

# Should Judges Regulate Lawyers?

Eli Wald\*

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## Rezumat:

*Scopul acestui eseu este de a răspunde la întrebarea simplă: Cine ar trebui să controleze avocații și dacă judecătorii ar trebui să fie implicați în acest proces?*

*În primul rând, există o federalizare în curs de desfășurare a eticii juridice, adusă prin promulgarea recentă a statutului federal care reglementează desfășurarea unor segmente ale profesiei de avocat, și, în consecință, controlul crescut față de avocați de către diverse agenții federale administrative. A doua tendință este creșterea de instituționalizare și de profesionalizare a procedurilor de gestionare a riscurilor ca o forță de reglementare cu impact semnificativ comportamentul avocaților.*

*Judecătorii își exercită controlul de răspundere profesională a avocaților atunci când prezidează procese de malpraxis, precum și controale instituționale atunci când impun sancțiuni avocaților prin puterea publică.*

## Abstract:

*The purpose of this essay is to answer the simple question: Who should regulate lawyers and whether judges should be involved in this process?*

*First, there is an ongoing federalization of legal ethics, brought about by recent promulgation of federal statutes regulating the conduct of some segments of the legal profession, and consequently, the increased regulation of lawyers by various federal administrative agencies. The second trend is the rise of institutionalization and professionalization of risk management procedures as a significant regulatory force impacting lawyers' conduct.*

*Judges exercise liability controls when presiding over malpractice lawsuits, and institutional controls when imposing sanctions on lawyers via the contempt power.*

**Keywords:** judicial independence, judiciary, judges, lawyers, liability, disciplinary authority, supervisory power

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\* Charles W. Delaney Jr. Associate Professor of Law and Hughes-Ruud Research Professor, University of Denver Sturm College of Law. I thank Rebecca Aviel, Dmitry Bam, Arthur Best, Richard Devlin, Charlie Geyh, Bruce Green, Robert Hawley, the Honorable John Irwin, Judy McMorro, Jim Moliterno, and participants in the *Judicial Ethics and Accountability: At Home and*

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## 1. Introduction

Judicial decision-making and performance have long been subject to scrutiny, from the observation that – [t]he law is what the judge had for breakfast<sup>102</sup>, to critical deconstruction of judicial appointments and case law. Recent scholarship has examined how judges think and make decisions with a focus on the role of unintentional bias in judicial decision-making.<sup>103</sup> These bodies of work have helped discredit simplistic assumptions, accounts, and myths about the judiciary and replace them with a more contemporary and realistic conception of judicial decision-making and role.<sup>104</sup>

One such simplistic assumption is that judges should regulate lawyers. Admittedly, the case for judicial regulation of lawyers seems not only well-grounded in the history and tradition of the legal profession, but also straightforward and persuasive. Constitutional law doctrines, such as the separation of powers and inherent powers of the court, grant judges the power to promulgate and enforce rules

of conduct for the legal profession<sup>105</sup>. Such regulation appears desirable because the judiciary has both a functional advantage in regulating lawyers (judges are ideally positioned to observe lawyer misconduct), and a comparative advantage in regulating lawyers (judges are experts in fact finding and adjudication and therefore can relatively easily respond to attorney misconduct).<sup>106</sup>



Straightforward as it may seem, the authority of judges to regulate lawyers should not be taken for granted. Rather, this Article argues that judicial regulation of lawyers should be scrutinized and not be assumed as either necessary or advantageous. Part II explores the basic elements of judicial regulation of lawyers: promulgation of rules of professional conduct (including top-down system-wide rules by states' highest courts and ad hoc rules by all courts)<sup>107</sup> and enforcement of rules (both formally and informally). The

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<sup>102</sup> The source for this quote, attributed to the Realist movement, seems to be – Anonymous. See, e.g., A DICTIONARY OF LEGAL QUOTATIONS 85 (Simon James & Chantal Stebbings eds., 1987); see also Pamela S. Karlan, *Bringing Compassion Into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173, 174 n.9 (1995) (tracing the underlying idea to Dickens' *Pickwick Papers*).

<sup>103</sup> John F. Irwin & Daniel Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 McGEORGE L. REV. \_\_\_ (2010). See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997); RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

<sup>104</sup> For a compelling critique of the simplistic assumption of judicial independence see Charles Gardner Geyh, *Judicial Politics, the Rule of Law and the Future of an Ermine Myth* (Ind. Legal Studies Research Paper, Paper No. 165, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1598454](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598454) (on file with the *McGeorge Law Review*). Ronald Rotunda recently

proposed an intriguing solution to related challenges to judicial independence: the appointment of an inspector general for the courts. See, Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010).

<sup>105</sup> Throughout this Article the term – rules of professional conduct? means simply the body of law and norms regulating the conduct of lawyers, not any particular set of rules such as the American Bar Association's (ABA) Model Rules of Professional Conduct. For a similar definition see Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1169 n.6 (2003).

<sup>106</sup> See *infra* Part IV.

<sup>107</sup> For purposes of this Article, "top-down" rules refer to rules of professional conduct or decisions by states' highest courts that are binding on all lawyers and lower courts within the jurisdiction. "Ad hoc" rules refer to rules and decisions by courts that may be binding only on lawyers appearing before them, such as local court rules.

rest of this Article examines the judicial regulation of lawyers in detail. Part III questions judicial rule promulgation, asserting that while in some contexts the judiciary under- promulgates and should be more proactive, in others it over-promulgates rules of conduct for the legal profession. Part IV probes judicial enforcement of rules concluding that in certain contexts it is ineffective and does not serve the interests of the legal system. It also outlines a proposal that in some circumstances will allow trial courts to better enforce rules – the appointment of legal ethics magistrates. Finally, Part V identifies additional lines of necessary inquiry regarding judicial regulation of lawyers.

Any discussion of judicial regulation of lawyers cannot escape the – elephant in the room. The question of whether judges should regulate lawyers involves more than simple issues of the relative competence and efficiency of the judiciary vis-à-vis other regulators. It entails nothing short of the future of the legal profession's prerogative of self-regulation. The legal profession has long invoked the power of the judiciary to regulate lawyers as a shield against external regulation of the bar, conveniently framing the debate over self-regulation as a constitutional inquiry regarding judicial regulation of lawyers and the separation of powers, and doubts about the efficacy of self-regulation as an assault on the integrity of the judiciary.<sup>108</sup>

**Constitutional law doctrines, such as the separation of powers and inherent powers of the court, grant judges the power to promulgate and enforce rules of conduct for the legal profession.**

Arguably, however, the legal profession has vigorously defended the regulation of lawyers by the judiciary not out of loyalty and deference to the courts but rather because questioning judicial regulation would undermine self-regulation by opening the door to external regulation of the practice of law. Indeed, questioning judicial regulation of lawyers may very well come with a hefty price tag – hastening the loss of self-regulation – yet the self-interest of the profession in continuing to self-regulate should not be confused with disrespect for the judiciary and should not hinder legitimate analysis of the regulation of lawyers.

## **2. The Meaning of Judicial Regulation of Lawyers**

The question – Who should regulate lawyers? is receiving significant attention. Building on the work of scholars of the professions who criticize the self-regulatory aspect of professionalism as self-serving,<sup>109</sup> the discourse encom-

<sup>108</sup> See *infra* Part III.A.

<sup>109</sup> Self-regulation is a constitutive feature of professionalism. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 4 (1975); TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY*, 36–40 (1954). By definition, self-regulation means that lawyers should regulate lawyers. Scholars of the professions have criticized self-regulation as self-serving. See generally MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977). Legal scholars have similarly criticized self-regulation as a self-serving

and exclusionary mechanism intended to maintain a monopoly over the provision of professional services. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 12 (1989) (–[T]he legal profession has sought to justify the autonomy it enjoys by regulating its own behavior: promulgating ethical rules, disciplining violations, protecting clients against financial loss, and ensuring lawyer competence.); see also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185–211 (1999) (joining, from a market-based approach, critical scholars in challenging professionalism and self-regulation).

passes a sophisticated institutional analysis comparing and contrasting the traditional disciplinary system with liability controls (malpractice lawsuits), institutional controls (regulation by administrative agencies), legislative controls (both state and federal), market-based controls (regulation by powerful clients, insurance companies, and banks), and social norms.<sup>110</sup>

Two ongoing trends further fuel the discourse. First, there is an ongoing federalization of legal ethics, brought about by recent promulgation of federal statutes regulating the conduct of some segments of the legal profession, and consequently, the increased regulation of lawyers by various federal administrative agencies.<sup>111</sup> The second trend is the rise of institutionalization and professionalization of risk management procedures as a significant regulatory force impacting lawyers' conduct.<sup>112</sup> Both trends under-

mine the status quo of attorney regulation by supplementing (and in some instances displacing) the traditional disciplinary apparatus with institutional and market-based regulations, and also by shifting regulatory power from the legal profession to the legislature and private parties, such as insurance companies.

