

THE ETHICS OF OPPOSING CERTIORARI BEFORE THE SUPREME COURT

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INTRODUCTION

Of all the pursuits one might undertake to attain distinction in the American bar, perhaps none is quite so exalted as arguing a case before the Supreme Court of the United States. Kannon Shanmugam, a partner at the D.C. law firm Williams & Connolly, who has argued before the Court eleven times, describes the experience as “exhilarating” and

“humbling.”¹ Mayer Brown special counsel Charles Rothfeld, who has argued twenty-five cases in the Court, characterizes Supreme Court oral arguments as “extraordinary” and a highly “sought-after commodity,” especially given that the Court hears only eighty or so cases each year.² Indeed, it might fairly be said that the chance to argue before the Court is so highly esteemed that its value is beyond quantification, opening doors to high-paying opportunities in private practice³ and offering a unique opportunity to litigate issues of national significance.⁴ To stand at the podium in our nation’s highest court is to share in a distinction held by giants in our nation’s legal history—figures such as Daniel Webster, Robert Jackson, and Thurgood Marshall.

As the Supreme Court’s docket grows smaller and an emerging class of “Supreme Court experts” snags a greater portion of that docket with every passing year,⁵ the value associated with each rare opportunity to argue before the Court continues to rise. The rising value has driven the legal academy to pay greater attention to the arduous process of persuading the Court to take on a case through its certiorari review.⁶ Elite Supreme Court practices have focused on the certiorari process as

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1. Kannon K. Shanmugam, *Serving the Public*, J. KAN. B. ASS’N, Oct. 2008, at 19.

2. Charles A. Rothfeld, *Avoiding Missteps in the Supreme Court: A Guide to Resources for Counsel*, 7 J. APP. PRAC. & PROCESS 249, 249 (2005).

3. See Mark Curriden, *The Long Shot*, A.B.A. J., Nov. 2010, at 52, 54 (explaining how after arguing before the Supreme Court, a Cleveland solo practitioner’s “days of surviving on court-appointed cases are soon to end” because “he will inevitably be bombarded by paying clients”).

4. See Alison Grant, *33-year-old Cleveland lawyer David Mills to argue case Monday before the U.S. Supreme Court*, THE PLAIN DEALER (Ohio), Oct. 30, 2010, http://www.cleveland.com/business/index.ssf/2010/10/young_cleveland_lawyer_to_argu.html (“Fewer than 1 in 10,000 practicing attorneys ever stand at the Supreme Court lectern.”).

5. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1510–12 (2008).

6. See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 390–91 (2004); David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237 (2009).

well, because the number of merits cases to which they will have access—and substantial fees—ride on the success of the petitions for certiorari they file.⁷ The stakes have gotten so high with respect to the Court's decisions on "cert" petitions that the popular website *SCOTUSblog* now has a regular "petitions to watch" column discussing certiorari petitions with a high chance of being granted⁸ and conducts live chats on mornings when the Court issues orders to provide instant analysis on newly granted cases.⁹

Persuading the Court to grant a petition for certiorari, however, is not the only way for an advocate to land an elusive Supreme Court oral argument. After all, the attorneys who *prevail* at the petition for certiorari stage take on only half of the sum total of oral arguments available. The other half belongs to the attorneys who *lose* at the petition stage and who, as a result, will be called before the Court to defend the merits of the judgment below.¹⁰ This Article's core premise is that greater attention must be paid to this set of Supreme Court oral advocates and the incentives they face. Attorneys who lose at the opposition stage might nevertheless enjoy a personal "win" in the form of an opportunity to argue at the Supreme Court; as a result, there is an *ex ante* ethical dilemma for attorneys tasked with opposing certiorari. This dilemma, in turn, might well have important downstream effects on clients who prevailed below and who, unlike their attorneys, would therefore prefer not to be in the Supreme Court at all.

An example may serve to highlight the significance of this dilemma. In September 1999, the Court granted certiorari in

7. See, e.g., *Offices: Washington D.C.*, AKIN, GUMP, STRAUSS, HAUER & FELD LLP, <http://www.akingump.com/offices/office.aspx?office=25> (last visited Mar. 24, 2012) ("our lawyers regularly prepare petitions for certiorari"); *Appellate and Supreme Court Practice: Our Work*, JENNER & BLOCK, <http://www.jenner.com/practices/100> (click "Our Work") (last visited Mar. 24, 2012) (listing thirty "Representative Petitions For Certiorari").

8. See, e.g., Christa Culver, *Petitions to watch: Conference of 03.18.11*, SCOTUSBLOG, (Mar. 14, 2011, 10:12 PM), <http://www.scotusblog.com/2011/03/petitions-to-watch-conference-of-03-18-11/>.

9. See, e.g., Adam Schlossman, *Live Blog: Orders and opinions: 3.7.11*, SCOTUSBLOG, (Mar. 7, 2011, 9:43 AM), <http://www.scotusblog.com/2011/03/live-blog-orders-and-opinions-3-7-11/>.

10. There are, of course, other avenues through which advocates may find their way before the Court, such as accepting a referral *after* cert has already been granted, representing the United States as *amicus curiae*, and being appointed by the Supreme Court if no party wishes to defend the judgment below.

Weisgram v. Marley Co., a case concerning the circumstances in which an appellate court may properly issue a judgment as a matter of law that effectively reverses the trial court's verdict.¹¹ One of the attorneys who would argue the case before the Supreme Court was a local North Dakota practitioner named Christine Hogan.¹² After the argument, Hogan published an essay in the American Bar Association's Journal describing the entire experience, her first in the Court.¹³ Reflecting on the moment the case was granted, Hogan wrote, "[M]y excitement level on the day I received the call from the office of the Clerk of the Supreme Court informing me that certiorari had been granted . . . ranks right up there with my wedding day and the births of my children. I was stunned."¹⁴

Of course, it was fair for Hogan to be stunned: the Court's decision to grant was statistically unlikely, in that the odds of cert being granted in any given case are less than 1%.¹⁵ It might have been inappropriate, however, for Hogan to be so excited as to rank the Court's decision to grant certiorari as "right up there" with *good* news like her wedding day and births of her children. That is because Hogan's client, a manufacturing company named Marley Co., had *prevailed* in the court below. The Supreme Court's decision to grant certiorari could thus lead only to bad news for her client: at worst the Court would reverse the decision below and reinstate a \$600,000 damages award against the client,¹⁶ while at best it would affirm the decision below after the client had forked over substantial attorneys' fees to Hogan for her additional work.

Hogan's declaration of excitement is particularly perplexing given that her client was *likely to lose* in the Supreme Court: when the Court takes up a case, it reverses the decision below nearly two-thirds of the time.¹⁷ In other words, the expected value of the Court's decision to grant the case was a loss of at

11. 527 U.S. 1069 (1999).

12. *Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000).

13. Christine Hogan, *May It Please the Court*, LITIG., Summer 2001, at 8.

14. *Id.*

15. Lazarus, *supra* note 5, at 1515.

16. *Weisgram v. Marley Co.*, 169 F.3d 514, 516 (8th Cir. 1999) ("The jury awarded \$500,000 to [the decedent's estate] and \$100,575.42 to [the plaintiff insurance company].").

17. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 193-94 (1995).

least \$400,000 for her client.¹⁸ Viewed in that light, it is difficult to understand Hogan's elated response; surely she would not have had the same reaction had a jury returned an initial verdict of \$400,000 against her client at trial.¹⁹

So why was Hogan so excited about the Court's decision to grant certiorari? Hogan herself provides the answer: like so many other attorneys across the country, she wanted to argue before the Supreme Court. She describes herself as a "Supreme Court junkie" who had long wondered "what it would be like to stand at the lectern before the Supreme Court."²⁰ After the reality set in that she would have the chance to do so, she characterized the occasion as "a once-in-a-lifetime opportunity that I only had dreamed would happen to me."²¹ It cannot be said that Hogan is unique in this regard—many appellate attorneys would similarly relish an opportunity to argue at the Court.²²

Yet, this raises a pressing dilemma. For attorneys like Hogan who would cherish the chance to argue before the Supreme Court, the personal benefit that will be enjoyed by losing at the certiorari stage—that is, the benefit of becoming one of the few, esteemed attorneys to appear before the Court²³—might be diametrically opposite to what is best for

18. The expected value is equal to the chances of reversal (roughly 66%, *see supra* text accompanying note 17) multiplied by the loss upon reversal (\$600,000), in addition to attorneys' fees incurred during the Supreme Court litigation.

19. In Hogan's substantial defense, she did ultimately prevail before the Supreme Court such that her client's victory below was upheld. *Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000). In addition, Ms. Hogan explained to me that her "only goal at the time was to protect [the decision below]," and that she wanted her brief in opposition "to be as clear as it could be in explaining all the reasons why the Court should not grant cert," and that "[i]t would never have occurred to me to consider pulling my punches in the opposition brief." Hogan summarized her reflections on the case by pointing out that "[n]o one was more surprised than me when [cert was granted]. And I had some serious [ex]plainin[g] to do to my client." E-mail from Christine Hogan, Staff Attorney, North Dakota Protection & Advocacy to Aaron Tang (June 20, 2011) (on file with the author).

20. Hogan, *supra* note 13, at 8.

21. *Id.*

22. *See, e.g.*, M.B.E. Smith, *May Judges Ever Nullify the Law?*, 74 NOTRE DAME L. REV. 1657, 1668 (1999) (observing that "all appellate attorneys want to argue before the Supreme Court").

23. This assumes that the client will not replace counsel after losing at the certiorari stage and before oral argument. But clients frequently "stick with the horse they rode in on," which was true at least in Hogan's case. *See* Hogan, *supra* note 13, at 8.

the client who has prevailed below and who obviously would prefer to win at the certiorari stage and never have counsel set foot in the U.S. Supreme Court Building at all. Our system of discretionary Supreme Court review thus appears to lay the groundwork for an inevitable conflict of interests between a client and her attorney when it comes to opposing certiorari. This Article addresses that conflict.

The Article proceeds in four parts. Using the basic principal-agent framework, Part I examines the conflict inherent in opposing certiorari. As is the case in any agency relationship, the attorney often will entertain and act on personal incentives that diverge from those of the client. Common examples include disputes over attorneys' fees and settlement offers.²⁴ Such disagreements, although often distasteful, generally are understood to be a part of the game, perhaps a necessary tradeoff for the benefits that may accrue from employing an attorney.²⁵ But these ordinary examples of client-attorney agency problems are different in kind from the divergence of interests between the client and her attorney in opposing certiorari. In the fee and settlement context, there is no question that the attorney still wants to win for her client; the question is instead *how* she will win—perhaps by charging more hours than warranted or by pressing the client to take a less than ideal settlement. By contrast, the attorney opposing certiorari is driven to do exactly what the client would not have him do: lose. Part I draws out the unique contours of this conflict and the ways in which it differs from typical client-attorney ethical disputes. Part I also considers how other aspects of an attorney's motivations, such as reputational concerns, might mitigate the severity of the conflict in certain contexts.

Part II turns from theoretical to experiential. I begin by presenting the results of an informal survey of 116 attorneys who work in the Supreme Court practice groups of major D.C. law firms, many of whom have prior experience in the Solicitor General's office. Although the respondents do not reach a consensus on whether the ethical problem inherent in opposing

24. See *infra* notes 35–47 and accompanying text.

25. See Jamie S. Henikoff & Scott R. Peppet, *The Attorney Accountability Act: A Case Study of the Complexities of Incentive-Based Legal Reform*, 1 HARV. NEGOT. L. REV. 223, 234 (1996) (discussing benefits and problems of agency relationship between attorney and client).

certiorari can be said to rise to the level of a “conflict of interest,” many believe the answer is yes—including a majority of the thirty-four respondents who have handled more than fifty matters before the Supreme Court.²⁶ Indeed, eight of the forty-six respondents (17.4%) who have handled more than twenty-five matters before the Court report having knowledge of a case where an attorney provided a “less than zealous representation on a brief in opposition to certiorari due in part to a personal desire to argue before the Court.”²⁷ Survey respondents also suggest that the conflict of interest has a greater effect on attorneys who are first-time players in the Supreme Court.²⁸ The difference might be a function of the greater reputational hazards faced by repeat players, as opposed to their one-time-only counterparts,²⁹ when they fail at the certiorari opposition stage.

Part II concludes with a second source of evidence of the conflict. Instead of asking attorneys for self-reported observations about the ethical dilemma, as in the survey, I analyze a number of briefs in opposition to certiorari that were actually filed in the Court. If it is true that some attorneys are intentionally losing at the opposition stage against their client’s wishes and to argue before the Court, then one might expect to see certain patterns consistent with this practice in opposition briefs. Part II thus examines various methods that an attorney who is ostensibly opposing certiorari might use to covertly increase his odds of arguing before the Court.

Part III discusses two major harms that can result from the ethical problem implicated by opposing certiorari. First is the obvious risk of prejudice to individual clients who might be exposed to adverse judgments because of the contradictory personal desires of their counsel. Second, when attorneys at the opposition stage fail for selfish reasons to effectively advance all of the strongest arguments for why the Court should decline to hear a case, cases that do not belong before the Court will

26. See *infra* Table 3.

27. See *infra* Table 5.

28. Compare *infra* Table 3, with *infra* Table 4.

29. I use the phrase “one-time-only” colloquially in this Article to describe the attorney who is not a member of a regular Supreme Court practice, who has never argued a case before the Court before, and who is unlikely to have a chance to do so again outside of the current case where her client has prevailed below.

find their way there. The result is an injury to the development of the law and the judiciary itself: either the Court will dismiss the case as improvidently granted and waste valuable time that it could have spent resolving another important question, or it will decide the question presented anyhow, encumbered though it might be by procedural defects in the proceedings below or the potential for inferior advocacy by self-interested respondent's counsel.

Finally, Part IV considers possible solutions to the problem. I discuss the modest measure of educating parties whose cases often come before the Court so that they can better protect their own interests, along with a variety of more aggressive measures that could be instituted by the bar or the Supreme Court itself.

I. THE UNIQUE ETHICAL DILEMMA OF OPPOSING CERTIORARI

The client-attorney relationship is, at bottom, just one example of the classic principal-agent dilemma.³⁰ On one hand, clients might enjoy many benefits in retaining the advice of counsel, including access to the expertise, resources, and specialized skills that attorneys often have to offer.³¹ But there are downsides to the attorney-as-agent as well. Like other agents, attorneys are not purely other-regarding. As a result, where attorneys have incentives and preferences that diverge from those of their clients, the potential exists for attorneys to exploit their position as trusted experts and to act in their own self-interest.³²

The academic literature is replete with observations regarding self-interested attorney action across a wide array of situations that arise in typical client-attorney relationships. Scholars have written about the agency dilemma in the context of class

30. John Bronsteen et. al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1546 (2008) (observing that "[m]uch has been made of the attorney-client relationship as a classic principal-agent problem"). For a thorough overview of the principal-agent relationship and accordant problems, see John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in PRINCIPALS & AGENTS: THE STRUCTURE OF BUSINESS 1 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

31. Henikoff & Peppet, *supra* note 25, at 234.

32. *Id.*

action and derivative lawsuits,³³ settlement negotiations,³⁴ and, of course, attorneys' fees.³⁵ In each of these contexts, lawyers often engage in behavior that is less than desirable from the clients' perspective.

