³¹ “exercise independent professional judgment,”³² “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,”³³ and “render candid advice.”³⁴ Two cases from the 2009 term involved federal statutes encroaching on a lawyer’s ability to advise her client.³⁵

a. Competent advice, compelled advertising, and the first amendment: Milavetz, Gallop & Milavetz, P.A. v. United States

In *Milavetz, Gallop & Milavetz, P.A. v. United States*³⁶ the Court was asked to define the First Amendment protection that attorney advice and advertising deserves in a challenge to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).³⁷ This case raised two previously unaddressed issues in First Amendment jurisprudence: the level of constitutional protection afforded to attorney advice and, correspondingly, the level of constitutional protection afforded to the client’s right to receive that advice.³⁸ The plaintiffs also questioned the constitutionality of the BAPCPA’s provisions that impose various disclosure requirements on attorneys’ advertisement of bankruptcy services.³⁹

To understand the issues involved in this appeal, some explanation of the BAPCPA is necessary. Congress enacted the BAPCPA after considering eight years of testimony and reports on increasingly prevalent fraud within the bankruptcy system.⁴⁰ The legislation was intended to target both

31. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009).

32. *Id.* at R. 2.1.

33. *Id.* at R. 1.4(b).

34. *Id.* at R. 2.1.

35. See *infra* notes 37, 65–70 and accompanying text (citing and explaining the statutes passed by Congress and the specific challenges to them).

36. 541 F.3d 785 (8th Cir. 2008), *aff’d in part and rev’d in part*, 130 S. Ct. 1324 (2010).

37. Pub. L. No. 109-8, 119 Stat. 23 (2005).

38. See *Milavetz*, 541 F.3d at 788 n.1 (observing that the *Milavetz* “client-plaintiffs are appearing on behalf of themselves and all others similarly situated who desire to exercise their First Amendment rights with attorneys regarding bankruptcy information”); see also Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005) (noting that the Supreme Court “has never squarely confronted” the First Amendment status of certain categories of speech, such as “professional advice to clients”).

39. *Milavetz*, 541 F.3d at 794.

40. For more detail on the BAPCPA’s origins, see Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 688–89 (2008) (noting that BAPCPA’s enactment was extremely controversial because it

debtors and attorneys who were perceived as abusing the bankruptcy laws.⁴¹ Among numerous amendments and additions to the federal Bankruptcy Code, the BAPCPA includes regulations applicable not only to debtors, but also to debt relief agencies, a term that has been construed by the majority of courts (and, ultimately, the Supreme Court in *Milavetz*) to include attorneys.⁴² These regulations include a prohibition on certain advice offered by an attorney to a debtor-client regarding the accumulation of additional debt in contemplation of bankruptcy⁴³ and a disclosure that must be included in certain advertising by an attorney who offers bankruptcy-related advice stating as follows: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”⁴⁴

The BAPCPA establishes penalties for the violation of these provisions. The penalties include voidance of any contract failing to comply with the Act’s provisions, attorney liability to the debtor for actual damages and reasonable attorneys’ fees and costs, and enforcement by the state attorney general or similar official for injunctive relief or monetary damages.⁴⁵ Shortly after the enactment of the BAPCPA, the *Milavetz* plaintiffs—two attorneys, their law firm, and two clients—filed a lawsuit against the federal government challenging the application of the debt relief agency classification to attorneys, as well as the advice prohibition and the mandatory advertising disclosures.

Regarding the advice prohibition, the parties recognized that the level of First Amendment protection afforded to attorney advice is unclear. The plaintiffs argued for strict scrutiny because the BAPCPA’s prohibition on

was a result of lobbying by some of the nation’s leading consumer credit providers). Those lobbying the bill allegedly invested more than \$40 million in their efforts. *Id.* at 689.

41. According to the legislative record, a primary purpose of the BAPCPA is to address “misconduct by attorneys and other professionals” and “abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief.” H.R. REP. NO. 109-31, at 5, 15 (2005) (internal quotation omitted), *reprinted in* 2005 U.S.C.C.A.N. 88, 92, 101.

42. The BAPCPA defines the term “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration.” 11 U.S.C. § 101(12A) (2006). At least six courts in addition to the Eighth Circuit in *Milavetz* have so held. *See, e.g.,* *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 746 (5th Cir. 2008) (holding that attorneys are included in the term “debt relief agency”) *cert. denied*, No. 08-1174, 2010 WL 1005956, at *1 (U.S. Mar. 22, 2010); *see also Milavetz*, 541 F.3d at 790 (citing five federal district court cases holding that attorneys are debt relief agencies and two holding the opposite) (citations omitted).

43. The BAPCPA provides in pertinent part that “[a] debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing [for bankruptcy].” 11 U.S.C. § 526 (a)(4) (2006).

44. *Id.* at §§ 528(a)(4), (b)(2)(B). The BAPCPA requires the disclosure (or something substantially similar) in any advertisement for “bankruptcy assistance services” or referencing “the benefits of bankruptcy” or any advertisement regarding “assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt.” *Id.* at §§ 528(a)(3), (b)(2)(B).

45. *See id.* at §§ 526(c)(1)–(3), (5) (explaining how the penalties are triggered).

bankruptcy-related advice is content-based.⁴⁶ The government disagreed, suggesting instead that the court apply a more lenient standard applicable to attorney ethics regulations.⁴⁷ A divided Eighth Circuit panel avoided the question of the applicable standard of review. Instead the court found that under any standard the provision was “unconstitutionally overbroad”⁴⁸ in that it not only prohibited unlawful advice (as the government suggested)⁴⁹ but also “advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws.”⁵⁰ Furthermore, the court found that the advice prohibition “prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice.”⁵¹ The debtor-client’s right to receive such advice was not addressed explicitly in the court’s determination.

As for the mandatory advertising disclosures, the *Milavetz* plaintiffs claimed that the disclosures violated the First Amendment rights of attorneys by compelling speech.⁵² They also argued that the general public is likely to be confused by an advertisement for a “debt relief agency” that does not distinguish attorneys from non-attorneys, and that the disclosure requirement is overbroad, if not inaccurate, because the disclosure is mandated for any attorney who might give bankruptcy advice, even on an occasional or incidental basis, and for all advertising regardless of whether it mentions bankruptcy or is deceptive.⁵³ The government, for its part,

46. See *Milavetz*, 541 F.3d at 792 (citing *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994)). Strict scrutiny requires the government to demonstrate a compelling interest in regulating the speech at issue and to employ the least restrictive means possible. *Id.*

47. See *id.* at 793 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991)). The standard established in the *Gentile* case “balance[s] the First Amendment rights of the attorneys against the government’s legitimate interest in regulating the activity in question—the prohibition of advising assisted persons to incur more debt in contemplation of bankruptcy—and then determine[s] whether the regulations impose ‘only narrow and necessary limitations on lawyers’ speech.’” *Id.* (quoting *Gentile*, 501 U.S. at 1075).

48. *Milavetz*, 541 F.3d at 793.

49. The court observed:

According to the government, [this section] should be interpreted as merely preventing an attorney from advising [a debtor-client] to take on more debt in contemplation of bankruptcy when the incurrence of such debt is done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge.

Id.

50. *Id.* As examples of such prudent (and lawful) planning, the court listed mortgage refinancing to “free up additional funds to pay off other debts,” and the purchase of “a reliable automobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work.” *Id.* at 794.

51. *Id.* at 793.

52. See *id.* at 794–95 (showing that the First Amendment encompasses both the right to speak freely as well as the right to refrain from speaking).

53. See *id.* at 796–97 (dismissing the attorneys’ concerns that the required disclosures would confuse the general public because nothing in the Code prohibits attorneys from affirmatively identifying themselves as attorneys in addition to identifying themselves as a debt relief agency).

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“contend[ed] that Congress enacted [the] disclosure requirements to address problems with deceitful or unclear advertising by bankruptcy attorneys.”⁵⁴ Although restrictions on non-deceptive advertising are typically reviewed under intermediate scrutiny (the level that the district court applied in finding the disclosures unconstitutional), the Eighth Circuit followed the government’s position and applied the test used by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,⁵⁵ employing a rational basis review to uphold the disclosure requirements because they were intended to avoid potentially deceptive advertising.⁵⁶ Both sides petitioned the Supreme Court for review and the appeals were consolidated.⁵⁷

The Supreme Court upheld the Eighth Circuit’s determination that lawyers are debt relief agencies and that the advertising disclosure requirements are constitutional, but reversed the finding of overbreadth on the advice ban.⁵⁸ Justice Sotomayor, writing the unanimous opinion, explained:

After reviewing these competing claims, we are persuaded that a narrower reading . . . is sounder, although we do not adopt precisely the view the Government advocates. The Government’s sources show that the phrase “in contemplation of” bankruptcy has so commonly been associated with abusive conduct that it may readily be understood to prefigure abuse. . . . [W]e think the phrase refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system . . . [and] conclude that [it] prohibits a debt relief agency [or attorney] only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose.⁵⁹

The Court explicitly declined, however, to “consider whether the statute so construed withstands First Amendment scrutiny,”⁶⁰ leaving open the question of whether the advice given by an attorney warrants constitutional free speech protections.⁶¹ Justice Sotomayor went on to observe that “it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive prefiling conduct could chill attorney speech or inhibit the attorney-client

54. *Id.* at 795.

55. 471 U.S. 626 (1985).

56. *See Milavetz*, 541 F.3d at 796 (concluding that a lower level of review was appropriate because the disclosure requirements were only intended to prevent potentially deceptive advertising and not legitimate and constitutionally protected advertising).

57. *See United States v. Milavetz, Gallop & Milavetz, P.A.*, 129 S. Ct. 2769 (2009) (noting that the case is consolidated).

58. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1341 (2010).

59. *Id.* at 1335–36 (2010).

60. *Id.* at 1339.

61. The Court declined to reach the First Amendment issue because the Court read the statute narrowly, and as such the issue had not been properly raised by the parties below. *Id.*

relationship.”⁶² Nevertheless, the result of *Milavetz* endorses a ban on legal advice, leaving at least some lawyers to reach a different conclusion. They speculate that this result will have a chilling effect on attorney advice and will inhibit the attorney-client relationship.⁶³

b. Attorney advice as expert advice and amicus advocacy: Holder v. Humanitarian Law Project

A second federal ban on the guidance that attorneys may give to their clients was challenged in *Holder v. Humanitarian Law Project*.⁶⁴ While this case touched on a range of concerns well beyond the law of lawyering, certain provisions of the federal law at issue may be read to constrain the advice lawyers give to clients. The Antiterrorism and Effective Death Penalty Act⁶⁵ and its amendment, the Intelligence Reform and Terrorism Prevention Act,⁶⁶ criminalize “expert advice or assistance”⁶⁷ given to any group designated as “a foreign terrorist organization”⁶⁸ even if such support is for lawful, nonviolent activities or humanitarian efforts.⁶⁹ “Expert advice or assistance” is defined as “scientific, technical, or other specialized knowledge,” which includes legal advice.⁷⁰

This prohibition was attacked by the Humanitarian Law Project and a retired administrative law judge, among others, who sought to provide support to the Kurdistan Workers Party and the Liberation Tigers of Tamil Eelam for nonviolent and lawful peace-making activities.⁷¹ This proffered support included “offer[ing] their legal expertise in negotiating peace agreements.”⁷² The Ninth Circuit pointed out that, “[a]t oral argument, the government stated that filing an amicus brief in support of a foreign terrorist organization would violate [the] prohibition against providing ‘expert advice or assistance.’”⁷³ Accordingly, the court held that the “other

62. *Id.* at 1338.

63. *See, e.g., infra* notes 384–85 and accompanying text.

64. 552 F.3d 916, 920 (9th Cir. 2009), *rev'd*, 130 S. Ct. 2705, 2712 (2010). This case was subsequently consolidated with *Humanitarian Law Project v. Holder*, 130 S. Ct. 49 (2009).

65. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.).

66. Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified in scattered sections of the U.S.C.).

67. *Id.* at 18 U.S.C. § 2339A(b)(3) (2006).

68. ADEPA, 8 U.S.C. § 1189 (2006).

69. *See, e.g., Humanitarian Law Project*, 552 F.3d 916, 921 (9th Cir. 2009) (challenging ADEPA and its IRTPA amendment because it barred plaintiffs from providing material support to organizations AEDPA designated as foreign terrorist organizations, even though the support was for “nonviolent and lawful activities” of the organization).

70. 18 U.S.C. § 2339A(b)(3).

71. *Humanitarian Law Project*, 552 F.3d at 921.

72. *Id.* at 921 n.1.

73. *Id.* at 930. On brief to the Supreme Court, however, amici in support of the government suggested otherwise. *See* Brief of *Amicus Curiae* Scholars, Attorneys, and

specialized knowledge” portion of the prohibition on “expert advice or assistance” language was void for vagueness as applied because it “cover[ed] constitutionally protected advocacy.”⁷⁴ The Ninth Circuit justified its position by reasoning that the “requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms.”⁷⁵

On petition to the Supreme Court, Attorney General Holder made the case that the provisions are not vague and, “in any event . . . regulate[] conduct, not speech, and do[] not violate the First Amendment.”⁷⁶ In opposition, the Humanitarian Law Project argued that the speech at issue is “pure political speech”—namely “to lobby Congress, to teach and advise on human rights, to promote peaceful resolution of political disputes, and to advocate for the human rights of minority populations”—deserving of “the First Amendment’s highest protection.”⁷⁷ Further, they countered that the “‘expert advice’ provisions criminalize speech on the basis of its content,” and maintained that the Ninth Circuit’s determination should be affirmed.⁷⁸

The Supreme Court, however, rejected “the extreme positions”⁷⁹ advanced by both sides. In Chief Justice Roberts’s words, writing for the 6-3 majority, “[t]he First Amendment issue before [the Court] is more refined than either plaintiffs or the Government would have it.”⁸⁰ The majority rejected outright the Government’s conduct characterization,⁸¹ as well as the plaintiffs’ pure political speech claim. Instead, the Court determined that “[t]he law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute

Former Public Officials with Experience in Terrorism-Related Issues In Support of Petitioners at 26 n.9, *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89 (U.S. Dec. 23, 2009) (“The government was incorrect in arguing below that submitting an *amicus* brief on a [foreign terrorist organization’s] behalf would be prohibited [as] ‘expert advice or assistance’ under the statute.”). They further argued that “the statute’s content-neutral licensing provision [under 31 C.F.R. § 597.505(a)] allows legal advice and representation.” *See id.* at 4. But at oral argument, Solicitor General Elena Kagan maintained the government’s position that the statute bars legal advice and representation such as the filing of an *amicus* brief. *See* Transcript of Oral Argument at 46–47, *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89 (U.S. Feb. 23, 2010) (arguing that while the statute does not bar a petitioner from drafting an *amicus* brief for a case *involving* an organization prohibited by the statute, it does bar a petitioner from drafting such a brief for the organization itself).

74. *Humanitarian Law Project*, 552 F.3d at 930.

75. *Id.* at 928 (citation and internal punctuation omitted).

76. Petition for Writ of Certiorari at 10, *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89 (U.S. June 4, 2009).

77. Opening Br. for Humanitarian Law Project, *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89 (U.S. Nov. 16, 2009).

78. Opposition to Petition for Writ of Certiorari at 26, *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89 (U.S. June 6, 2009) (internal punctuation omitted).

79. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723 (2010).

80. *Id.* at 2724.

81. *See id.* at 2723 (“The Government is wrong that the only thing actually at issue in this litigation is conduct.”).

consists of communicating a message.”⁸² As such, “a more demanding standard”⁸³ of review is warranted, though the Court did not specifically characterize the test applied as one of strict scrutiny.⁸⁴

The Court reversed the Ninth Circuit and upheld the ban as applied to the plaintiffs in the limited circumstances of (1) training how to use humanitarian and international law to peacefully resolve disputes; and (2) teaching how to petition various representative bodies like the United Nations.⁸⁵ The Court left open the possibility that engaging in political advocacy on behalf of groups like the Kurds and the Tamil Tigers would violate the law as well, but found that the proposed advocacy was “phrased at such a high level of generality that [the plaintiffs] cannot prevail in this preenforcement challenge.”⁸⁶

Upholding the ban, the majority noted that “[e]veryone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order,” and found significant both Congress’s “specific findings regarding the serious threat posed by international terrorism” as well as the Executive Branch’s conclusion in an affidavit that “the experience and analysis of Government agencies charged with combating terrorism strongly support Congress’s finding that all contributions to foreign terrorist organizations . . . further those groups’ terrorist activities.”⁸⁷ In a strongly worded dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, wrote:

[T]he Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in . . . communication and advocacy of political ideas and lawful means of achieving political ends. . . . That this kind of speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary.⁸⁸

Moreover, Justice Breyer pointed out that “the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not ‘directed to inciting or producing *imminent lawless action*,’”⁸⁹ and “[n]o one

82. *Id.* at 2724.

83. *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

84. *See id.* at 2734 (Breyer, J., dissenting); *see also* discussion of strict scrutiny, *supra* n. 46. Whether the Court created a new level of scrutiny for speech restrictions involving national defense or war on terrorism concerns has been the subject of speculation by commentators. *See, e.g.*, Eugene Volokh, Humanitarian Law Project and Strict Scrutiny (June 21, 2010), available at <http://volokh.com/2010/06/21/humanitarian-law-project-and-strict-scrutiny/>.

85. *See Holder v. Humanitarian Law Project*, 130 S.Ct. at 2729.

86. *Id.*

87. *Id.* at 2710 (internal punctuation and citations omitted).

88. *Id.* at 2732 (emphasis in original, citations omitted).

89. *Id.* at 2733 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)) (emphasis in original)

contends that the plaintiffs' speech to these organizations can be prohibited as incitement."⁹⁰

Chief Justice Robert was careful to make clear that the holding in *Humanitarian Law Project* should not be understood "to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny."⁹¹ He further cautioned that the opinion does not "address the resolution of more difficult cases that may arise under the statute in the future."⁹² Thus, the Court did not rule specifically on the ban's application to legal advice or amicus advocacy. The holding of this case, however, is likely to have a chilling effect on attorney advice, as Justice Breyer suggested in his dissent:

It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests—a chain that leads from peaceful advocacy to "legitimacy" to increased support for the group to an increased supply of material goods that support its terrorist activities. Even were we to find some such line of distinction, its application would seem so inherently uncertain that it would often, perhaps always, "chill" protected speech beyond its boundary.⁹³

As in *Milavetz*, the Supreme Court's treatment of this federal statutory constraint on attorney advice may very well have significant ramifications for lawyers and clients. The results of these cases may have considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information. The Supreme Court's ruling in these cases also may adversely impact the ability of attorneys to offer advice in other areas of law, for an affirmation of these statutory restrictions on legal advice potentially emboldens Congress to impose similar restraints in other areas of law.

The next three fee-shifting statute cases turn on a concern related to accessing legal advice—the availability of attorneys to provide advice.

2. *Access to legal representation via fee-shifting statutes*

Three attorneys' fees cases decided by the Court bring to light another aspect of a client's right or ability to access legal advice: the availability of attorneys' fees in cases where, absent a meaningful fee-shifting statute attached to the relief sought, potential clients would be left without a lawyer to take up their case.⁹⁴ And, consequently, parties seeking

90. *Id.*

91. *Id.* at 2730.