While the extensive – Who should regulate lawyers? literature leaves almost no stone unturned, the desirability of judicial regulation of lawyers, at least as a part of a greater regulatory apparatus of the legal profession, has hardly been questioned.<sup>113</sup> Even as a growing body of empirical work suggests that judges do not effectively regulate lawyers,<sup>114</sup> the literature continues to assert that judges *can* regulate lawyers (*i.e.*, that judges have the power to regulate lawyers), and that the judiciary *should* regulate lawyers.<sup>115</sup> Accordingly, the common response to an assertion that judges do

<sup>110</sup> David Wilkins' comparative institutional analysis of professional regulation exploring competing mechanisms and arenas of regulation is considered the cornerstone of the current discourse. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). Four years later, an entire symposium issue revisited Wilkins' analysis. Symposium, *Institutional Choices in the Regulation of Lawyers* 65 FORDHAM L. REV. 33 (1996).

<sup>111</sup> See generally Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. (forthcoming 2011) (on file with the *McGeorge Law Review*); Daniel R. Coquillette & Judith A. McMorrow, *Federalization and Contextualization of Legal Ethics*, 48 SAN DIEGO L. REV. (forthcoming 2011) (on file with the *McGeorge Law Review*); Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 PROF. LAW. 15 (2003); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994); Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 125-27 (1991).

<sup>112</sup> See generally Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006) (examining the normative implications of the growing embrace of risk management); Anthony E. Davis, *Legal Ethics and*

*Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 96 (2008) (arguing that – risk management enhances individual ethical deliberation.); Stephan Landsman, *The Risk of Risk Management*, 78 FORDHAM L. REV. 2315 (2010) (critically examining risk management through the lens of the medical industry).

<sup>113</sup> Notably, the judicial regulation of lawyers has remained largely unchallenged even as judicial decision-making in general has become increasingly scrutinized. See generally Symposium, *Judicial Ethics and Accountability: At Home and Abroad*, 42 MCGEORGE L. REV. 1 (2010).

<sup>114</sup> Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1454 (2004) (– By looking at what judges do—the sanctions imposed—when confronted with attorney conduct and the language they use in imposing those sanctions, we see a picture of judges who are not aggressively seeking to regulate the legal profession as a whole.); see also Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 38 (2005) (– The federal judges appear to embrace what can be called a minimal encroachment approach to attorney regulation.).

<sup>115</sup> See, e.g. Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1392 (2007).

not effectively regulate lawyers is a call for greater judicial regulation of lawyers.<sup>116</sup>

Judges are involved in many aspects of the regulation of lawyers. In most jurisdictions, the entire disciplinary system is premised on rules of professional conduct promulgated by a state's highest court. Rule enforcement is managed by the delegation of power from a state's highest court to a disciplinary authority, granting judges supervisory power over disciplinary controls.<sup>117</sup> Judges exercise liability controls when presiding over malpractice lawsuits, and institutional controls when imposing sanctions on lawyers via the contempt power. The negative aspect of the inherent powers doctrine, pursuant to which courts have the exclusive power to regulate lawyers,<sup>118</sup> grants judges the power to strike down legislation regulating attorney conduct as unconstitutional, and thus allows the judiciary to influence legislative controls. Even market-based regulation is influenced by judicial regulation of lawyers. For example, an informal judicial opinion chastising an attorney may have a significant negative impact on the lawyer's reputation.

Because judges are omnipresent in attorney regulation, to question judicial

regulation of lawyers appears to entail questioning the entire apparatus of attorney regulation. Moreover, questioning judicial regulation of lawyers seems to be a monumental task, and perhaps even counter-productive because the justification for judicial regulation of lawyers appears to be straightforward – judges are well-positioned to observe and respond to attorney misconduct. To some, questioning judicial regulation of lawyers amounts to not only challenging a well-justified core aspect of attorney regulation, but also constitutes heresy.<sup>119</sup>

In historical context, judicial regulation of lawyers makes ample sense. As late as the nineteenth century, when the paradigm of law practice was embodied in the circuit-riding litigator whose practice commonly involved going to the courthouse, when admission to the practice of law literally meant admission to a court, and when judges were often the most reliable, if not sole, point of intersection all lawyers had with government, vesting regulatory power over the legal profession in the judiciary was – simply inescapable, natural and inevitable.<sup>120</sup> Judges not only were best situated to regulate lawyers, they had the expertise to do so. – History and tradition, concludes Andrew

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<sup>116</sup> See *id.* (arguing that judges should play a leading role in regulating attorney conduct).

<sup>117</sup> In Massachusetts, for example, attorney discipline is administered by the Board of Bar Overseers, essentially an arm of the Supreme Judicial Court. Board of Overseers, Mass.gov, <http://www.mass.gov/obcbbo/> (last visited Sept. 23, 2010) (on file with the *McGeorge Law Review*). In California, attorney discipline is a function reserved to the Supreme Court and exercised through the State Bar, a legislatively created public corporation that serves as the administrative arm of the Supreme Court and is answerable to the Court. See *Hustedt v. Workers Compensation Appeals Board*, 30 Cal. 3d 329 (1981); *In Re Attorney Discipline System*, 19 Cal. 4th 582, 586 (1998). See also Barton, *supra* note 4, at 1173.

<sup>118</sup> For a concise, albeit critical, definition of the negative aspect of the inherent powers doctrine,

see Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation - the Role of the Inherent powers Doctrine*, 12 U. ARK. L. J. 1, 6-13 (1989).

<sup>119</sup> Barton, *supra* note 4, at 1172. To the extent that questioning judicial regulation of lawyers constitutes heresy, this Article joins celebrated – heretics? authors Andrew Kaufman and Charles Wolfram in challenging some aspects of it. See Andrew L. Kaufman, *Ethics 2000 – Some Heretical Thoughts*, 2001 PROF. LAW. SYMP. ISSUES 1 (2001) (calling on judges to be more proactive in regulating lawyers and criticizing courts' habit of delegating to the ABA the task of promulgating rules of professional conduct); Wolfram, *supra* note 17, at 19-23 (arguing that courts ought to share the power to regulate lawyers with the legislative and executive branches).

<sup>120</sup> Wolfram, *supra* note 17, at 5.

Kaufman, – have given the task of regulating lawyers' conduct largely to the country's judiciary.<sup>121</sup>

The practice of law has undergone a significant transformation since. As Charles Wolfram notes, – [t]he average lawyer no longer spends very much time in court. In fact, the great majority of lawyers would starve if they had to make their living out of court appearances. Most lawyers make their money in their offices,<sup>122</sup> out of judicial sight, and in ways that increasingly fall outside of judicial expertise. While it is no doubt convenient and self-serving for the legal profession to fall back on history and tradition and to characterize attempts to externally regulate the profession as an unconstitutional usurpation of judicial power, the evolution and growth of law practice demands close scrutiny of judicial regulation of lawyers. The rest of this Article, accordingly, studies judicial regulation of lawyers: first examining judicial promulgation of rules of professional conduct, and subsequently exploring their enforcement by courts.

Notably, the distinction between promulgating and enforcing rules, while conceptually clear, is complicated in

practice because the two forms of regulation intertwine. In his influential article, *Who Should Regulate Lawyers*, David Wilkins concentrates on regulatory enforcement, assuming away rule-promulgation or the content of the rules.<sup>123</sup> This simplifying assumption was heavily challenged by critics who point out that disputes over rule enforcement are often a cover for disagreements about rule-promulgation and content.<sup>124</sup> In the context of judicial regulation of lawyers, many understand the two forms of regulation to be inseparable because the constitutional doctrines that confer upon courts the authority to regulate lawyers include both the power to promulgate rules and the power to enforce them. Nonetheless, distinguishing between promulgation and enforcement is necessary for a proper investigation of the judicial regulation of lawyers.

### 3. Judicial Promulgation of Rules of Conduct

Investigating judicial promulgation of the rules of professional conduct requires addressing three kinds of questions: (1)

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<sup>121</sup> Kaufman, *supra* note 18, at 4. Of course, it is not history and tradition alone that explain judicial regulation of lawyers and the dominance of the litigation paradigm in codes of professional conduct. By the time early codes of conduct were being drafted, the balance was tipping toward office work and away from litigation. The newly established elite of the legal profession, the office practice attorneys, have always used their influence to draft codes whose regulation fell most heavily on the "rest" of the bar, the "undesirable" solo and small firm practitioners populating the lower spheres of the profession. See ABEL, *supra* note 8; JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, 25-6 (1976).

<sup>122</sup> Wolfram, *supra* note 17, at 5.

<sup>123</sup> Wilkins, *supra* note 9, at 810 (–To isolate this question [of enforcement], it is necessary to assume a single set of rules that will be interpreted and applied by all enforcement officials. Because the ABA's Model Rules of Professional Conduct ...

continue to constitute the most influential sources of professional norms, I assume that all enforcement officials agree that lawyers can only be sanctioned for conduct prescribed in [this] document).

<sup>124</sup> See, e.g., Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 *FORDHAM L. REV.* 33, 53-8 (1996); Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 82-3 (1996). Wilkins himself acknowledged that – [c]ontent arguments often underline enforcement debates,? but noted that – [t]his assumption, although obviously exaggerated, is not completely unrealistic,? adding that it is not – possible to consider all regulatory tasks simultaneously.? Wilkins, *supra* note 9, at 809, 810 n.36; David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 *FORDHAM L. REV.* 465, 476 (1996).

can judges promulgate rules of professional conduct (that is, do judges have the power and authority to promulgate rules for lawyers?); (2) *do* judges promulgate rules of conduct (that is, do judges in fact exercise the power to promulgate rules?); (3) and *should* judges have the power to promulgate rules of conduct, either exclusively or alongside other regulators.