For instance, in class action and derivative lawsuits, where we rely on plaintiffs' attorneys to bring suit against "bad actors," Professor John Coffee explains how such reliance on attorney incentives might result in under-enforcement from the perspective of clients.³⁶ Consider Coffee's classic example, a private class action that will cost \$500,000 to litigate, all in the form of an attorney's time.³⁷ In theory, the plaintiff class will want the lawsuit to proceed so long as they project to receive a net recovery, which is whenever the expected value of the suit exceeds \$500,000.³⁸ But the plaintiffs' attorney has a different set of incentives. If the court will only award attorneys' fees of twenty-five percent of the total judgment, the attorney will not want to sue unless the expected value of the judgment exceeds \$2,000,000.³⁹ The result, in Professor Coffee's words, is "a serious principal-agent problem that gives the plaintiff's attorney, not the client, the real discretion as to whether to commence suit."⁴⁰

Principal-agent problems also are implicated when attorneys engage in settlement discussions on behalf of their clients. Professor Nora Freeman Engstrom touches on many of these problems in her in-depth analysis of law firm "settlement mills," which handle high volumes of low-recovery cases, often in the field of personal injury.⁴¹ Professor Freeman Engstrom ob-

33. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

34. See, e.g., Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009); Henikoff & Peppet, *supra* note 25; Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 177-81 (1997).

35. Lynn A. Baker, *Facts About Fees: Lessons for Legal Ethics*, 80 TEX. L. REV. 1985 (2002); Robert E. Litan & Steven C. Salop, *Reforming the lawyer-client relationship through alternative billing methods*, 77 JUDICATURE 191 (1994).

36. Coffee, *supra* note 33, at 685-86.

37. *Id.* at 686-87.

38. *Id.* at 687.

39. *Id.*

40. *Id.* at 685.

41. Freeman Engstrom, *supra* note 34, at 1491.

serves that in this context the settlement values that attorneys typically reach with defendants are calculated “with little regard to fault” and are instead based on generic past settlement experiences, which leads to bad consequences for clients who have particularly meritorious claims.⁴² The root cause of this settlement problem is agency costs: The settlement mill attorney’s interest is in volume—a quick resolution of a maximum number of claims—and not necessarily in what is best for each *individual* client.⁴³ A similar agency problem exists in the criminal defense context, where crushing caseloads often lead public defenders to quickly plead a substantial number of their cases even though individual clients might do better to go to trial or hold out for more lenient terms.⁴⁴

Probably the most commonly cited example of client-attorney agency problems is that of attorneys’ fees. The two most common forms of fee arrangements—the contingent fee and the hourly fee—are known to produce perverse incentives for attorneys.⁴⁵ In its simplest form, the problem is as follows: An attorney on a contingent fee will rush to settle a case for a less-than-optimal outcome for his client, because the additional investment of time often is not worth the marginal increase in fees, while an attorney in an hourly fee arrangement might take

42. *Id.* at 1534–35.

43. *See id.* at 1532. *See also* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 190 (1987) (describing conflicts of interest that arise because “the interests of plaintiff and attorney are never perfectly aligned”).

44. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2477 (2004) (noting that “[t]he desire for a lighter workload and free time may incline [public defenders and attorneys on flat fees] toward plea bargaining”); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 672 (1986) (“In many public defender offices the caseload of the staff attorney is so great that in order for the attorney to ‘process’ all his cases, he must recommend to many of his clients that they plead guilty.”).

45. *See, e.g.*, Lucian Arye Bebchuck & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53, 54 (1996) (describing systematic effects of fee arrangements on settlement processes and outcomes); Bruce L. Hay, *Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation*, 23 WM. MITCHELL L. REV. 43, 46–47 (1997) (describing “troubling features” of settlement outcomes from the perspective of client welfare, including that attorneys might have an incentive to settle a case even if going to trial is in the client’s best interests); Lisa G. Lerman, *Gross Profits? Questions about Lawyer Billing Practices*, 22 HOFSTRA L. REV. 645, 650–51 (1994) (“[A] substantial portion of the practicing bar may be engaged in some misrepresentation of the time they tell their clients they have worked . . .”).

longer than needed or exaggerate the number of hours required to perform each assignment.⁴⁶ The popular media has found this agency dilemma in particular to be an easy mark, as evidenced by regular stories on the skyrocketing costs of legal representation⁴⁷ and the punishment of attorneys who are caught overbilling their clients.⁴⁸

Although these dilemmas seem severe, they each maintain a fundamental alignment between the interests of the attorney and the interests of the client with respect to the client's ultimate goal of winning the case. To be sure, a client might not win *as much* as she would like due to agency costs in the course of settlement negotiations, or her attorney's incentives in structuring a fee arrangement might result in her winning but paying a bloated legal bill at the end of the litigation. But no one suggests that the agency problems in the class action, settlement, and fees contexts are so ethically debilitating that they prevent attorneys from sharing their clients' desire to win in the first place.

The same cannot be said about the attorney who opposes certiorari. In this unique circumstance, driven by the immense benefit of an appearance before the Supreme Court,⁴⁹ the attorney's personal incentives might not be aligned with the client's ultimate goal at all, as the attorney might wish to do precisely the one thing the client does not want: lose.⁵⁰ In fact, to argue a case before the Supreme Court is so rare an achievement in American legal practice that the prestige appears to derive

46. Baker, *supra* note 35, at 1986–89; *see also* Lerman, *supra* note 45, at 648–49.

47. *See, e.g.*, Nathan Koppel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST. J., July 22, 2010, at A4.

48. *E.g.*, Matthew Walberg & Joel Hood, *Attorney bilked Calumet Park of more than \$1 million, state alleges*, CHI. TRIB., Mar. 5, 2010, http://articles.chicagotribune.com/2010-03-05/news/ct-met-attorney-charged-theft-20100305_1_greenberg-traurig-tif-law-firm.

49. *See, e.g.*, Grant, *supra* note 4.

50. There is, however, the occasional instance where a client who has prevailed below might actually want certiorari to be granted. This dynamic arises in cases where the courts of appeals apply divergent rules such that the client who has prevailed below might nevertheless wish to take the case up to the Supreme Court to persuade the Court to apply the more favorable rule uniformly across all of the courts below. *See infra* Part III.A; *see also, e.g.*, Response to Petition for Certiorari at 7–8, 18, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) (No. 03-1388) (respondent acquiesces to petition so that Court might apply more favorable rule in other circuits).

principally from being before the Court in the first place;⁵¹ from a reputational standpoint, whether one wins or loses is less relevant. A quick scan of the biographies of some of the modern day greats in Supreme Court oral advocacy— Paul Clement, Carter Phillips, and Seth Waxman, to name a few—reveals that although each biography highlights the sheer number of times the advocate has argued before the Court, the biographies do not mention the number of cases the advocate has actually won.⁵² For some self-interested attorneys, then, the ideal outcome at the certiorari opposition stage is a loss followed by a win, but the second best outcome may well be a loss followed by another loss (as opposed to a win at the opposition stage that would keep the client out of the Court altogether).

The ethical dilemma created in this situation is thus not like the agency problems in settlement negotiations, fee arrangements, or class actions, where the attorney still wants to win, just not necessarily in a fashion that best suits the client's interests. The better analogy might instead be that of a defense attorney at the summary judgment stage who purposefully throws the motion to obtain the increased publicity and fee-earning opportunities a trial may present, even though doing so will result in a greater likelihood of loss for the client.⁵³ Yet even this analogy is inapt in a significant sense, because the personal benefits an attorney will accrue by arguing before the

51. See KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 167–70 (1993) (discussing prestige associated with practice before the Supreme Court and membership in the Supreme Court bar); Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 365, 387–88 (1993) (describing how core members of the Supreme Court bar “occupy the highest rungs of the social ladder”).

