

# PRIORITIZING PROFESSIONAL RESPONSIBILITY AND THE LEGAL PROFESSION: A PREVIEW OF THE UNITED STATES SUPREME COURT’S 2009–2010 TERM

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*In this article, Prof. Knake reviews the ten cases related to the role of attorneys and the practice of law scheduled to be argued before the Supreme Court during the October 2009 term. This term marks a high-water mark in the number of professional responsibility cases that will be heard before the Court, and Prof. Knake surveys the cases to gain insights into the Court’s increased interest in questions that address the role of attorneys. Prof. Knake posits that the unprecedented number of professional responsibility cases, when considered together, signal the Court’s significant prioritization of concerns related to the roles and obligations of attorneys.*

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I. INTRODUCTION

The United States Supreme Court’s 2009–2010 term features an unprecedented number of cases addressing fundamental aspects of professional responsibility and regulation of the legal profession. At the time of this writing, the Court has granted petitions for certiorari in ten cases related to the role of attorneys and the practice of law. This body of cases represents a significant departure from dockets in recent history, where typically the Court has considered no more than two or three matters involving the ethical obligations and legal duties of attorneys (and at times none).<sup>1</sup>

The questions presented in these cases will force the Court to confront the following issues: the First Amendment rights of attorneys to give advice and to advertise; the standards for finding ineffective assistance of counsel when an attorney gives faulty advice, employs questionable trial strategy, lacks the requisite experience, or misses a critical filing deadline; the right to an immediate appeal of challenged attorney-client privilege waivers; the calculation of attorney fees awarded under fee-shifting statutes as well as whether an attorney holds a property right in such an award; and the extent to which a prosecuting attorney may be liable for civil damages for procuring false testimony and introducing it at trial. The cases are surveyed below in an effort to gain insights into the Court’s increased interest in questions that address the role of attorneys.

This essay argues that the Supreme Court’s decision to devote over ten percent<sup>2</sup> of its time during the 2009-2010 term to matters

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1. In a typical term the Supreme Court hears three or fewer such cases at most, and sometimes none. *See infra* notes 155–158 and accompanying text.

2. To date, the Supreme Court has granted certiorari to sixty-two cases, ten (or 16%) of which include issues centrally related to the law of lawyering. The Court may very well add more cases before the term ends. Even if it does not, these ten cases will represent over 10% of the Court’s agenda assuming that it grants review to a total of approximately 80-85 cases (during

involving the law of lawyering is noteworthy not only for the individual issues to be resolved but also for the cases' existence, indeed dominance, on the docket. The law of lawyering is an oft-ignored but vitally important field necessary for ensuring the proper function of our justice system and our democratic form of government. The outcomes of these cases have the potential to impact the work of many attorneys in meaningful ways and, when considered together, signal the Court's significant prioritization of concerns related to the roles and obligations of attorneys.

## II. A PREVIEW OF THE PROFESSIONAL RESPONSIBILITY CASES ON THE SUPREME COURT'S 2009–2010 DOCKET

### A. *Milavetz, Gallop & Milavetz, P.A. v. United States: Attorney Advice and Advertising*

One of the more important issues facing the Court this term focuses on the First Amendment protection that attorney advice and advertising deserves, albeit in a rather unlikely context: a constitutional challenge to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).<sup>3</sup> On its surface *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*<sup>4</sup> appears to be about prevention of bankruptcy abuses,<sup>5</sup> yet the more consequential considerations are whether Congress can place limits on otherwise lawful legal advice and compel certain disclosures in attorney advertisements.<sup>6</sup>

Some explanation of the BAPCPA is necessary to understand how the Court may resolve this appeal. Congress enacted the BAPCPA after considering eight years of testimony and reports on the pervasive and increasing problems of fraud within the bankruptcy system.<sup>7</sup> The BAPCPA targeted both debtors and attorneys who

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the 2007-2008 and 2008-2009 terms the Court granted review to 78 and 87 cases, respectively).

<sup>3</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in 11 U.S.C., and in scattered sections of 28 U.S.C.).

<sup>4</sup> *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785 (8th Cir. 2008), cert. granted 129 S. Ct. 2766 (2009), consolidated with *United States v. Milavetz, Gallop & Milavetz, P.A.*, 129 S. Ct. 2769 (2009).

<sup>5</sup> *Milavetz*, 541 F.3d 785.

<sup>6</sup> *Id.*

<sup>7</sup> See Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 688–89 (2008) (providing detail on BAPCPA's origins).

engaged or appeared to engage in abusive practices.

The BAPCPA includes regulations applicable not only to debtors, but also to “debt relief agencies,” a term that has been construed by a majority of courts, including the Eighth Circuit in *Milavetz*, to encompass attorneys.<sup>8</sup> These regulations include a prohibition on certain advice offered by an attorney to a debtor-client regarding the accumulation of additional debt in contemplation of bankruptcy,<sup>9</sup> and a mandatory inclusion of the following disclosure in advertising by an attorney who offers bankruptcy-related advice: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”<sup>10</sup>

Shortly after the enactment of the BAPCPA, the *Milavetz* plaintiffs—two attorneys, their law firm, and two clients—filed a lawsuit against the federal government. They challenged the application of the debt relief agency classification to attorneys, as well as the advice prohibition and the mandatory advertising disclosures. The Eighth Circuit ultimately struck down the advice prohibition but upheld the advertising disclosures. Both sides appealed.

At a time when attorney regulation has come under intense scrutiny, particularly in the areas of finance and bankruptcy given the recent economic tumult, this case has weighty repercussions for clients who need complete legal advice about bankruptcy and for their attorneys who are under ethical obligations to deliver that guidance. The regulations run counter to an attorney’s established ethical duties under the American Bar Association (ABA) Model Rules of Professional Conduct to “provide competent representation”<sup>11</sup> and “render candid advice,”<sup>12</sup> as well as “not make a false or misleading communication about the . . . lawyer’s services.”<sup>13</sup> Should the Supreme Court declare the challenged regulations

8. The BAPCPA defines the term “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration . . .” 11 U.S.C.A. § 101(12A) (West Supp. 2009).

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

10. The BAPCPA requires the disclosure (or something substantially similar) in any advertisement for “bankruptcy assistance services” or referencing “the benefits of bankruptcy” or any advertisement regarding “assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt.” 11 U.S.C.A. §§ 528(a)(3), (4); 11 U.S.C.A. §§ 528(b)(2)(A), (B).