#### A. Can Judges Promulgate Rules of Conduct?

It is beyond dispute that the judiciary has the power to regulate the legal profession and can both promulgate and enforce rules of conduct. The judicial power to promulgate rules consists of both authority to promulgate top-down system-wide rules and the power to promulgate ad hoc rules. In most jurisdictions, the state's highest court is the – ultimate arbiter of attorney regulation and discipline. The source of a supreme court's authority is often the state constitution itself, or otherwise derived from case law,<sup>125</sup> which means that the highest court can promulgate on a top-down system-wide basis by putting in place rules applicable to all lawyers in the jurisdiction. In addition to the states' highest courts' top-down promulgation power, the power to promulgate rules – has been well-established to be within the auspices of any state court, including state

trial courts<sup>126</sup> pursuant to the positive aspect of the inherent powers doctrine.<sup>127</sup> This ad hoc authority allows every court to promulgate rules of conduct applicable to the lawyers who practice before it.<sup>128</sup>

While the judiciary clearly has the power to promulgate rules of professional conduct, the extent and limits of its power are somewhat imprecise. It is noteworthy that while the judiciary sometimes asserts its exclusive power to promulgate rules of conduct pursuant to the negative aspect of the inherent powers doctrine,<sup>129</sup> the proposition is questionable both in theory and, increasingly, in practice. State and federal legislatures also claim to have the power to regulate lawyers, a power they exercise both at the system-wide level (increasingly so via federal agencies as part of the federalization of legal ethics)<sup>130</sup> and at the ad hoc level, often by curbing the inherent authority of courts in specific instances.<sup>131</sup>

Just as importantly, rhetoric notwithstanding, the judiciary does not attempt to exercise exclusive power to promulgate rules at either level. At the system-wide level, the highest court authority is often mostly nominal. The states' highest courts usually defer not only to the ABA's Model Rules of Professional Conduct as the initial and primary source of rule promulgation, but also to a process of adopting state rules of professional conduct by which lawyers

<sup>125</sup> McMorrow, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, *supra* note 12, at 1456 (2004).

<sup>126</sup> *Id.*

<sup>127</sup> Wolfram, *supra* note 17, at 4-6.

<sup>128</sup> That all courts can (as in have the power to) promulgate rules of conduct is sometimes obscured by scholars who focus, in terms of rule-promulgation, on the power of the state's highest court's to promulgate top-down, system-wide rules to the exclusion of the ad hoc promulgation powers. Barton, *supra* note 4, at 1173 (studying the former but not the latter).

<sup>129</sup> Wolfram, *supra* note 17, at 6-13.

<sup>130</sup> Coquillette & McMorrow, *supra* note 10.

<sup>131</sup> While the U.S. Supreme Court decision in *Chambers v. Nasco*, 501 U.S. 32 (1991) reaffirmed in principle the existence of courts' inherent powers, states have continued to pass statutes limiting the inherent powers of the court in particular circumstances. For example, several states have constrained the ability of courts to invoke their inherent powers to disqualify a district attorney. See generally Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney's Client: The Law Between the Courts and the State*, 85 *DenV. U. L. Rev.* 369 (2007).

serving on supreme courts' advisory committees draft and submit the rules for the courts' approval.<sup>132</sup> At the ad hoc level, courts accept legislative constraints on their inherent powers routinely, even as they continue to assert their exclusive powers rhetorically.<sup>133</sup>

Moreover, multiple sources of rule-promulgation emerge independent of formal allocation of power. For example, insurance companies, by setting malpractice insurance premiums and denying coverage, practically have the power to regulate certain aspects of lawyers' practice.<sup>134</sup> Large-entity clients exercise power to promulgate rules for lawyers through their in-house legal departments, which increasingly amount to near micro-managing of legal work—how many and what lawyers are assigned to particular tasks, how much time to spend on particular issues, and how much to charge for their work.<sup>135</sup> And some rules are truly self-regulating. For example, lawyers' growing tendency to implement risk management policies meant to reduce their liability is practically regulating both who is represented and how.<sup>136</sup>

### *B. Do Judges Promulgate Rules of Conduct?*

By and large, the judiciary exercises its power to promulgate rules for the legal profession. Most state supreme courts exercise the system-wide power to promulgate top-down rules by adopting rules of professional conduct, although the exercise of power is often mostly nominal, deferring in substance to the ABA's Model Rules of Professional Conduct.<sup>137</sup> Of course, the highest courts also promulgate system-wide rules by deciding cases and announcing liability rules, such as the doctrines of malpractice and attorney aiding and abetting clients' conduct. Many courts also exercise their ad hoc power to announce local rules applicable to lawyers appearing before them. Indeed, as different courts at different levels promulgate and adopt different rules, a deep confusion exists with regard to the content of the rules.<sup>138</sup>

### *C. Should Judges Promulgate Rules of Conduct?*

As the – can judges promulgate rules of conduct?? analysis demonstrates,

<sup>132</sup> Kaufman, *supra* note 18, at 4.

<sup>133</sup> Wald, *Disqualifying a District Attorney*, *supra* note 30, at 372.

<sup>134</sup> See generally Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Legal Secret*, 47 VAND. L. REV. 1657, 1707-1733 (1994) (requiring mandatory malpractice insurance allows insurers to determine who practices law); Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996) (arguing that insurance is becoming a more formal regulatory tool); see also John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 101-102 (1999) (–Professional responsibility experts agree that ... malpractice liability will play an increasing role in regulating attorney conduct).

<sup>135</sup> See David B. Wilkins, *Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2071 (2010); Robert L. Nelson, *Ideology,*

*Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 505 (1985).

<sup>136</sup> Davis, *supra* note 11, at 100.

<sup>137</sup> See A.B.A. Ctr. for Prof. Resp., *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement 2* (1992) (–Today, judicial regulation of lawyers is a principle firmly established in every state.); Charles W. Wolfram, *Modern Legal Ethics* 24 (1986) (noting that state supreme court regulation –covers every aspect of the practice of law, =starting with admission, ending with disbarment and covering everything in between.‘?); Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919, 921 (1976) (–The regulation of the legal profession is primarily under the control of state supreme courts).

<sup>138</sup> Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.



judicial power to promulgate consists, in practice, of both a non-exclusive system-wide power and a non-exclusive ad hoc power. Exploring the desirability of judicial promulgation of rules of conduct for lawyers thus requires questioning both types of power.

First, should judges play a role in promulgating top-down, system-wide rules of conduct? Answering this question requires a comparative institutional analysis,<sup>139</sup> yet two obstacles stand in the way of such inquiry. Constitutional constraints seem to guarantee the judiciary a role in promulgating rules,<sup>140</sup> even if a comparative analysis established that judges are poor regulators of lawyers' conduct. Furthermore, conducting an institutional analysis—by comparing the strengths and weaknesses of the abilities of the judiciary to promulgate rules to other institutions' regulatory skills—is somewhat hindered by the current lack of alternative regulators to compare to the judiciary. Indeed, because the judiciary has for so long dominated the rule promulgating landscape, the comparative exercise is likely to be limited by constraints imposed by the status quo on legal imagination.<sup>141</sup> Consequently, traditional institutional analysis is likely to explore only three possibilities for rule promulgation: the judiciary, the legislature,

and de-regulation or market-based – promulgation.<sup>142</sup> Moreover, the judicial alternative is likely to be understood in terms of existing practice realities: de facto delegation of the power to promulgate rules by the states' highest courts to the ABA and the organized bar. Similarly, the legislative alternative is likely to be understood in terms of an increasingly polarized legislative body lacking expertise and subject to the legal profession's significant lobbying power, as well as the presence (and often dominance) of lawyers in the legislature.<sup>143</sup> Finally, the de-regulation alternative is likely to be discussed in terms of harming vulnerable clients who will be left unprotected to fend for themselves against powerful

Within these constraints, some legal scholars conclude that a legislative body, either Congress or state legislatures, would be more likely than the judiciary to promulgate public-minded rules of professional conduct.<sup>144</sup> These scholars argue that while the judiciary is independent of lobbying efforts by interest groups, this relative strength vis-à-vis legislatures is overstated because, in the context of regulating the bar, judges have a natural affinity with the interests and concerns of lawyers,<sup>145</sup> are – too busy, too connected and sympathetic to lawyers, and are

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<sup>139</sup> Wilkins, *supra* note 9.

<sup>140</sup> Namely, the separation of powers doctrine and the positive aspect of the inherent powers doctrine, *supra* notes 24-26 and accompanying text.

<sup>141</sup> On the tense relationship between status quo and legal imagination, see generally Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995) (arguing that Anthony Kronman's lament in *THE LOST LAWYER* (1993) over the decline of practical wisdom and his embrace of traditional lawyering risks suffocating innovation in the practice of law); see also POSNER, *supra* note 8, 185-211 (asserting that traditional professional mystique stands in the way of effective client service).

<sup>142</sup> Notably, in the context of regulation of the

legal profession, calls for de-regulating the profession come not only from conservative thinkers but also from liberal scholars. See, e.g., Posner, *supra* note 8 (for a typical conservative, market-based assault on lawyers' self-regulation); DEBORAH L. RHODE, *IN THE INTEREST OF JUSTICE* 143-183 (2003) (for a liberal attack on the legal profession's monopoly over the provision of legal services).