52. See *Our People: Carter G. Phillips*, SIDLEY AUSTIN LLP, <http://www.sidley.com/ourpeople/detail.aspx?attorney=123> (last visited Mar. 24, 2012) (observing that Phillips’s “74 arguments before that Court are the most of any lawyer currently in private practice,” but making no mention of his win-loss record); *Biographies: Seth P. Waxman*, WILMERHALE, http://www.wilmerhale.com/seth_waxman/ (last visited Mar. 24, 2011) (noting that Waxman “has delivered 56 oral arguments in the United States Supreme Court” without identifying a success rate); *Professionals: Paul D. Clement*, BANCROFT PLLC, <http://www.bancroftpllc.com/professionals/paul-d-clement/> (last visited Mar. 24, 2012) (noting that Clement “has argued over 55 cases before the United States Supreme Court,” but not identifying the number of cases he has won).

53. Thanks are owed to one of the survey respondents for suggesting the summary judgment analogy.

Supreme Court far outweigh the gains an attorney will receive by taking any given case to trial in a local district court.⁵⁴

But the analogy is worth exploring because defense attorneys do not throw summary judgment motions (or at the least, there does not appear to be any evidence that they do).⁵⁵ If defense attorneys are able to avoid the “losing is winning” ethical trap, can the attorneys who oppose certiorari? Buttressed by the responses of regular Supreme Court practitioners that I present below,⁵⁶ I think the answer is a qualified yes. *Certain* attorneys who oppose certiorari for *certain* clients do consider factors other than the value of a Supreme Court oral argument in their personal cost-benefit analysis when determining how zealously to oppose certiorari, and the net result for some clients is that they are able to get highly effective representation at the cert opposition stage. But to see why the answer is only a *qualified* yes, it is helpful to understand why defense attorneys do not—or at least, should not—throw summary judgment motions in the mine run of cases.

In a word, the reason is *reputation*. The civil defense attorney who intentionally loses a winnable summary judgment motion risks serious reputational injury in both a general and a specific sense. In the general sense, such an attorney could become the subject of scorn to other lawyers in the same practice area and the same town, and also to the local courtroom. Reputations carry great weight in the legal arena,⁵⁷ and an attorney who is suspected of throwing a motion to draw more fees or publicity in a protracted trial surely will suffer at the hands of a judge who would prefer the dispassionate and efficient exercise of jus-

54. See *supra* notes 3–4 and accompanying text.

55. See, e.g., D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 281 (2010) (noting strong support for summary judgment among defense attorneys). See generally Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1023 (1989) (discussing use of summary judgment to “intercept and discourage the assertion of doubtful or meritless claims”).

56. See *infra* Part II.A.

57. See, e.g., Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176–83 (2008) (discussing the role reputation plays in client selection of attorneys and in client-attorney interactions); see also Alan O. Sykes, *Judicial Limitations on the Discretion of Liability Insurers to Settle or Litigate: An Economic Critique*, 72 TEX. L. REV. 1345, 1353 (1994) (noting how “insurers care about their reputations in the marketplace” when deciding whether to proceed to trial).

tice. Even more problematic, an attorney who develops a losing track record at the summary judgment stage might struggle to persuade new clients to hire him.

And in the specific sense, the same attorney risks losing the long-term business of the client he is currently representing in future matters. After all, a client who thinks her case is a slam dunk that should have been won on summary judgment might think twice before retaining the same attorney for a future matter, and might even go so far as to replace the lawyer with new counsel for the trial itself.

In theory, the same reputational interests should affect repeat practitioners before the Supreme Court. The major law firm Supreme Court practice groups all recognize the importance of maintaining their general reputational credibility before the court: As Professor Lazarus noted, former Supreme Court law clerks freely admit that they are more likely to lend credence at the cert stage to assertions made by attorneys whose work before the Court is well-known.⁵⁸ For an attorney who enjoys such a positive reputation in the Court, it would be devastating to lose that inherent credibility because of a less-than-zealous effort on a brief in opposition. The same general reputational concerns are likely to exert a positive influence on the quality of advocacy provided by another growing segment of the Supreme Court bar—law school Supreme Court clinics—whose ability to appear regularly and credibly before the Court also is a function of their reputation as skilled and ardent advocates.⁵⁹

And with respect to specific reputational sanctions, a client who believes that her attorney should easily be able to keep her case out of the Court might well look for other counsel in future matters if the attorney fails. This is especially true for the kind of paying clients who appear most regularly in the Supreme Court—sophisticated business interests,⁶⁰ whose ability to pick a replacement is even greater today because the market for Supreme Court counsel is now so saturated.⁶¹ For an attor-

58. Lazarus, *supra* note 5, at 1526; accord McGuire, *supra* note 17, at 193.

59. See Pamela S. Karlan et al., *Go East, Young Lawyers: The Stanford Law School Supreme Court Litigation Clinic*, 7 J. APP. PRAC. & PROCESS 207, 226 (2005) (discussing growing reputation of Stanford Supreme Court Litigation Clinic); Tony Mauro, *Students End Term with a Perfect Score*, LEGAL TIMES, July 12, 2004, at 8 (discussing the Stanford Supreme Court Litigation Clinic's reputation for success).

60. Lazarus, *supra* note 5, at 1531–32.

61. *Id.* at 1498–1501.

ney whose practice is centered on credibility and repeat appearances before the Court, soft-pedaling an opposition to certiorari to obtain an oral argument could thus end up doing more harm than good; the short-term potential gain of the oral argument might be outweighed by long-term reputational sanctions.⁶² Put another way, high paying clients in a competitive marketplace will be more likely to retain law firms that have successful track records of opposing certiorari than firms that do not, so attorneys will think long and hard before giving anything less than a zealous effort in opposing certiorari.⁶³

Two considerations, however, prevent reputational sanctions from entirely eliminating the ethical dilemma for *all* attorneys who oppose certiorari. First, not all attorneys who oppose certiorari are repeat players with established Supreme Court practices. Small town civil litigation practices, local prosecutors, and most significantly public defenders all have cases that might wind up on petition for certiorari to the Court, and the chance that any of these lawyers would experience severe general reputational injury from a failure to oppose cert diligently is minimal because they might never have occasion to step foot in the Supreme Court again. Indeed, having one argument in the Court, even if it is obtained by way of a less-than-zealous cert opposition, actually could *improve* the attorney's reputation in relevant local circles by lending instant gravitas to the attorney's name when she returns from Washington, D.C. and appears in her county courthouse.

Second, not every client whose matter comes up to the Court is a sophisticated, high-paying corporate entity. A substantial portion of the Court's docket involves indigent criminal defendants who are represented by public defenders or court-appointed counsel.⁶⁴ Neither general nor specific reputational

62. This is assuming that the attorney's sophisticated client even chooses to retain the attorney at the merits stage.

63. The tension between an attorney's desire to argue before the Supreme Court and the client's best interests may also be mitigated if the attorney is retained in the original matter on a contingency fee, so that any desire to litigate in the Court could be offset by the risk of financial loss should the judgment below ultimately be reversed.

64. *See, e.g.*, *Cavazos v. Williams*, 132 S. Ct. 1088 (2012); *Martel v. Clair*, 132 S. Ct. 1276 (2012); *Florida v. Jardines*, 132 S. Ct. 995 (2012); *Howes v. Fields*, 132 S. Ct. 1181 (2012); *United States v. Alvarez*, 132 S. Ct. 457 (2011); *United States v. Tinklenberg*, 131 S. Ct. 2007, 2011 (2011); *Kentucky v. King*, 131 S. Ct. 1849 (2011); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1394 (2011); *Michigan v. Bryant*, 131 S. Ct.

sanctions are of any moment in these cases. A public defender's ability to find *future* clients will likely not be materially affected by her failure to oppose certiorari in the Supreme Court for a current criminal defendant.⁶⁵ Such attorneys thus find themselves at the nexus of two important dimensions where they might be insulated from the reputational concerns that check other lawyers: They do not have a particular client or class of clients whose business they risk losing in the future and their practice does not depend on future appearances in the Supreme Court such that general reputational sanctions would matter were they to improperly fail in opposing certiorari.⁶⁶

The chart below explains these two dimensions and the relative probability within each grid that the personal benefits from arguing before the Supreme Court will outweigh possible reputational concerns and result in a conflict of interest against the client.