92. *Id.*

93. *Id.* at 2736.

94. *Hardt v. Reliance Standard Life Ins. Co.*, 336 F. Appx. 332, 336 (4th Cir. 2009) (per

enforcement or redress would have no access to legal advice or meaningful legal representation.⁹⁵

The default standard for determining the payment of attorneys' fees is the so-called American Rule, under which each side must bear its own expenses regardless of the outcome.⁹⁶ Fee-shifting statutes alter the default rule, requiring the losing party to pay the prevailing party's expenses.⁹⁷ The purpose of fee-shifting statutes is to encourage private citizens to vindicate important public rights that otherwise might go unaddressed due to an inability to cover the attorneys' fees and costs involved. Congress has employed fee-shifting statutes since the mid-1960s to ensure the enforcement of civil rights statutes⁹⁸ and has attached them to other important social and economic statutes as well.⁹⁹

As Professor Samuel Bagenstos explains, "[s]tatutes shifting responsibility for plaintiffs' attorneys' fees to unsuccessful defendants are central to ensuring access to justice for people of limited means in civil rights, environmental, and other public interest cases."¹⁰⁰ Professor

curiam) (clarifying the requirements for fee-shifting), *rev'd and remanded*, 130 S. Ct. 2149, 2156 (2010); *Ratliff v. Astrue*, 540 F.3d 800, 801 (8th Cir. 2008) (determining entitlement for fee-shifting statutes), *rev'd and remanded*, 130 S. Ct. 2521, 2524 (2010); *Kenny A. ex. rel. Winn v. Purdue*, 532 F.3d 1209, 1214 (11th Cir. 2008) (determining when fee award may be enhanced), *rev'd and remanded* 130 S. Ct. 1662, 1669 (2010).

95. Unless, of course, they are fortunate enough to receive assistance from a community legal aid organization, law school clinic, or pro bono representation. These resources, however, are insufficient to satisfy the growing unmet need for legal services, especially for enforcement of civil rights and economic benefit statutes. See, for example, Quintin Johnstone, *An Overview of the Legal Profession in the United States, how that Profession Recently has been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 771-72 (2008), explaining:

The main reason for the extensive lack of legal services for the poor and the frequent inadequacy of many of the legal services that are provided the poor is the insufficient funding of these services by both government and private sources. The total annual amount of funding for civil legal services for the poor in the United States as of 2005 was about 1 billion dollars a year, of which the federal government contribution was about thirty percent of the total amount, the state government contribution was about seven percent, and the remainder came from other public and private sources.

96. See Walter Olson, *Loser Pays*, POINT OF LAW, May 21, 2005, <http://www.pointoflaw.com/loserpays/overview.php> (asserting that the United States is the only western democracy that still requires each side to pay their own expenses, and arguing for the abandonment of this requirement in favor of a rule that requires the loser to pay litigation cost).

97. See, e.g., 42 U.S.C. § 1988(b) (2006) ("In any action or proceeding to enforce [civil rights laws], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .").

98. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1136 (2006) (detailing Congress' abandonment of the American Rule in civil rights cases).

99. See Petitioner's Brief on the Merits at 11, *Perdue v. Kenny A. ex. rel. Winn*, 130 S. Ct. 1662 (2009) (No. 08-970) (citation omitted) (recognizing that there are "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party").

100. Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting*

Bagenstos notes several advantages of fee-shifting for these kinds of cases: “[b]ecause lawyers in fee-shifting cases get paid only when they win, they have an incentive to find and bring cases in which a court is likely to conclude that someone’s legal rights were actually violated.”¹⁰¹ The decentralizing feature of fee-shifting statutes, he points out, means that:

Public funding or employment of lawyers for less well-off person[s] places them at the whim of government decisions about what sorts of clients should be represented, what sorts of litigation should be brought, what sorts of remedies should be sought, and so forth. But a fee-shifting system equally subsidizes litigation for any violation of legal rights covered by a fee-shifting statute—whether or not the particular client or case is likely to be politically popular. And unlike systems of public financing of litigation—whose costs are borne by taxpayers generally—fee-shifting statutes place the burden of financing access to justice squarely on those entities that have actually violated the law (at least in the first instance).¹⁰²

Realization of the benefits highlighted by Professor Bagenstos necessarily assumes that the fee-shifting statute is applied in a meaningful and robust way. Historically, however, the Supreme Court has interpreted fee-shifting statutes narrowly, limiting the circumstances when attorneys’ fees must be paid¹⁰³ and even allowing for fees to be completely negotiated away in a settlement.¹⁰⁴ Most recently the Court held that a party is not a “prevailing party” for purposes of the fee award unless deemed such by judicial decree, even if all relief sought is obtained.¹⁰⁵ As Professor Andrew Siegel concludes:

Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don’t Get It), 1 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 150, 2009), available at <http://ssrn.com/abstract=1407275>. But not everyone agrees that fee-shifting statutes encourage access to justice. For example, University of Calgary Law Professor Alice Wooley argues that a fee-shifting statute can act as a barrier for an individual who has pro bono representation but does not have the ability to pay the other side’s attorneys’ fees if unsuccessful. See Posting of Alice Wooley to Legal Ethics Forum, <http://www.legalethicsforum.com/blog/2010/01/supreme-court-agrees-to-hear-another-fee-shifting-statute-case.html> (Jan. 16, 2010, 09:34 EST).

101. Bagenstos, *supra* note 100, at 1.

102. *Id.* at 1–2.

103. See, e.g., *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam) (holding that a declaratory judgment ordering a change in prison policies did not constitute a victory on which attorneys’ fees could be based where one co-plaintiff had already been released from prison and the other co-plaintiff had died); *Hewitt v. Helms*, 482 U.S. 755, 759–60 (1987) (holding that an interlocutory ruling that one’s complaint should not have been dismissed does not render one a prevailing party for the purposes of attorneys’ fees).

104. See *Evans v. Jeff D.*, 475 U.S. 717, 720 (1986) (holding that a district court may refuse to award fees where the plaintiff waives them as part of a settlement).

105. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*,

[B]y limiting the availability of fees to situations in which the plaintiff obtains a judicially enforceable judgment or decree that provides significant betterment of his condition (through substantial damages or a consequential injunction), the [Court] require[s] an attorney . . . to evaluate not only the underlying merits of the plaintiff's claim but also such extraneous variables as the likelihood that the action will become moot, the possibility that relief will come through non-judicial channels, and the scope of any potential damage award.¹⁰⁶

The result is that an attorney may decline to accept even a highly meritorious case, therefore circumventing the congressional purpose behind enactment of the fee-shifting statute.

The Court's grant of certiorari to three cases in this category during the 2009 term indicates an awareness of the significance that a fee-shifting statute may have on the realization of the underlying relief sought. Moreover, while each case addressed a different fee-shifting statute, fee-shifting provisions generally are interpreted consistently¹⁰⁷ so the outcomes of these cases potentially may have far-reaching results.¹⁰⁸

a. An attorney's entitlement to the fee-shifting award: Astrue v. Ratliff

*Astrue v. Ratliff*¹⁰⁹ raised a basic, but important, question regarding attorneys' fees and federal fee-shifting statutes: does a fee award belong to the attorney or the client? Attorney Catherine Ratliff "successfully represented two claimants in their efforts to receive benefits from the Social Security Administration."¹¹⁰ After her victory, she requested payment of her fees and costs under the Equal Access to Justice Act ("EAJA").¹¹¹ The EAJA is a federal fee-shifting statute that allows "prevailing parties" in civil actions against the United States to recover fees and other costs in certain cases.¹¹² The district court granted Ratliff's request, but the government reduced her award because of debt that her client owed the United States government.¹¹³ Ratliff challenged the

532 U.S. 598, 600 (2001) (finding, contrary to the majority of the circuits, that attorneys' fees cannot be awarded under a catalyst theory—where the plaintiff achieves the desired outcome because the litigation led to a voluntary change in the defendant's conduct).

106. Siegel, *supra* note 98, at 1137.

107. See *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603 n.4 (stating that the Court approaches an assessment of such provisions with an understanding that "[they] have interpreted these fee-shifting provisions consistently.").

108. See *supra* note 99 and accompanying text.

109. *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *rev'd and remanded*, *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010).

110. *Id.* at 801.

111. *Id.* The Equal Access to Justice Act is codified at 28 U.S.C. § 2412 (2006).

112. § 2412(a)(1).

113. *Ratliff*, 540 F.3d at 801. At issue was a fee awarded in the amount of \$2,239.35, all of which was offset by the government to satisfy the client's pre-existing federal debt. See

government's action under the Fourth Amendment, arguing that it constituted an illegal seizure, but the district court held she lacked standing "because the fees were awarded to the parties, not their attorney."¹¹⁴

The Eighth Circuit reversed, holding that "EAJA attorneys' fees are awarded to the prevailing parties' attorneys."¹¹⁵ It did so in the face of contradictory precedent from other jurisdictions, in particular the Tenth and Eleventh Circuits.¹¹⁶ The court noted, however, that the result was based upon controlling Eighth Circuit cases and "[w]ere [it] deciding this case in the first instance, [it might] well agree with [its] sister circuits."¹¹⁷

Predictably, in its petition for certiorari, the government argued that the Supreme Court should follow those courts holding that fees awarded to a prevailing party under the EAJA are property of the client, not the attorney.¹¹⁸ Ratliff countered that the Eighth Circuit correctly held attorneys are entitled to EAJA awards regardless of the government's asserted right to collect debts the client owes.¹¹⁹ Further, she noted that the Eighth Circuit's acknowledgement of an attorney's "protectable property interest in an EAJA fee once it is awarded" was a position "find[ing] strong support in the long-established rule that an attorney's interest in a fee for her efforts creates a lien allowing equitable tracing of funds that have been transferred to other creditors of the client."¹²⁰ Thus, it follows that "the attorney's equitable lien is itself a property interest subject to constitutional protection against government confiscation," irrespective of "who has the right to apply for an attorney fee . . . or even to receive it in the first instance."¹²¹

Ratliff also suggested the consequences of a reversal would leave few attorneys, if any, to assist Social Security claimants given the risk of receiving no compensation, "even in those cases where they not only succeed, but [also] where the government's position was not . . . justified."¹²² She argued that the purpose of fee-shifting statutes—"to encourage attorneys to take meritorious cases challenging government action and thereby allow even the indigent to enforce the rule of law—is satisfied only if an attorney who earns a fee receives it."¹²³ The absence of

Petition for a Writ of Certiorari at 4–5, *Astrue v. Ratliff*, No. 08-1322 (U.S. Apr. 28, 2009).

114. *Ratliff*, 540 F.3d at 801.

115. *Id.* at 802.

116. *Id.* at 801–02 (citing cases).

117. *Id.* at 801–02.

118. See Petition for a Writ of Certiorari, *supra* note 113, at 7.

119. Respondent's Brief in Opposition at 21, *Astrue v. Ratliff*, No. 08-1322 (U.S. June 25, 2009).

120. *Id.* at 22.

121. *Id.*

122. *Id.* at 29.

123. Respondent's Brief at 39, *Astrue v. Ratliff*, No. 08-1322 (U.S. Jan. 8, 2010).

a guaranteed fee for successful representation translates into an absence of lawyers to undertake the representation.

The Supreme Court disagreed, holding unanimously that an EAJA fee award belongs to the client, not the attorney.¹²⁴ As such, the fee award can be seized by the federal government to satisfy the client's debt obligation.¹²⁵ Justice Thomas authored the opinion, explaining that a textual reading of the statute makes clear "that courts shall award to a prevailing party fees and other expenses."¹²⁶ Further, he noted that the Court has "long held that the term 'prevailing party' in fee statutes is a term of art that refers to the prevailing litigant," not the litigant's attorney.¹²⁷

Justice Sotomayor, joined by Justices Stevens and Ginsburg, wrote a separate concurring opinion, acknowledging the concerns raised by Ratliff.¹²⁸ While Justice Sotomayor agreed that fees awarded under the EAJA are payable to the litigant rather than the attorney, and that "the litigant's obligation to pay her attorney is controlled not by the EAJA but by contract and the law governing that contract," she observed that "it is likely both that Congress did not consider that question and that, had it done so, it would not have wanted EAJA fee awards to be subject to offset."¹²⁹ In particular, she criticized the offset as "undercut[ing] the effectiveness of the EAJA" and suggested that Congress "perhaps will in the future make the opposite choice."¹³⁰ In short, she wrote: "[t]he EAJA's admirable purpose will be undercut if lawyers fear that they will never actually receive attorney's fees to which a court has determined the prevailing party is entitled. The point of an award of attorney's fees, after all, is to enable a prevailing litigant to pay her attorney."¹³¹

b. Revisiting the prevailing party requirement for fee-shifting statutes: Hardt v. Reliance Standard Life Insurance Co.

A second fee-shifting statute case sought clarification about the prevailing party requirement. In *Hardt v. Reliance Standard Life Insurance Co.*,¹³² the plaintiff's attorney successfully represented Hardt in obtaining the relief she sought—a reversal by Reliance of its initial decision to deny

124. *Astre v. Ratliff*, 130 S. Ct. 2521, 2524 (2010) ("We hold that a § 2412(d) award is payable to the litigant and is therefore subject to a Government offset to satisfy a pre-existing debt that the litigant owes the United States.").

125. *Id.*

126. *Id.* at 2525 (internal punctuation and citation omitted).

127. *Id.* (internal punctuation and citation omitted).

128. *Id.* at 2529–33.

129. *Id.* at 2530.

130. *Id.* at 2530 (internal punctuation omitted).

131. *Id.*

132. 336 F. Appx. 332 (4th Cir. 2009) (per curiam), *rev'd and remanded*, 130 S. Ct. 2149, 2156 (2010).

her long-term disability benefits for carpal tunnel syndrome.¹³³ The district court granted her motion, observing that because “on remand, Hardt received precisely the benefits she had sought, she meets the definition of a prevailing party and is eligible for an award of attorney’s fees” in the amount of nearly \$40,000.¹³⁴

Significantly, there was no judgment on the merits or judicially sanctioned relief. Thus, Reliance argued “that at best, this is a case of ‘tactical mooting,’” with no judgment on the merits entitling the plaintiff to fees.¹³⁵ In other words, there was no prevailing party. On appeal, the Fourth Circuit agreed with Reliance.¹³⁶

The Fourth Circuit held that Hardt was not a prevailing party, and reversed the district court’s award of attorneys’ fees under ERISA § 502(g)(1).¹³⁷ Hardt appealed to the Supreme Court, presenting two questions: first, “whether . . . a district court [has] discretion to award reasonable attorney’s fees only to a prevailing party;” and second, “whether a party is entitled to attorney’s fees pursuant to [the ERISA statute] when she . . . secures a judicially ordered remand . . . and subsequently receives the relief sought.”¹³⁸ Hardt argued that attorneys would be reluctant to represent future ERISA plaintiffs in pursuit of their rightful entitlements if denied fees in situations like this.¹³⁹

And this time the Court agreed, holding that under the ERISA fee-shifting statute, “a court in its discretion may award fees and costs to either party as long as the fee claimant has achieved some degree of success on the merits.”¹⁴⁰ Justice Thomas authored another unanimous opinion, and again followed a textual reading of the fee-shifting statute. Because the term “prevailing party” does not appear in the ERISA fee-shifting statute, the Court declined to incorporate this requirement.¹⁴¹ Instead, the statute requires only “some success on the merits,” under which the Court found that “the District Court properly exercised its discretion to award Hardt attorney’s fees in this case.”¹⁴²

133. *Id.* at 333 (describing the condition as so severe that Hardt could no longer continue to work as an administrative assistant).

134. *Id.* at 334.

135. *Id.* at 336.

136. *Id.* at 336.

137. *Id.* at 333.

138. Petition for Writ of Certiorari at i–ii, *Hardt v. Reliance Standard Life Ins. Co.*, No. 09-448 (U.S. Oct. 14, 2009).

139. Brief for Petitioner at 33, *Hardt v. Reliance Standard Life Ins. Co.*, No. 09-448 (U.S. Oct. 14, 2009).

140. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156(2010) (internal punctuation and citation omitted).

141. *Id.*

142. *Id.* at 2159 (citations omitted).

The third fee-shifting statute case heard by the Court involved a similar concern regarding the reluctance of attorneys to take on difficult but worthy cases when the fee award is uncertain.

c. Enhancing fee-shifting awards for extra effort: Perdue v. Kenny A. ex rel. Winn

The third fee-shifting case, *Perdue v. Kenny A. ex rel. Winn*,¹⁴³ examined when, if ever, an award under a federal fee-shifting statute may “be *enhanced* based solely on quality of performance and results obtained, or [whether] these factors already are included in the lodestar calculation.”¹⁴⁴ The default standard for calculating a fee award is based upon the lodestar formula, a tool applied by courts to assess an appropriate compensation award for attorneys representing the prevailing party under a fee-shifting statute.¹⁴⁵ The formula multiplies the reasonable number of hours worked on a case by a reasonable hourly rate that reflects the skill and experience of the attorneys seeking the fee award, and a court may enhance the lodestar calculation on the basis of performance and results only in exceptional circumstances.¹⁴⁶

This case stemmed from a Georgia federal district court’s award of \$10.5 million to a group of attorneys who represented a class of 3,000 foster children against the State of Georgia in constitutional and statutory challenges directed toward the foster care system for two metropolitan Atlanta counties.¹⁴⁷ Of that award, \$4.5 million represented an enhancement to the lodestar calculation.¹⁴⁸ The enhancement, or bonus, was based upon the district court’s assessment that the quality of legal representation “was far superior to what consumers of

143. *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1296–97 (N.D. Ga. 2006), *aff’d*, 532 F.3d 1209, 1214–15, 1242 (11th Cir. 2008), *rev’d and remanded* 130 S. Ct. 1662, 1669 (2010).

144. Petitioner’s Brief on the Merits at i, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010) (No. 08-970) (emphasis added).

145. *Perdue*, 130 S. Ct. at 1673 (explaining that the lodestar formula attempts to compensate attorneys in fee-shifting cases in line with market rates).

146. *See id.* at 1672–73. Reasonableness is assessed by a number of factors including:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983).

147. 130 S. Ct. 1662, 1669 (2010).

148. *See Perdue*, 130 S. Ct. at 1670 (explaining that the lodestar fee of \$6,012,802.90 should be adjusted upward by a multiplier of 1.75, resulting in a total fee award of over \$10.5 million).

legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation,¹⁴⁹ or in other words, the quality of performance and the results obtained. The district court judge based the fee award on his belief that the resolution of the foster care class action was unprecedented in its success.¹⁵⁰ The case spanned more than three years, concluding with a consent decree in which the State agreed to take thirty-one separate steps to improve the situation of foster children, including obligations such as prompt investigation of abuse or neglect reports, regular visits by caseworkers, licensing of foster homes, and timely delivery of medical and dental care.¹⁵¹

The State of Georgia appealed the award but a unanimous panel of the Eleventh Circuit affirmed the lower court's award, though it did so with serious reservations.¹⁵² In particular, the court observed that the district court's enhancement "cannot be squared with . . . Supreme Court [precedent]," and reached the "conclusion that the enhancement to the lodestar amount in this case was improper."¹⁵³ Nevertheless, "under the prior panel precedent rule [the court was] not free to decide the enhancement issue."¹⁵⁴ As such, though the court was "convinced" that the prior Eleventh Circuit precedent was "wrong and conflict[ed] with relevant Supreme Court decisions," it felt "bound to follow it"¹⁵⁵ and upheld the award.¹⁵⁶ After the denial of a rehearing en banc,¹⁵⁷ the State petitioned for review.