<sup>143</sup> See Russell G. Pearce & Eli Wald, *Law Practice as a Morally Responsible Business: Reintegrating Ethics into Economics and Law* (forthcoming 2011) (on file with the McGeorge Law Review); Barton, *supra* note 4, at 1216-1231.

<sup>144</sup> Barton, *supra* note 4, at 1221; Zacharias, *Federalizing Legal Ethics*, *supra* note 10, at 376-7.

<sup>145</sup> Barton, *supra* note 4, at 1188-1200.

inaccessible to the public.<sup>146</sup> And while judges have relevant subject-matter expertise regarding the conduct of lawyers, they are inexperienced as legislators.<sup>147</sup> Moreover, as the practice of law grows more complex and specialized, especially in areas which involve little interaction with the judiciary, judges may not possess the necessary expertise to promulgate rules of conduct.

Persuasive as these arguments may be, there is little reason to exclude judicial insight from rule-promulgation, especially since judicial promulgation can be imagined beyond the limits of the existing regulatory apparatus. That is, while judicial promulgation of rules may be unattractive when it means deference to the ABA and the organized bar,<sup>148</sup> judicial promulgation could take other forms. The Conference of Chief Justices,<sup>149</sup> for example, could draft rules of professional conduct for the legal profession, either by itself or by appointing a committee and relying on its recommendations.<sup>150</sup> This would ensure the power of judicial promulgation is actually exercised by the judiciary and not delegated to the ABA and the organized bar. Or the Conference of Chief Justices could at least play a meaningful role in commenting on the ABA suggested

Model Rules.<sup>151</sup>

Alternatively, states' highest courts could continue to defer to the ABA as the initial drafter of the rules (and the organized bar as the primary source of commenting on the ABA draft), but subsequently play a more active role in crafting the rules' content. Such a proactive supervisory method may yield rules reflecting a more even-handed approach toward the profession's various constituencies by restraining the influence of powerful actors within the organized bar, such as large law firms. At a minimum, the rules ought to effectively regulate all segments of the bar and not focus on individual and small-firm practitioners, especially as a growing number of American lawyers practice outside of these arenas.<sup>152</sup> For example, the rules should include provisions regulating large law firm practice by adding regulations at the firm-level.<sup>153</sup> Also, the rules ought to reflect the practice realities of all lawyers and not focus almost exclusively on litigation practices. Most importantly, the rules should do more to protect the interests of clients and the public. For example, the communications rule needs to ensure effective communication of information to clients, so that clients can act on an informed

<sup>146</sup> *Id.* at 1246.

<sup>147</sup> *Id.* at 1204-1207.

<sup>148</sup> *Id.* at 1210; Kaufman, *supra* note 18, at 4-6.

<sup>149</sup> Conference of Chief Justices, <http://ccj.ncsc.dni.us/about.html> (last visited August 23, 2010) (on file with the *McGeorge Law Review*).

The Conference of Chief Justices ... was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters. Membership in the Conference of Chief Justices [includes] the highest judicial officer of the fifty states ... *Id.*

<sup>150</sup> Which, if then adopted by each court within its jurisdiction, would have the desirable effect of

introducing uniformity across the states.

<sup>151</sup> Kaufman, *supra* note 18, at 4-6.

<sup>152</sup> RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 55 (2008).

<sup>153</sup> See Larry E. Ribstein, *Ethical Rules, Law Firm Structure and Choice of Law*, 69 U. CIN. L. REV. 1161, 1201-02 (2001); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2266 n.113 (2010) (—The ABA Model Rules of Professional Conduct, their predecessors (the Model Code and the Canons), as well as every state code of professional conduct implementing the Model Rules, all essentially regulate individual lawyer conduct and do not meaningfully regulate at the law firm level).

basis by mandating communications of all material information relating to the attorney-client relationship.<sup>154</sup>

In other words, whether judges should promulgate top-down, system-wide rules of conduct depends both on the quality of the rules states' highest courts can produce, and the quality of rules any alternative promulgating bodies can generate. Such rigorous institutional comparative analysis, however, cannot take place for two reasons: the simplistic assumption that the judiciary alone should promulgate rules of conduct for the legal profession; and the entrenched tradition of courts delegating their promulgating authority to the ABA and the organized bar. The powerful combination of simplistic assumptions about the exclusive role of the judiciary in promulgating rules of conduct (*e.g.*, judges alone should promulgate rules) and acceptance of the status quo regarding how courts promulgate rules (*e.g.*, deferring to the ABA and the organized bar) preempts the development of alternative bodies to compete with the judiciary for promulgating system-wide rules. Rather than continuing to assume that judges should promulgate system-wide rules, we ought to encourage the development of alternative bodies of rule-promulgation and demand that the judiciary actually exercises its power to promulgate, instead

of delegating to the ABA and the organized bar.

Second, should judges have the power to promulgate ad hoc rules? The case for judicial expertise here is compelling. Who better than a presiding judge to know and understand the needs of the court? Moreover, it seems obvious that judges should control and administer their own courtrooms. These compelling arguments, however, do not support vesting rule-promulgation power in every court. To begin with, granting courts enforcement powers (rather than promulgation powers) accomplishes the compelling goal of allowing judges to control and manage their own courtrooms. Contempt and sanctioning powers would allow courts the ability to address misconduct taking place in their courtrooms. Next, the great variance in rules of conduct across courts suggests that perhaps courts exercise the rule-promulgation power poorly, with insufficient consideration for the interests of clients and lawyers alike in uniformity.<sup>155</sup> For example, vesting ad hoc rule-promulgation powers with the United States Supreme Court and the states' highest courts, with the expectation that they promulgate applicable rules for federal and state courts respectively, would confer on the rules the benefit of judicial expertise yet result in much needed uniformity and cooperation across courts.<sup>156</sup> Once again, rather than

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<sup>154</sup> Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 750 (2008). Similarly, legislative promulgation can take place in an effective and responsible manner, controlling for some of the obvious disadvantages of lay regulators—such as lack of subject matter expertise and regulatory capture. Finally, market-based rule-promulgation (that is, de-regulation) could be imagined to strengthen, not weaken, the position of clients vis-à-vis lawyers. For example, the elements of malpractice could be relaxed to allow more liability-based private regulation by clients,

along with mandatory rules for malpractice liability coverage akin to those adopted by Oregon (enhancing the role of insurance companies as regulators), and more demanding disclosure from lawyers regarding legal services to clients. Sahl, *supra* note 33, at 101-102

<sup>155</sup> Zacharias, *Federalizing Legal Ethics*, *supra* note 10 at 345-73 (exploring the impact of splintered rules of conduct on lawyers and clients).

<sup>156</sup> See Zacharias & Green, *supra* note 37, at 74; McMorow, *The (F)Utility of Rules*, *supra* note 13, at 5-6, 10-11.

assuming that all courts should promulgate ad hoc rules of conduct, we ought to insist on the development of compelling justifications for the use of such power, and if good reasons cannot be produced, consider stripping lower courts of this power.

To be clear, the objective of this Article is not to argue against judicial promulgation of rules of conduct for the legal profession. Given the entrenched role of judges in regulating lawyers, as well as some of the persuasive justifications for judicial involvement in rule promulgation, such an assertion would be too far-fetched and ill-advised. Rather, the point is that judges, the legal profession, and the public should not take judicial promulgation of rules of conduct for granted, but instead subject it to close scrutiny. Arguably, by deferring to the ABA and the organized bar, the judiciary under-promulgates top-down, system-wide rules, and by allowing each court to announce its own local rules, the judiciary over-promulgates at the ad hoc level.

#### 4. Judicial Enforcement of Rules of Conduct

Consistent with analyzing judicial rule promulgation, examining judicial rule enforcement calls for addressing three kinds of questions: (1) *can* judges enforce rules of professional conduct (that is, do judges have the power and authority to

enforce rules for lawyers?); (2) *do* judges enforce rules of conduct (that is, do judges in fact exercise the power to enforce rules?); (3) and *should* judges have the power to enforce rules of conduct, either exclusively or alongside other regulators.

##### A. Can Judges Enforce Rules of Conduct?

Courts clearly have the power to enforce existing rules of conduct.<sup>157</sup> Judicial enforcement of attorney regulation consists of formal and informal measures. Formal enforcement includes sanctioning a lawyer pursuant to either a statutory provision (such as Rule 11 of the Federal Rules of Civil Procedure) or the court's inherent powers. It also includes measures other than sanctions, such as the authority to award attorney's fees and court costs, and the power to disqualify an attorney tainted by a conflict of interest. Informal enforcement includes oral and written orders, referrals to the disciplinary authorities, and modes of interaction with lawyers.<sup>158</sup> Indeed, a judge's mere presence may command respect and lead lawyers to act a certain way. Judges who have developed a reputation for not tolerating a certain kind of conduct may be able to influence attorney conduct and preempt attorney misconduct in and outside of the courtroom.

It is important to note, however, that while all judges have the power to enforce rules of conduct,<sup>159</sup> they generally lack the

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<sup>157</sup> See *supra* notes 24-26 and accompanying text.

<sup>158</sup> McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct*, *supra* note 13, at 1427.