1143 (2011); *Missouri v. Frye*, 131 S. Ct. 856, (2011); *Lafler v. Cooper*, 131 S. Ct. 856 (2011); *Premo v. Moore*, 131 S. Ct. 733, 737 (2011).

65. No clear parallel exists in the summary judgment context, where in light of the local nature of the practice, reputational concerns essentially always will be a factor.

66. Note there is a third group of attorneys who are qualitatively different than those I have described so far: cause lawyers. These attorneys, at organizations like the ACLU, might not suffer as acutely from the conflict of interest in opposing certiorari. First, such organizations often do have reputational interests at stake such that they would not want to be seen intentionally losing at the cert stage. Second, cause lawyers tend to be motivated by a substantive policy objective that serves an additional counterweight against the value of a Supreme Court oral argument.

Table 1—Severity of Conflict of Interest in Opposing Certiorari Based on Type of Counsel and Type of Client

	Wealthy Client / Civil Defendant Client	Indigent Client / Criminal Defendant Client
Expert Supreme Court Counsel	<p><u>Lowest chance of conflict of interest.</u></p> <ul style="list-style-type: none"> • Counsel must earn the confidences of this particular client to retain the paying client's future business. • Counsel must act zealously and in good faith in order to build a reputation for successful Supreme Court advocacy so as to secure future paying clients. 	<p><u>Low chance of conflict of interest.</u></p> <ul style="list-style-type: none"> • Although counsel is unlikely to be concerned with this particular client's business in the future, counsel must still act zealously and in good faith to build a reputation for successful Supreme Court advocacy so as to secure future paying clients.
One-Time Supreme Court Counsel	<p><u>Medium chance of conflict of interest.</u></p> <ul style="list-style-type: none"> • Counsel will weigh the benefits of the opportunity to argue before the Supreme Court (for example, increase in future clients, job offers, publicity, psychic rewards) against the possibility that the current client may not retain her in the future if certiorari is granted. • There is little concern of reputational sanction because counsel is unlikely to ever be in a position to solicit paying clients on matters before the Supreme Court. 	<p><u>Highest chance of conflict of interest.</u></p> <ul style="list-style-type: none"> • Counsel's personal desire to argue before the Supreme Court will be unchecked by reputational concerns, as counsel is unlikely to ever be in a position to solicit paying clients on matters before the Supreme Court. • Counsel also has no concern regarding the possibility of losing future clients, as neither the current client nor any future clients will seek him out for future paying matters.

Of course, there are additional factors beyond personal incentives and reputational concerns that influence the behavior of both regular Supreme Court practitioners and local attorneys who might only have one opportunity to appear before the Court. One such influence might be the ethical codes of conduct established by the bar. The American Bar Association's Model Rules of Professional Conduct specify that attorneys are

to act “with zeal in advocacy upon the client’s behalf,”⁶⁷ and Model Rule 1.7 governing conflicts of interest directs that “a lawyer shall not represent a client” if “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”⁶⁸

Whether either of these provisions applies squarely to the ethical dilemma I have raised, and how they might be enforced even if they do apply, are open questions I address below in Part IV.⁶⁹ But suffice it to say for now that the mere existence of these ethical codes, without actual enforcement, is unlikely to deter all attorneys from acting in their own self-interest and pursuing the allure of a Supreme Court oral argument.⁷⁰

To summarize, the theoretical framework I have proposed here suggests that there is an inherent conflict facing attorneys who oppose certiorari to the Supreme Court. The distinctive privilege of a chance to argue before the Court creates a distinctive ethical dilemma: These attorneys have a personal motivation to lose that collides with the responsibilities they owe to their clients. But the severity of this conflict should be substantially mitigated for some clients by two kinds of reputational concerns that will alter certain attorneys’ cost-benefit analyses. First, attorneys with a regular Supreme Court practice will encounter serious reputational sanctions if they are perceived as subverting their client’s interests at the opposition stage to obtain an oral argument in the Court. Second, clients who provide regular paying business to their attorney have an additional protection: The attorney’s desire to maintain that relationship is likely to exert a positive pressure on the quality of the cert opposition as well.

Still, these reputational concerns will be of little help to a one-time client represented by an attorney who has no established practice in the Court. Such clients face the greatest danger that their attorney will place the personal benefit of arguing in the Court ahead of their own interests in deciding how zeal-

67. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt.1 (2011).

68. MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2011).

69. See *infra* Part IV.

70. The deterrent effect of the rules surely would be increased were they to be accompanied by enforcement measures, but precisely how to identify and punish attorneys for failing to zealously oppose certiorari is itself a difficult question as I discuss in Part IV below.

ously to oppose the Court's certiorari review. But theory is one thing and practice is another. I turn now to evidence gathered from Supreme Court practitioners who were asked whether opposing certiorari does indeed present an inherent conflict of interest that may adversely affect an attorney's duty and responsibility to zealously represent her client.

II. EVIDENCE OF THE ETHICAL DILEMMA IN OPPOSING CERTIORARI

Two sources of data might help in determining the prevalence of the suggested conflict in actual practice. The first is an informal survey of attorneys who regularly handle matters in the Supreme Court asking their views on the extent to which the ethical dilemma has real bite. The second is an analysis of real briefs in opposition filed in the Court that might display strategies that an attorney who wishes to argue before the Court could use to discreetly undermine his client's chances of getting certiorari denied.

A. *Supreme Court Experts Discuss the Conflict*

To ascertain whether attorneys might actually provide substandard representation at the certiorari opposition stage because of a personal desire to argue before the Supreme Court, I developed a six-question survey probing the various aspects of the ethical dilemma.⁷¹ The survey was sent to 273 attorneys, the vast majority of whom are partners or of counsel at law firms with substantial Supreme Court practice groups.⁷² One hundred and sixteen responded, or 42.5%. The theory behind this choice of sample is that one sensible way to determine if some attorneys intentionally provide inferior quality work to their clients at the opposition to certiorari stage is to ask the lawyers who have spent the greatest amount of time handling actual

71. The full survey is included herein as Appendix.

72. I sent the survey to the Supreme Court practice groups at the following law firms: Akin Gump; Arnold & Porter; Baker Botts; Bingham McCutchen; Covington & Burling; Gibson Dunn; Hogan Lovells; Jenner & Block; Jones Day; Kellogg, Huber; King & Spalding; Kirkland & Ellis; Latham & Watkins; Mayer Brown; MoloLamken; Morrison Foerster; O'Melveny & Myers; Quinn Emanuel; Robbins, Russell; Schnader; Sidley Austin; Squire Sanders; Williams & Connolly; WilmerHale; and Winston & Strawn.

matters in the Court whether they have observed this phenomenon in the course of their practice.