149. *Perdue*, 454 F. Supp. 2d at 1288. The District Court further observed that "[a]fter 58 years as a practicing attorney and federal judge, th[is] Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

150. *See id.* at 1290 (recounting the court's investigatory actions that led to the lodestar calculation's multiplication by 1.75).

151. *Id.* at 1289; *see also* Petitioner's Brief on the Merits, *supra* note 99, at 4–6 (discussing the volume of hours spent by counsel preparing for and mediating the case).

152. *Kenny A. ex rel. Winn*, 532 F.3d at 1242. Among those reservations the court noted that

[t]he multi-million dollar enhancement, over and beyond the full lodestar sum . . . amounts to an involuntary, federal court ordered contribution from the taxpayers of Georgia to a non-profit organization. The perverse irony of the seven figure, court ordered gratuity in this case is that it reduces the amount of state funds available to care for [the children that the litigation sought to protect].

Id. at 1236.

153. *Id.* at 1225, 1233.

154. *Id.* at 1236 (explaining that the court was constrained to following its earlier rulings in *NAACP v. City of Evergreen*, 812 F.2d 1331 (11th Cir. 1987) and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988)).

155. *Id.* at 1238 (citing *Hurth v. Mitchem*, 400 F.3d 857, 862 (11th Cir. 2005) ("[W]e are not permitted to reach a result contrary to a prior panel's decision merely because we are convinced it is wrong . . .")).

156. *Id.* at 1242.

157. *Kenny A. ex rel. Winn v. Perdue*, 547 F.3d 1319, 1320 (2008).

In its petition to the Supreme Court, the State of Georgia argued that the results obtained in a case, and the quality of work done on a case, are considerations to be taken into account only when initially calculating the basic lodestar fee amount.¹⁵⁸ It constitutes double-counting, so the argument goes, to consider those factors again in awarding an enhancement, bonus, or other additional amount. The United States filed an amicus curiae brief in support of the State of Georgia, maintaining that:

Enhancements based on the quality of representation or the results obtained are not necessary to satisfy the aim of fee-shifting statutes. Congress designed these statutes to enable private parties to attract competent counsel to help vindicate important federal rights, but Congress also cautioned that attorney's fee awards should not produce windfalls.¹⁵⁹

Furthermore, “[i]n the rare case in which representation of an unpopular or otherwise highly controversial client causes counsel to suffer professional or financial harm, the lodestar amount may be insufficient and an enhancement appropriate. But no such special circumstances are present in this case.”¹⁶⁰ In support of this position, the United States pointed to Supreme Court precedent showing that the “Court has steadily distanced itself from the notion that an enhancement . . . may be based on quality of representation or results obtained, even in ‘exceptional’ cases.”¹⁶¹

In response, the attorneys seeking enforcement of the fee award focused on the district court's decision and the Eleventh Circuit's denial of a rehearing en banc, in which Judge Wilson concurred. He explained that “[s]everal decades of established Supreme Court precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal fee-shifting statute . . . when there is specific evidence in the record to support an exceptional result and superior

158. See Petitioners' Brief on the Merits, *supra* note 99, at 13–14.

159. Brief for the United States as Amicus Curiae Supporting Petitioners at 9–10, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2009) (No. 08-970).

160. *Id.* at 10.

161. *Id.* at 17 (discussing cases where the Court incorporated elements in a basic lodestar calculation that circuit courts were erroneously considering to be enhancements). The government also noted that the ABA Model Rules require that “[a]n attorney who accepts a case arising under a fee-shifting statute is ethically obligated, as is any attorney in any case, to represent her client to the best of her legal ability,” regardless of compensation. *Id.* at 29. Accordingly, “[p]ursuant to these professional norms, lawyers every day provide best efforts for fees similar to what respondents' counsel would receive under the lodestar award, without any prospect of substantial monetary bonuses.” *Id.* Indeed, the lawyers in *Perdue* took on and successfully carried out their representation without any expectation of an enhancement. See Tony Mauro & Marcia Coyle, *Judges Back Fee Enhancements But Only in Rare Circumstances*, NEW YORK LAW JOURNAL, April 22, 2010, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202448453777> (interviewing Marcia Robinson Lowry, executive director of Children's Rights, Inc.—the group of lawyers representing the plaintiff class in *Perdue*—who explained “that fee enhancements like the one requested in this case are rare, occurring an average of once each year in the entire federal system”).

performance.”¹⁶² Judge Wilson concluded that *Perdue* “is that case,” and Judge Tjoflat emphasized in his own dissent that the district court provided precisely the sort of specific facts required to support an enhancement.¹⁶³

The Supreme Court held that an enhancement to an award under a fee-shifting statute may be permitted “in extraordinary circumstances,” but reversed the \$4.5 million bonus at issue in *Perdue*.¹⁶⁴ Writing for the 5-4 majority, Justice Alito explained:

[T]here is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified. Because the District Court did not apply these standards, we reverse¹⁶⁵

Justice Breyer, joined by Justices Stevens, Ginsberg, and Sotomayor, wrote an opinion concurring in part and dissenting in part.¹⁶⁶ Justice Breyer agreed with the majority’s conclusion that “when ‘superior attorney performance’ [] leads to ‘exceptional success an enhanced award may be justified.’”¹⁶⁷ However, he would have held that the district court did not abuse its discretion in awarding the enhancement in this case, an issue “which lies beyond the narrow question that [the Court] agreed to consider.”¹⁶⁸

In his dissent, Justice Breyer reached the conclusion that the lower court’s original determination was not an abuse of discretion for four reasons, explaining:

First, the record indicates that the lawyers’ objective in this case was unusually important and fully consistent with the central objectives of the basic federal civil-rights statute, 42 U.S.C. § 1983. . . .

. . . .

Second, the course of the lawsuit was lengthy and arduous. . . .

Third, in the face of this opposition, the results obtained by the plaintiffs’ attorneys appear to have been exceptional. . . .

Fourth and finally, the District Judge, who supervised these proceedings, who saw the plaintiffs amass, process, compile, and convincingly present vast amounts of factual information, who witnessed their defeat of numerous state procedural and substantive motions, and

162. Respondents’ Brief at 12, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2009) (No. 08-970) (quoting *Kenny A. ex rel. Winn*, 547 F.3d at 1320 (Wilson, J., concurring)).

163. *Kenny A. ex rel. Winn*, 547 F.3d at 1321–22 (Tjoflat, J., dissenting).

164. *Kenny A. ex rel. Winn*, 130 S. Ct. at 1669.

165. *Id.*

166. *Id.* at 1678 (Breyer, J., dissenting).

167. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

168. *Id.*

who was in a position to evaluate the ultimate mediation effort, . . . [found, among other observations] “that . . . counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the [district judge] ha[d] seen displayed by the attorneys in any other case during its 27 years on the bench.”¹⁶⁹

He also pointed out that the district court would not be prohibited “from awarding an enhanced fee on remand if that court provides more detailed reasoning supporting its decision.”¹⁷⁰

Compensation guaranteed by fee-shifting statutes undoubtedly influences attorneys to take on representations where parties otherwise would be left with no legal advice (and, in cases like these, with no assistance in obtaining wrongly-denied benefits). Thus, in an important way, the attorneys’ fees cases intertwine with those cases addressing access to attorney advice and, in particular, the right or ability of clients to access necessary legal assistance. Another case taken up by the Court this term identified comparable concerns regarding access to legal advice in a different context—the protection afforded to attorney-client privilege claims during civil trials.

3. *Preserving access to legal advice through the immediate appeal of a disputed attorney-client privilege waiver: Mohawk Industries, Inc. v. Carpenter*

*Mohawk Industries, Inc. v. Carpenter*¹⁷¹ involved a question of civil procedure, asking “whether a party has an immediate appeal [under the collateral order doctrine]¹⁷² of [a] district court’s order finding waiver of the attorney-client privilege and compelling production of privileged materials.”¹⁷³ The Supreme Court took up the case to reconcile a circuit split and held that such a party does not have a right to an immediate appeal.¹⁷⁴ Rather, the Court observed, “[p]ostjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege.”¹⁷⁵

This case was sparked by a dispute between Mohawk Industries and its employee, Norman Carpenter, who alleged that he was terminated unlawfully after reporting to Mohawk’s human resources department that

169. *Id.* at 1679–1682 (citation omitted).

170. *Id.* at 1684.

171. 130 S. Ct. 599 (2009).

172. The collateral order doctrine provides for an immediate appeal in limited situations. See *infra* notes 181–183 and accompanying text.

173. Reply Brief at 1, *Mohawk Indus., Inc.*, 130 S. Ct. 599 (No. 08-678).

174. *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1050 (11th Cir. 2008) (per curiam), *aff’d*, *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009).

175. *Id.*

several temporary employees were illegal aliens.¹⁷⁶ During the course of discovery, Carpenter requested information from a meeting that took place between Mohawk's attorney and him in an unrelated case, as well as information about Mohawk's decision to terminate his employment.¹⁷⁷ Mohawk refused to provide the documents on the basis of attorney-client privilege, leading Carpenter to move to compel discovery.¹⁷⁸ While the district court agreed "that the communications at issue were protected by the attorney-client privilege . . . it went on to conclude that [Mohawk] had implicitly waived the attorney-client privilege due to the response [it] filed in [an unrelated] action."¹⁷⁹ Mohawk, believing it had not waived the privilege, sought an appeal of the decision based upon the collateral order doctrine.¹⁸⁰

The Supreme Court set forth the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*¹⁸¹ The doctrine provides an exception to the final judgment rule and the corresponding principle that "[g]enerally, discovery orders are not final orders . . . for purposes of obtaining appellate jurisdiction."¹⁸² Thus, "[u]nder *Cohen*, an order is appealable [only] if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment."¹⁸³

While the Eleventh Circuit found the first two prongs satisfied in this case, regarding the third prong it found "that a discovery order that implicates the attorney-client privilege is [not] effectively unreviewable on appeal from a final judgment."¹⁸⁴ For example, the court explained that,

If [it] were to determine on appeal from a final judgment that privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, [it] could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information.¹⁸⁵

Acknowledging that other circuits have reached an opposite result, the Eleventh Circuit concluded that a discovery order compelling the disclosure of privileged information cannot be appealed before final

176. 130 S. Ct. 599, 609 (2009).

177. *Id.* at 1051.

178. *Id.*

179. *Id.*

180. *Id.* at 1052.

181. 337 U.S. 541 (1949).

182. *Mohawk*, 541 F.3d at 1052.

183. *Id.* at 1052 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

184. *Id.*

185. *Id.*

judgment.¹⁸⁶ Instead, the court suggested that mandamus or a challenge to a contempt order following noncompliance might provide alternative mechanisms for review,¹⁸⁷ notwithstanding the practical difficulties associated with these options and the extraordinary costs involved with a new trial.¹⁸⁸

In its brief to the Supreme Court, petitioner Mohawk focused on the importance of the attorney-client privilege in the context of the justice system, an issue glossed over in the Eleventh Circuit opinion. Mohawk explained:

The attorney-client privilege lies at the heart of our adversary system, promotes loyalty and trust between attorney and client, and advances the broader public interests in the observance of law and administration of justice. Because the attorney-client privilege is deeply rooted in public policy and essential to achieving a healthy legal system, a district court order that compromises the privilege by compelling the disclosure of privileged information threatens rights critical to the public good and is sufficiently important to warrant collateral order jurisdiction, outweighing the traditional concerns of piecemeal appeals.¹⁸⁹

Moreover, Mohawk reasoned that if it was forced “to wait until after a final judgment to appeal the District Court’s order, the right Mohawk seeks to protect, namely, the right not to disclose privileged information, will have been destroyed. It is this right of non-disclosure that is at the heart of the attorney-client privilege”¹⁹⁰ Mohawk went on to clarify that, “as the Third, Ninth, and D.C. Circuits have recognized, an appeal after final judgment cannot remedy the breach of confidentiality occasioned by erroneous disclosure of privileged material. Once the privileged information is disclosed, ‘there is no way to unscramble the egg scrambled by the disclosure.’”¹⁹¹ For example, adverse parties “cannot unlearn what has been disclosed to them,”¹⁹² and “allowing an adversary to see

186. See *id.* at 1053 (listing cases from the Third, Ninth, and D.C. Circuits that have held that the collateral order doctrine allows review of an order compelling the production of attorney-client communication, and cases from the First, Second, Fifth, Seventh, Tenth, and Federal Circuits stating that it does not).

187. *Id.* at 1054–55.

188. See, e.g., Michael P. Shea, *Allow Prompt Appeals*, NAT’L L. J., Apr. 13, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429788127> (explaining that “mandamus—an extraordinary remedy reserved for ‘clear abuses of discretion’ by the trial judge—is a poor fit for orders denying privilege claims” and that the contempt order for non-compliance “is even worse” in that for most parties “enduring the penalties and stigma associated with a contempt sanction is simply not a feasible option”); see also Brief for Petitioner at 32–40, *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (No. 08-678) (discussing problems associated with mandamus and contempt).

189. Brief for Petitioner, *supra* note 188, at 10.

190. *Id.* at 11–12.

191. *Id.* (quotation and citation omitted).

192. Brief Amicus Curiae of the American Bar Association in Support of Petitioner at 15, *Mohawk Indus., Inc.*, 130 S. Ct. 599 (No. 08-678) (quoting Chase Manhattan Bank, N.A.

privileged documents that are later held inadmissible at retrial ‘may alert adversary counsel to evidentiary leads or give insights regarding various claims or defenses.’¹⁹³

In his opposition brief, Carpenter pointed to precedent disallowing an immediate appeal of discovery orders, including privilege rulings, based upon the final judgment rule and concerns of judicial administration.¹⁹⁴ Applying the criteria for collateral order review, he argued that none of the factors were satisfied here for four reasons: first, “privilege rulings are inconclusive because they are particularly subject to reconsideration;” second, they “are not completely separate from the merits;” third, “privilege claims are not important enough to overcome the final judgment rule;” and finally, “orders denying attorney-client privilege claims are not effectively unreviewable after final judgment.”¹⁹⁵ Carpenter also made the case that allowing an immediate appeal would result in a flood of appeals, along with unnecessary delay in the trial process, if a party were to demand an immediate appeal any time the attorney-client privilege is invoked, even on the witness stand.¹⁹⁶

The Supreme Court agreed with Carpenter.¹⁹⁷ For the Court, “the decisive consideration [wa]s whether delaying review until the entry of final judgment ‘would imperil a substantial public interest’ or ‘some particular value of a high order.’”¹⁹⁸ The Court acknowledged Mohawk’s argument that attorney-client privilege is fundamental to ensuring confidential communications¹⁹⁹ and even accepted Mohawk’s contentions about the need to fully protect privilege, observing that:

v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992)).

193. *Id.* (quoting *Chase Manhattan Bank, N.A.*, 964 F.2d at 165).

194. *See* Brief for Respondent at 10–11, *Mohawk Indus., Inc.*, 130 S. Ct. 599 (No. 08-678) (discussing cases in which the Supreme Court held that orders enforcing discovery requests are not suitable for immediate appeal because they are not “final order[s],” and that this rule holds true even for questions of privilege in cases that involve Constitutional rights, such as Fifth Amendment protections) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992)); *see also id.* at 11 (recognizing that the Supreme Court “has repeatedly cautioned against opening the door to appeals that would undermine ‘the deference owed by appellate courts to trial judges charged with managing the discovery process’”) (quoting *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 209 (1999)).

195. *Id.* at 8–9.

196. *Id.* at 46. *But see* Brief for Petitioner at 14, *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (Jan. 20, 2010)(No. 08–678)(“[T]he available evidence shows that the three circuits that have allowed collateral order review of orders compelling the disclosure of information claimed to be subject to the attorney-client privilege have dealt with a total of approximately eleven such appeals since 1997. Of these appeals, only three fell into the category at issue here. . . .”).

197. *See Mohawk*, 130 S. Ct. at 603 (holding that “disclosure orders adverse to the attorney-client privilege [do not] qualify for immediate appeal under the collateral order doctrine”).

198. *Id.* at 605 (quoting *Will v. Hallock*, 546 U.S. 345, 352–53 (2006)).

199. *Id.* at 606.

By assuring confidentiality, the privilege encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This, in turn, serves broader public interests in the observance of law and administration of justice.²⁰⁰

The Court further recognized that some of the orders affecting attorney-client privilege could influence litigation in such a way that could not be easily remedied by post-decision appeals.²⁰¹

But the alternative was not a result the Court could accept, for allowing parties to undertake piecemeal appeals of each adverse attorney-client ruling would unnecessarily delay resolution at the district court level and unduly burden the courts of appeals.²⁰² Instead, the Court cited alternative measures such as the ability of appellate courts to “vacat[e] an adverse judgment and remand[] for a new trial in which the protected material and its fruits are excluded from evidence,” and the reality that immediate review is already available for more serious privilege issues such as “[s]ection 1292(b) appeals, mandamus, and appeals from contempt citations.”²⁰³ The Court suggested that the decision to allow immediate appeals for orders affecting attorney-client privilege issues should come through the process of rulemaking because of “the opportunity for full airing it provides.”²⁰⁴

These six cases focusing on access to lawyers and legal advice reveal a troubling pattern, one in which Congress and the Court place or allow limits on the ability of those most in need of legal representation to receive complete advice, assuming they are even able to obtain a lawyer. In only one of the six decisions—*Hardt v. Reliance Standard Life Insurance Company*—did the result favorably encourage access to lawyers, and it is limited to the unique structure of the ERISA fee-shifting provision applicable in that case. A similar pattern is seen in the remaining cases considered by the Court during the 2009 term as well, all of which touch on the consequences of bad lawyering. A comparable denial of access to justice and legal representation may occur when a lawyer introduces false testimony, presents insufficient mitigating evidence, offers the wrong advice, misses a necessary filing deadline, or fails to request a limiting instruction.

200. *Id.* (citations and internal punctuation omitted).

201. *Id.* at 608.

202. *Id.*

203. *Id.* at 606–08.

204. *Id.* at 609.

B. Cases Addressing Harm Caused by Bad Lawyering

1. Prosecutors' civil liability for fabricating evidence and introducing it at trial: McGhee v. Pottawattamie County, Iowa

*McGhee v. Pottawattamie County, Iowa*²⁰⁵ could have fundamentally altered the law on prosecutorial immunity. The Supreme Court never had an opportunity to rule on the case, however, because the parties reached a settlement soon after oral argument, and requested dismissal.²⁰⁶ Nevertheless, it is worth briefly exploring the background of this case because the Court has demonstrated an interest in resolving the issue presented and similar cases are likely to reappear again in the future.²⁰⁷ It is also important to consider the lawyering issues presented in this case because a sufficient number of justices found the case cert-worthy and, absent the parties' self-imposed dismissal by settlement, the Court was prepared to issue an opinion on the merits.