Judges have a panoply of procedural and substantive rules to address attorney conduct issues that arise in litigation. For example, in federal courts judges may rely on Rule 11 and Rule 37 of the Federal Rules of Civil Procedure, as well as various discovery rules, to establish norms of conduct and impose sanctions. Judges can supplement these rules with their own creative

responses using the court's inherent power ... State judges have a similar variety of rules and inherent powers. *Id.*; see also Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 32 WAKE FOREST L. REV. 621, 622-23 (1997) (exploring means of judicial regulation of lawyers other than the traditional forms of written opinions and referral to the disciplinary authorities).

<sup>159</sup> Recall the term "rules of professional conduct" denotes the entire body of law regulating the conduct of lawyers, not any particular set of rules, *supra* note 4.

power to discipline lawyers. In other words, individual judges are usually not authorized to regulate attorneys through professional discipline. The power to impose professional discipline is reserved to a subset of the judiciary, state supreme courts, often not directly but rather through the established disciplinary systems.<sup>160</sup>

### *B. Do Judges Enforce Rules of Conduct?*

As rule enforcers, the judiciary wears two hats: first, state supreme courts oversee the bar's disciplinary processes, and second, individual judges enforce rules of conduct. All state supreme courts enforce rules of conduct in the former, supervisory sense.<sup>161</sup> A growing body of empirical research suggests, however, that the judiciary exercises its enforcement power in the latter sense only reluctantly and infrequently for two inter-related reasons.<sup>162</sup> Although the judiciary has the power to promulgate rules of conduct, it appears that some individual judges often do not see that power as relevant to their own work in the courtroom.<sup>163</sup> These judges see both the rules of professional conduct and their power to enforce them pursuant to the positive aspect of the inherent powers doctrine not as an independent duty, but

rather as flowing from their obligation to ensure a fair and efficient disposition of the cases before them.<sup>164</sup> The task of enforcing the rules seems further removed from courts' primary agenda because, while rule promulgation is dominated by the litigation paradigm, only a handful of rules actually have relevance in the daily practice of the courts.<sup>165</sup>

Whether the judiciary's reluctance to enforce rules of conduct against lawyers constitutes a problem depends on whether one thinks that judges should be in the business of enforcing rules. The conventional wisdom is that judges should enforce rules of conduct, and that their failure to do so constitutes a problem in need of attention. Concerned commentators often call upon judges to do more to enforce professionalism on lawyers.<sup>166</sup>

### *C. Should Judges Enforce Rules of Conduct?: The Seemingly Straightforward Case for Judicial Enforcement of Rules – [W]ho better than judges, who have daily interaction with attorneys, to keep a proverbial finger on the pulse of attorney conduct?<sup>167</sup>*

Presiding over the adversary system, judges are arguably well-positioned to directly observe lawyer misconduct. Judges – will know if a lawyer has failed to file a pleading,<sup>168</sup> has poorly researched

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<sup>160</sup> *Supra* note 16. See, e.g., *Husted v. Workers Compensation Appeals Board*, 30 Cal. 3d 329 (1981).

<sup>161</sup> Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 AM. B. FOUND. RES. J. 31 (examining the processes by which state supreme courts assumed responsibility for overseeing disciplinary system in place of bar associations).

<sup>162</sup> See McMorrow et al., *Judicial Attitudes Confronting Attorney Misconduct*, *supra* note 13, at 1454; McMorrow, *The (F)Utility of Rules*, *supra* note 13, at 38.

<sup>163</sup> *Id.* This perspective may be explained in part by the fact that while the judiciary has the power

the promulgate rules of conduct, most promulgation is done at the top-down, system-wide level by state supreme courts, and not by trial or appellate courts. Since a majority of judges do not engage in rule promulgation, the task may reasonably seem somewhat removed from their work in the courtroom.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Camp, *supra* note 14, at 1392.

<sup>167</sup> McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct*, *supra* note 13, at 1457 (quoting *5-H Corp v. Padovano*, 708 So. 2d 244, 247 fn.8 (Fla. 1997)).

<sup>168</sup> Wilkins, *Who Should Regulate Lawyers?*, *supra* note 9, at 808.

or drafted pleadings,<sup>169</sup> is ill prepared for a case, or is abusive toward opposing counsel, a witness, or his own client in the courtroom. The institutional design of the adversary system also positions judges to respond well to instances of attorney misconduct, giving courts great flexibility in terms of both the kind of sanction they may impose (formal, informal, monetary, evidentiary, etc), as well as its timing (immediate, after a separate hearing, etc), such that judges can appropriately respond in context to different types of misconduct. Next, judicial expertise in fact findings, mastery of the relevant law, and in fashioning appropriate remedies allows the judiciary to effectively respond to attorney misconduct. That is, judges have a relative comparative advantage in deciding disputes, and thus have an advantage in resolving disputes about attorney misconduct. The combination of functional advantage and relative comparative expertise strongly supports the desirability of judicial enforcement of rules of conduct.

Moreover, judicial enforcement is not only consistent with the history of judicial regulation and courts' longstanding claims to have the authority and power to

regulate the legal profession,<sup>170</sup> but also with the sense that judges do and should play an important role in ensuring that the bar lives up to high standards of professional conduct.<sup>171</sup> Judicial regulation of lawyers comports with societal expectations of lawyers, clients, the public, and the judiciary itself regarding the role of judges ensuring fairness in the legal system. Some argue that judges should regulate lawyers because enforcement of professionalism is, and should be, an integral part of what it means to be a judge.<sup>172</sup> By virtue of their elevated status within the profession as well as their position as keepers of the rules of the adversary game, and in contrast to lawyers who are expected to act as zealous client advocates, judges are expected to ensure the fairness of the justice system, which entails ensuring lawyers behave consistent with the rules of conduct. Accordingly, judges have a special duty to uphold and cultivate standards of professionalism.<sup>173</sup> Some scholars cite a recent surge in attorney misconduct, explained in terms of a decline in values and lack of civility and professionalism in and outside of the courtroom, as proof that judicial

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<sup>169</sup> See, e.g., ABEL, *LAWYERS IN THE DOCK*, *supra* note 52 at 502 (describing an attorney's poor performance before an immigration judge).

<sup>170</sup> Although as Barton points out, legislatures used to be more involved once upon a time. Barton, *supra* note 4, at 1172-73. See also, Kaufman, *supra* note 18 at 4 (– For better or worse, and I think for better, history and tradition have given the task of regulating lawyers' conduct largely to the country's judiciary.).

<sup>171</sup> Camp, *supra* note 14, at 1392 ("Judges have a unique ability to project and enforce professionalism standards."); See generally Shepard, *supra* note 58 (examining judges' role in encouraging attorney professionalism).

<sup>172</sup> Warren E. Burger, Chief Justice, U.S. Supreme Ct., *Remarks at the American Law Institute Opening Session: The Necessity for Civility* (May 18, 1971), in 52 F.R.D. 211, 215 (1971):

[C]ivility is relevant to judges, and especially trial judges because they are under greater stress than other judges, and subject to the temptation to respond in kind to the insolence and mad manners of lawyers. Every judge must remember that no matter what the provocation, the judicial response must be judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider. *Id.*; see also, Kenji Yoshino, *What's Past is Prologue: Precedent in Literature and LaW*, 104 Yale L. J. 471, 479 (1994) (exploring how social expectations construct and shape judicial role and conduct).

<sup>173</sup> Interestingly, taking seriously the proposition that judges as judges must be involved in regulating lawyers arguably implies even if it turns out that judges are not particularly effective or efficient in regulating lawyers, there would still be a reason for them to be involved in regulating lawyers.

enforcement of rules is necessary and desirable.<sup>174</sup>

Against this backdrop, empirical findings suggesting that the judiciary only reluctantly regulates lawyers are usually met with calls for judges to be more proactive and assume a greater role in regulating the profession.<sup>175</sup>

#### *D. The Case Against Judicial Enforcement of Rules of Conduct*

##### **1. Judges' Position in Assessing Attorney Misconduct Revisited**

Since many attorneys do not appear or interact with judges at all in the ordinary course of their practice (and even within the confines of the adversary system most cases settle with little to no judicial intervention) the possible extent of judicial enforcement of rules of conduct should not be exaggerated.<sup>176</sup> More importantly, even for the subset of situations that do involve lawyers interacting with the judiciary, judges only observe the – tip of the iceberg when it comes to attorney misconduct. The point is not merely that significant attorney conduct takes place outside of the courtroom (for example, attorney-client communications, communications with opposing counsel, depositions and discovery), but rather that attorney conduct directly-observable by judges constitutes but a small part of a much larger pattern of conduct not directly observed by the judiciary. Assessing and

acting on directly observable attorney conduct may be difficult to do without being privy to the greater context.

Judges can fairly easily observe and effectively react to a self-standing act of misconduct; for example, a failure to meet a court imposed deadline, incompetence in the courtroom, or attorney abuse of opposing client, a witness, or a client. Attorney conduct that is part of a larger pattern, however, may be much harder to evaluate quickly. Even a supposedly straightforward failure to meet a deadline or to effectively communicate with opposing counsel may be in part the result of opposing counsel's refusal to cooperate. Specific attorney conduct in a deposition or in discovery may be part of a larger pattern or in response to off-the-record conduct by opposing counsel. Without investing time and energy in learning the relevant context of attorney conduct, which is not directly observable in court (by reviewing deposition transcripts, scheduling additional hearings, etc.), a judge may not, in practice, occupy a convenient position from which he or she can assess attorney conduct.