Collecting data from this group, however, presents an archetypical self-reporting problem. The surveyed attorneys who know the most about whether the allure of arguing before the Court adversely affects the quality of certiorari opposition might be the least likely to admit to the conflict, because they are the ones who could be adversely affected by any effort to address the problem. To curb this self-reporting bias, survey respondents were promised anonymity in their responses, though they were free to opt out and identify themselves in case they wished to discuss the inquiry further, and several respondents did in fact do so. Even still, it should be conceded that an anonymous self-reporting survey is an inadequate way of determining what lawyers *actually* do when confronted with this ethical dilemma.⁷³ Little is to be gained and much can be lost by admitting that one has witnessed or been a party to a case where an attorney's conflicted personal desire to argue before the Supreme Court resulted in intentionally less-than-zealous advocacy. Regardless, what is most important to note about the self-reporting bias in this survey is the direction in which it cuts; respondents are more likely to *understate* than overstate the extent of the ethical problems that opposing certiorari presents in light of their position as potential subjects to those very ethical dilemmas.⁷⁴

As to the survey itself, the first four questions were in multiple choice format, and the last two were optional and open response.⁷⁵ Question One asked survey participants to identify themselves in terms of the amount of their previous Supreme Court experience. Questions Two and Three presented the principal inquiry of the survey, asking whether different

73. Cf. Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 738 (2002) (acknowledging that survey asking physicians to evaluate another physician's work for malpractice may suffer from a response bias because respondents may be less likely to answer honestly and criticize another's work, out of concern that they may one day face a malpractice suit and would want surveyed physicians to vindicate their work).

74. One exception to this directional bias might be that the regular practitioners surveyed on the matter might wish to over-report the extent to which one-time players in the Court suffer the proposed conflict, because doing so may place the repeat-players in a better light. See *infra* note 96.

75. See Appendix for the full survey.

kinds of attorneys who oppose certiorari face a conflict of interest that might compromise their ability to zealously represent their client's interests. Question Four asked whether participants have actually encountered a case where an attorney provided less-than-zealous representation because of a personal desire to argue in the Court. Question Five was optional and asked participants whether they had any stories to share of experiences in which attorneys they knew provided less-than-zealous representation at the opposition stage because of the personal desire to argue in the Court. Question Six was an open-ended comment box. I intersperse and analyze answers survey participants provided in response to Questions Five and Six throughout the ensuing subsections where they are appropriate. As I hope becomes clear from the presentation of results below, these qualitative responses are data points that are at least as important as the quantitative results, in part because the survey respondents were quite generous in sharing their thoughts about the questions presented in the survey and in part because the data itself comes from a modest sample ($n=116$).

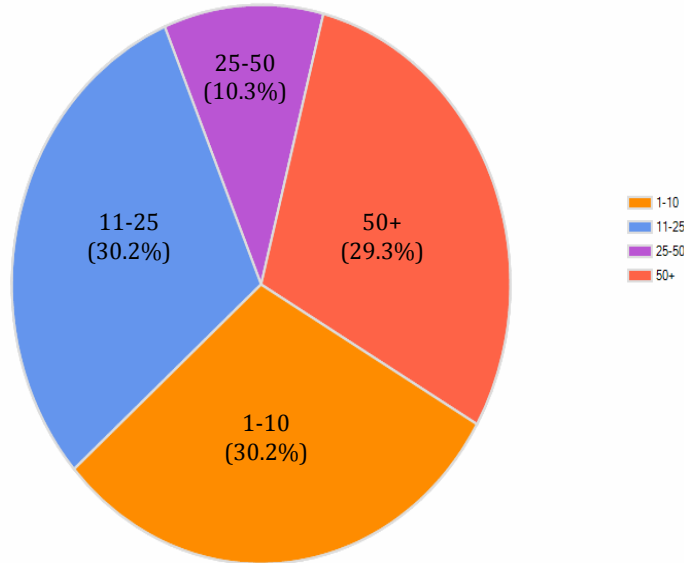
1. *Survey: Question One*

The 116 attorneys who responded to the survey can be classified based on their level of experience in the Court, as the survey asked the attorneys to identify the number of cases that they had handled in the Court including cert petitions (whether granted or not), briefs in opposition, and merits cases.⁷⁶ Four possible response choices were given, with the following results: fewer than ten cases (30.2% of respondents), between eleven and twenty-five cases (30.2%), between twenty-five and fifty cases (10.3%), and greater than fifty cases (29.3%). The breakdown of survey respondents along these four responses is shown in Table 2 below.

76. See Appendix, Question One.

Table 2:

Approximately how many Supreme Court litigation matters have you handled, including petitions for certiorari (whether granted or not), briefs in opposition, and merits cases?



By any estimation, most of the survey respondents can safely be said to be experts in Supreme Court practice. This is certainly true for the attorneys who have handled more than twenty-five matters in the Court. Even attorneys who have handled between eleven and twenty-five cases are likely to have amassed enough experience to be familiar with the incentives driving attorney behavior at the opposition and merits stages, although we might weigh the observations from their more experienced peers more heavily. It could be said, however, that the responding attorneys who have handled fewer than ten cases might not possess the requisite experience to provide reliable data points. As a result, I present the data for the questions below broken down by the four levels of respondent experience in the Supreme Court.

2. Survey: Questions Two and Three

Survey Questions Two and Three form the core inquiry in the survey, asking respondents to consider whether the basic ethical dilemma I have described—the divergence between an

attorney's personal desire to lose at the opposition stage to appear before the Supreme Court and the client's desire to prevail at the opposition stage—can be said to rise to the level of a “conflict of interest that may adversely affect the attorney's ability to zealously oppose certiorari on behalf of their client.”⁷⁷ Both questions present a hypothetical situation of a case where certiorari has a reasonable chance of being granted,⁷⁸ and ask the survey respondent to identify the degree to which the attorney who is opposing certiorari might be affected by the conflict.⁷⁹ Question Two poses the inquiry in the context of an attorney who is not a part of a regular Supreme Court practice, who has never argued before the Court, and who is not likely to have a chance to do so outside of the instant case in which he is opposing certiorari. Question Three asks whether the same ethical quandary would present a conflict of interest for an attorney who is part of a “regular Supreme Court practice” and who therefore expects repeat appearances in the Court. The responses are given in Tables 3 and 4 below, broken down by respondent groups in terms of amount of experience in Supreme Court litigation.

77. See Appendix, Questions Two and Three for the full text of each question.

78. Of course, as some of the respondents noted, a case that has a “reasonable chance of being granted” (that is, where there is a clear circuit split and issue of national importance) might very well still stand a greater than 50% chance of being denied; the point of the question is just that attorneys are unlikely to succumb to the ethical dilemma I have presented in cases that have little chance of being granted to begin with.

79. Survey respondents were given four choices in response to this question. They were asked whether the scenario presented would create a “strong conflict of interest,” an “intermediate conflict of interest,” a “minor conflict of interest,” or “no conflict of interest.” I have aggregated the former three responses into “yes, conflict of interest” in this table, but the full range of responses is given in Appendix.

Table 3—Does an attorney who is not a member of a regular Supreme Court practice and who has never argued before the Court (but who wishes to do so) face a conflict of interest that may adversely affect her ability to zealously oppose certiorari on behalf of her client?⁸⁰

	<u>Experience (number of cases in the Court)</u>				All Respondents
	< 10	11–25	25–50	> 50	
Yes, conflict of interest	22.9% (8)	14.3% (5)	41.7% (5)	52.9% (18)	31% (36)
No conflict of interest	77.1% (27)	85.7% (30)	58.3% (7)	47.1% (16)	69% (80)
<i>Total responses</i>	35	35	12	34	116

Table 4—Does an attorney who is a member of a regular Supreme Court practice face a conflict of interest that may adversely affect her ability to zealously oppose certiorari on behalf of her client?⁸¹

	<u>Experience (number of cases in the Court)</u>				All Respondents
	< 10	11–25	25–50	> 50	
Yes, conflict of interest	28.6% (10)	0% (0)	25% (3)	32.4% (11)	20.7% (24)
No conflict of interest	71.4% (25)	100% (35)	75% (9)	67.6% (23)	79.3% (92)
<i>Total responses</i>	35	35	12	34	116

The first point that merits attention is that for both questions, a clear majority of respondents answered that the hypothetical situation presented would *not* rise to the level of a “conflict of interest that might adversely affect the attorney’s ability to zealously oppose certiorari on behalf of their client.”⁸² This, of course, is good news; whatever can be said about the ethical dilemma that exists in the situation I pre-