The case dates back to 1978, when two black teenagers, Curtis McGhee and Terry Harrington, were wrongfully convicted of murdering a white, retired Council Bluffs police department captain who was working as a night security guard.²⁰⁸ They were sentenced to life imprisonment.²⁰⁹ In 2002, the Iowa Supreme Court found that the prosecutors coerced false testimony and failed to disclose evidence of an alternative suspect.²¹⁰ The court reversed Harrington's conviction, and McGhee entered a plea of second degree murder in exchange for a sentence of time served.²¹¹

The two men then brought civil rights actions under 42 U.S.C. § 1983 against Pottawattamie County, Iowa, and the two former county prosecutors, Joseph Hrvol and David Richter, alleging that they fabricated

205. 547 F.3d 922 (8th Cir. 2008), *appeal dismissed*, 130 S. Ct. 1047 (2010).

206. Jessie Holland, *Case Over Iowa Prosecutors' Conduct is Settled*, AP NEWS, Jan. 4, 2010, http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=1612107874 (“A multimillion-dollar settlement on Monday ended the Supreme Court’s consideration of a case that could have changed the legal protections that criminal prosecutors get as they do their jobs. The high court agreed to dismiss the case after Terry Harrington and Curtis W. McGhee Jr. agreed to a \$12 million settlement with Pottawattamie County, Iowa, and two of its former prosecutors.”).

207. Indeed, the Court already has granted certiorari to one such case. *See Connick v. Thompson*, 578 F.3d 293 (5th Cir. 2009), cert. granted 130 S. Ct. 1880 (2010) (challenging \$14 million verdict against district attorney’s office for failure to train lawyers about Brady-violations, a failure that led to the wrongful conviction and death sentence of accused murder John Thompson); *but see* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI. KENT L. REV. 127, 127–28 (2010) (dismissing the idea that defendants who were wrongfully convicted due to prosecutorial misconduct should be able to pursue monetary damages against the prosecutors, and arguing instead that the justice system should continue to rely on “political accountability” as the best deterrent against prosecutorial misconduct).

208. *McGhee*, 547 F.3d at 925; *see also infra* note 219.

209. *Id.*

210. *Id.*

211. *Id.*

witness testimony, which they later used at trial, and withheld evidence by failing to disclose the existence of a key suspect.²¹² The prosecutors argued that they were entitled to absolute immunity under *Imbler v. Pachtman*,²¹³ in which the Supreme Court held that prosecutors are afforded absolute immunity at trial for their prosecutorial acts, but only qualified immunity for investigatory or administrative acts.²¹⁴ The Court did not provide definitive guidance, however, as to what differentiates a prosecutorial activity from an investigatory or administrative activity.²¹⁵

The district court dismissed the claims against the prosecutors based on the withholding of exculpatory evidence, but denied immunity for the claims based on the allegations that the prosecutors coerced false testimony from witnesses and later introduced it at trial to obtain the convictions.²¹⁶ The Eighth Circuit affirmed, holding that the prosecutors' procurement of false testimony violated McGhee's and Harrington's right to substantive due process, and that the prosecutors were not entitled to immunity after they fabricated evidence and introduced it at trial.²¹⁷ As McGhee and Harrington observed, "[w]ithout the fabricated testimony, there was no evidence connecting [the] plaintiffs to the murder."²¹⁸

The former prosecutors petitioned the Supreme Court solely to address the question of whether they could be tried civilly and owe damages for wrongful conviction and incarceration for violating the defendants' substantive due process rights by soliciting false testimony and introducing it at trial.²¹⁹ Though the former prosecutors were careful to note that they

212. *Id.*

213. 424 U.S. 409 (1976).

214. *See id.* at 430 (recognizing that when a prosecutor is performing an investigative or administrative role, the prosecutor is only entitled to "a good-faith defense comparable to [a] policeman's").

215. *See id.* at 430–31 (clarifying that the Court's holding is limited to prosecutorial immunity under a § 1983 civil suit for damages).

216. *See McGhee v. Pottawattamie County, Iowa*, 475 F. Supp. 2d 862, 927–28 (S.D. Iowa 2007) (ordering in addition that Harrington's and McGhee's state claims, including intentional infliction of emotional distress and malicious prosecution, be dismissed to the extent they derived from "withholding of exculpatory evidence," but not dismissed to the extent they derived from "arrest without probable cause and fabrication/coercion of evidence"), *aff'd in part and rev'd in part*, 547 F.3d 922 (8th Cir. 2008), *appeal dismissed*, 130 S. Ct. 1047 (2010).

217. *McGhee*, 547 F.3d at 932–33.

218. Brief in Opposition for Respondent Curtis W. McGhee, Jr. at 6, *McGhee*, 130 S. Ct. 1047 (No. 08-1065) [hereinafter McGhee Opposition Brief]; *accord* Brief in Opposition for Respondent Terry J. Harrington at 10, *McGhee*, 130 S. Ct. 1047 (No. 08-1065) [hereinafter Harrington Opposition Brief].

219. Brief for the Petitioners at i, *McGhee*, 130 S. Ct. 1047 (No. 08-1065). McGhee and Harrington in their opposition briefs suggest that petitioners' motivation was "[r]acial prejudice against [them] as African-Americans" and that petitioners "framed" them because they "wanted a conviction" and "they knew a white Council Bluffs jury would readily convict two black teenagers from across the Missouri River in Omaha, Nebraska for the

had not conceded McGhee and Harrington's version of the facts,²²⁰ they did not dispute them in the appeal; rather, they made two arguments. First, they contended that the Eighth Circuit's decision stands in conflict with the Seventh Circuit's holding in *Buckley v. Fitzsimmons*,²²¹ that the procurement of false testimony does not violate the Constitution and that the prosecutor is entitled to absolute immunity for the use of such false testimony.²²² Second, they suggested that the Eighth Circuit's decision also conflicted with other Supreme Court precedent, particularly related to the Court's "function test" for prosecutorial immunity.²²³ In sum, the two prosecutors made the case that they should enjoy absolute immunity from plaintiffs' claims because the claims "go to the heart of a prosecutor's function as an advocate for the state in judicial proceedings."²²⁴

In opposing the appeal, Harrington and McGhee both disputed the claim of a circuit split and distinguished *Buckley* on the grounds that it involved a different situation—there, one group of prosecutors coerced false testimony while another used that testimony at trial.²²⁵ Furthermore, both argued that the Eighth Circuit properly applied the functional test in reaching prosecutors' actions taken outside the advocacy functions (e.g. the procurement of false testimony and the introduction of said testimony at trial).²²⁶ McGhee also argued that relief under 42 U.S.C. § 1983 must be available in cases like this to deter prosecutorial misconduct, or prosecutors would fabricate evidence in criminal investigations, knowing there is little chance that punishment would result.²²⁷

killing of a white Council Bluffs, Iowa police officer. Indeed, they preferred framing two innocent black teenagers to conducting a proper investigation of white suspects"
 McGhee Opposition Brief, *supra* note 218, at 5–6.

220. See Reply to Briefs in Opposition at 11, *McGhee*, 130 S. Ct. 1047 (No. 08-1065) ("Petitioners consistently have maintained that *even if* the alleged facts were true, respondents' claims must fail because petitioners are immune as a matter of law.")

221. 20 F.3d 789 (7th Cir. 1994).

222. *Id.* at 795; see also Reply to Briefs in Opposition, *supra* note 220, at 2–3 (arguing that although Respondents attempted to trivialize the Seventh Circuit's holding in *Buckley* as "illusory" and "an isolated aberration," some circuits have since directly applied the holding or applied a similar test).

223. See Brief for the Petitioners, *supra* note 219, at 7–8, 34–36 (discussing cases that apply the function test, under which "a prosecutor is absolutely immune for acts that are 'intimately associated with the judicial phase of the criminal process'" (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 270 (1993))).

224. *Id.* at 5.

225. McGhee Opposition Brief, *supra* note 218, at 16–17; Harrington Opposition Brief, *supra* note 218, at 12–14.

226. McGhee Opposition Brief, *supra* note 218, at 9–10; Harrington Opposition Brief, *supra* note 218, at 12–13.

227. McGhee Opposition Brief, *supra* note 218, at 19.

The *amici curiae* brief filed by the National Association of Assistant United States Attorneys and the National District Attorneys Association in support of the former prosecutors focused on the practical implications of allowing the Eighth Circuit's decision to stand and addressed McGhee's argument about deterrence.²²⁸ The amici explained that allowing prosecutors to face litigation and potential civil liability will "chill[] prosecutorial efforts that are necessary to combat and deter crime. The increase in litigation will impose precisely the burdens on prosecutors—in terms of both time and money—that the doctrine of absolute immunity is intended to preclude."²²⁹ Further, the amici highlighted alternative punishments and sanctions that are already available, such as federal and state attorney disciplinary organizations and review boards,²³⁰ judicial sanctions, job loss, and criminal sanctions.²³¹ Notably absent from the list of available sanctions, however, was a remedy that might, in some way, go toward addressing the harm suffered by the wrongfully-convicted.²³²

In addition to considering the misconduct of prosecutors, the Supreme Court also considered the bad lawyering of criminal defense attorneys during the 2009 term, granting review to a record ten ineffective assistance of counsel cases involving lawyering issues.²³³ In several of the cases, the Court analyzed the constitutional sufficiency of evidence offered during the sentencing or mitigation phase of a capital murder trial, and in the other cases the Court evaluated the consequences of a misguided closing argument, misadvice, a missed deadline, and the lack of a limiting instruction.

228. *See generally* Brief of the National Association of Assistant United States Attorneys and National District Attorneys Association as *Amici Curiae* in Support of Petitioners, Pottawattamie County, Iowa v. McGhee, 130 S. Ct. 1047 (2010) (No. 08-1065).

229. *Id.* at 2.

230. *See id.* at 8–12 (discussing entities such as the Department of Justice's Office of Professional Responsibility, which investigates episodes of prosecutorial misconduct by Department attorneys including "allegations of improper coercion or intimidation of witnesses," and state bar associations that have authority to discipline both federal and state prosecutors within their jurisdictions for such infractions).

231. *See id.* at 13–15 (explaining additional checks on prosecutorial misconduct already in place such as the "adversarial system" that ensures a prosecutor's actions are challenged at trial, and "reversal on appeal" because of the negative impact such a ruling can have on a prosecutor's career).

232. Perhaps the multi-million dollar settlement that McGhee and Harrington received in this case will do so, though the effectiveness of such a settlement as a deterrent against similar future misconduct by prosecutors is unclear. *See* Rosenthal, *supra* note 207, at 152–53 (arguing that damages liability is unlikely to deter prosecutorial misconduct because most damages awards will be passed on to the public through indemnification).

233. *See supra* notes 7–12 and accompanying text. In the past decade, three merits opinions in ineffective assistance of counsel cases involving lawyering issues are the most that have occurred in any term. *See* Appendix.

2. *Inexperience and insufficient mitigation evidence: Wood v. Allen*

Wood v. Allen,²³⁴ one of ten decisions addressing the criminal defendant's Sixth Amendment right to effective assistance of counsel, presented an issue certain to resonate with law students and newly practicing lawyers, as well as with the more senior attorneys who train and supervise them: the degree to which an attorney's inexperience²³⁵ plays a role in an ineffective assistance of counsel claim. More specifically, the question presented to the Court was whether "the failure of a novice attorney with no criminal law experience to pursue or present evidence of [the] defendant's severely impaired mental functioning was a strategic decision," despite evidence in the record demonstrating otherwise.²³⁶

Affirming the Eleventh Circuit, a divided Supreme Court held that the exclusion of this evidence from the mitigation phase of the capital murder trial was, indeed, a strategic decision.²³⁷ Consequently, the Court concluded that the habeas relief sought was not warranted.²³⁸ Notably, the Court paid little attention to the inexperience of Wood's lawyer, despite the fact that the lawyer's inexperience was emphasized heavily by Wood on appeal and by Judge Barkett, writing in dissent to the Eleventh Circuit opinion.²³⁹

The case originated from a challenge to the death sentence for capital murder given to the petitioner, Holly Wood, a black man with an IQ below 70, who was represented during the penalty phase by Kenneth Trotter, a

234. 542 F.3d 1281 (11th Cir. 2008), *aff'd*, 130 S. Ct. 841 (2010).

235. Both newly practicing lawyers and their supervising attorneys have professional obligations regarding attorney inexperience. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2009) ("In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."); MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009) (addressing "[r]esponsibilities of [p]artners, [m]anagers, and [s]upervisory [l]awyers").

236. Petition for Writ of Certiorari at i, *Wood*, 130 S. Ct. 841 (No. 08-9156).

237. *Wood*, 130 S. Ct. 841, 851 (2010). *But see id.* at 851-52 (Stevens, J., dissenting) (distinguishing the decision to enter evidence of Wood's mental deficiency at trial from the decision to enter the evidence at sentencing, and arguing that while not entering the evidence at trial was a strategic decision, not entering that evidence at sentencing was "the result of inattention and neglect").

238. *Wood*, 130 S. Ct. at 845.

239. *See id.* at 850 (declining to address the question of "whether counsel's judgment was reasonable" and instead focusing on "whether counsel made a strategic decision"). *But see* *Wood*, 542 F.3d at 1292-94 (describing the preparation for the penalty phase conducted by Trotter, the most inexperienced attorney of the three that represented Wood in his criminal trial); *id.* at 1320 (Barkett, J., dissenting) ("Due to Trotter's inexperience, and to [the other attorneys'] lack of participation in preparation for the penalty phase, no investigation of Wood's mental retardation was conducted at all, and that alone is the reason it was never presented to the jury in mitigation.").

novice lawyer without any experience in criminal law.²⁴⁰ Though Wood had been assigned two additional trial counsel with more experience, those attorneys delegated the sentencing process to Trotter, and “[i]n effect, Trotter was left to sink or swim.”²⁴¹ In his petition brief, Wood argued that Trotter’s efforts were “woefully inadequate” and that “[d]espite [] clear evidence of mental impairments, neither Trotter nor either of his co-counsel pursued that evidence as a mitigating factor.”²⁴² Wood claimed his lawyers were ineffective in the sentencing phase for two reasons: first, they “did not present to the jury evidence of Wood’s borderline intellectual functioning and special education classes,” and second, they “failed to adequately investigate those issues before deciding against presenting mental health evidence.”²⁴³

The Eleventh Circuit considered a range of evidence to evaluate the ineffective assistance of counsel claim, including testimony from each attorney, the mitigating evidence presented to the jury and sentencing judge, and the additional evidence that Wood argued should have been investigated and presented.²⁴⁴ Applying the *Strickland v. Washington*²⁴⁵ test for ineffective assistance of counsel, which requires a deficient performance by counsel and that the deficiency prejudiced the defendant, a divided panel of the Eleventh Circuit rejected Wood’s argument.²⁴⁶

In reaching its conclusion, the Eleventh Circuit observed that this was “not a case where counsel failed to present any mitigation evidence,”²⁴⁷ nor was “this a case where counsel failed to obtain any mental evaluation or did not know about the mental condition in issue.”²⁴⁸ Rather, the challenge rested on “whether not telling the jury about Wood’s low intellectual functioning—shown clearly in [a mental health expert’s] pre-trial report—was ineffective assistance.”²⁴⁹ Given the “highly deferential review of counsel’s performance”²⁵⁰ required by *Strickland* and other precedent, the

240. Petition for Writ of Certiorari, *supra* note 236, at 3 (citation omitted).

241. *Id.*; see ALA. CODE § 13A-5-54 (LexisNexis 2005) (requiring that attorneys appointed to capital murder cases have a minimum of five years experience in criminal law). *But see* MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2 (2009) (“A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.”).

242. Petition for Writ of Certiorari, *supra* note 236, at 4.

243. Wood, 542 F.3d at 1289.

244. *Id.* at 1289–99.

245. 466 U.S. 668 (1984). In *Strickland*, the Supreme Court established that to find ineffective assistance of counsel under the Sixth Amendment, a defendant must prove that: (1) the quality of the counsel’s representation failed to meet an “objective standard of reasonableness” and (2) this caused the defendant prejudice. *Id.* at 687–88, 691–92.

246. See Wood, 542 F.3d at 1303.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

Eleventh Circuit sided with the other state courts reviewing the matter (but not the federal district court)²⁵¹ and concluded that this decision did not constitute deficient performance.²⁵² As to Wood's argument that his counsel did not conduct a thorough investigation, the court again applied *Strickland* to find that the duty "to make reasonable investigations"²⁵³ was satisfied.²⁵⁴ Untroubled by Trotter's lack of experience, the majority instead focused on the fact that two other experienced attorneys also had been involved in the case.²⁵⁵

Writing in dissent, however, Judge Barkett was incredibly disturbed by what she described as "egregious failures of Wood's defense counsel to investigate and develop available mitigating evidence for the penalty phase," the very kinds of failures that ineffective assistance of counsel claims are designed to prevent.²⁵⁶ Devoting over twenty pages exclusively to the issue of whether Trotter's inexperience caused ineffective counsel, she observed that "[n]o evidence of Wood's mental retardation was ever presented to the jury" and dismissed the majority's finding that this was a strategic decision as "nothing but pure speculation" that "ignore[d] specific and direct evidence of ineffectiveness of counsel."²⁵⁷ Instead, Judge Barkett argued that the majority finding "resemble[d] more a *post hoc* rationalization of counsels' conduct than an accurate description of their deliberations prior to sentencing."²⁵⁸

Examining Trotter's experience, Judge Barkett noted several concerns. Trotter had been practicing law for less than six months and conveyed his nervousness about handling the case, yet was given primary responsibility for the penalty phase of the trial.²⁵⁹ This and other evidence led Judge Barkett to find that Trotter's inexperience and lack of assistance from the

251. See *Wood v. Allen*, 465 F. Supp. 2d 1211, 1242, 1245 (M.D. Ala. 2006) (holding that the evidence did not support the state court's finding that Trotter made a "strategic decision" not to present evidence of Wood's mental retardation and, accordingly, vacating Wood's death sentence), *aff'd in part and rev'd in part*, 542 F.3d 1281 (11th Cir. 2008), *aff'd*, 130 S. Ct. 841 (2010).

252. See *Wood*, 542 F.3d at 1303–04 (holding that counsels' determination that "calling [the mental health expert] would not be in Wood's best interest" was not objectively unreasonable based on the facts).

253. *Id.* at 1307 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

254. See *id.* at 1308 n.28 (distinguishing from *Wiggins* because counsel in that case failed to investigate defendant's mental condition altogether, while in *Wood* counsel did investigate before deciding not to enter evidence of the defendant's mental condition).

255. *Id.* at 1292.

256. *Id.* at 1315 (Barkett, J., dissenting).

257. *Id.* at 1314.

258. *Id.* at 1321 (quoting *Wiggins*, 539 U.S. at 526–27).