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

12. MODEL RULES OF PROF’L CONDUCT, R. 2.1.

13. MODEL RULES OF PROF’L CONDUCT R. 7.1; *see also* MINN. R. PROF’L CONDUCT, R. 7.1 (adopting Model Rule 7.1).

constitutional, this case could detrimentally affect the ability of attorneys to provide complete advice and advertising free of arguably-inaccurate disclaimers not only in bankruptcy practice but also in other areas of law.<sup>14</sup> A number of the cases before the Court this term raise similar concerns about the rights and obligations of the attorney together with those of the client.

*B. Holder v. Humanitarian Law Project: Attorney Advice Again*

A second federal statute limiting the guidance that attorneys may give to their clients is challenged in *Holder v. Humanitarian Law Project*.<sup>15</sup> While this case touches on a range of concerns well beyond the law of lawyering, certain provisions before the Court apply directly to the advice a lawyer may give to clients. The Antiterrorism and Effective Death Penalty Act<sup>16</sup> and its amendment, the Intelligence Reform and Terrorism Prevention Act,<sup>17</sup> criminalize “expert advice or assistance”<sup>18</sup> given to any group designated as “a foreign terrorist organization”<sup>19</sup> even if such support is for nonviolent activities or humanitarian efforts.<sup>20</sup> “Expert advice or assistance” is defined as “scientific, technical, or other specialized knowledge.”<sup>21</sup> This prohibition was challenged by the Humanitarian Law Project, among others, which sought to provide support to the Kurdistan Workers Party and the Liberation Tigers of Tamil Eelam for nonviolent and lawful peace-making activities. This support included “offer[ing] their legal expertise in negotiating peace agreements.”<sup>22</sup>

The Ninth Circuit held that the “other specialized knowledge”

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14. See, e.g., David L. Hudson, Jr., *A Debt-Defying Act: Courts say part of embattled bankruptcy law violates First Amendment*, J. AMER. BAR ASS'N. (Jan. 2009) (quoting Joseph R. Prochaska, immediate-past chair of the Consumer Bankruptcy Committee in the ABA Section of Business Law, as stating that “[t]his could have a spillover outside the bankruptcy context. . . . For example, Congress could apply the same rationale to the tax arena and start to regulate the content of advice that tax attorneys give to clients about lawful ways to minimize tax liabilities.”).

15. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009), *cert. granted*, *Holder v. Humanitarian Law Project*, \_\_\_ S. Ct. \_\_\_ (Sept. 30, 2009), 2009 WL 1574134, *consolidated with* *Humanitarian Law Project v. Holder*, \_\_\_ S. Ct. \_\_\_ (Sept. 30, 2009), 2009 WL 2189681.

16. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

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

18. 18 U.S.C.A. § 2339A(b)(3) (West Supp. 2009).

19. 8 U.S.C.A. § 1189 (West 2005).

20. 18 U.S.C.A. § 2339B(a).

21. § 2339A(b)(3).

22. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n. 1 (9th Cir. 2009).

portion of the prohibition on “expert advice or assistance” language was void for vagueness as applied because it “cover[s] constitutionally protected advocacy.”<sup>23</sup> The court justified its position by reasoning that the “requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms.”<sup>24</sup>

In petitioning the Supreme Court for certiorari, Attorney General Holder argued that the provisions are not vague and, “[i]n any event . . . regulate[] conduct, not speech, and do[] not violate the First Amendment.”<sup>25</sup> In opposition, the Humanitarian Law Group countered that the “‘expert advice’ provisions criminalize speech on the basis of its content,” and argued that the Ninth Circuit’s determination should be affirmed.<sup>26</sup>

As in *Milavetz*, the Supreme Court’s treatment of this federal statutory constraint on attorney advice may have significant ramifications for lawyers and clients. A third case also bears on this issue, questioning the impact of a client’s reliance on bad advice.

### C. *Padilla v. Kentucky: Attorney Misadvice*

*Padilla v. Kentucky*<sup>27</sup> involves a Sixth Amendment ineffective assistance of counsel claim brought by a legal permanent resident whose attorney incorrectly advised him that pleading guilty to three drug-related charges would not result in deportation.<sup>28</sup> *Padilla* presents two closely related questions. First, does an attorney have an affirmative duty to advise a non-citizen client that pleading guilty to an offense will result in deportation, or is this a “collateral consequence” that would relieve the attorney of such a duty?<sup>29</sup> Second, if deportation is a collateral consequence, does an attorney’s misadvice that the guilty plea will not result in deportation constitute ineffective assistance of counsel?<sup>30</sup>

A brief history of this case provides context for the questions

23. *Id.* at 930.

24. *Id.* at 928 (quoting *Info. Providers’ Coal. for the Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991)).

25. Petition for a Writ of Certiorari at 10, *Holder v. Humanitarian Law Project*, No. 08-1498 (U.S. June 4, 2009).

26. Opposition to Petition for a Writ of Certiorari at 26, *Humanitarian Law Project*, No. 08-1498 (U.S. July 6, 2009).

27. *Padilla v. Kentucky*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 129 S. Ct. 1317 (2009).

28. *Id.* at 483.

29. Brief of Petitioner at 1, *Padilla v. Kentucky*, No. 08-651 (U.S. May 25, 2009).

30. *Id.*

presented. The petitioner, Jose Padilla, had lived in the United States over forty years (and served in the U.S. military during the Vietnam War) when he was indicted in 2001 on three drug counts related to the trafficking and possession of marijuana and for failing to have an appropriate tax number on the truck he was driving.<sup>31</sup> Padilla conferred with his attorney about how to respond to the charges, asking specifically about the consequences of a guilty plea.<sup>32</sup> After his attorney reassured him that he “did not have to worry about immigration status since he had been in the country so long,”<sup>33</sup> Padilla pleaded guilty to the drug charges and the other charge was dropped.<sup>34</sup>

The advice from Padilla’s attorney was wrong. Two federal statutes related to antiterrorism and illegal immigration reform enacted in 1996 made Padilla’s crime an “aggravated felony” under the Immigration and Nationalization Act, triggering mandatory deportation following a guilty plea.<sup>35</sup> Padilla sought post-conviction relief arguing that his attorney’s misadvice about the deportation consequences of a guilty plea constituted ineffective assistance of counsel.<sup>36</sup> A divided Kentucky Supreme Court rejected Padilla’s request for relief based upon his attorney’s misadvice, holding that mandatory deportation is a “collateral consequence[] . . . outside the scope of the guarantee of the Sixth Amendment right to counsel.”<sup>37</sup>

Like *Milavetz* and *Holder*, *Padilla* raises critical questions about a lawyer’s obligation and ability to provide accurate and complete advice to a client as well as a lawyer’s duty of competence. For example, as previously discussed, the ABA Model Rules mandate that attorneys provide competent representation to a client, which includes “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>38</sup> As the ABA set forth in its amicus curiae brief in support of Padilla, “under the ABA Criminal Justice Standards, a lawyer’s duty of competence includes the duty to be informed about the consequences of a client’s guilty

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31. *Padilla*, 253 S.W.3d at 483.