Attempting to regulate lawyers based on observable conduct without an appreciation of the greater context within which the conduct takes place risks ineffective regulation. Consider the following example: Judge (J) concludes that Lawyer (L) has failed to disclose to the court controlling authority damaging

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<sup>174</sup> See, e.g., AMERICAN BOARD OF TRIAL ADVOCATES, CODE OF PROFESSIONALISM, available at <http://www.abota.org/NetCommunity/Document.Doc?id=71> (last visited Sept. 18, 2010) (on file with the *McGeorge Law Review*); AMERICAN BOARD OF TRIAL ADVOCATES, PRINCIPLES OF CIVILITY, INTEGRITY AND PROFESSIONALISM, available at <http://nevadacountycourts.com/documents/public/Principles%20of%20Civility.pdf> (last visited Sept. 18, 2010) (on file with the *McGeorge Law Review*); Loren McMaster, *Thoughts on Improving Civility and Professionalism*, SACRAMENTO LAWYER Jan.-Feb. 2007, at 16; Loren McMaster, *Attorney Guidelines*

*of Civility and Professionalism*, SACRAMENTO LAWYER Mar.-Apr. 2008, at 8; CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM, available at <http://nevadacountycourts.com/documents/public/CalBar%20Guidelines%20of%20Civility.pdf> (last visited Sept. 18, 2010) (on file with the *McGeorge Law Review*).

<sup>175</sup> See, e.g., Camp, *supra* note 14, at 1392.

<sup>176</sup> The judiciary reaches all lawyers in the limited sense that states' highest courts promulgate rules of professional conduct that apply to all lawyers, and all attorneys can face malpractice lawsuits

to her client's case.<sup>177</sup> L is a senior associate with a large law firm. Before sanctioning L's misconduct, should J inquire further regarding the misconduct? What if L's failure to disclose stems from her reliance on research conducted by a junior associate (JA) at her firm who failed to identify the case law in question? It would seem that the focus of the regulation should be L's ineffective supervision of JA's work and JA's incompetence, not merely L's failure to disclose the controlling authority. What if L's failure to disclose stems from a direct order she received from a partner (P) at her firm? It would seem that the focus of the regulation should at least include P's conduct. And what if P's conduct was in turn the result of intense pressure from within the law firm to please the client and not reveal the controlling authority? Should the law firm or some of its partners be the focus of J's regulatory efforts?<sup>178</sup>

The example is not intended to belittle L's misconduct. It is simply meant to illustrate that the so-called convenient functional position from which a judge can easily observe and react effectively to attorney misconduct should not be overstated. Significant lawyer conduct takes place outside of the courtroom and even conduct directly observable by judges takes place within a context not necessarily easily observable by judges.

Moreover, observed attorney misconduct may not necessarily be

correctable by judicial enforcement of rules of professional conduct. Consider the following example: J observes that L is ill-prepared in the courtroom, does not seem to know the case well or communicate effectively with his client, repeatedly files for continuances, and fails to meet court imposed deadlines. L is apologetic, promises to do better when informally reprimanded by J, but appears to be either unable or unsuccessful in addressing J's concerns.<sup>179</sup> J believes that L's misconduct is likely connected to his significant caseload, possibly too large to handle effectively.

J is very concerned with L's misconduct and his clients' best interests, but doubts whether sanctioning L will be effective in remedying the situation. L appears to be representative of a subculture of lawyering, where lawyers assume a large caseload, defer to agencies who refer clients to them, provide sub-par legal services, and charge relatively low fees for their services.<sup>180</sup> L's misconduct must be addressed, but J is concerned that simply sanctioning L may amount to addressing a symptom rather than the problem. L's clients might end up being referred to someone just like L, or worse, be left without representation altogether. J is uncertain whether, given the larger context, L's clients will be better off with or without L's representation, and whether enforcing rules of conduct against L would be effective in the situation.<sup>181</sup>

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<sup>177</sup> MODEL RULES OF PROF'L CONDUCT R 3.3(a)(2) (2010) (– A lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel).

<sup>178</sup> On the need to promulgate rules of conduct at the firm-level, see *supra* note 53 and accompanying text; see generally MILTON REGAN, EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2005) (situating the professional misconduct of one large law firm attorney within a rich context of firm

practice that help explain the lawyer's behavior).

<sup>179</sup> See ABEL, LAWYERS IN THE DOCK, *supra* note 52, at 496.

<sup>180</sup> *Id.* at 505.

<sup>181</sup> Eli Wald, *Book Review* 59 J. LEGAL EDUC. 311, 327-30 (2009) (reviewing RICHARD L. ABEL, LAWYERS IN THE DOCK (2008)) (arguing that responses to individual attorney misconduct ought to be grounded in a contextual understanding of the wrongdoing as well as in institutional considerations contributing to the conduct).



Finally, by the time parties bring a dispute to the judge's attention, the issues may be complex and involve mutual allegations of wrongdoing.<sup>182</sup> A judge may find it both difficult and time consuming to attempt to assess the cross-allegations of wrongdoing.<sup>183</sup>

All in all, the nature of the adversary system no doubt positions judges to observe *some* attorney misconduct and allows them to respond to it promptly and effectively. Nonetheless, judges' ability to observe and react to misconduct should not be exaggerated in terms of detecting misconduct, assessing it in context, and addressing it.

## 2. Judges' Competence and Experience Assessing Misconduct

Related to the argument that the judiciary is well-positioned to observe lawyer misconduct is the notion that judges are well-positioned to respond to misconduct because they are competent and experienced in doing so. The argument consists of three elements. First, it assumes that judges know the law governing attorneys' conduct. Second, that judges are experienced in evaluating factual allegations and applying the law given the facts—meaning that they have the capacity to effectively assess claims regarding attorney misconduct and determine the appropriate sanction, if any. Finally, that judges have experience

judging, that is, fashioning an appropriate remedy to an instance of misconduct.

Upon reflection, however, it seems that all three elements of the argument are somewhat flawed. Assuming judicial knowledge of the relevant rules appears to be a questionable proposition because the law governing lawyers is a complex web of uncertainty.<sup>184</sup> A large body of literature documents the significant problem of the indeterminacy of the law governing lawyers.<sup>185</sup>

Furthermore, while judges may be generically experienced in assessing facts and applying the law, their experience with regard to lawyer conduct may be in decline. Empirical studies suggest that the judiciary is becoming more professional, with career judges becoming more common.<sup>186</sup> Whereas historically state and federal judges were experienced practitioners, it appears that state judges at the trial level assume their positions at a younger age with less experience than their predecessors, and that state appellate and supreme court judges – as well as federal judges – increasingly assume their positions with more judicial experience and less practice experience.<sup>187</sup>

While the debate about the desirability of career versus practice-oriented judges continues, one thing is clear: the professionalization of the judiciary detracts from its ability to effectively regulate lawyers. Judges with practice experience

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<sup>182</sup> Camp, *supra* note 14, at 1391 (observing that – discovery abuses or bad faith are seldom limited to one side on abusive litigation).

<sup>183</sup> For example, both parties may accuse each other of discovery abuse, with plaintiff's counsel alleging non-responsiveness or being buried in over-the-top irrelevant production, and defense counsel arguing over-broad discovery requests.

<sup>184</sup> Zacharias, *supra* note 10 at 345-73.

<sup>185</sup> See *e.g.*, Zacharias & Green, *supra* note 37; McMorro, *The (F)Utility of Rules*, *supra* note 13.

<sup>186</sup> See Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 248-49 (1978); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 320-22 (1989); Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 323, 232-33 (2001).

<sup>187</sup> Monique Renée et al., *Evaluation of Judicial Careers in the Federal Courts, 1789-2008*, 93 JUDICATURE 62, 63 (2009); Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 140 (2010).

are more likely to better understand and relate to attorney misconduct. Indeed, judges with practice experience are also more likely to command the respect of the lawyers appearing before them, preempting misconduct and diminishing the need for formal enforcement. On the other hand, judges with little practice experience are less likely to understand attorney conduct, understand and appreciate the context within which it takes place, or to command the respect of the litigators appearing before them, and may possibly be less inclined to intervene in and address instances of attorney misconduct. In other words, even if career judges are better judges in terms of deciding the underlying disputes before them, their declining practice experience renders them likely less effective in terms of regulating attorney conduct.

Finally, while judges do have expertise in determining appropriate remedies, they also have a countervailing incentive not to sanction attorneys for misconduct. Sanctioned attorneys are likely to appeal the sanction, resulting in additional delay to the proceedings and a possible reversal by a court of appeals.<sup>188</sup>

### 3. Judges' Institutional Role

Notwithstanding rhetoric regarding the role of judges as regulators of the justice system and of lawyers, the judiciary is primarily concerned with the efficient disposition of disputes as opposed to the

enforcement of legal ethics rules.<sup>189</sup> That is, judges do not perceive their professional mandate as making them responsible for the conduct of lawyers. Rather, only to the extent that attorney conduct impacts the case before them do judges respond to lawyer misconduct.<sup>190</sup> Even when attorney misconduct is likely to impact the case, a judge must balance the costs and benefits of enforcing rules of conduct. Not only is judicial regulation time consuming and costly, it also distracts the judge from the case at hand. A judge may therefore tend to focus only on egregious misconduct, tolerating other misconduct in the name of conserving judicial resources. This tendency to focus on only egregious conduct is further supported by the fact that each judge only sees a subset of each attorney's *modus operandi* and has little incentive to explore the greater context and patterns of misconduct, in part because a judge may lack the power and authority to act on such larger context, even if known to him or her. This means that, given the role of judges and their primary objective of the fair and efficient resolutions of disputes, significant but not egregious attorney misconduct may escape through the judicial cracks.