259. *Id.* at 1316; see *id.* at 1316–18 ("Trotter expressed his frustration at the lack of supervision and guidance he was receiving in a letter to . . . the Southern Poverty Law Center, stating, 'I have been stressed out over this case and don't have anyone with whom to discuss the case, including the two other attorneys.'") (emphasis omitted).

other two attorneys in preparing for Wood's penalty phase caused Wood to be prejudiced due to ineffective assistance of counsel.²⁶⁰

Wood relied heavily on arguments similar to Judge Barkett's dissent in his petition to the Supreme Court.²⁶¹ In opposing the petition, Alabama's attorney general primarily looked to the rulings of the Eleventh Circuit and the two state courts rejecting Wood's claim that his counsel were ineffective.²⁶² Regarding the first prong of *Strickland*, which requires a showing of deficient performance, the attorney general cited the conclusions of one of the state court's previous rulings on the case:

Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. Because every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial . . . counsel does not enjoy the benefit of unlimited time and resources [to investigate every possible argument].²⁶³

As for the prejudice prong, the attorney general maintained that given "the brutal nature of his crime and the specific findings of the court that sentenced him to death," Wood's counsel's decision not to enter evidence of his mental retardation at the sentencing phase did not prejudice him because it "would not have altered, diminished, or undermined the [] aggravating circumstances."²⁶⁴

A divided Supreme Court sided with the Eleventh Circuit.²⁶⁵ Justice Sotomayor, writing for the 7-2 majority, explained:

Reviewing all of the evidence, we agree with the State that even if it is debatable, it is not unreasonable to conclude that . . . counsel made a strategic decision not to inquire further into the information contained in the report about Wood's mental deficiencies and not to present to the jury such information as counsel already possessed about these deficiencies.²⁶⁶

Justices Stevens and Kennedy disagreed. Justice Stevens, writing in dissent, said that the only conclusion he could draw from the record is that the decision not to introduce evidence of Wood's mental impairment was

260. *Id.* at 1320, 1322.

261. See Petition for Writ of Certiorari, *supra* note 236, at 19–23 ("The record reflects that Counsel's failure to request an independent psychological evaluation at that late date was not based on a weighing of the pros and cons for Wood, but solely based on their conclusion 'that . . . they didn't think the Judge would grant a continuance.'" (citation omitted)).

262. Brief of Respondents in Opposition to the Petition for Writ of Certiorari at 18, *Wood v. Allen*, 130 S. Ct. 841 (2010) (No. 08-9156).

263. *Id.* at 19–20 (quotation and punctuation marks omitted).

264. *Id.* at 29. As described in the brief: "Wood brutally murdered Ruby Gosha while she was asleep in her bed in her mother's house and then callously bragged about the crime to his cousin . . ." *Id.*

265. *Wood*, 130 S. Ct. at 851.

266. *Id.* at 850–51.

due to neglect and lack of attention and that such a decision runs counter to “[t]he lawyers’ duty to conduct a thorough investigation of possible mitigating evidence [that] is well established by our cases.”²⁶⁷ Furthermore, Justice Stevens declared that “[d]espite the fact that Trotter had a meager five months of experience as a lawyer when he was appointed to represent Wood, . . . even he knew that further investigation into any mental or psychological deficits was in order.”²⁶⁸ This case was not the Court’s final word on adequate mitigation evidence, however, during the 2009 term.

3. *More on insufficient mitigation evidence:* *Wong v. Belmontes*, *Bobby v. Van Hook*, *Porter v. McCollum*, *Jefferson v. Upton*, and *Sears v. Upton*

Wood was not the only opportunity for the Supreme Court to consider the sufficiency of evidence offered during the sentencing phase of a capital murder trial. The Court granted certiorari and issued per curiam opinions without argument in five additional cases that examined a criminal defense attorney’s obligation to secure mitigation evidence during sentencing.²⁶⁹ The Court reversed or vacated the lower court decisions in all five cases. In *Bobby v. Van Hook*²⁷⁰ and *Wong v. Belmontes*,²⁷¹ the Court reversed the Sixth and Ninth Circuits’ decisions that counsel’s performance was deficient and prejudicial in failing to offer sufficient evidence.²⁷² However, in *Porter v. McCollum*,²⁷³ the Court reversed the Eleventh Circuit’s decision that counsel’s failure to offer additional mitigating evidence was not prejudicial.²⁷⁴ Similarly, in *Jefferson v. Upton*²⁷⁵ and *Sears v. Upton*,²⁷⁶ the Court vacated the decisions of the Eleventh Circuit and the Supreme Court of Georgia, respectively, finding that both lower courts failed to properly evaluate the sufficiency of mitigation evidence. Read together, the opinions offer guidance for determining when the Court believes a

267. *Id.* at 852–53 (Stevens, J., dissenting) (citations omitted).

268. *Id.* at 854.

269. *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam); *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam); *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (per curiam); *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam).

270. 130 S. Ct. 13 (2009) (per curiam).

271. 130 S. Ct. 383 (2009) (per curiam).

272. *See Bobby*, 130 S. Ct. at 15–16 (describing the Sixth Circuit’s disposition of the case and rejecting the circuit court’s theory of the case); *Wong*, 130 S. Ct. at 384 (rejecting the Ninth Circuit’s analysis of prejudice).

273. 130 S. Ct. 447 (2009) (per curiam).

274. *Id.* at 455–56.

275. 130 S. Ct. 2217(2010) (per curiam) (Scalia, J. dissenting, joined by Thomas, J.).

276. 130 S. Ct. 3259, 3261 (2010) (per curiam) (Scalia, J. dissenting, joined by Thomas, J.) (The Chief Justice and Justice Alito would deny the petition for certiorari.).

lawyer's failure to put on additional mitigating evidence amounts to a constitutional violation.

The cases bear a number of striking similarities, and understanding these similarities is critical to appreciating the significance of their differences. All five cases involved particularly gruesome murders that occurred in the early and mid-1980s (with the exception of one that took place in the early-1990s).²⁷⁷ All five defendants experienced horrific physical and psychological abuse²⁷⁸ or physical trauma²⁷⁹ during childhood, evidence of which they sought to use during the penalty phase of their murder trials but were prevented from doing so. And, as mentioned above, the lower court decisions in all five cases were reversed or vacated by the Supreme Court.

Of the three reversals, what separates *Porter* (where the Court said the mitigating evidence was *not* sufficient) from *Van Hook* and *Belmontes* (where the Court said the mitigating evidence was sufficient) is the fact that Porter's attorney omitted entire categories of evidence—most notably his honorable military service.²⁸⁰ The only mitigating evidence Porter's attorney offered was “inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son.”²⁸¹ No evidence was offered about Porter's childhood abuse, mental

277. See *Bobby*, 130 S. Ct. at 15 (detailing how Van Hook lured the victim into a vulnerable position where he strangled and subsequently murdered him with a kitchen knife before mutilating the body); *Porter*, 130 S. Ct. at 448 (recounting how Porter threatened and repeatedly drove past the house of a former girlfriend before subsequently shooting and killing her); *Wong*, 130 S. Ct. at 384 (describing how Belmontes used a steel bar to fatally bludgeon his victim during the course of a burglary); *Jefferson v. Hall*, 570 F.3d 1283, 1287 (11th Cir. 2009) (reviewing the severe beating of the victim with wooden sticks or clubs, and a log dropped on the victim's head); *Sears v. State*, 514 S.E.2d 426, 430 (Ga. 1999) (explaining that victim was kidnapped while leaving a supermarket, assaulted with brass knuckles, raped, and killed by knife stabbing).

278. See *Bobby*, 130 S. Ct. at 18 (“Van Hook (whose parents were both ‘heavy drinkers’) started drinking as a toddler, began ‘barhopping’ with his father at age 9, drank and used drugs regularly with his father from age 11 forward[,] . . . watched his father beat his mother weekly, . . . and was beaten himself at least once.”); *Porter*, 130 S. Ct. at 449 (“Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target.”); *Wong*, 130 S. Ct. at 387 (“A number of [] witnesses highlighted Belmontes' ‘terrible’ childhood. They testified that his father was an alcoholic and extremely abusive.”); *Sears*, 130 S. Ct. at 3262 (“His parents had a physically abusive relationship . . . he suffered sexual abuse at the hands of an adolescent male cousin” and his parents were “verbally abusive . . . and disciplined Sears with age-inappropriate military-style drills.”).

279. See *Jefferson*, 130 S. Ct. at 2218 (“When Jefferson was a child, he suffered a serious injury to his head. . . . [His mother testified] that a car ran over the top of his head when he was two years old” and left him with “permanent brain damage that causes abnormal behavior over which he has no or substantially limited control.”) (internal punctuation and citations omitted).

280. See *Porter*, 130 S. Ct. at 449–50 (describing Porter's “heroic military service” and the subsequent mental trauma it caused him).

281. *Id.* at 449 (highlighting counsel's failure to present any evidence related to Porter's mental health).

health, or, significantly, his military history.²⁸² The Court was especially impressed by the honorable and heroic nature of Porter's military service.²⁸³ So impressed, in fact, that the court considered Porter's lawyer's omission of a "commanding officer's moving description [of] his active participation in two major engagements during the Korean War" amounted to a constitutional deprivation.²⁸⁴ Also relevant to the Court was evidence of the trauma Porter sustained from his military service, including "long-term substance abuse, and his impaired mental health and mental capacity."²⁸⁵

In contrast, the attorneys for Van Hook and Belmontes both presented some evidence regarding their clients' childhood abuse and psychological trauma, but Van Hook and Belmontes each argued that their attorneys should have presented further testimony from additional witnesses.²⁸⁶ While the appellate courts were sympathetic, the Supreme Court was not, finding that additional testimony would be unlikely to alter the ultimate result.²⁸⁷ Thus these cases reveal that a constitutional concern may be raised when an entire category of mitigation evidence goes unconsidered (i.e. Porter's military history), but not when more evidence falling into the same category is omitted (i.e. Van Hook's and Belmonte's additional evidence on childhood abuse). The two vacated cases confirm this conclusion.

As for the two vacated cases, the Supreme Court determined that the lower courts failed to properly apply the standards for finding prejudice under *Strickland v. Washington* based upon insufficient mitigation evidence (*Sears*) or to properly apply the standards for holding an evidentiary hearing challenging the sufficiency of mitigation evidence (*Jefferson*). In *Sears*, the Court held that the state "court failed to apply the proper prejudice inquiry," observing that "[w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only little or no

282. *Id.*

283. *See id.* at 454 (describing Porter's military service as "heroic," and sympathetically depicting his struggle to "regain normality" upon leaving military service).

284. *Id.* at 448.

285. *Id.* at 449.

286. *Bobby v. Van Hook*, 130 S. Ct. 13, 18–19 (2009) (per curiam); *Wong v. Belmontes*, 130 S. Ct. 383, 384, 387 (2009) (per curiam).

287. *Bobby*, 130 S. Ct. at 19–20 ("But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. . . . Neither the Court of Appeals nor Van Hook has shown why the minor additional details the trial court did not hear would have made any difference."); *Wong*, 130 S. Ct. at 391 ("It is hard to imagine expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of [the] murder. . . . [T]he notion that the result could have been different if only [his attorney] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful.") (emphasis in original).

mitigation evidence presented.”²⁸⁸ Moreover, the Court clarified that “[w]e certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.”²⁸⁹ Thus the fact that some mitigation evidence was introduced (“evidence describing [Sears’] childhood as stable, loving, and essentially without incident . . . [to show that] a death sentence . . . would devastate the family”)²⁹⁰ does not foreclose a conclusion that the defendant was prejudiced by a failure to introduce additional evidence of a different nature (evidence showing an abusive childhood including “significant frontal lobe abnormalities . . . [and] several serious head injuries he suffered as a child as well as drug and alcohol abuse”).²⁹¹ In *Jefferson*, the Court found that the Eleventh Circuit erred in considering only one of the eight exceptions applicable for determining “whether the state court’s factual findings [that investigation of Jefferson’s childhood head trauma was unnecessary for mitigation purposes] warrant a presumption of correctness.”²⁹² As in *Sears*, the Court vacated the decision below and remanded the case back to the lower court for further consideration.²⁹³

4. *Disloyalty in the closing argument: Smith v. Spisak*

*Smith v. Spisak*²⁹⁴ introduced yet another claim of constitutionally ineffective lawyering, this time based, in part, upon a lawyer’s trial strategy at closing argument.²⁹⁵ Defendant Spisak was convicted in 1983 of four murders at Cleveland State University.²⁹⁶ He pled not guilty by reason of insanity, but admitted to the murders.²⁹⁷ During the trial he showed no remorse and claimed to be a follower of Adolf Hitler.²⁹⁸ Though a number of experts were prepared to testify about Spisak’s mental illness, they were excluded from supporting his insanity claim.²⁹⁹

288. *Sears*, 130 S.Ct. 3259, 3266 (2010) (internal punctuation and citations omitted).

289. *Id.* at 3266 (emphasis in original).

290. *Id.* at 3261.

291. *Id.* at 3262.

292. 130 S. Ct. at 2223.

293. *Id.* at 2221 (citing 28 U.S.C. § 2254(d) which codifies the factors to be considered for presumption of correctness to be applied to the state court factual determinations in a federal habeas appeal).

294. 130 S. Ct. 676 (2010).

295. *Id.* at 680.

296. *Spisak v. Mitchell*, 465 F.3d 684, 688–90 (6th Cir. 2006), *remanded*, *Hudson v. Spisak*, 128 S. Ct. 373 (2007), *rev’d*, *Smith v. Spisak*, 130 S. Ct. 676, 680 (2010).

297. *Id.* at 688, 690.

298. *See id.* at 688 (detailing the court’s competency proceedings and Spisak’s request for multiple psychiatric evaluations).

299. *See e.g., id.* at 691–703 (recounting Dr. Oscar Markey’s diagnosis of Spisak’s mental state and subsequently approving of the lower court’s exclusion of that testimony because it failed to show that Spisak met the legal standard required for a plea of not guilty by reason of insanity).

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In the closing argument of the sentencing phase, Spisak's attorney "repeatedly stress[ed] the brutality of the crimes and demean[ed] [Spisak]." ³⁰⁰ He described each murder in graphic detail, made little mention of Spisak's mental illness as a mitigating factor, and "rambl[ed] incoherently . . . about integrity in the legal system." ³⁰¹ The district court found the argument to be "an appropriate part of trial counsel's strategy to confront the heinousness of the murders before the prosecution had the opportunity to do so." ³⁰²

The Sixth Circuit disagreed. The court reasoned that "in pursuing this course, [Spisak's attorney] abandoned the duty of loyalty owed to [his client]." ³⁰³ Of particular concern to the court was the attorney's failure to explain mental illness as a mitigating factor and that the attorney's "hostility toward [Spisak] aligned [him] with the prosecution against his own client." ³⁰⁴ Furthermore, the court observed, "[m]uch of [Spisak's attorney's] argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." ³⁰⁵ The Sixth Circuit reversed the district court's denial of habeas. ³⁰⁶

Ohio's attorney general argued on appeal to the Supreme Court that Spisak's attorney's closing argument was "reasonable when viewed from counsel's perspective at the time." ³⁰⁷ A group of prominent trial advocacy law professors, who filed an amicus curiae brief, took issue with this position. ³⁰⁸ They explained that Spisak's attorney's closing argument unconstitutionally prejudiced his case, asserting that "a closing argument that magnifies and obsesses on weaknesses, while discussing strengths in an indirect and at times incomprehensible manner, is below any reasonable measure of professional competence." ³⁰⁹ "For this Court to determine otherwise," they warned, "would teach generations of future lawyers incorrect lessons about how to present a case, and would leave clients . . . without the

300. *Id.* at 704.

301. *Id.* at 705.

302. *Id.*

303. *Id.* at 706.

304. *Id.* (comparing Spisak's representation to the representation in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), where defense counsel repeatedly disparaged his client as part of a strategy to persuade the jury that the defendant's "sick" nature warranted mitigation of his capital sentence).

305. *Id.*

306. *Id.* at 687–88, 703.

307. Brief of Petitioner at 36, *Smith v. Spisak*, 130 S. Ct. 676 (2010) (No. 08-724).

308. Brief of Stephen Lubet et al. as *Amici Curiae* in Support of Respondent at 2, *Spisak*, 130 S. Ct. 676 (No. 08-724).

309. *Id.* at 3.

reasonable assurance of actual assistance of counsel to which the Sixth Amendment entitles them.”³¹⁰

Writing for a unanimous Court, Justice Breyer conceded that Spisak’s attorney delivered an ineffective closing argument but “nevertheless [found] no ‘reasonable probability’ that a better closing argument without these defects would have made a significant difference.”³¹¹ Because Spisak admitted to the murders and shootings and, among other things, testified that he was a follower of Adolf Hitler and that he “had hoped to ‘create terror’” targeting his victims based on their race, the Court determined that an improved closing argument would not have altered the result.³¹² Justice Stevens, however, wrote separately in a concurring opinion to emphasize the deplorable nature of the closing argument:

It is difficult to convey how thoroughly egregious counsel’s closing argument was without reproducing it in its entirety Suffice it to say that the argument shares far more in common with a prosecutor’s closing than with a criminal defense attorney’s. Indeed, the argument was so outrageous that it would have rightly subjected a prosecutor to charges of misconduct. . . .

. . . .
Spisak’s crimes, and the seemingly unmitigated hatred motivating their commission, were truly awful. But that does not excuse a lawyer’s duty to represent his client within the bounds of prevailing professional norms. . . . In short, counsel’s argument grossly transgressed the bounds of what constitutionally competent counsel would have done in a similar situation.³¹³

The Court’s decision in *Spisak* brings to light a disconcerting breach in the system of lawyer regulation that is supposed to protect clients from such “thoroughly egregious” behavior by lawyers. While the outcome might not have been different for Spisak, his attorney nonetheless remained bound to the requirements of professional conduct. Yet it appears no discipline or other follow up occurred before the Ohio Office of Disciplinary Counsel or Grievance Committee.³¹⁴

310. *Id.*

311. *Smith*, 130 S. Ct. at 685.

312. *Id.* at 686–87.

313. *Id.* at 691–93.

314. See Renee Newman Knake, Study of Disciplinary Action in U.S. Supreme Court Ineffective Assistance of Counsel and Prosecutorial Misconduct Cases (unpublished study, on file with author). For another theory on the strategy employed by Spisak’s attorney, see Ineffective Assistance of Counsel, Bad Lawyer Blog, <http://badlawyernyc.blogspot.com/2009/10/ineffective-assistance-of-counsel.html#comments> (Oct. 14, 2009) (suggesting that Spisak’s attorney, Tom Shaughnessy, wanted to “save Frank Spisak’s life—and, that Shaughnessy ‘ineffectively’ knew precisely what he was doing” in making such a prejudicial closing argument).