32. *Id.*

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

34. *Id.*

35. Brief of Petitioner at 5–7, *supra* note 29 (citing the Antiterrorism and Effective Death Penalty Act, 28 U.S.C.A. § 2241 (West 2006) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996, 8 U.S.C.A. § 1229(b) (West 2005)).

36. *Padilla*, 253 S.W.3d at 483.

37. *Id.* at 485.

38. MODEL RULES OF PROF’L CONDUCT, R. 1.1 (2009). *See also* KY. SCR 3.130(1.1) (adopting Model Rule 1.1).

plea, and to advise the client accordingly.”<sup>39</sup> Furthermore, the ABA Standards specifically “provide that a lawyer should advise a non-citizen client about the immigration consequences of a guilty plea because they will frequently be of critical importance to the client.”<sup>40</sup>

Though *Milavetz*, *Holder*, and *Padilla* involve different rights and protections, bankruptcy debtors, humanitarian workers, and criminal defendants all face harsh consequences from incomplete or wrong advice from their attorneys. To the extent the Court favors the arguments in *Milavetz* and *Holder* that the First Amendment protects attorney advice from federal statutory constraints, the Court should likewise rule here that Padilla’s plea cannot stand given counsel’s misadvice. Another case on the Court’s docket, *Wood v. Allen*, identifies comparable concerns for clients in a different context: an attorney’s insufficient experience.

#### D. *Wood v. Allen: Attorney Inexperience*

*Wood v. Allen*<sup>41</sup> presents an issue certain to resonate with law students and newly practicing lawyers, as well as with the more senior attorneys who train and supervise them. The case concerns the degree to which an attorney’s inexperience plays a role in an ineffective assistance of counsel claim. The case originates from a challenge to the sentence received by the petitioner, Holly Wood, “a black man with an IQ less than 70. . . . [who was] sentenced to death for a capital murder.”<sup>42</sup> During the penalty phase of the trial, Wood “was represented by Kenneth Trotter, a recently-admitted lawyer who lacked any criminal law experience.”<sup>43</sup> Though two more experienced trial counsel worked on the case, (and Alabama law at the time required attorneys appointed to capital murder cases to have at minimum five years of experience in criminal law),<sup>44</sup> the sentencing process fell to Trotter alone.<sup>45</sup> Wood argued that Trotter’s efforts were “woefully inadequate” and that “[d]espite . . . clear evidence of mental impairments, neither Trotter nor either of his co-counsel pursued that

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39. Brief of American Bar Association as Amicus Curiae in Support of Petitioner at 5–6, *Padilla v. Kentucky*, No. 08-651 (U.S. May 25, 2009) (citing relevant ABA Model Rules and ABA Standards for Criminal Justice, Prosecution Function and Defense Function).

40. *Id.* at 10.

41. *Wood v. Allen*, 542 F.3d 1281 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 2389 (2009).

42. Petition for Writ of Certiorari at 3, *Wood v. Allen*, No. 08-9156 (U.S. Mar. 12, 2009) (citation omitted).

43. *Id.*

44. *See id.* at 3, n.1 (citing ALA. CODE § 13A-5-54 (1994)).

45. *Id.* at 3.

evidence as a mitigating factor.”<sup>46</sup>

Applying the *Strickland v. Washington*<sup>47</sup> test for ineffective assistance of counsel—that counsel’s performance was deficient and that the deficiency prejudiced the defendant—a divided panel of the Eleventh Circuit rejected Wood’s argument.<sup>48</sup> Untroubled by Trotter’s lack of experience, the majority instead focused on the fact that two other experienced attorneys also worked on the case. In dissent, however, Judge Barkett lamented what she described as “egregious failures of Wood’s defense counsel to investigate and develop available mitigating evidence for the penalty phase,” failures that “epitomize[d] the sort of deficient performance that an ineffective assistance claim exists to guard against.”<sup>49</sup>

Devoting over twenty pages solely to the issue of whether Trotter’s inexperience caused ineffective counsel, the dissent noted several concerns. Trotter had been practicing law for less than six months and conveyed his nervousness about handling the case, yet received primary responsibility for the penalty phase of the trial.<sup>50</sup> He “expressed his frustration at the lack of supervision and guidance he was receiving in a letter to . . . the Southern Poverty Law Center, stating, ‘I have been stressed out over this case and don’t have anyone with whom to discuss the case, including the two other attorneys.’”<sup>51</sup> The dissent observed that “[h]e realized too late what any reasonably prepared attorney would have known: that evidence of Wood’s mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing.”<sup>52</sup> Thus, the dissent concluded, “[d]ue to Trotter’s inexperience, and [the two senior attorneys’] lack of participation in preparation for the penalty phase, no investigation of Wood’s mental retardation was conducted at all, and that alone is the reason it was never presented to the jury in mitigation.”<sup>53</sup> The dissent also agreed with the district court that this ineffectiveness prejudiced Wood.<sup>54</sup>

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46. *Id.* at 4.

47. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

48. *See Wood v. Allen*, 542 F.3d 1281, 1303 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 2389 (2009) (holding that failure to present evidence of Wood’s mental retardation did not constitute ineffective assistance of counsel).

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

50. *Id.* at 1316 (Barkett, J., dissenting).

51. *Id.* at 1318 (Barkett, J., dissenting) (emphasis omitted).

52. *Id.*

53. *Id.*

54. *Id.* at 1322 (Barkett, J., dissenting).

A reversal by the Supreme Court would have a range of implications for inexperienced lawyers and their supervising attorneys. It would signal the seriousness of attorneys' ethical and professional obligations to seek assistance when necessary<sup>55</sup> and to provide appropriate supervision of junior attorneys.<sup>56</sup> This appeal also indirectly implicates an evolving debate among legal educators on the training and preparation that law students receive prior to entering law practice. Similarly, the *Wood* case intersects with *Milavetz* and *Padilla* in raising questions about minimum levels of competence that a client can expect from an attorney. Here, however, the primary issue is the lawyer's strategy, or means employed to pursue the client's objectives, rather than the giving of advice.

Unlike the advice cases, where it is clear whether an attorney has offered prohibited or incorrect advice, inexperience is not easily defined. As the ABA Model Rules explain, "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience."<sup>57</sup> The most difficult aspect of this case for the Court will be drawing the line as to when, if ever, the inexperience of an attorney translates into ineffective assistance of counsel.