Inquiry into the role morality of judges creates further doubt regarding their institutional capacity to regulate lawyers.<sup>191</sup> – [T]he role morality of the judge is also to be enscribed [sic] in two principles: passivity and moral non-account-

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<sup>188</sup> See e.g., Robert B. Tannenbaum, *Misbehaving Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct*, 75 U. CHI. L. REV. 1857, 1857 (2008).

<sup>189</sup> See McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct*, *supra* note 13, at 1429-30.

<sup>190</sup> McMorrow, *The (F)utility of Rules*, *supra* note 13, at 33 (Since attorney conduct issues are largely derivative in court practice, secondary to the fair

resolution of the litigants' claims, the federal courts appear reluctant to address attorney conduct issues unless they will have a consequence in the case at hand).

<sup>191</sup> Wasserstrom, *supra* note 8 (defining role morality to mean justifications for conduct one engages in while acting in a specific role, like that of a lawyer or a judge, which may differ from common morality, the justifications one would ordinarily offer to explain conduct).

tability. The principle of passivity is justified on the basis that primary responsibility for the carriage and presentation of the case lies with counsel; hence the role of the judge is primarily quiescent.<sup>192</sup> Judicial passivity is often contrasted with judicial activism,<sup>193</sup> leaving another aspect of judicial passivity—the sense of inability or unwillingness to enforce rules of conduct—under-explored. Judicial passivity makes judges less inclined to enforce rules of professional conduct against lawyers. Because the judicial role morality is defined in terms of passivity, it makes a judge less likely to initiate and play a leading role in regulating a lawyer, and more likely to await action by the opposing counsel. Moreover, judicial regulation of lawyers seems to contradict the very notion of judicial passivity. Ideally, if judges are to sit back and allow counsel to assume the responsibility for the carriage and presentation of the case, assuming a leading role in regulating one or both of the parties seems inconsistent with the role morality of judges. A judge engaged in sanctioning a lawyer appearing before him or her may appear to be less impartial toward that lawyer and her client. Thus, judges who take impartiality and its appearance seriously may be reluctant to enforce rules against misbehaving lawyers.

Finally, recent empirical research suggests that judges may be too close to

lawyers to regulate them, that is, they may tend to identify with lawyers, they may be too understanding and too protective of members of the legal profession, and the bias may be subconscious and therefore hard to address.<sup>194</sup>

Judicial role morality thus casts a doubt on the desirability for judicial enforcement of rules of professional conduct. While the judiciary is perceived by lawyers, clients, and the public to have a heightened responsibility for ensuring the fairness of the legal system (including lawyers' conduct), judges themselves do not see their own role as entailing regulation of the conduct of lawyers per se.<sup>195</sup> Even if they did, their role as passive, neutral adjudicators within the adversary system does not lend itself toward regulating lawyers appearing before them, because it tends to compromise the very neutrality with regard to lawyers that the judicial role requires.

#### 4. Judges' Incentives and Interests

Judicial self-interest may further hinder judicial rule enforcement against lawyers. From the perspective of judges, there is a cost associated with regulating lawyers, as enforcing rules of conduct likely results in an acrimonious relationship, even animosity. The benefit of regulation, on the other hand, is more remote. While effective regulation contributes to the

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<sup>192</sup> Richard F. Devlin, *From Archetypes to Architects: Re-Envisioning the Role Morality of Trial Level Judges* 7 (Dec. 2, 2009) (unpublished manuscript, on file with the *McGeorge Law review*) (– The principle of moral non-accountability is justified on the basis that the rules of the legal system, both procedural and substantive, are sufficiently constraining such that the role of a judge is essentially that of a conduit - a transmission belt ... and that ultimately the judge, while legally accountable in an objective sense, is not subjectively implicated in a moral sense"); see also POSNER, *HOW JUDGES THINK*, *supra* note 2, at 252 (arguing that [j]udges are less likely to be drunk

with power if they realize they are exercising discretion than if they think they are just a transmission belt for decisions made elsewhere and so bear no responsibility for any ugly consequences of those decisions).

<sup>193</sup> Devlin, *supra* note 92.

<sup>194</sup> See e.g., Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* 59 ALA. L. REV. 453, 461-65 (2008). Interestingly, the professionalization of the judiciary and increased number of career judges may render judges less likely to be partial to lawyers.

<sup>195</sup> *Supra* notes 63-65.

overall performance of the legal profession and hopefully improves the conduct of an attorney in question, such misconduct may instead persist or require continuous judicial attention, and the resulting – better conduct may be offset by the acrimonious nature of the relationship. A judge may be tempted to think that other disciplinary avenues might be better suited or more likely to intervene, and forego taking action against misbehaving lawyers. Indeed, even misconduct directed toward the judge itself may be too costly from the judge's perspective to address.<sup>196</sup>

Elected judges face a significant additional cost associated with the regulation of lawyers. Judicial election campaigns are becoming more costly and lawyers are a dominant donor constituency.<sup>197</sup> Enforcement risks alienating potential donors.<sup>198</sup> The same rationale, albeit with less force, holds true for appointed judges and judges facing retention elections. Regulation of lawyers, with the consequence of developing acrimonious relationships with members of the bar, may lead to criticism of judges. Lawyers are potential repeat players in their interactions with judges, and judges therefore have an incentive to keep the relationship cordial.

Moreover, regulation of lawyers is likely to result in appeals. This constitutes a double disincentive for judicial enforcement of rules of professional conduct. First, for judges concerned with conserving judicial resources, enforcing rules against lawyers will result in more work as the regulated lawyer is likely to challenge the enforcement. Second, judges may fear being reversed on appeal. Empirical research suggests that while courts of appeals tend not to scrutinize the finding of attorney wrongdoing, they *do* tend to heavily scrutinize the sanction imposed, and often times reverse it.<sup>199</sup>

Finally, trial judges may face a personal conflict of interest when called upon to enforce rules of conduct against misbehaving lawyers in their courtrooms. Abusive attorney conduct toward opposing counsel, witnesses, or court personnel may be perceived by some judges as a personal slight, that is, the misconduct may be taken personally by presiding judges as disrespectful of their courtroom. In extreme circumstances, some judges may find it hard to resist imposing sanctions not only based on the underlying conduct but also as a measure of personal vindication.<sup>200</sup> Such scenarios suggest the wisdom of having a detached

<sup>196</sup> ABEL, *LAWYERS IN THE DOCK*, *supra* note 52, at 105-91 (Abel's illuminating case study of professional misconduct documents repeated abuse of the immigration magistrate by the attorney in question as well as the magistrate's inability and reluctance to respond to it, in part out of a desire to conserve judicial resources and avoid additional case delay).

<sup>197</sup> See, e.g., Jed Handelsman Shugerman, *Twist of Long Terms: Judicial Elections, Role fidelity, and American Tort Law*, 98 *Geo. L.J.* 1349, 1401 (2010) ("modern judicial campaigns have become dramatically more expensive due to television and direct mailing"); Nancy M. Olson, *Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers' Campaign Contributions and the Common Practice of "Anything Goes,"* 8 *Cardozo Pub. L. Pol'y & Ethics*

J. 341 (2010) (exploring the role lawyers play in expensive judicial campaigns and calling for enhanced regulation of lawyers' contributions).

<sup>198</sup> See e.g., Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009); Bruce Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 *SYRACUSE L. REV.* 229, 229 (2010).

<sup>199</sup> See e.g., Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009); Bruce Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 *SYRACUSE L. REV.* 229, 229 (2010).

<sup>200</sup> *Id.* McMorrow's finding that courts of appeal tend to uphold trial courts' findings of attorney misconduct, but often reverse the sanctions imposed, is arguably explained in part by the fact that the former believe that the latter's judgment is clouded by their personal interest in punishing misbehaving attorneys.

regulator enforce the rules and support judicial referral of misbehaving attorneys to the disciplinary system.<sup>201</sup>

*E. A Modest Proposal to Improve Trial Courts' Rule Enforcement: Appointment of Legal Ethics Magistrates*

The assertion that judges are well-positioned to observe and respond to attorney misconduct should not be overstated. While in some circumstances, especially with misconduct directly observed by a judge, the judiciary is well-positioned to observe and react to attorney wrongdoing; in other instances it is not.<sup>202</sup> The desirability of judicial enforcement of rules of professional conduct cannot be assumed, but should be explored in particular contexts and assessed not only on its own merits, but also relative to the ability of alternative regulators to enforce rules of conduct against lawyers.

Unlike the case of rule promulgation, one need not imagine and encourage new regulators to step forward and enforce rules of conduct. To the contrary, a multitude of regulators, private and public actors alike, appear to be willing and able to enforce rules, and the number of regulators, it seems, grows weekly.<sup>203</sup> Conducting contextual comparative institutional analysis to determine the strengths and weaknesses of judicial rule enforcement and other modes and types of regulators is thus going to be a difficult task, even when necessary empirical

evidence becomes available<sup>204</sup> and even if no new contenders for rule enforcement emerged.