5. *Misadvice: Padilla v. Kentucky*

In *Padilla v. Kentucky*³¹⁵ a legal permanent resident brought an ineffective assistance of counsel claim after his attorney incorrectly advised him that pleading guilty to three drug-related charges would not result in deportation.³¹⁶ The case raised two closely related questions regarding the Sixth Amendment's guarantee of effective assistance of counsel: first, whether an attorney has an affirmative duty to advise a non-citizen client that pleading guilty to an offense will result in deportation (or is this a "collateral consequence" that would relieve the attorney of such a duty?); and second, if the deportation is in fact a collateral consequence, does an attorney's misadvice that a guilty plea will not result in deportation constitute ineffective assistance of counsel?³¹⁷

A brief history of this case clarifies the questions presented. The petitioner, Jose Padilla, had lived in the United States for over forty years (and served in the U.S. military during the Vietnam War) when he was indicted in 2001 on three drug counts related to the trafficking and possession of marijuana and for failing to have an appropriate tax number on the truck he was driving.³¹⁸ Padilla conferred with his attorney about how to respond to the charges, asking specifically about the consequences of a guilty plea.³¹⁹ After his attorney reassured him "that he 'did not have to worry about immigration status since he had been in the country so long,'" Padilla pled guilty to the drug charges and the other charge was dropped.³²¹

But the advice from Padilla's attorney was wrong. Two federal statutes related to antiterrorism and illegal immigration reform enacted in 1996 made Padilla's felony an "aggravated felony" under the Immigration and Nationalization Act, with deportation mandatory following a guilty plea to such a charge.³²² Accordingly, Padilla sought post-conviction relief arguing that his attorney's wrong advice about the deportation

315. *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *rev'd and remanded* *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

316. *Id.* at 1478.

317. Brief of Petitioner at i, *Padilla*, 130 S. Ct. 1473 (No. 08-651) [hereinafter *Padilla* Petitioner Brief].

318. 253 S.W.3d at 483.

319. *See id.* (indicating that Padilla's counsel had discussed the possibility of deportation with Padilla, and that Padilla's counsel had given him a direct answer).

320. *Id.*

321. *Id.*

322. *See* *Padilla* Petitioner Brief, *supra* note 317, at 5–7 (citing AEDPA, Pub. L. No. 104-132 § 440(d), 110 Stat. 1214, 1276–77 (codified as amended in scattered sections of the U.S.C.), and the Illegal Immigration Reform and Immigration Responsibility Act of 1996, 8 U.S.C. § 1229(b) (1996)).

consequences of a guilty plea constituted ineffective assistance of counsel.³²³

A divided Kentucky Supreme Court rejected Padilla's request for relief based upon his attorney's misadvice, holding that mandatory deportation is a "collateral consequence[] . . . outside the scope of the guarantee of the Sixth Amendment right to counsel."³²⁴ The court grounded its decision in the precedent of *Commonwealth v. Fuartado*,³²⁵ where it previously held that attorneys have no duty to advise their client about the possible deportation consequences of a guilty plea.³²⁶

The two dissenting justices, however, argued that *Fuartado* was "distinguishable in a small, but critical way."³²⁷ Specifically, they noted that although an attorney may not have an "affirmative duty to inform his or her client of the impact that a guilty plea will have on civil immigration status," Padilla's situation was different in that he explicitly asked his counsel about that very issue and was given "terribly wrong advice."³²⁸ The dissent went on to explain that "[c]ounsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness."³²⁹ The dissent concluded that, at a minimum, Padilla "was at least entitled to a hearing" on the matter.³³⁰

Other courts considering similar types of cases involving attorney advice on collateral consequences of a guilty plea apply a variety of approaches in determining what amounts to ineffective assistance.³³¹ Padilla's petition to the Supreme Court classified the approaches into four categories: (1) finding ineffective assistance only if an attorney volunteers wrong advice; (2) allowing an attorney to refuse to answer a question but finding ineffective assistance if wrong advice is given; (3) affirmatively requiring attorneys to advise clients of immigration consequences of guilty pleas (like deportation); and (4) the approach of Kentucky courts finding that misadvice on collateral consequences is never grounds for setting aside a plea.³³² Padilla argued that Kentucky's approach was out of step with precedent of the Supreme Court and the majority of lower courts that have

323. See *Padilla*, 253 S.W.3d at 483.

324. *Id.* at 485.

325. 170 S.W.3d 384 (Ky. 2005), *abrogated by* *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

326. See *Padilla*, 253 S.W.3d at 483 (citing *Fuartado*, 170 S.W.3d 384).

327. *Id.* at 485 (Cunningham, J., dissenting).

328. *Id.*

329. *Id.*

330. *Id.*

331. See generally *Padilla* Petitioner Brief, *supra* note 317 at 54–58 (discussing considerations and approaches taken by various state and federal courts).

332. See *id.* at 27, 54–58.

addressed this issue,³³³ as well as with the standards of the American Bar Association and public defenders' organizations that require counsel to investigate and advise clients about collateral consequences of conviction.³³⁴ Specifically, he looked to *Strickland v. Washington*³³⁵ where the Supreme Court established the test for finding ineffective assistance of counsel, contending that he could not be bound to a plea that was substantially induced by his attorney's mistaken advice regarding the deportation consequences of pleading guilty.³³⁶

In opposing the petition, the Commonwealth of Kentucky essentially focused on *Fuortado's* treatment of collateral consequences.³³⁷ The key components of the argument were that the Sixth Amendment does not guarantee a criminal defendant any right to receive advice from counsel regarding the collateral consequences of a guilty plea and, accordingly, it necessarily follows that since deportation is a collateral consequence, the failure to advise is indistinguishable from misadvice.³³⁸ While indicating that an attorney's ethical obligations might be implicated by the misadvice, the Commonwealth asserted that Sixth Amendment protections do not extend to issues "wholly collateral to the criminal prosecution."³³⁹

The Supreme Court reversed,³⁴⁰ and instead provided for "an extraordinary expansion of the Sixth Amendment rights of criminal defendants."³⁴¹ In a 7-2 decision, the Court found that the failure to warn Padilla about his deportation constituted ineffective assistance of counsel. Justice Stevens, writing for the majority, observed that "[d]eportation as a

333. See Petition for Writ of Certiorari at 10-15, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (noting a 27-3 split among the courts on the question of whether counsel have no Sixth Amendment duty to advise immigration defendants of the deportation consequences of a guilty plea and a 17-2 split on the question of whether, considering deportation as a collateral consequence, misadvice nonetheless violates the Sixth Amendment, with only Kentucky and the D.C. Circuit holding that it does not).

334. See Padilla Petitioner Brief, *supra* note 317, at 15-16 (asserting that basic representation and advice of counsel must consider any dire risks or consequences that result from legal action).

335. For a discussion of *Strickland's* two-prong ineffective assistance of counsel test, see *supra* note 245, and accompanying text.

336. See Padilla Petitioner Brief, *supra* note 317, at 14-17 (arguing that the immigration consequences of conviction can sometimes be a greater risk for a defendant than criminal conviction itself, and asserting that defendants, not attorneys, should define the objectives and scope of representation).

337. See generally Respondent's Brief in Opposition at 5-6, *Padilla*, 130 S. Ct. 1473 (No. 08-651) (minimizing the connection between a criminal guilty plea and potential deportation, and, further arguing that the central justification for the Sixth Amendment right to adequate counsel is to ensure fairness in the establishment of guilt or innocence).

338. See *id.* at 6-7, 16.

339. *Id.* at 17.

340. See *Padilla*, 130 S. Ct. at 1480 (alluding to recent changes in immigration law as justification for finding that immigration consequences are integral to criminal proceedings).

341. Gabriel J. Chin & Margaret Colgate Love, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction* 1, (Ariz. Legal Studies, Discussion Paper No. 10-16, 2010), available at <http://www.ssrn.com/abstract=1591264>.

consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence.³⁴² As such, the Court applied *Strickland* and held that a lawyer is constitutionally required to advise a client about the deportation consequences of a guilty plea.³⁴³ The Court declined to decide the prejudice prong of *Strickland*, however, because the question was not properly before the Court.³⁴⁴

Applying the first prong of *Strickland*—“whether counsel’s representation fell below an objective standard of reasonableness”—Justice Stevens explained that this inquiry “is necessarily linked to the practice and expectations of the legal community” or “prevailing professional norms.”³⁴⁵ In this case, the majority determined that the “weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”³⁴⁶ Thus, as in some of the mitigation evidence cases, Padilla’s outcome stands in contrast to the other bad lawyering cases because it was resolved favorably for the defendant. Another ineffective assistance of counsel case to do so was *Holland v. Florida*.

6. *Missing a critical filing deadline: Holland v. Florida*

*Holland v. Florida*³⁴⁷ involved a death row petitioner’s late-filed federal habeas appeal.³⁴⁸ Defendant Holland repeatedly contacted his court-appointed attorney about the filing of his habeas petition, both by letter and telephone.³⁴⁹ But his attorney missed the filing date.³⁵⁰

Holland then proceeded *pro se*, filing the petition on his own and requesting “equitable tolling,” or an extension, of the deadline based upon his attorney’s “gross negligence.”³⁵¹ The statute of limitations to file a federal habeas corpus petition provides for equitable tolling when two standards are met: first, the petitioner must show “that he has been

342. *Padilla*, 130 S. Ct. at 1482.

343. *See id.* (relying on professional norms to require advice on immigration consequences of criminal proceedings).

344. *Id.* at 1487.

345. *Id.* at 1482 (citation omitted).

346. *Id.*

347. *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008) (per curiam), *rev’d and remanded*, 130 S. Ct. 2549, 2554 (2010).

348. *Id.* at 1336.

349. *See id.* at 1337 (detailing Holland’s attempts to contact his attorney and his attorney’s failure to even inform Holland that his petition for a writ of habeas corpus had been denied).

350. *Id.* at 1336.

351. *Id.*; *see also* Petition for Writ of Certiorari at i, *Holland v. Florida*, No. 09-5327 (U.S. May 13, 2009) [hereinafter *Holland Petition*] (seeking certiorari to determine whether late filing of a habeas appeal due to gross negligence of counsel warrants equitable tolling).

pursuing his rights diligently, and [second,] that some extraordinary circumstance stood in his way and prevented timely filing.”³⁵²

According to the Eleventh Circuit, “[p]ure professional negligence is not enough” to satisfy this test.³⁵³ While the court agreed that the attorney’s “failure to file a [timely] federal habeas petition [], despite [Holland’s] repeated instructions to do so”³⁵⁴ constituted gross negligence, it determined that “no allegation of lawyer negligence or of failure to meet a lawyer’s standard of care . . . can rise to the level of egregious attorney misconduct that would entitle [Holland] to equitable tolling.”³⁵⁵ In other words, “even attorney conduct that is grossly negligent can never warrant tolling absent bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part.”³⁵⁶

In his Supreme Court appeal, Holland took issue with “[t]he Eleventh Circuit’s stubborn refusal to acknowledge that ‘gross negligence’ is sufficient to warrant equitable tolling.”³⁵⁷ He contended that the Eleventh Circuit’s test conflicts with other circuits and establishes a “near-impossible standard to meet.”³⁵⁸ In the opposition brief, Florida’s attorney general suggested that Holland’s own behavior, including not answering “at least eight letters” written by his attorney, should be taken into account, and further argued that equitable tolling is not warranted in this case because Holland’s attorney’s “miscalculat[ion of] the federal habeas deadline . . . was merely ordinary attorney negligence.”³⁵⁹

A majority of the Supreme Court agreed with Holland that equitable tolling applied to the federal habeas deadline, and rejected the Eleventh Circuit’s “rigid” standard for finding the “extraordinary circumstances” warranting tolling.³⁶⁰ The Court left the question of whether tolling should apply in this particular case, however, to the lower court.³⁶¹ Justice Breyer

352. *Holland*, 539 F.3d at 1338 (quoting *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007)).

353. *Id.* at 1339.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Holland* Petition, *supra* note 351, at 7.

358. *Id.* at 7–8.

359. Respondent’s Brief in Opposition at 13, *Holland v. Florida*, No. 09-5327 (U.S. Sept. 11, 2009).

360. *Holland v. Florida* 130 S. Ct. 2549, 2563 (2010) (“[W]e hold that [the Antiterrorism and Effective Death Penalty Act of 1996 28 U.S.C.] § 2244(d) is subject to equitable tolling in appropriate cases.” *Id.* at 2560.). Justice Breyer authored the 7-2 opinion, with Justice Scalia authoring a dissent joined by Justice Thomas.

361. *See id.* at 2565 (“Thus, because we conclude that the District Court’s determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.”).

writing for the majority suggested that the facts of this case “may well be an extraordinary instance” where tolling is appropriate:

[Attorney] Collins failed to file Holland’s federal petition on time despite Holland’s many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland’s letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland’s many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.³⁶²

Like many of the lawyering cases before the Court this term, *Holland* implicates important duties owed by a lawyer to the client. For example, the ABA Model Rules demand minimum levels of competence, diligence, and communication.³⁶³ A lawyer also is required under the Model Rules to “abide by a client’s decisions concerning the objectives of representation” and must “consult with the client as to the means by which they are to be pursued.”³⁶⁴ While a violation of these duties alone does not necessarily rise to the level of a constitutional violation, the compounded violation of multiple professional conduct duties as in cases like *Holland* must be taken into account, a point acknowledged by the Court’s majority opinion.³⁶⁵

7. *Failure to request a limiting instruction: Berghuis v. Thompkins*

*Berghuis v. Thompkins*³⁶⁶ is best-known for holding that a criminal suspect waives his right to remain silent if he does not affirmatively invoke the right.³⁶⁷ But the case also touched on a lawyering issue—whether the

362. *Id.* at 2564.

363. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009) (addressing duty of competence); MODEL RULES OF PROF’L CONDUCT R. 1.3 (2009) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3),(4) (2009) (“A lawyer shall . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information . . .”).

364. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2009).

365. *See Holland*, 130 S. Ct. at 2564-65 (citing Brief of Legal Ethics Professors and Practitioners et. al. as *Amicus Curiae* in Support of Petitioner); *see also* Brief of Legal Ethics Professors and Practitioners et. al. as *Amici Curiae* in Support of Petitioner at 12, *Holland v. Florida*, No. 09-5327 (U.S. Dec. 30, 2009) (discussing the fiduciary duties lawyers owe to their clients and how professional standards of conduct underscore the gross nature of the attorney’s negligence in *Holland*).

366. *Thompkins v. Berghuis*, 547 F.3d 572, 590–91 (6th Cir. 2008), *rev’d and remanded*, 130 S.Ct. 2250 (2010) (Sotomayor, J. dissenting, joined by Stevens, Ginsburg, Breyer, J.J.).

367. *Id.* at 2264. The portion of the Court’s opinion discussing the waiver of Miranda rights received extensive media coverage shortly after the decision was rendered. *See, e.g.*, Adam Liptak, *Mere Silence Doesn’t Invoke Miranda, Justices Say*, N. Y. TIMES, June 1,

defense attorney's failure to request a limiting instruction constituted ineffective assistance of counsel. Van Chester Thompkins was convicted of murder and related offenses for the drive-by shooting-death of a man outside a mall located in suburban Detroit, Michigan, and injuries to another victim.³⁶⁸ According to "the prosecution's theory, . . . Thompkins shot the victims from the passenger seat of a van driven by Eric Purifoy. . . . The defense strategy was to pin the blame on Purifoy."³⁶⁹

During trial, the prosecution established that Purifoy had been previously tried and acquitted on murder and assault charges brought under an aiding-and-abetting theory since he was the driver.³⁷⁰ In his testimony, Purifoy explained that "he had been driving the van and that Thompkins was in the passenger seat while another man, [named] Myzell Woodward, was in the back."³⁷¹ Purifoy then went on to testify that "he did not see who fired the weapon because the van was stopped and he was bending over near the floor when shots were fired."³⁷²

The prosecution believed Purifoy was lying. In an exchange of letters between Purifoy and Thompkins that occurred after Purifoy's trial but before Thompkins's started, "one of Purifoy's letters appeared to give Thompkins a trial strategy. The prosecution suggested that this strategy was to say Woodward shot the victims, allowing Purifoy and Thompkins to say they dropped to the floor when the shooting started."³⁷³ Thus, during closing arguments, the prosecution "suggested that Purifoy lied when he testified that he did not see Thompkins shoot the victims."³⁷⁴

Thompkins's attorney did not object to the prosecution's inference that Purifoy lied, nor did he request "an instruction informing the jury that it could consider evidence of the outcome of Purifoy's trial only to assess Purifoy's credibility, not to establish Tompkins's guilt."³⁷⁵ Thompkins was sentenced to life in prison without parole after the jury found him guilty on

2010 at A15; Jess Bravin, *Justices Narrow Miranda Rule*, WALL ST. J., June 2, 2010 at A2; Robert Barnes, *Supreme Court: Suspects must invoke right to remain silent in interrogations*, WASH. POST, June 2, 2010 at A5.

368. See 130 S.Ct. at 2256–68.

369. *Id.* at 2257.

370. See *id.* at 2257 ("So that the Thompkins jury could assess Purifoy's credibility and knowledge, the prosecution elicited testimony from Purifoy that he had been tried earlier for the shooting under an aiding-and-abetting theory. Purifoy . . . testified that a jury acquitted him of the murder and assault charges" but convicted him of lesser charges like carrying a concealed weapon.).

371. *Id.* at 2275.

372. *Id.*

373. *Id.*

374. *Id.* at 2257. The prosecutor argued: "Did Eric Purifoy's Jury make the right decision? I'm not here to judge that. You are not bound by what his Jury found. Take his testimony for what it was, [a] twisted attempt to help not just an acquaintance but his tight buddy." *Id.* at 2258.

375. *Id.* at 2258.

all charges. Though the federal district court and state courts denied Thompkins's claim that his attorney's failure to ask for a limiting instruction constituted ineffective assistance of counsel, the Sixth Circuit granted him relief.

According to the Sixth Circuit, "the failure to request such a limiting instruction is particularly deficient in light of Thompkins's primary defense at trial, which was that Eric Purifoy was the shooter and that [Thompkins] was merely present."³⁷⁶ The court also found that *Strickland's* prejudice requirement was clearly established, given that "in the absence of a limiting instruction, the jury could well have believed that it was entirely proper to weigh Purifoy's acquittal as significant evidence that Thompkins must have been the shooter."³⁷⁷

The Supreme Court reversed. Justice Kennedy, writing for the majority, observed:

It seems doubtful that failure to request the instruction about the earlier acquittal or conviction was deficient representation; but on the assumption that it was, on this record, Thompkins cannot show prejudice. The record establishes that it was not reasonably likely that the instruction would have made any difference in light of all the other evidence of guilt.³⁷⁸

Even if the Sixth Circuit was correct that "the state court used an incorrect legal standard" the majority held that Thompkins could not satisfy *Strickland's* prejudice requirement.³⁷⁹

As demonstrated by the summary in Part I of this Article, each of the 2009 cases raised on its own important law of lawyering considerations, especially regarding access to legal advice and adequate legal representation. Equally critical, however, are observations drawn from a collective reading of the cases. Part II offers some preliminary thoughts.

II. SOMETHING MORE: DERIVING MEANING FROM THE SUPREME COURT'S INCREASED ATTENTION TO THE LAW OF LAWYERING

The lawyering cases addressed by the Supreme Court during the 2009 term varied widely in substance, but contained common themes about the law of lawyering as well as the rights and interests of those who need legal representation and advice. All of the cases raised important questions about the role of lawyers and the practice of law. Accordingly, the cases

376. *Thompkins v. Berghius*, 547 F.3d 572, 590–91 (6th Cir. 2008).