#### E. *Holland v. Florida: Attorney Negligence*

An attorney's duties of competence, diligence, and communication all are at issue in *Holland v. Florida*<sup>58</sup>, another ineffective assistance of counsel case. This matter involves a death row inmate's late-filed federal habeas appeal. Though *Holland*, the inmate, repeatedly contacted his court-appointed attorney about filing his habeas petition,<sup>59</sup> his attorney missed the filing date.

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55. See, e.g., MODEL RULES OF PROF'L CONDUCT, R. 1.1 cmt. 1 (2009) ("In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.").

56. See, e.g., MODEL RULES OF PROF'L CONDUCT, R. 5.1 (addressing "responsibilities of partners, managers, and supervisory lawyers").

57. MODEL RULES OF PROF'L CONDUCT, R. 1.1 cmt. 2.

58. *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008), cert. granted, \_\_\_ S. Ct. \_\_\_ (Oct. 13, 2009), 2009 WL 2134374.

59. *Holland*, 539 F.3d at 1337.

Holland then proceeded *pro se*, filing the petition on his own and requesting equitable tolling, or an extension, of the deadline based upon his attorney's "gross negligence."<sup>60</sup> The statute of limitations to file a federal habeas corpus petition provides for equitable tolling when two standards are met. First, the petitioner must show he diligently pursued his rights. Second, he must show that "some extraordinary circumstance stood in his way and prevented timely filing."<sup>61</sup>

The Eleventh Circuit held that "[p]ure professional negligence" was not enough to qualify for equitable tolling.<sup>62</sup> While the court assumed that the attorney's failure to file a federal habeas petition "despite [Holland's] repeated instructions to do so"<sup>63</sup> constituted gross negligence, it determined that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care . . . can rise to the level of egregious attorney misconduct that would entitle [Holland] to equitable tolling."<sup>64</sup>

In his Supreme Court appeal, Holland took issue with "[t]he Eleventh Circuit's stubborn refusal to acknowledge that 'gross negligence' is sufficient to warrant equitable tolling."<sup>65</sup> He contended that the Eleventh Circuit's test conflicts with other circuits and establishes a "near-impossible standard to meet."<sup>66</sup> In the opposition brief, Florida suggested that Holland's own behavior, including not answering "at least eight letters" written by his attorney, should be taken into account, and further argued that equitable tolling is not warranted in this case because Holland's attorney's failure to file a timely federal habeas petition "was merely ordinary attorney negligence."<sup>67</sup>

Like many of the lawyering cases before the Court this term, *Holland* implicates important duties owed by a lawyer to the client. For example, the ABA Model Rules demand minimum levels of diligence<sup>68</sup> and communication.<sup>69</sup> A lawyer also is required under the

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60. Petition for a Writ of Certiorari at i, 4–5, *Holland v. Florida*, No. 09-5327 (U.S. May 13, 2009).

61. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 548 U.S. 408, 418 (2005)).

62. *Holland*, 539 F.3d at 1339.

63. *Id.*

64. *Id.*

65. Petition for a Writ of Certiorari, *supra* note 60, at 7.

66. *Id.* at 7–8.

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

68. MODEL RULES OF PROF'L CONDUCT, R. 1.3 (2009) ("A lawyer shall act with reasonable

Model Rules to “abide by a client’s decisions concerning the objectives of representation” and must “consult with the client as to the means by which they are to be pursued.”<sup>70</sup> While the Supreme Court has been reluctant to “constitutionalize”<sup>71</sup> standards of professional conduct, it has looked to the Model Rules for evaluating attorney behavior in evaluating the Sixth Amendment right of a criminal defendant to effective assistance of counsel,<sup>72</sup> and may do so in *Holland* and the other ineffective assistance of counsel cases as well.

#### F. *Smith v. Spisak: Attorney Loyalty and Strategy*

*Smith v. Spisak*<sup>73</sup> presents yet another claim of constitutionally ineffective lawyering, this time based upon a lawyer’s trial strategy at closing argument. Defendant Spisak was convicted in 1983 of four murders at Cleveland State University.<sup>74</sup> He pled not guilty by reason of insanity, but admitted to the murders.<sup>75</sup> During the trial he claimed to be a follower of Adolf Hitler.<sup>76</sup> Though a number of experts were prepared to testify about Spisak’s mental illness, they were excluded from supporting his insanity claim.<sup>77</sup>

In the closing argument of the sentencing phase, Spisak’s attorney “repeatedly stress[ed] the brutality of the crimes and demean[ed] [Spisak].”<sup>78</sup> He described each murder in graphic detail, made little mention of Spisak’s mental illness, and “rambl[ed] incoherently . . .

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diligence and promptness in representing a client.”). The Rules Regulating the Florida Bar mirror the relevant obligations of the ABA Model Rules. See FLORIDA RULES REGULATING THE BAR, R. 4-1.1, R. 4-1.2, R. 4-1.3, R. 4-1.4 (2009).

69. MODEL RULES OF PROF’L CONDUCT, R. 1.4(a)(3),(4) (“A lawyer shall . . . keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information.”).

70. MODEL RULES OF PROF’L CONDUCT, R. 1.2.

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

72. *Id.*

73. *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), *cert. granted and case remanded*, *Hudson v. Spisak*, 128 S. Ct. 373 (2007), *on remand*, *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008), *reh’ng en banc denied*, 512 F.3d 852 (6th Cir. 2008), *cert. granted*, *Smith v. Spisak*, 129 S. Ct. 1319 (2009).

74. *Spisak v. Mitchell*, 465 F.3d 684, 688–90 (6th Cir. 2006) (quoting *State v. Spisak*, 521 N.E.2d 800, 800–01 (1988)),

75. *Id.* at 688, 690.

76. *Id.* at 688.

77. *Id.* at 691–703.

78. *Id.* at 705.

about integrity in the legal system.”<sup>79</sup> The district court found the argument to be “an appropriate part of trial counsel’s strategy to confront the heinousness of the murders before the prosecution had the opportunity to do so.”<sup>80</sup> The Sixth Circuit disagreed.