80. See Appendix, Question Two for full text of question and responses.

81. See Appendix, Question Three for full text of question and responses.

82. See Appendix, Questions Two & Three.

sented, many of the surveyed attorneys believe that it does not pose a significant danger to the interests of clients whose goal it is to see certiorari denied. As one respondent who has handled more than fifty cases in the Court including numerous oral arguments explained, "The 'conflict' here cannot be denied as a theoretical matter, but it is far more theoretical than real. I know of no lawyer who has ever sacrificed a victory he or she won in the lower courts just because of a desire to argue in the Supreme Court."⁸³

Other respondents who responded that there was no conflict reason that even if there is some divergence of interests between attorney and client in the course of opposing certiorari, it is not so severe as to rise to the level of a legal conflict of interest.⁸⁴ As one respondent who answered "no conflict" to both Questions Two and Three commented, this is "an intriguing question, but from a doctrinal legal ethics perspective I don't see any actual conflict."⁸⁵ Another attorney who gave the same answers said:

There definitely is some tension between an attorney's desire to argue before the Supreme Court and their client's interest in avoiding being before the Court. That, however, is no different from the situation that occurs when a lawyer wants to go to trial, to make new law on an issue, or to be in the center of a case that gets them in the newspapers and on television. So, in my view it does not raise to the level of a conflict of interest.⁸⁶

Yet many of the survey respondents did report concerns about the ethics of opposing certiorari. One respondent who has handled more than twenty-five cases in the Court including multiple oral arguments commented that

83. Anonymous survey respondent #34.

84. Note that in asking the survey respondents whether attorneys opposing certiorari face a "conflict of interest" rather than a more general "ethical dilemma," the survey admittedly uses a term with loaded meaning because respondents might have considered the former term (but not the latter) to trigger the requirements of Model Rule 1.7. Nevertheless, I chose to use the term "conflict of interest" in the survey because that term was likely to yield the more conservative results and because I believe identifying a problem as posing a "conflict of interest" is more helpful than identifying a problem as a mere "ethical dilemma" in terms of suggesting plausible policy responses.

85. Anonymous survey respondent #67.

86. Anonymous survey respondent #45.

I am eager to read the results of your research. In my practice, this is an issue that has been discussed informally, but because my colleagues and I are so client-service-focused, I have confidence that this would not likely happen here. But in a world where “number of supreme court arguments” is like notches in a belt, and the media attention heaped upon practitioners is so intense . . . the pull of this brand of “practice-building” may be just too great to resist.⁸⁷

Another participant suggested that a conflict might very well exist depending on the attorney in question: “[w]hether there is a conflict depends, of course, on how badly the attorney wants to argue at the Court as a personal matter.”⁸⁸ The participant further noted that “[t]here are surely some if not many regular members of the Supreme Court bar” who may face “concrete and personal conflicts in the sense that their livelihood and good standing in their firms require regular appearance at the Court”⁸⁹

In other words, even though a majority of surveyed attorneys answered that there is no inherent conflict of interest facing an attorney who opposes certiorari—69% with respect to an attorney who has never argued in the Court and 79.3% with respect to the regular Supreme Court practitioner—the survey respondents did not reach a consensus on the matter.

The lack of consensus takes on even sharper relief when one examines the difference between responses from survey participants who have had only modest experience in the Court and the responses from participants who have had the greatest amount of experience before the Court. For instance, on Question Two, of the thirty-four respondents who have handled more than fifty matters in the Court, a majority actually held the opposite view as compared with the survey respondents as a whole.⁹⁰ 52.9% of these experts agree that the one-time-only attorney who has no established practice in the Supreme Court and who is unlikely to appear there again *does* harbor a conflict

87. Anonymous survey respondent #20.

88. Anonymous survey respondent #44.

89. *Id.*

90. The respondents with the greatest amount of Supreme Court experience also were most likely to find a conflict of interest in the hypothetical posed in Question Three as well: 32.4% said that even the regular Supreme Court practitioner would face some degree of an inherent conflict of interest when opposing certiorari. See *supra* Table 4.

of interest such that his personal desire to argue in the Court may adversely affect his ability to zealously oppose certiorari on behalf of his client.⁹¹

It is no small thing for this many of the nation's most seasoned Supreme Court practitioners to say that some kind of an ethical problem exists, even if the survey did not specify whether "conflict of interest" should be interpreted in the doctrinal legal ethics sense such that the attorney in Question Two would need to obtain a waiver from his client to be eligible to stay on the case under ABA Model Rule 1.7.⁹² The depth of the problem is partially relieved by the fact that none of the eighteen super-experts identified the situation facing the one-time-only attorney as a "strong" conflict of interest.⁹³ Even still, 27.7% of these eighteen respondents found the conflict to be of "intermediate" strength, with the rest describing it as a "minor" conflict, but a conflict nonetheless. And as one survey respondent noted, even a minor conflict can have substantial implications because "[c]onflict of interest is a loaded term—no matter how slight it is, it should be disclosed to the client and would prevent you from taking the case, absent a waiver."⁹⁴

Another important takeaway to be gleaned from Questions Two and Three is that the ethical dilemma does appear to have a reduced impact on attorneys who belong to a regular Supreme Court practice as compared to attorneys who have never argued in the Court and who are unlikely to do so outside of the present certiorari opposition. Whereas 31% of respondents believe some kind of conflict exists for the one-time-only attorney, only 20.7% of the participants gave the same response for attorneys who belong to a firm with a regular flow of Supreme Court cases.⁹⁵ Put another way, the survey respondents were fifty percent more likely to agree that there is a conflict of interest that compromises an attorney's ability to zealously represent their client at the cert opposition stage when the attorney is a novice whose only opportunity to argue in the Court is in

91. See Appendix, Question Two.

92. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2011); see also Appendix, Question Two for full text of question and responses.

93. See Appendix.

94. Anonymous survey respondent #8.

95. See *supra* Tables 3, 4.

the case at bar.⁹⁶ Or as one survey participant wrote, “The temptation for conflict is obviously going to be felt more potently by the attorney who does not regularly practice in the Supreme Court, and who would like to have her once-in-a-lifetime shot.”⁹⁷

The explanation survey participants provided for this difference is in line with the theory of reputational sanctions I described above.⁹⁸ One attorney who has argued numerous times in the Court and who has handled more than fifty matters including cert petitions and briefs in opposition explained that “those with supreme court practices have far less of an [ethical] issue [than one-time-only attorneys] because . . . [the former] have a professional interest in maintaining, displaying and proving their ability to successfully oppose certiorari.”⁹⁹ In this attorney’s view, the presence of reputational and professional interests was enough to persuade her to mark “no conflict” for the repeat Supreme Court practitioner, whereas she believed a one-time-only attorney in the same situation would face an “intermediate” conflict of interest.¹⁰⁰

Another attorney who works at a major D.C. Supreme Court practice and who has argued more than fifteen cases before the Court described the reputational concern as a simple matter of sound business judgment: “Lawyers with an established Supreme Court practice recognize that it is in their long-term business interest to write effective briefs in opp[osition].”¹⁰¹ Lawyers whose practice is not founded on repeat appearances in the Court, by contrast, need not worry about the possibility that an ineffective brief in opposition will sabotage their long-term business interest. Indeed, an appearance in the Supreme Court, even if it results in a loss,

96. Of course, part of this difference might be attributable to the fact that the survey respondents are themselves repeat and not one-time players in the Court and thus the respondents might have self-serving reasons for distinguishing between the two classes of attorneys. Nevertheless, insofar as these attorneys have witnessed efforts by both expert and one-time counsel at the cert opposition stage, their experience-based responses still warrant attention.