Nonetheless, the above conceptual analysis suggests the possibility of yet one more rule enforcer to aid individual judges in resolving complex disputes over attorney misconduct in conjunction with pending litigation before them: the development of legal ethics magistrates, who would work with and subject to individual trial courts to assist the judiciary with the enforcement of rules of professional conduct. Courts could appoint legal ethics magistrates from the ranks of senior, experienced practitioners from all segments of the legal profession, who would be tasked exclusively with resolving disputes concerning attorney misconduct.

Legal ethics magistrates would be better positioned to observe the attorney conduct in question compared to trial judges because, unlike trial judges whose main task it is to resolve the underlying dispute between parties fairly and efficiently, legal ethics magistrates would be solely dedicated to addressing the ethical allegations made by opposing counsels. Legal ethics magistrates would have every incentive to hold evidentiary hearings necessary to assess the ethical allegations without the fear of distracting themselves from the main function of the judicial system—adjudicating the underlying disputes. Competence and

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<sup>201</sup> *Supra* note 16.

<sup>202</sup> Wilkins captures this very point, noting that the judiciary will not tend to be well-suited to observe and respond to agency problem between clients and their lawyers. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 9, at 824, 829.

<sup>203</sup> Coquillette & McMorrow, *supra* note 10. Indeed, that the traditional state-based judicially-nominally-controlled but organized bar driven system of discipline is becoming a smaller and smaller part of the wide web of attorney regulation constitutes yet another reason to subject judicial regulation of lawyers to greater scrutiny.

<sup>204</sup> Carole Silver, *What we Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1016 n.19 (2010) (arguing that the debates about attorney regulation are "difficult to resolve, in great part, because of the absence of empirical evidence."). As Silver compellingly notes, there is much to be determined before we are able to effectively regulate lawyers. In particular, we need to find out, rather than assume, whether judges are effective enforcers of rules of professional conduct.

experience are another key advantage, enabling magistrates to effectively respond to attorney wrongdoing: legal ethics magistrates' diverse practice backgrounds would give them the necessary context against which to assess the conduct in question, unlike career judges who increasingly do not have such a practice-based perspective. Indeed, appointing legal ethics magistrates with various practice backgrounds, such as individual, small firm, and large firm practitioners from different practice areas, would ensure that legal ethics magistrates are qualified to appreciate attorney conduct in a variety of contexts. In this sense, functional advantage, experience, and competence will reinforce each other and allow legal ethics magistrates to better address complex disagreements over attorney misconduct.

Next, legal ethics magistrates would not suffer from some of the obstacles of judges' role morality. The magistrates' explicit role would be to enforce rules of professional conduct, not to fairly and quickly dispose of their caseload. Nor would they be expected to be neutral or passive toward the lawyers in question. Legal ethics magistrates would have no disincentives to do their enforcement jobs: they would all be appointed and have no reason to serve the interests of lawyers or fear lawyer retaliation come election time. Moreover, to the extent that experienced lawyers tend to be more

interested and invested in maintaining high standards of professional conduct,<sup>205</sup> and given that their experience would insulate them from self-interested concerns about their own professional future, legal ethics magistrates would likely be effective in enforcing rules of professional conduct against lawyers.

Putting a legal ethics magistrate system in place, if only in cases involving complex ethics disputes and at the discretion of trial judges, will entail some costs. Should we worry about additional costs and delays, in the sense of a cottage industry or an ethical – side show for which clients will have to pay?<sup>206</sup>

Not necessarily. Experienced and respected practitioners nearing retirement might be committed to the cause of ensuring lawyers' ethical conduct and fairly inexpensive to employ. Complaining parties could be obliged to post security bonds, and measures could be put in place which would make it more difficult, if not impossible, for lawyers to pass the cost to clients (although lawyers could simply bypass these measures by raising rates).

Legal ethics magistrates are not envisioned as a quick or one-size-fits-all solution for the perceived problem of ineffective enforcement of rules of conduct against lawyers.<sup>207</sup> They may help, however, address ineffective enforcement in some instances, as well as retain some of the advantages of

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<sup>205</sup> In large law firms, for example, prior to the institutionalization and professionalization of risk management processes, near-retired or partly-retired senior partners would often assume the role of "ethics counsel" or informal "ethics guru." See, Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); Elizabeth Chambliss & David B. Wilkins, *New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335 (2003); Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm*

*Lawyer's Lawyer*, 53 U. KAN. L. REV. 835 (2005).

<sup>206</sup> Chambliss & Wilkins, *supra* note 105 (describing the emergence of the legal ethics counsel industry).

<sup>207</sup> David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469, 503 (1990) (– The rules of professional conduct are chronically underenforced.); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648 (1981) (noting that – study after study has shown that the current rules of professional conduct are not enforced.).

judicial enforcement without experiencing some of the challenges faced by the judiciary. It remains to be seen how legal ethics magistrates may fare compared to other alternative regulatory enforcement mechanisms.

### 5. Conclusion

In an era of increased knowledge, sophistication, and sobriety about judicial decision-making, performance, and role, and a time in which simplistic assumptions about the judiciary are replaced with constructive and detailed informed analyses, myths about judges ought to be discredited. One such simplistic assumption is that judges should regulate lawyers. While the judiciary has an important role to play in both promulgation and enforcement of rules of professional conduct, there is little reason to accept as a truism that judges should regulate lawyers.

This Article shows this truism is neither obvious nor easily explained. With regard to rule-promulgation, courts may be both under-regulating and over-regulating

lawyers. By essentially deferring to the ABA Model Rules and to a process of rule implantation dominated by the organized bar, the judiciary does not do enough to meaningfully participate in promulgating top-down, system-wide rules of conduct. At the same time, by adopting a multitude of local rules, the judiciary over-promulgates ad hoc rules which results in splintered rules and unnecessary confusion on the part of both lawyers and clients. Similarly, it appears that the conventional wisdom of accepting, without question, the desirability of judicial enforcement of rules of professional conduct is considerably overstated. While judges are well-positioned to observe and react to some attorney misconduct, they are ill-positioned to detect and react to other instances of wrongdoing. Judges also face a variety of role-pressures and incentives to *not* effectively enforce rules against lawyers. Table I summarizes the main findings of this Article and offers a conceptual blueprint for assessing judicial regulation of lawyers in context.

**Table I: Judicial Regulation of Lawyers**

Rule Promulgation	Rule Enforcement	
<b>Can judges regulate lawyers?</b>	<ul style="list-style-type: none"> <li>* Yes, non-exclusively.</li> <li>* Judges share power with legislatures, private actors, and lawyers.</li> </ul>	<ul style="list-style-type: none"> <li>* Yes, non-exclusively.</li> <li>* Judges share power with administrative agencies, disciplinary agencies, and private actors.</li> </ul>
<b>Do judges regulate lawyers?</b>	<ul style="list-style-type: none"> <li>* The judiciary under-promulgates system-wide rules by deferring to the ABA and the organized bar.</li> <li>* The judiciary over-promulgates ad hoc rules resulting in splintered rules.</li> </ul>	<ul style="list-style-type: none"> <li>* Judges often enforce rules reluctantly and ineffectively.</li> </ul>
<b>Should judges regulate lawyers?</b>	<ul style="list-style-type: none"> <li>* Yes, non-exclusively.</li> <li>* Judges should more actively participate in drafting, commenting on, and adopting system-wide rules of conduct.</li> <li>* In the interest of uniformity and clarity judges should refrain from promulgating ad hoc rules.</li> </ul>	<ul style="list-style-type: none"> <li>* Yes, non-exclusively.</li> <li>* The conventional wisdom regarding the judiciary's functional and comparative advantage regulating lawyers is overstated.</li> <li>* In some limited instances judges should enforce rules; in others they should defer to other means and regulatory actors.</li> </ul>

Should judges regulate lawyers? It depends. In some circumstances, judicial promulgation and enforcement of rules of professional conduct is desirable, while in others it is not. The first step towards answering the question in context, taken here, is to abandon the simplistic assumption that judges should regulate lawyers. History and tradition notwithstanding, there is simply little support, analytical or empirical, to the assertion that judges effectively regulate and thus should regulate the legal profession. The next step is to conduct a contextual comparative institutional analysis scrutinizing the promulgation and enforcement abilities of the judiciary broken into its various elements (federal and state, high court, appellate level, trial level, etc.), and to contrast them with those of alternative regulatory bodies.<sup>208</sup>

*The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC'Y REV. 839 (2009); Rekha Mirchandani, *What's So Special about Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 LAW & SOC'Y REV. 379 (2005); Robert M. Howard, *Comparing the Decision Making*

*of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135 (2005); Betsy Tsai, *the Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995). If, as suggested by this Article, courts were to appoint legal ethics magistrates regularly, the magistrates' work would come to resemble that of a specialized legal ethics court. Indeed, the state-based disciplinary system administrative judges also resemble legal ethics magistrates, yet the former have historically focused on "low-hanging fruit" whereas the latter would be positioned to also address alleged professional misconduct by powerful attorneys.

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<sup>208</sup> Assessing judicial regulation of lawyers in context might be particularly revealing in the case of specialized courts, where enhanced judicial expertise is an inherent feature, although the expertise is with regard to the subject matter being

litigated before the court, not lawyers' ethics. For the growing number and types of specialized courts, see Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts:*