On appeal, the Sixth Circuit concluded that “in pursuing this course, [Spisak’s attorney] abandoned the duty of loyalty owed to [his client].”<sup>81</sup> The court was particularly concerned that the attorney’s “hostility toward [Spisak] aligned [him] with the prosecution against his own client.”<sup>82</sup> Furthermore, the court observed, “[m]uch of [Spisak’s attorney’s] argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim.”<sup>83</sup> The Sixth Circuit reversed the district court’s denial of habeas.<sup>84</sup>

Ohio argued on appeal to the Supreme Court that Spisak’s attorney’s closing argument was “reasonable when viewed from counsel’s perspective at the time.”<sup>85</sup> Yet, a group of prominent trial advocacy law professors filed an amicus brief reaching the opposite conclusion.<sup>86</sup> They explained that Spisak’s attorney’s closing argument unconstitutionally prejudiced his case, observing that “a closing argument that magnifies and obsesses on weaknesses, while discussing strengths in an indirect and at times incomprehensible manner, is below any reasonable measure of professional competence.”<sup>87</sup> They suggested that a holding to the contrary “would teach generations of future lawyers incorrect lessons about how to present a case, and would leave clients—both Mr. Spisak and future clients in like cases—without the reasonable assurance of actual assistance of counsel to which the Sixth Amendment entitles them.”<sup>88</sup> As in the other ineffective assistance of counsel cases, the Supreme Court’s decision in *Spisak* will address the key elements of a lawyer’s duties and obligations to the client, and will determine when, if ever, a failure to fulfill those duties rises to the level of a constitutional violation.

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79. *Id.*

80. *Id.*

81. *Id.* at 706.

82. *Id.*

83. *Id.*

84. *Id.*

85. Brief of Petitioner at 36, *Smith v. Spisak*, No. 08-724 (U.S. May 22, 2009).

86. Brief of Stephen Lubet et al. as Amici Curiae in Support of Respondent at 2–3, *Smith v. Spisak*, No. 08-724 (U.S. Aug. 14, 2009).

87. *Id.* at 3.

88. *Id.*

G. *Mohawk Industries, Inc. v. Carpenter: Attorney-Client Privilege*

*Mohawk Industries, Inc. v. Carpenter*<sup>89</sup> asks “whether a party has an immediate appeal . . . of a district court’s order finding waiver of the attorney-client privilege and compelling production of privileged materials.”<sup>90</sup> But the outcome will impact far more than procedural functions. As the petitioner Mohawk argues, an immediate appeal is imperative to protecting attorney-client privilege in this situation.

This case involves an unlawful termination dispute between Mohawk Industries and its employee, Norman Carpenter.<sup>91</sup> During discovery, Carpenter requested information that Mohawk refused to provide on the basis of attorney-client privilege. Carpenter moved to compel discovery. While the district court agreed that the disputed communications were privileged, it concluded that Mohawk “had implicitly waived the attorney-client privilege” through a response filed in an unrelated action.<sup>92</sup>

Mohawk appealed under the collateral order doctrine, which provides an exception to the final judgment rule and the corresponding principle that “[g]enerally, discovery orders are not final orders . . . for purposes of obtaining appellate jurisdiction.”<sup>93</sup> Under this exception, “an order is appealable [only] if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.”<sup>94</sup> The Eleventh Circuit found the first two prongs satisfied, but held “that a discovery order [implicating] the attorney-client privilege is [not] effectively unreviewable on appeal from a final judgment.”<sup>95</sup> Acknowledging a split among the circuits,<sup>96</sup> the court suggested that mandamus or a challenge to a contempt order following noncompliance provide alternative mechanisms for review,<sup>97</sup>

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89. *Carpenter v. Mohawk Indus., Inc.* 541 F.3d 1048 (11th Cir. 2008) (per curiam), *cert. granted*, *Mohawk Indus., Inc. v. Carpenter*, 129 S. Ct. 1041 (2009).

90. Reply Brief of Petitioner at i, *Mohawk Indus., Inc. v. Carpenter*, No. 08-678 (U.S. Jan. 6, 2009), 2009 WL 52074.

91. *Mohawk*, 541 F.3d at 1050.

92. *Id.*

93. *Id.* at 1052 (citing 28 U.S.C.A. § 1291 (West 2006)).

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

95. *Id.* at 1052.

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

97. *See Mohawk*, 541 F.3d at 1048, 1054–55.

notwithstanding the practical difficulties associated with these options and the extraordinary costs associated with a new trial.<sup>98</sup>

On appeal to the Supreme Court, Mohawk focused on the importance of the attorney-client privilege in the context of the justice system—an issue glossed over in the Eleventh Circuit opinion.<sup>99</sup> Moreover, Mohawk reasoned that if it must “wait until after a final judgment to appeal the District Court’s order, the right [it] seeks to protect, namely, the right not to disclose privileged information, will have been destroyed. It is this right of non-disclosure that is at the heart of the attorney-client privilege.”<sup>100</sup> Mohawk went on to observe: “as the Third, Ninth, and D.C. Circuits have recognized, an appeal after final judgment cannot remedy the breach of confidentiality occasioned by erroneous disclosure of privileged material . . . . Once the privileged information is disclosed, there is no way to unscramble the egg scrambled by the disclosure.”<sup>101</sup>

This case strikes at the same concerns about an attorney’s ability to advise her client as do the preceding cases of *Milavetz*, *Padilla*, and *Wood* addressing attorney advice. The rationale of the attorney-client privilege—“the oldest of the privileges for confidential communications known to the common law”—is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>102</sup>

Without that full and frank communication, an attorney may not be able to offer essential advice. Similarly, “corporations may be less likely to engage in internal investigations to ensure their compliance with the law because the assurance that the legal findings and conclusions resulting from such investigations could be maintained in confidence would be weakened considerably.”<sup>103</sup> When a client is forced to produce documents protected by the attorney-client

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98. See, e.g., Michael P. Shea, *Allow Prompt Appeals*, NAT’L L. J., April 13, 2009 at 23 col. 1 (explaining that “mandamus—an extraordinary remedy reserved for ‘clear abuses of discretion’ by the trial judge—is a poor fit for orders denying privilege claims” and that the contempt order for non-compliance “is even worse” in that for most parties “enduring the penalties and stigma associated with a contempt sanction is simply not a feasible option”); see also Reply Brief of Petitioner at 32–40, *Mohawk Indus., Inc. v. Carpenter*, No. 08-678 (U.S. April 27, 2009), 2009 WL 1155404 (discussing problems associated with mandamus and contempt).

99. Reply Brief of Petitioner, *supra* note 98 at 19.

100. *Id.* at 11–12.

101. *Id.* at 12 (quotation and citations omitted).

102. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

103. Reply Brief of Petitioner, *supra* note 98, at 32–40.

privilege only to learn at a trial's end that the documents ought not to have been revealed, the privilege exists in theory but not in practical application.