377. *Id.* at 591.

378. 130 S.Ct. at 2265.

379. *Id.*

should be considered in relation to one another in order to understand and appreciate their implications for the law of lawyering field.

While the full impact of these cases may be realized more fully with the passage of time, this Article suggests three reasons why the Court's heightened interest in the law of lawyering appears to be more than mere coincidence. First, when read together, the cases reveal a troubling pattern of limitations on access to legal advice coupled with an inability to fully redress harms caused by bad lawyering. Second, certain aspects of the cases offer helpful lessons for those involved in future efforts to regulate the legal profession. Third, if any question remains as to the importance of constitutional considerations in the study and scholarship of lawyer ethics, the Court's newest lawyering precedent puts the matter to rest. Each observation is addressed in turn below.

A. Accessing Competent Legal Advice; Ameliorating Harmful Legal Representation

The lawyering cases taken up by the Supreme Court during the 2009 term reveal a troubling pattern of limitations on access to legal advice coupled with an inability to fully redress harms caused by bad lawyering. One common thread running through every opinion is the need for clients to access competent legal advice and effective, rather than harmful, representation. For example, the cases of *Milavetz*, *Humanitarian Law Project*, and *Mohawk Industries* presented the Court with assorted dimensions of the attorney's responsibility to competently advise a client, whether the attorney faces constraints on advice from a federal statute or finds that attorney-client privilege may not be adequately protected.³⁸⁰ These cases reveal tension between an attorney's professional obligations and regulations from external sources like federal laws.

The problem with statutes like those at issue in the *Milavetz* and *Humanitarian Law Project* cases is that, as the Supreme Court explained in a similar context, "[r]estricting . . . attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys."³⁸¹ In recognizing the importance of "an informed, independent bar,"³⁸² the Court further observed that "[w]e must be vigilant

380. See *supra* notes 2 and 5.

381. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001).

382. *Id.* at 545; see also *Polk County v. Dodson*, 454 U.S. 312, 321–322 (1981) (holding that a public defender does not act "under color of state law" because the public defender "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client" and because there is an "assumption that counsel will be free of state control").

when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.”³⁸³ The advice and advocacy bans in *Milavetz* and *Humanitarian Law Project* run the risk of doing precisely that—they insulate aspects of Congress’s bankruptcy and anti-terrorism laws from legal challenge by preventing lawyers from advising clients completely about the application and meaning of those laws. Even under the narrowed construction required by the Court’s holding in *Milavetz*, permitting the ban to stand means that certain advice may remain off-limits for lawyers and their clients.³⁸⁴ In some instances, these laws deter lawyers from offering any legal services that might be implicated by the bans.³⁸⁵ Moreover, although the Court upheld the ban in *Humanitarian Law Project* only as applied to the plaintiffs under narrow circumstances, going forward the holding is likely to have a significant chilling effect on legal advice to clients designated as foreign terrorist organizations.³⁸⁶ And, while *Mohawk Industries* did not challenge a federal statute, similar concerns were at stake, as Chief Justice Roberts acknowledged during oral argument when he reflected that preservation of attorney-client privilege—a protection necessary to facilitate candid legal advice—is “central to maintaining the rule of law.”³⁸⁷

Thus, *Mohawk Industries* also strikes at the essence of the same concerns about an attorney’s ability to advise a client as those featured in *Milavetz* and *Humanitarian Law Project*. As the Supreme Court has long recognized, the rationale for the attorney-client privilege—“the oldest of the privileges for confidential communications known to the common law”—“is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”³⁸⁸ Without that full and frank communication, an attorney may not be able to offer essential advice. Similarly, if the possibility of an immediate appeal to protect that privilege does not exist, clients “may be less likely to engage in internal investigations to ensure their compliance with the law because the

383. *Legal Servs. Corp.*, 531 U.S. at 548.

384. See, e.g., Wash Park Prophet: Alas, Narrowed Bankruptcy Gag Rule Lives, <http://washparkprophet.blogspot.com/2010/03/narrowed-bankruptcy-gag-rule-lives.html> (Mar. 8, 2010, 12:29 EST) (listing concerns for attorneys offering bankruptcy advice in the wake of *Milavetz*, such as the continued inability to offer full advice and the potential breach of attorney-client privilege should it become necessary to determine whether an attorney has violated the statute).

385. Some bankruptcy attorneys, for example, avoid any consumer work because of the restrictions under BAPCPA. See Email with Peter J. Roberts, Partner, Shaw Gussis Fishman Glantz Wolfson & Towbin (July 22, 2010) (on file with author).

386. See discussion *supra* note 93 and accompanying text.

387. Transcript of Oral Argument at 25, *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (No. 08-678).

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

assurance that the legal findings and conclusions resulting from such investigations could be maintained in confidence would be weakened considerably.”³⁸⁹ Though the Court ultimately was not persuaded by this argument, the case brings to light a problematic limitation on access to legal advice.

For many in need of access to legal advice, however, the predicament is not whether an attorney can offer complete and candid guidance, but whether an attorney is available at all. While in recent years Congress has demonstrated a willingness to limit the nature of attorneys’ advice, as seen in *Milavetz* and *Humanitarian Law Project*,³⁹⁰ in comparison, Congress has expanded access by encouraging attorneys to take on meritorious cases through fee-shifting statutes.³⁹¹ The Court, however, as explained in Part I of this Article, has been less than eager to do so. The outcomes of *Astrue*, *Hardt*, and *Perdue* present a bit of a mixed bag but ultimately do more to undermine than support the effectiveness of fee-shifting statutes in facilitating and encouraging access to lawyers and legal advice. *Astrue* leaves fee-shifting awards subject to offset; *Perdue* makes it less likely that fee-shifting awards will be enhanced. These constraints on fee-shifting statutes are especially alarming given the decline in affordable, accessible legal representation caused by the economic downturn of the past few years. The chief state court justices for California and New York recently editorialized:

As the economy has worsened, the ranks of the self-represented poor have expanded. In a recent informal study conducted by the Self-Represented Litigation Network, about half the judges who responded reported a greater number of pro se litigants as a result of the economic crisis. Unrepresented litigants now also include many in the middle class and small-business owners who unexpectedly find themselves in distress and without sufficient resources to pay for the legal assistance they need.³⁹²

In many cases, these are precisely the individuals that federal fee-shifting statutes are designed to assist. For example, the Equal Access to Justice Act (the statute at issue in *Astrue*) “was enacted to improve access to the courts for small business and individuals by paying their attorney’s fees

389. Brief for Petitioner, *supra* note 188, at 29.

390. For further discussion about Congress’s efforts in this regard, see *infra* notes 402–411 and accompanying text.

391. See, e.g., *supra* notes 3–4 and accompanying text.

392. John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 1, 2010, at A21; see also Gillian Hadfield, *Making Legal Aid More Accessible and Affordable*, WASH. POST, Mar. 12, 2010, at A17 (“[A]mericans have a much higher rate of simply giving up in the face of legal difficulties, with effectively nowhere to turn if they cannot afford a lawyer who comes at a minimum price of \$150 an hour.”).

when the Government has acted unreasonably.”³⁹³ But the Court has repeatedly undermined, rather than supported, congressional policy in this area.³⁹⁴

In addition to raising concerns about how Congress and the Supreme Court limit access to lawyers, a number of the cases reviewed in this Article reveal harms that can be caused by inadequate lawyering. The ten ineffective assistance of counsel cases taken up by the Court expose a gap in attorney regulation. In some cases the lawyering is so bad that it would constitute misconduct for the opposing counsel (let alone the client’s own attorney),³⁹⁵ but it goes unaddressed because the bad lawyering does not rise to the level of a constitutional violation.³⁹⁶ In theory the attorney discipline systems administered independently by all states should kick in,³⁹⁷ but these cases suggest that this does not always occur.³⁹⁸ This pattern of limitations on access to legal advice and harms caused by bad lawyering is concerning. Nevertheless it appears that the Court, for the most part, is willing to let the pattern continue, at least with respect to limits on access to legal advice (where the Court upheld five of the six limits at issue in the 2009 cases),³⁹⁹ though certainly less so in the bad lawyering matters (where the Court ruled at least somewhat favorably for the criminal defendants in five of the ten ineffective assistance of counsel cases).⁴⁰⁰

393. Brief of Amici Curiae National Organization of Social Security Claimants’ Representatives et al. at 11, *Astrue v. Ratliff*, No. 08-1322 (U.S. Jan. 15, 2010).

394. See, e.g., *supra* notes 94–108 and accompanying text.

395. See, e.g., *supra* notes 313–14 and accompanying text.

396. For a thorough and compelling discussion of the deficiencies in America’s criminal justice system, see AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (Metropolitan Books) (2009).

397. As Justice Blackmun observed, concurring in the judgment in *Jones v. Barnes*, 463 U.S. 745, 755 (1983), an attorney’s behavior may very well violate ethical standards but not constitute a constitutional violation.

398. See Renee Newman Knake, Study of Disciplinary Action in U.S. Supreme Court Ineffective Assistance of Counsel and Prosecutorial Misconduct Cases (unpublished study, on file with author). Several of these cases evidence acquiescence by the Court (and the legal profession) to the reality that having a lawyer may very well be one of the punishments inflicted upon those who find themselves charged with a crime. See 463 U.S. at 764 (Brennan, J., dissenting) (“In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.”).

399. The only access decision that came down favorable to attorneys or clients in terms of encouraging access to legal advice and lawyers was *Hardt v. Reliance Standard Life Insurance Co.* See discussion *supra* notes 132 to 142 and accompanying text.

400. For example, consider the *Padilla* and *Porter* cases where the Court found that the lawyer conduct at issue violated the Sixth Amendment. Interestingly, the Court in both cases opened the opinions emphasizing the honorable military service by the defendants. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010) (“Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War.”); *Porter v. McCollum*, 130 S. Ct. 447, 448 (2009) (“Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man.”). The

B. Lessons for Future Regulation of the Legal Profession

A second observation to be drawn from these cases lies in the lessons offered for those involved in future regulation of the legal profession. A number of the cases illustrate the consequences borne of increasing external regulation and treatment of lawyers as gatekeepers or service providers.⁴⁰¹ Moreover, the Court's reference to the role of the ABA in certain of the cases, whether ABA model guidelines or amicus arguments, should be heeded in order for the ABA and state bar organizations to remain relevant and effective in upcoming efforts to regulate the profession.

1. Recognizing the consequences of increased federal regulation and the classification of lawyers as gatekeepers or service providers

In recent years, scholars in the law of lawyering field have begun to consider how the role of lawyers has evolved in light of increasing external regulation (*i.e.*, regulation beyond that administered by the state supreme courts based upon professional conduct rules promulgated by the ABA). As ABA President Carolyn Lamm has written:

Unfortunately, the present system of regulation of lawyers [by the highest court of each state] is being eroded through multiple changes enacted at the federal level, without the needed study, thought and consensus and without central guiding principles. A series of piecemeal federal laws and regulations threatens to undermine state judicial branch regulation of lawyers and to erode several of the cornerstones on which is built the client-lawyer relationship that protects both clients and the public.⁴⁰²

The concept of internal regulation refers to professional conduct rules drafted by the ABA for adoption and enforcement by state courts. External regulation, in contrast, includes federal action, like that cited by Lamm, and also efforts such as provisions like the regulating of lawyers found in the Sarbanes-Oxley Act⁴⁰³ and the Wall Street Reform and Consumer

Holland, *Jefferson*, and *Sears* cases are also exceptions to this observation, though the ultimate outcome for the defendants remains to be determined on remand. *See supra* notes 347–65 (*Holland*), 288–93 (*Jefferson* and *Sears*) and accompanying text.

401. The author is grateful for the suggestions from David Wilkins and Laurel Terry to consider the 2009 cases from this perspective.

402. Carolyn B. Lamm, *Memo to Washington: Hands Off Lawyers*, NAT'L L. J., Sept. 21, 2001, at 62.

403. For a discussion of the ways Congress controls lawyers under the Sarbanes-Oxley Act, see Lewis D. Lowenfels et al., *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. TOL. L. REV. 877, 878, 929 (2006) (observing that “[t]he ushering in of what appears to be a new era of the SEC as an active and enthusiastic proponent of the attorney’s ‘gatekeeping’ role raises serious questions” and citing evidence that “the sheer number of SEC actions against lawyers” in the wake of the new regulation “has increased dramatically”). For an example of an earlier federal statutory

Protection Act passed by the House of Representatives in December 2009 (though subsequently modified to exclude lawyers, in large part due to efforts by the ABA).⁴⁰⁴ The problem with these kinds of federal laws, as Lamm explains, is that they “incorrectly identify lawyers and other professionals as ‘creditors’” or “‘debt relief agencies’” or “‘providers of financial products or services’” and consequently “interfere[] with the states’ rights to regulate lawyers and protect consumers of legal services.”⁴⁰⁵

As a result of the expanding external regulation, lawyers are faced with increasing duties. Two terms often ascribed to lawyers’ new duties are lawyers as “gatekeepers”⁴⁰⁶ or “service providers.”⁴⁰⁷ One concern about

constraint on legal advice, see J. Matthew Miller, Note, *Balancing the Budget on the Backs of America’s Elderly—Section 4734 of the Balanced Budget Act: Criminalization of the Attorney’s Role as Advisor and Counselor*, 29 U. MEM. L. REV. 165, 197 (1998), arguing that section 4734 of the Balanced Budget Act of 1997 unconstitutionally prohibited attorneys from counseling elderly clients about legal actions regarding Medicaid issues.

404. See H.R. 4173, 111th Cong. (1st Sess. 2009) and ABA President Lamm Statement re: “Exclusion for the Practice of Law” in “Dodd-Frank Act of 2010,” <http://www.abanow.org/2010/06/aba-president-lamm-statement-re-exclusion-for-the-practice-of-law-in-dodd-frank-act-of-2010/> (June 26, 2010) (explaining that the new Consumer Financial Protection Bureau established by the Dodd-Frank Act of Wall Street Reform and Consumer Protection Act of 2010 “may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law”). For a detailed history of the “evolving relationship between the internal and external law” of lawyering, see Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 595–603, 608 (2005), detailing several developments and trends, such as:

a shift in the regulatory center of gravity toward Washington with a corresponding shift from judicial to legislative and administrative regulation; [] greater emphasis on regulation that makes lawyers gatekeepers in order to protect public or third-party, rather than client, interests; [] a growing tendency to place lawyers and members of other occupations that perform similar work in the same regulatory class; [and]

. . . a shift away from the primacy of the ‘internal’ law toward law that is produced, interpreted, and enforced by ‘external’ regulators.

405. Lamm, *supra* note 402, at 62 (citations omitted).

406. See Schneyer, *supra* note 404, at 582–83 (citations omitted) (“All lawyers are ‘gatekeepers’ in the obvious sense that they may not knowingly assist clients in unlawful conduct and some have long had modest duties to monitor their clients as well. But the term has taken on a more specialized meaning since the 1980s. In this usage, it refers to auditors and other professionals who are in a position to prevent corporate misconduct or failures by monitoring their corporate clients or evaluating a company’s performance and withholding their approval or assistance when they detect problems.”). See also David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145, 1164 (1993). Professor Wilkins was among the first to identify what he calls the “‘gatekeeper’ strategy” for preventing a client’s misconduct in which “the lawyer can refuse to participate in the disputed transaction or otherwise withhold support in a manner that makes it more difficult for the client to accomplish its illicit purpose,” drawing from Professor Reinier Kraakman’s definition of the term “gatekeeper liability as ‘liability imposed on private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers.’” *Id.* at 1164 n.80 (citing Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53,

characterizing lawyers in these roles is that the gatekeeper or service provider regulations can alter lawyers' ethical functions in elemental ways.⁴⁰⁸ An example of this has been identified by Professor John Leubsdorf: "where the bar's main focus has usually been on the lawyer-client relationship and the adversary system, new regulations often make lawyers gatekeepers charged to protect public and governmental interests."⁴⁰⁹ Similarly, Professor Laurel Terry has explained that under

the *service providers* paradigm, the legal profession is not viewed as a separate, unique profession entitled to its own individual regulations, but is included in a broader group of "service providers," all of whom can be regulated together. In [her] view, this new paradigm represents a fundamental, seismic shift in the approach towards lawyer regulation.⁴¹⁰

Her research documents how the service providers classification "already has affected some aspects of U.S. (and non-U.S.) lawyer regulation" and she predicts that it "is likely to have profound implications for the future."⁴¹¹

While the questions of who should regulate lawyers and how to regulate lawyers are not new,⁴¹² several of the cases on the Supreme Court's 2009 docket shed a fresh light on this predicament. For example, the *Milavetz* and *Humanitarian Law Project* cases both stem from Congress's treatment of lawyers as gatekeepers and service providers.⁴¹³ Under the statutes at issue in each of these cases, lawyers find themselves with new obligations to police, or at least deter, the behavior of clients by denying them certain legal advice (and subject to hefty penalties for failure to do so). Likewise,

53 (1986)).

407. See, e.g., Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"*, 2008 J. PROF. LAW. 189, 189 (2008) ("In the past fifty years, one has heard debates about whether law is a business, a profession, or both, what these terms mean and whether it matters. Regardless of what one thinks about these debates, there is a new paradigm that must be added to the mix, which is the paradigm of lawyers as 'service providers'").

408. A complete discussion of lawyers' roles as gatekeepers or service providers is beyond the scope of this Article and already has been well-covered by lawyer ethics scholars elsewhere. See, e.g., Schneyer, *supra* note 404; Terry, *supra* note 407; Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1389 (2004).

409. John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 971-72 (2009); see also James M. Fischer, External Control Over the American Bar, 19 Geo. J. Legal Ethics 59, 97 (2006) (discussing increased state and federal legislative control over lawyers).

410. Terry, *supra* note 407, at 189.

411. *Id.*

412. Indeed, as Professor David Wilkins wrote nearly twenty years ago in his seminal article on the regulation of lawyers:

[d]uties to the legal framework require different kinds of maintenance than obligations owed to clients. As a result, the question to be asked is not who should regulate lawyers, but rather how should policymakers coordinate the various resources at their disposal to increase the likelihood that all segments of society can benefit from a competent and independent legal profession.

David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 887 (1992).

413. See discussion *supra* notes 36-93 and accompanying text.

under these statutes lawyers are regulated alongside non-lawyers who provide bankruptcy or peace-making services without acknowledging the distinct and important function of attorney advice and advocacy.⁴¹⁴

When lawyers are treated as gatekeepers or service providers, they cease to serve solely as the advocate and advisor to the client, which alters “not just the details of legal representation but its rationale and function.”⁴¹⁵ As a result, “even when the new regulations appear to leave intact the substance of previous rules balancing the interests of clients and those of nonclients, they often impose more stringent penalties that will sway lawyers to pay more attention to the latter.”⁴¹⁶ For these reasons, the ABA and state bar associations have argued “that extensive gatekeeping [or service provider] duties cannot be reconciled with the loyalty and confidentiality duties lawyers (unlike [other professionals]) owe to their clients, and that ‘deputizing’ lawyers as gatekeepers will discourage candid communication with clients or client agents and ultimately be self-defeating.”⁴¹⁷

The ten ineffective assistance of counsel cases approach the question of who should regulate lawyers from another perspective. A number of these cases expose how incredibly bad lawyering goes unaddressed when the conduct at issue is not sufficiently damaging to render it a constitutional violation. While professional conduct rules exist to prevent the kinds of poor lawyering seen in the ineffective assistance cases, it seems that enforcement of these rules through the attorney discipline process is lacking in many ways.