Approaching this case from the standpoint of the client's interests offers further justification for the position that an immediate appeal is warranted. Such a ruling in the context of protecting attorney-client privilege certainly would be consistent with the prioritization of protections on attorney advice and the client's receipt of that advice as noted in the prior cases studied in this essay. The next case turns to a related concern—access to attorney advice.

#### H. *Perdue v. Kenny A. ex rel. Winn: Attorney Fees*

At issue in *Perdue v. Kenny A. ex rel. Winn*<sup>104</sup> is when, if ever, “a reasonable attorney’s fee award under a federal fee-shifting statute . . . [may] be *enhanced* based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation.”<sup>105</sup> This case stems from a Georgia federal district court’s award of more than \$10.5 million to a group of attorneys who represented a class action of 3,000 foster children against the State of Georgia.<sup>106</sup> Of that award, \$4.5 million represented an enhancement to the lodestar calculation, based upon the district court’s assessment that the quality of legal representation was “far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive.”<sup>107</sup>

A unanimous panel of the Eleventh Circuit affirmed the lower court’s award, though it did so with serious reservations.<sup>108</sup> In

104. *Perdue v. Kenny A. ex rel Winn*, 532 F.3d 1209 (11th Cir. 2008), *reh’ng en banc denied*, 547 F.3d 1319 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 1907 (2009).

105. Brief for Petitioner at i, *Purdue v. Kenny A. ex. rel. Winn*, No. 08-970 (U.S. June 22, 2009) (emphasis added). The lodestar formula includes twelve factors for determining an appropriate fee: “(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.” *Hensely v. Eckerhart*, 461 U.S. 424, 430 n. 3 (1983).

106. Brief for Petitioner, *supra* note 105 at 4–8.

107. *Kenny A. ex rel Winn v. Perdue*, 454 F. Supp. 2d 1260, 1288 (N.D. Ga. 2006). The District Court further observed that “[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.” *Id.* at 1290.

108. *Perdue*, 532 F.3d at 1236–38.

particular, the court observed that the district court's enhancement "cannot be squared with the Supreme Court [precedent],"<sup>109</sup> and "that the enhancement to the lodestar amount in this case was improper."<sup>110</sup> Nevertheless, "under the prior panel precedent rule [the court was] not free to decide the enhancement issue."<sup>111</sup> As such, though the court was "convinced" that the prior Eleventh Circuit precedent "was wrong and conflict[ed] with relevant Supreme Court decisions," it felt "bound to follow it"<sup>112</sup> and upheld the award.

In its petition to the Supreme Court, the State argued that the results obtained and the quality of work done in a case should be considered only when calculating the basic lodestar fee amount.<sup>113</sup> In other words, it constitutes double-counting to consider those factors again in awarding an enhancement, bonus, or other additional amount.

In response, the attorneys seeking enforcement of the fee award focused on the district court's decision and on the Eleventh Circuit's denial of a rehearing en banc. Judge Wilson wrote an opinion concurring in the denial and finding that "[s]everal decades of established precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal-fee shifting statute, in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance."<sup>114</sup>

There is no question that these factors are appropriate for calculating a reasonable lodestar amount; however, that these factors should be grounds for a de facto bonus is a conclusion unlikely to be reached by a majority of the Supreme Court. This is especially true given that the omission of such enhancement would not discourage or thwart future representations.<sup>115</sup> As with the other cases, professional

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109. *Id.* at 1225.

110. *Id.* at 1233.

111. *Id.* at 1236 (citing *NAACP v. City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987) and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988)).

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

113. See Brief for Petitioner, *supra* note 105 at 13–14.

114. Brief in Opposition at 10, *Purdue v. Kenny A. ex. rel. Winn*, No. 08-970 (U.S. March 4, 2009) (quoting 547 F.3d at 1320) (citations omitted).

115. In fact, the lawyers in *Perdue* took on and successfully carried out their representation without any expectation of an enhancement. See Marcia Coyle, *Advocacy Group to Defend Hike in Fee Award*, N.Y. L. J., April 13, 2009 at 1 col. 3 (interviewing Marcia Robinson Lowry, executive director of Children's Rights, Inc. (group of lawyers representing plaintiff class in *Perdue*), who explained "that such enhancements were rare, occurring on average only once

conduct codes also have a role here. For example, Model Rule 1.5 reinforces the factors for determining the reasonableness of a fee,<sup>116</sup> and the Model Rules also ensure that “[a]n attorney who accepts a case arising under a fee-shifting statute is ethically obligated, as is any attorney in any case, to represent her client to the best of her ability,”<sup>117</sup> regardless of compensation.

### I. *Astrue v. Ratliff: Attorney Fees Again*

*Astrue v. Ratliff*<sup>118</sup> offers a second opportunity for the Court to evaluate attorneys’ fees in the context of federal fee-shifting statutes. At stake in this case is whether a fee award belongs to the attorney or the client. Attorney Catherine Ratliff “successfully represented two claimants in their efforts to receive benefits from the Social Security Administration.”<sup>119</sup> After her victory, she requested payment of her fees and costs under the Equal Access to Justice Act (“EAJA”).<sup>120</sup> The EAJA is a federal fee-shifting statute that allows “prevailing parties” in civil actions against the United States to recover fees and other costs in certain cases. The district court granted Ratliff’s request, but the government reduced her award because of debt that one of her clients owed the United States Government.<sup>121</sup> Ratliff challenged the government’s action under the Fourth Amendment, arguing that it constituted an illegal seizure, but the district court held she lacked standing “because the fees were awarded to the parties, not their

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each year in the entire federal system. Her own organization ‘has never sought and never received an enhancement’ she said in an interview last week”).

116. See MODEL RULES OF PROF’L CONDUCT, R. 1.5(a) (7) (2009) (“The factors to be considered in determining the reasonableness of a fee include . . . the experience, reputation, and ability of the lawyer or lawyers performing the services.”).

117. Brief for the U.S. as Amicus Curiae Supporting Petitioner at 29, *Purdue v. Kenny A. ex. rel. Winn*, No. 08-970 (U.S. June 29, 2009) (citing MODEL RULES OF PROF’L CONDUCT, R. 1.1 (2008) (“A lawyer shall provide competent representation to a client,” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”) and MODEL RULES OF PROF’L CONDUCT, R. 1.3 cmt. 1 (2008) (stating a lawyer should “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor” and must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”)).

118. *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *cert. granted*, *Astrue v. Ratliff*, \_\_\_ S. Ct. \_\_\_ (Sep. 30, 2009), 2009 WL 1146426.

119. *Id.* at 801.