These concerns are reflected in several of the Court’s lawyering cases from the 2009 term. The question that follows, then, is how should the ABA and state bar organizations respond?

2. *Appreciating the Role of the American Bar Association*

Several lawyer ethics scholars predicted this expansion of external regulation and proposed various ways the ABA and others might adapt. Indeed, nearly a decade ago Professor William Hodes forecast that “[u]nless the organized bar cleans its own house, sooner or later government agencies will remove the unique measure of self-regulation

414. See e.g., *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 931 (9th Cir. 2009) (rejecting plaintiff’s argument that “service” is an overbroad term for regulating lawyers); see also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329 (2010) (deciding that lawyers are appropriately categorized as debt relief agencies whenever they provide qualifying services, and as such, are required to make certain disclosures under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

415. Leubsdorf, *supra* note 409, at 960.

416. *Id.*

417. Schneyer, *supra* note 404, at 583.

granted to the legal profession.”⁴¹⁸ Likewise, Professor Fred Zacharias declared that, “[t]he ABA’s purported goals of self-regulation—fostering a complete regime of appropriate lawyer behavior and forestalling external regulation—have proven unrealistic.”⁴¹⁹ Instead, he recommended that the ABA and state bar organizations “attend to other functions that only they can accomplish,”⁴²⁰ such as programs for assisting attorneys with substance abuse.

By comparison, Professor Schneyer has offered a slightly more optimistic future for the ABA’s regulatory endeavors, suggesting:

[T]he bar can continue to have a substantial impact on the course of lawyer regulation, if it recognizes that the channels through which it does so will often be different than in the past. In the emerging regime, bar influence will often have to be exerted by negotiating with, testifying before, and submitting reports and comments to “external” regulators, especially at the federal level.⁴²¹

Similarly, Professor Terry has proposed that “it would be useful for the ABA or others to develop a standard ‘template’ that could be used when considering a new legal professional rule.”⁴²² She recommends that the ABA articulate its regulating objectives, that it conduct cross-cultural and cross-professional benchmarking, and that it be prepared to explain why special treatment is justified.⁴²³ She believes such an approach would not only “lead to better regulations” but that also “having thought through the justifications for its rules ahead of time, the legal profession should be in a better position to defend its rules if challenged” and the profession could more readily “identify those rules that are most likely to be challenged and for which it will need the strongest justifications.”⁴²⁴ To be sure, the ABA can do more.

The Supreme Court’s handling of the ABA during cases from the 2009 term illustrates this point in striking ways that provide helpful guidance to the ABA and state bar organizations for future regulatory endeavors. For example, the Court paid an unusual amount of attention to the role and influence of the ABA as the source of model guidelines for the profession

418. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 537 (2002).

419. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1189 (2009).

420. *Id.*

421. Schneyer, *supra* note 404, at 609.

422. Terry, *supra* note 407, at 210.

423. *Id.*

424. *Id.*

and as an advocate of practicing lawyers in filing amicus curiae briefs.⁴²⁵ The Court's heightened focus on the ABA offers at least two lessons.

First, in advocating its position as a representative of the legal profession, the ABA needs to do its empirical homework. The ABA should conduct fact-based, empirical studies to explain the unique role of attorneys and to support the position it advances, especially when necessary to justify treating lawyers differently from other professionals. For example, during the oral argument for *Mohawk Industries*, Chief Justice Roberts commented on the ABA's position in its amicus curiae brief "that the opening up of the privilege and the disclosure, however rare the case is, will, in fact, undermine the—the value of the privilege."⁴²⁶ He explained that "[the Court]—I, at least, look at a brief from the American Bar Association and view that as a representation of how the people affected here, the lawyers, view the value of the privilege and what will happen to it."⁴²⁷

In the end, however, the Court disagreed with the ABA's position in *Mohawk*, reasoning that "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone the timing of a possible appeal."⁴²⁸ Yet in a footnote the Court further observed that this conclusion "[p]erhaps . . . would be different if district courts were systematically underenforcing the privilege."⁴²⁹ Had the ABA offered a study evidencing under-enforcement of the privilege or other empirical findings to support treating attorney-client privilege differently than other protected material like trade secrets, the result might have been different. At a minimum, the Court appears open to considering such information in future cases. Empirical research might also assist in facilitating improvements for state attorney discipline systems.

425. A number of Supreme Court commentators noted the unusual amount of attention the ABA received from the Court during the 2009 term. *See, e.g.*, Posting of Marcia Coyle to The BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2009/11/a-justices-curious-comment-about-aba-guidelines-for-death-penalty-lawyers-.html> (Nov. 10, 2009, 15:15 EST) (addressing the increased discussion of ABA guidelines in recent Court opinions); Tony Mauro, *High Court Debates Value of Attorney-Client Privilege*, NAT'L L. J., Oct. 6, 2009, <http://www.law.com/jsp/article.jsp?id=1202434312108> (discussing Justices' skepticism regarding the protections due to the attorney-client privilege); Debra Cassens Weiss, *ABA Gets 'Shout Out' in Oral Arguments About Attorney-Client Privilege*, ABA JOURNAL, Oct. 6, 2009, http://www.abajournal.com/news/article/aba_gets_shout_out_in_oral_arguments_about_attorney-client_privilege/ (noting the Court's discussion and division of opinion in regards to the importance of ABA guidelines).

426. Transcript of Oral Argument, *supra* note 387, at 38.

427. *Id.* at 38–39. *But see* Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) ("And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.").

428. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009).

429. *Id.* at 607 n.2.

Second, another common thread running among nearly all of the cases discussed in this Article is reliance by at least one party on the ABA Model Rules as a measure for the reasonable actions of lawyers.⁴³⁰ In this way, the cases demonstrate the role that professional conduct rules play outside the lawyer discipline process, a function often underappreciated by those outside the law of lawyering field. Not only did the parties cite ABA rules and guidelines, but the Court also explicitly relied upon them as a measure of what should be expected from a reasonable lawyer. For example, in *Milavetz*, the Court cited Model Rule 1.2(d), which prohibits an attorney from endorsing or participating in a client's crime or fraud, but at the same time allows an attorney to advise a client, when appropriate, about legal strategies for testing or challenging a law.⁴³¹ In justifying a narrowed construction of the bankruptcy advice ban, the Court referred to requirements of Model Rule 1.2(d), implicitly suggesting that the federal statute not be construed to conflict with the Model Rule.⁴³² And in the cases of *Padilla v. Kentucky* and *Bobby v. Van Hook*, the Court offered further insight about how it views the role of professional conduct rules in constitutional analysis.⁴³³

While the Supreme Court has been reluctant to “constitutionalize”⁴³⁴ standards of professional conduct, it has looked to the ABA Model Rules when evaluating attorney behavior in some circumstances, with a particular reliance on the Model Rules when evaluating the Sixth Amendment right of a criminal defendant to effective assistance of counsel.⁴³⁵ For example, in *Padilla v. Kentucky*, Justice Stevens wrote:

430. See, e.g., Brief for American Bar Association as Amicus Curiae in Support of Petitioner at 5, *Padilla*, 130 S. Ct. 1473 (No. 08-651) (citing relevant ABA Model Rules and ABA Standards for Criminal Justice, Prosecution Function and Defense Function); Brief for Petitioners at 44–45, 71–72, *Milavetz, Gallop & Milavetz, P.A., v. United States*, 130 S. Ct. 1324 (2010) (No. 08-1119) (citing ABA Model Rules 1.1, 1.3, 1.4, 2.1, 7.1, and 8.4 to argue against categorizing an attorney as a debt relief agency); Respondent's Brief, *supra* note 123, at 59 (referencing ABA Model Rule 1.15 in support of an argument permitting attorneys to receive fees from client windfalls).

431. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”).

432. See *Milavetz*, 130 S. Ct. at 1337–38 (rejecting the suggestion that the bankruptcy advice ban generally disallows debt relief agencies from discussing other subjects, and noting that “[c]overed professionals remain free to talk fully and candidly about the incurrence of debt in contemplation of filing a bankruptcy case”) (citation and internal punctuation omitted).

433. See *supra* notes 270–87, 315–46 and accompanying text.

434. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (looking to the Model Rules for guidance but cautioning that “[w]hen examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct”).

435. *Id.* (discussing the relationship between professional standards and the Sixth

We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . Although they are only guides, and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation⁴³⁶

And the Court relied upon these standards along with those promulgated by other legal organizations to hold that the Constitution requires a lawyer to advise the client whether a plea carries a deportation risk.⁴³⁷ Specifically, the Court looked to “[a]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.”⁴³⁸

The Court adopted a different position, however, in *Bobby v. Van Hook*, though perhaps more due to the fact that the ABA guidelines at issue were outdated rather than reflecting a movement away from the use of such benchmarks for evaluating the duties and obligations of a reasonable attorney.⁴³⁹ The Court took issue with the Sixth Circuit’s reliance on a version of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Guidelines) “announced 18 years after Van Hook went to trial”⁴⁴⁰ and faulted “the [circuit court for] treat[ing] the ABA’s 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel must fully comply.”⁴⁴¹ The Court held that “[j]udging counsel’s conduct in the 1980’s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial—was error.”⁴⁴² The Court further cautioned that “‘American Bar Association standards and the like’ are ‘only guides’ to what reasonableness means, not its definition.”⁴⁴³

Amendment guarantee of assistance of counsel).

436. 130 S. Ct. 1473, 1482 (2010) (citations and internal punctuation omitted).

437. *See id.* at 1483.

438. *Id.* at 1482 (citations and internal punctuation omitted).

439. *See* 130 S. Ct. 13, 16 (2009) (per curiam) (“Restatements of professional standards, we have recognized, can be useful as ‘guides’ to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.”) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

440. *Id.* The Guidelines in effect when Van Hook committed the murder “described defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms” whereas the Guidelines applied by the Sixth Circuit “discuss[ed] the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin.”

Id. at 17.

441. *Id.* at 17 (citation and internal punctuation omitted).

442. *Id.*

443. *Id.* (quoting *Strickland*, 466 U.S. at 688).

Accordingly, the Court declared that “[w]hile states [and private organizations] are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.”⁴⁴⁴

Thus it seems, going forward, the Court is likely to continue using ABA standards as guides for reasonable attorney behavior so long as the standard applied was in place at the time of the behavior in question, but the ABA should not simply assume this. Concurring in *Padilla v. Kentucky*, Justice Alito criticized the majority by writing:

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. . . . However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.⁴⁴⁵

Likewise, Justice Alito wrote a separate concurrence in *Bobby v. Van Hook* to “emphasize [his] understanding that the opinion in no way suggests that the [Guidelines] have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment.”⁴⁴⁶ In his mind, while “[t]he ABA is a venerable organization with a history of service to the bar, . . . it is, after all, a private group with limited membership. . . . [Its] views . . . do not necessarily reflect the views of the American bar as a whole.”⁴⁴⁷ Justice Alito would place the responsibility “to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution” with the courts, not the ABA.⁴⁴⁸ Though his views were not shared by the majority, the fact that Justice Alito felt compelled to issue a separate concurrence to the otherwise unanimous per curiam opinion suggests that the debate about the ABA’s role in this regard is ongoing among the members of the Supreme Court.⁴⁴⁹ A lesson for the

444. *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)) (internal punctuation omitted).

445. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring in judgment).

446. *Bobby*, 130 S. Ct. at 20 (Alito, J., concurring).

447. *Id.*

448. *Id.*

449. The debate also was evident in Chief Justice Robert’s self-correction from “we” to “I” when expressing his view on the role of the ABA as a representative of the legal profession during the Mohawk oral argument. See *supra* note 427 and accompanying text.

ABA is to ensure that in holding itself out as a representative of the legal profession as a whole, it actually constitutes an accurate representation. The ABA can no longer simply rest its case on the history of exclusive state court regulation.

*C. Expanding Focus on the Constitutional Aspects of the Law of
Lawyering*

Finally, if any question remains as to the importance of constitutional considerations in the study and scholarship of lawyer ethics, the Court's newest lawyering precedent should end that debate. Professor Monroe Freedman, credited with establishing modern legal ethics as a serious academic specialty,⁴⁵⁰ has observed that scholars all too often give inadequate attention to the constitutional aspects of the field.⁴⁵¹ Yet, the overwhelming majority of the lawyering cases that sparked the Court's interest during the 2009 term involved constitutional challenges.⁴⁵² *Milavetz and Humanitarian Law Project* questioned whether the First Amendment applies to attorney advice and advocacy. The ten ineffective assistance of counsel cases forced the Court to revisit the constitutional rights and safeguards guaranteed to a defendant in a criminal trial. This developing area of Supreme Court jurisprudence offers a bounty of material for teaching lawyer ethics and for continuing to build upon the academic scholarship addressing the constitutional issues of lawyer ethics that Professor Freedman and others have begun.⁴⁵³

450. See generally Ronald Rotunda, *Judicial Ethics, Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1337 (2006) (attributing the development of legal ethics as an academic area of concentration to Professor Monroe Freedman).

451. Professor Monroe Freedman made this observation in his comments as a panelist at the Association of American Law Schools Annual Meeting Hot Topic Panel. See Monroe Freedman, Professor, Hofstra Univ. Sch. of Law, Ass'n of American Law Sch. Annual Meeting Hot Topic Panel: The U.S. Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More? (Jan. 7, 2010), available at http://memberaccess.aals.org/eWeb/DynamicPage.aspx?Site=AALS&WebKey=b8e081a5-3c1b-41ca-8c1f-c9d84b62a02f&RegPath=EventRegFees&REg_evt_key=e95fe6b3-00bd-4570-950c-d1bfa09e510c.

452. See discussion *infra* notes 434, 435.

453. For just a small sample of the existing scholarship on intersections between the law of lawyering and constitutional issues, see Fred Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990); Erwin Chemerinsky, *Silence is not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001); Monroe Freedman & Abbe Smith, UNDERSTANDING LAWYERS' ETHICS, §§ 4.07–4.09, 12.06–12.12 (Matthew Bender & Co., Inc. 2004); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567 (2009); Erica Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. REV. 1147 (2010).

CONCLUSION

In response to the question posed at the outset, this Article concludes that the Supreme Court's increased interest in the law of lawyering is more than mere coincidence. Each case addressed during the 2009 term encompassed issues fundamental to the role of an attorney and the rights of a client: access to legal advice, effectiveness of counsel, attorney-client privilege protections, and fee awards. Moreover, when considered together, the cases evidence increased attention to concerns about access to the legal system and effective lawyers, especially concerns involving constitutional issues. Those involved in future regulation of the profession should pay careful attention to the lessons offered by these cases, as should practitioners and scholars in the law of lawyering field.

APPENDIX

Set forth below is a list of cases involving lawyering issues over the past decade, collected as described *supra* notes 14 to 22 and accompanying text.

1999 TERM

- *Portunodo v. Agard*, 529 U.S. 61, 63 (2000) (prosecutorial misconduct, comments during closing argument)
- *Roe v. Flores-Ortega*, 528 U.S. 470, 473 (2000) (ineffective assistance of counsel, failure to file notice of appeal)
- *Smith v. Robbins*, 528 U.S. 259, 264-65 (2000) (ineffective assistance of counsel, failure to file merits brief on appeal)
- *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000) (ineffective assistance of counsel, sufficiency of mitigation evidence)

2000 TERM

- *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001) (attorneys' fees under fee shifting statute)
- *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 536 (2001) (First Amendment challenge to funding and legal advocacy restrictions under the Legal Services Corporation Act)

2001 TERM

- *Bell v. Cone*, 535 U.S. 685, 688, 692 (2002) (ineffective assistance of counsel, sufficiency of mitigation evidence and waiver of closing argument)
- *Gisbrecht v. Barnhart*, 535 U.S. 789, 792-93 (2002) (attorneys' fees for representing Social Security benefits claimants)
- *Mickens v. Taylor*, 535 U.S. 162, 164 (2002) (ineffective assistance of counsel, conflict of interest)
- *United States v. Ruiz*, 536 U.S. 622, 625 (2002) (prosecutorial misconduct, disclosures required before plea agreement)

2002 TERM

- *Brown v. Legal Foundation*, 538 U.S. 216, 220 (2003) (lawyers' trust accounts)
- *Wiggins v. Smith*, 539 U.S. 510, 514 (2003) (ineffective assistance of counsel, sufficiency of mitigation evidence)

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- *Yarborough v. Gentry*, 540 U.S. 1, 5, 11 (2003) (per curiam) (ineffective assistance of counsel, prejudicial closing argument)

2003 TERM

- *Banks v. Dretke*, 540 U.S. 668, 675 (2004) (prosecutorial misconduct, disclosure of potentially exculpatory or impeaching evidence)
- *Florida v. Nixon*, 543 U.S. 175, 178 (2004) (ineffective assistance of counsel, concession of guilt without defendant's express consent)
- *Lamie v. United States Trustee*, 540 U.S. 526, 529 (2004) (attorneys' fees in bankruptcy proceedings)
- *Mitchell v. Esparza*, 540 U.S. 12, 13 (2003) (per curiam) (ineffective assistance of counsel, failure to raise argument about state's non-compliance with sentencing procedures)
- *Scarborough v. Principi*, 541 U.S. 401, 405-06 (2004) (attorneys' fees under the Equal Access to Justice Act)

2004 Term

- *Bradshaw v. Stumpf*, 545 U.S. 175, 187-88 (2005) (prosecutorial misconduct, use of inconsistent theories to secure convictions of two defendants for same crime)
- *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 134, 139-40 (2005) (attorneys' fees when remanding a case to state court after removal to federal court)
- *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (ineffective assistance of counsel, sufficiency of mitigation evidence)

2006 TERM

- *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (ineffective assistance of counsel, miscalculation of statute of limitations period)
- *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007) (ineffective assistance of counsel, sufficiency of mitigation evidence)
- *Sole v. Wyner*, 551 U.S. 74, 77-78 (2007) (attorneys' fees, prevailing party requirement under fee-shifting statute)
- *Travelers Cas. & Sur. Co. v. Pacific Gas*, 549 U.S. 443, 445 (2007) (attorneys' fees under federal bankruptcy law)

2007 TERM

- *Wright v. Van Patten*, 552 U.S. 120, 121 (2008) (per curiam) (ineffective assistance of counsel, attorney participation in plea hearing by speaker phone)

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2008 TERM

- Cone v. Bell, 129 S. Ct. 1769, 1772-73 (2009) (prosecutorial misconduct, disclosure of mitigating evidence)
- Knowles v. Mirzayance, 129 S. Ct. 1411, 1414 (2009) (ineffective assistance of counsel, withdrawal of insanity defense)
- Van de Kamp v. Goldstein, 129 S. Ct. 855, 858 (2009) (prosecutorial misconduct, disclosure of impeaching evidence)