120. Equal Access to Justice Act, 28 U.S.C.A. § 2412.

121. *Ratliff*, 540 F.3d at 801. The amount at issue relates to only one of the clients, a Social Security claimant proceeding *in forma pauperis*. The court awarded Ratliff fees and expenses in the amount of \$2,239.35, all of which was offset by the government to satisfy the claimant’s pre-existing federal debt. See generally Petition for Writ of Certiorari, *Astrue v. Ratliff*, No. 08-1322 (U.S. April 28, 2009), 2009 WL 1155415.

attorney.”<sup>122</sup>

The Eighth Circuit reversed, holding that “EAJA attorneys’ fees are awarded to the prevailing parties’ attorneys.”<sup>123</sup> It did so in the face of contradictory precedent from other jurisdictions, notably the Tenth and Eleventh Circuits.<sup>124</sup> The court noted, however, that the result was based upon controlling Eighth Circuit cases and “[w]ere [it] deciding this case in the first instance, [it might] well agree with [the] sister circuits.”<sup>125</sup>

Predictably, in its petition for certiorari, the government argued that the Supreme Court should follow those courts holding that fees awarded to a prevailing party under the EAJA are property of the client, not the attorney.<sup>126</sup> Ratliff, for her part, countered that “the Eighth Circuit was correct in holding that attorneys are entitled to receive EAJA awards in Social Security cases notwithstanding the government’s purported offset rights to collect debts owed by clients.”<sup>127</sup> Further, she noted that the Eighth Circuit’s acknowledgement of an attorney’s “protectable property interest in an EAJA fee once it is awarded” was a position “find[ing] strong support in the long-established rule that an attorney’s interest in a fee for her efforts creates a lien allowing equitable tracing of funds that have been transferred to other creditors of the client.”<sup>128</sup> Thus, it follows that “the attorney’s equitable lien is itself a property interest subject to constitutional protection against government confiscation,” irrespective of “who has the right to apply for an attorney fee . . . or even to receive it in the first instance.”<sup>129</sup> Ratliff also suggested that the consequences of a reversal would leave few attorneys, if any, to assist Social Security claimants given that they risk receiving no compensation, “even in those cases where they not only succeed, but [also] where the government’s position was not . . . justified.”<sup>130</sup>

Both *Purdue* and *Astrue* stand apart from most of the other cases previewed in this essay, as they do not directly address a primary function of the attorney-client relationship. Nevertheless, compensation guaranteed by a fee-shifting statute undoubtedly

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

123. *Id.* at 802.

124. *Id.* at 801–02 (citing cases).

125. *Id.* at 802.

126. See Petition for Writ of Certiorari, *supra* note 121, at 7.

127. Respondent’s Brief in Opposition at 21, *Ratliff*, No. 08-1322 (U.S. June 25, 2009).

128. *Id.* (citations omitted).

129. *Id.* (citations omitted).

130. *Id.* at 29.

influences attorneys to take on representations where parties otherwise would be left with no legal advice (and, in cases like *Astrue*, with no assistance in obtaining wrongly-denied benefits). Thus, in an important way, the attorney fees cases are interwoven with those cases addressing attorney advice and, in particular, the right or ability of clients to access necessary legal representation and advice.

*J. Pottawattamie County, Iowa v. McGhee: Attorney Immunity*

The final case previewed in this essay demands that the Court offer much-needed clarification to the doctrine of prosecutorial immunity. *Pottawattamie County, Iowa v. McGhee*<sup>131</sup> dates back to 1978 when two black teenagers, Curtis McGhee and Terry Harrington, were convicted of murdering a white, retired Council Bluffs police department captain.<sup>132</sup> Both were sentenced to life imprisonment.<sup>133</sup> In 2002, finding that the prosecutors failed to disclose evidence of an alternative suspect and coerced false testimony, the Iowa Supreme Court reversed Harrington's conviction,<sup>134</sup> and McGhee was allowed to enter a plea to second degree murder in exchange for a sentence of time served.<sup>135</sup>

The two men then brought civil rights actions under 42 U.S.C.A. § 1983 against Pottawattamie County and the two former county prosecutors.<sup>136</sup> The prosecutors argued that they were entitled to absolute immunity under *Imbler v. Pachtman*,<sup>137</sup> in which the Supreme Court held that prosecutors are afforded absolute immunity at trial for their prosecutorial acts but only qualified immunity for investigatory or administrative acts.<sup>138</sup> *Imbler* did not provide definitive guidance, however, as to what differentiates a prosecutorial activity from an investigatory or administrative activity.<sup>139</sup> The *McGhee* case provides the Court a window to do so; in fact, it offers an opportunity for the Court to reconsider *Imbler's* holding in its entirety.

The district court dismissed the claims against the prosecutors

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131. *McGee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, *Pottawattamie County, Iowa v. McGhee*, 129 S. Ct. 2002 (2009).

132. 547 F.3d at 925.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

138. *Id.* at 430–31.

139. *Id.*

based on withholding of exculpatory evidence, but denied immunity for the claims based on the allegations that the prosecutors had coerced false testimony from witnesses that later was introduced at trial and resulted in the convictions.<sup>140</sup> The Eighth Circuit affirmed.<sup>141</sup> As McGhee and Harrington observed, “[w]ithout the fabricated testimony, there was no evidence connecting plaintiffs to the murder.”<sup>142</sup>

The former prosecutors petitioned the Supreme Court to address whether they “may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where [they] allegedly violated a criminal defendant’s ‘substantive due process’ rights by procuring false testimony during the criminal investigation and then introduced that same testimony against the defendant at trial.”<sup>143</sup> Though the former prosecutors were careful to note that they had not conceded McGhee and Harrington’s version of the facts,<sup>144</sup> they did not dispute them in the appeal. Rather, they made two arguments. First, they contended that the Eighth Circuit’s decision conflicts with the Seventh Circuit’s holding in *Buckley v. Fitzsimmons*<sup>145</sup> that the procurement of false testimony does not violate the Constitution and prosecutors are entitled to absolute immunity for the use of such false testimony.<sup>146</sup> Second, they suggested that the Eighth Circuit’s decision conflicts with other Supreme Court precedent, particularly with regard to the Court’s “function test” for prosecutorial immunity.<sup>147</sup> In sum, they made the case for “absolute[] immun[ity] from claims that they introduced perjured testimony . . . [as] [s]uch claims go to the heart of a prosecutor’s function as an advocate for the state in judicial proceedings.”<sup>148</sup>

In opposing the appeal, Harrington and McGhee both disputed the claim of a circuit split and distinguished *Buckley* as involving a different situation—one in which one group of prosecutors coerced

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140. McGhee v. Pottawattamie County, Iowa, 475 F. Supp. 862, 927 (S.D. Iowa 2007).

141. *McGhee*, 547 F.3d at 932 (citation omitted).

142. Brief in Opposition for Respondent McGhee at 6, Pottawattamie County, Iowa v. McGhee, No. 08-1065 (U.S. March 17, 2009). *Accord* Brief in Opposition for Respondent Harrington at 10, *McGhee*, No. 08-1065 (U.S. March 17, 2009).

143. Brief of Petitioner at i, *McGhee*, No. 08-1065 (U.S. July 13, 2009).

144. *See* Petitioner’s Reply to Brief in Opposition at 11, *McGhee*, No. 08-1065 (U.S. March 31, 2009). (“Petitioners consistently have maintained that *even if* the alleged facts were true, respondents’ claims must fail because petitioners are immune as a matter of law.”).

145. *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994).

146. Brief of Petitioner, *supra* note 143, at 2–3.

147. *See id.* at 7–8 and 34–36 (discussing cases).

148. *Id.* at 5.

false testimony, while another group of prosecutors used that testimony at trial.<sup>149</sup> Furthermore, both argued that the Eighth Circuit properly applied the functional test in reaching prosecutors' actions taken outside the advocatory functions (e.g. the procurement of false testimony and the introduction of said testimony at trial).<sup>150</sup> McGhee also argued that relief must be available in cases like this to deter prosecutorial misconduct, or prosecutors would be "free to fabricate evidence during criminal investigations because they would know there was virtually no possibility of ever being punished for it."<sup>151</sup>

To be sure, strong protections are accorded to prosecutorial immunity, and for good reason.<sup>152</sup> Yet, cases like this expose areas of potential prosecutorial abuse and have led some commentators to argue against absolute immunity.<sup>153</sup> The *McGhee* case also illustrates another example of the role that attorney codes of conduct should play. Even if the Court determines that fabrication of evidence and use of that evidence at trial does not rise to the level of a claim here, there is no question that these allegations ought to be addressed by the attorney discipline system and ethical conduct codes.<sup>154</sup> Last, *McGhee* exemplifies a common thread among all of these pending cases in that it demands guidance about the role and responsibilities of an attorney balanced against the rights of the client or defendant.

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149. Brief in Opposition for Respondent McGhee, *supra* note 142, at 16–17; Brief in Opposition for Respondent Harrington, *supra* note 142, at 12–14.

150. Brief in Opposition for Respondent McGhee, *supra* note 142, at 9–10, Brief in Opposition for Respondent Harrington, *supra* note 142, at 13–14.

151. Brief in Opposition for Respondent McGhee, *supra* note 142, at 19.

152. See, e.g., Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473 (2008) (discussing principles of absolute immunity and qualified immunity when government officials are sued for money damages).

153. See, e.g., Douglas J. McNamara, *Buckle, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 *ALB. L. REV.* 1135, 1138 (1996) (arguing for the end of absolute immunity so that "incompetent or malevolent prosecutors [may be] subject to civil liability for their misdeeds").

154. See, e.g., MODEL RULES OF PROF'L CONDUCT, R. 3.8 (2009) (requiring prosecutors to disclose exculpatory evidence to the defense and to "remedy" a conviction upon awareness that the defendant did not commit the crime); Iowa S. Ct. R. 32.3.8(a) (prohibiting prosecution of a charge prosecutor knows is not supported by probable cause); Iowa S. Ct. R. 32.3.8(d) (prohibiting a prosecutor from knowingly failing to disclose exculpatory evidence). See also Brief for the Nat. Ass't U.S. Atty's. as Amicus Curiae Supporting Petitioner at 2, *Pottawattamie County, Iowa v. McGhee*, No. 08-1065 (U.S. July 20, 2009) ("[P]rosecutors who engage in misconduct are already subject to discipline by a variety of institutions, state bar associations, and the judges before whom they appear. In the most extreme cases, prosecutors may face criminal sanctions for their misconduct.").

### III. CONCLUSION

During a typical term the Supreme Court hears perhaps one,<sup>155</sup> two,<sup>156</sup> or maybe three<sup>157</sup> cases addressing issues related to the role of an attorney or the practice of law, or sometimes none at all.<sup>158</sup> To date, ten cases have been granted review by the Court and even more may be added before the term concludes.<sup>159</sup> Not only is the number of cases in this category unusual,<sup>160</sup> but also the questions presented by all of the cases encompass core facets of the law of lawyering. Thus, the placement of these matters on the Supreme Court's docket is remarkable both for the quantity of cases and their substance. Each case individually addresses issues that have the potential to substantially alter the day-to-day practice of law for attorneys in a variety of settings. Viewing the matters collectively exposes their interconnections and the dramatic impact that their outcomes may have on the Supreme Court's legal profession jurisprudence. Attorneys, along with their clients, will want to follow the Court's rulings closely.

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155. For example, during the 2006–2007 term, the Court heard only one case addressing matters related to attorneys and the practice of law: *Travelers Cas. & Sur. Co. v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007) (attorneys' fees). See Survey of Supreme Court Cases Containing a Legal Ethics Issue from the 1998–1999 Term to Present (unpublished manuscript, on file with author). It should be noted for purposes of this essay that cases involving regulation of the judiciary or judicial misconduct have been excluded.

156. For example, during the 1998–1999 term, the Court heard two cases related to attorneys and the practice of law: *Martin v. Hadix*, 527 U.S. 343 (1999) (addressing attorneys' fees); *Conn v. Gabbert*, 526 U.S. 286 (1999) (addressing prosecutorial misconduct).

157. For example, during the 2003–2004 term, the Court heard three cases involving attorneys and the practice of law: *Florida v. Nixon*, 543 U.S. 175 (2004) (addressing ineffective assistance of counsel); *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (addressing attorneys' fees); and *Banks v. Dretke*, 540 U.S. 668 (2004) (addressing prosecutorial misconduct). With the exception of the current 2009–2010 term, three cases are the most appearing on any Supreme Court docket since at least the 1998–1999 term, and likely previous terms. See Survey, *supra* note 155.

158. For example, during the 2005–2006 term, the Court heard no cases central to the role of an attorney or the practice of law. See Findlaw 2005–2006 Supreme Court Case Index, [http://supreme.lp.findlaw.com/supreme\\_court/caseindex2005.html](http://supreme.lp.findlaw.com/supreme_court/caseindex2005.html) (listing cases heard during the 2005–2006 term).

159. The standard practice of the Supreme Court is to continue adding cases for review at least until January of the current term.

160. See *supra* notes 155–158 and accompanying text.