97. Anonymous survey respondent #35.

98. See *supra* Part I & Table 1.

99. Anonymous survey respondent #69.

100. *Id.*

101. Anonymous survey respondent #42.

might actually increase a small-town attorney's reputation in his local courtroom and community.

One survey respondent explained in a more elaborate fashion why one-time-only attorneys face a conflict of interest when opposing certiorari but not repeat players:

My own view is that whatever minor conflict of interest might otherwise be created by a strong desire (and limited opportunities) to argue before the Court are all but eliminated by several factors: (1) the risk that sophisticated clients, in particular, would perceive any soft-pedaling in the opposition brief (and either insist on revisions or fire you); (2) the very real risk that a client unhappy with a grant, even where the opp brief was strong, will hire someone else to handle the merits and argue the case; (3) the risk of ultimately losing the case on the merits (since the Court reverses far more than it affirms); 4) it is a small world—and particularly for young litigators trying to build a Supreme Court practice, there are reputational concerns So, I don't think a competent and rational Supreme Court litigator would fail to zealously oppose certiorari just to get an argument. My answer was slightly different for a non-Supreme Court litigator. Such an attorney (assuming an unsophisticated client, anyway) might intentionally concede a circuit split or something, but otherwise do a good job in the opposition brief, in hopes of snagging a once-in-a-lifetime argument.¹⁰²

This attorney's response supports the theory that reputational sanctions will ensure zealous cert opposition work by regular Supreme Court litigators, particularly where those litigators serve sophisticated clients at the cert stage. In such cases, to soft-pedal a brief in opposition is to risk losing the sophisticated client's future work, other future clients who care about the attorney's track record, and also the case itself on the merits, which will matter more for established Supreme Court practices that count wins and losses.¹⁰³

102. Anonymous survey respondent #51.

103. At least one survey respondent, however, disagreed with this view. One participant argued that "some if not many regular members of the Supreme Court bar . . . actually may have more concrete personal conflicts" than one-time attorneys because the repeat practitioners are more likely to have "their livelihood and good standing in their firms" on the line, and failure to obtain opportunities to argue in court may jeopardize this standing. Anonymous survey respondent #44.

But as the attorney's response also postulates, a one-time-only litigator does not share the same concerns. The one-time litigator does not need to establish a record of success in the Supreme Court because his future clients do not expect to ever be there—as in the case of a public defender or small-town lawyer. Moreover, the one-time litigator is not as concerned with having cert granted only to lose the case on the merits because doing so is likely to have a smaller negative impact on his career than the positive effect of arguing in the Court at all.

The heightened severity of the conflict for the one-time lawyer is even more noticeable for the type of clients whom such lawyers often represent—indigent criminal defendants and small, unsophisticated corporate entities or individuals. These kinds of clients are less likely to punish an attorney who fails to vigorously oppose certiorari (either by firing or spreading unfavorable reviews of the attorney to potential future clients), and the result is that their attorneys have greater license to soft-pedal a brief-in-opposition. One survey participant picked up on this dynamic, in the context of pro bono and billable Supreme Court matters:

I imagine that many attorneys would feel greater pressure from billable clients to have certiorari denied than pro bono clients. A billable client is in a better position to hire a new lawyer if its attorney fails to have certiorari denied, thus imposing greater financial pressure on the attorney opposing cert. . . . [T]his is probably extremely influential.¹⁰⁴

In summary, the response data from Questions Two and Three, particularly from the most seasoned practitioners—and anecdotal comments from survey participants—confirm that there is some potential for a conflict of interest that will prevent an attorney from zealously opposing certiorari on behalf of a client. The data and written comments also suggest that the injuries from this conflict are likely to be visited most commonly upon unsophisticated clients by attorneys who seek a once-in-a-lifetime opportunity to argue before the Supreme Court.

104. Anonymous survey respondent #26.

3. *Survey: Question Four*

Where Questions Two and Three asked respondents to provide an answer in hypothetical scenarios, Question Four asked attorneys to respond whether they had any experiences with cases where a respondent's counsel might have intentionally rigged a brief in opposition to increase their chances of arguing in the Court. The advantage of this question, of course, is that it asks directly what the hypothetical questions Two and Three seek to ascertain indirectly. The disadvantage is that asking attorneys about their personal experiences with such cases implicates the full-on problems of self-reporting bias: An attorney who has in fact seen a colleague or some other attorney soft-pedal an opposition to certiorari or who has done so himself may well be reluctant to admit to it even on an anonymous survey.¹⁰⁵

Nevertheless, the results from the question are instructive. When asked whether they had ever come across a case in which an attorney provided less-than-zealous advocacy in opposing certiorari on behalf of a client because of the attorney's personal desire to argue in the Court, the survey respondents gave markedly different answers depending on their level of previous experience in the Court. None of the respondents who had handled between one and ten matters in the Court reported encountering such a situation, and among the responding attorneys who had been involved in between eleven and twenty-five cases, just three of thirty-five, or 8.6%, responded in the affirmative.¹⁰⁶ Yet among the survey participants with greater first-hand experience in the Court, those who had handled twenty-five or more cases, a far larger proportion—17.4%—reported knowledge of a case where an attorney compromised the quality of his representation for his client at the cert opposition stage because of a personal desire to argue in the Court. By way of comparison, respondents who handled more than twenty-five Supreme Court matters were *more than four times more likely* to have encountered an instance of improper attorney conduct than respondents with less than

105. As one respondent wrote, any information about such an observation would be "privileged" anyhow. Anonymous survey respondent #45.

106. See *infra* Table 5.

twenty-five matters (17.4% compared with 4.3%). Table 5 gives the data broken down by participant expertise level.

Table 5—Have you encountered a situation in which you believe an attorney provided less than zealous representation on a brief in opposition to certiorari due in part to a personal desire by the attorney to argue before the Court?

	< 10	11–25	25–50	> 50	All Respondents
Yes	0% (0)	8.6% (3)	25% (3)	14.7% (5)	9.5% (11)
No	100% (35)	91.4% (32)	75% (9)	85.3% (29)	90.5% (105)
<i>Total responses</i>	35	35	12	34	116

There are two primary explanations as to why survey participants who have been a part of more than twenty-five cases in the Court are so much more likely than the novice or intermediate experts to have encountered actual cases where a respondent's counsel has succumbed to a conflict of interests and improperly "thrown" a brief in opposition. First, to the extent that an attorney's selfish motivations in rigging an opposition brief are somehow revealed to other attorneys—whether to fellow lawyers in the attorney's firm, to amici, or to opposing counsel—it is possible that the most senior attorneys involved in the case (that is, those who have already handled a large number of cases in the Court) are more likely to be in a position to learn of the ethical misstep. Additionally, these seasoned Supreme Court veterans may, from experience working on briefs, be better at ascertaining when an attorney is providing less than zealous representation on a brief.

Second, survey participants who have handled more Supreme Court matters might be more likely to report knowledge of such conflicts simply because they have had more chances to encounter an attorney succumbing to the temptation, whether blatantly or more covertly. To the extent that it might be difficult to ascertain whether an attorney is truly not providing fully zealous representation, the finding that 17.4% of experienced Supreme Court attorneys report first-hand evidence of the conflict in action may only scratch the surface; it is conceivable that other cases of wrongful, self-

interested attorney action might exist where attorneys rigged their briefs in opposition without telling anyone or otherwise getting caught by another attorney.

In any event, the primary lesson to be gleaned from the responses to Question Four seems fairly straight-forward: the ethical dilemma is real and it is happening, albeit not in overwhelming numbers—ninety percent of the surveyed attorneys have not yet witnessed a case where the conflict adversely affected an attorney’s ability to represent her client.¹⁰⁷ Survey respondents flagged two chief explanations for why such actual encounters with attorneys guilty of misconduct at the opposition stage may be so rare. The first explanation was that perhaps attorneys will find it fruitless to intentionally rig a brief in opposition because even if certiorari is granted, they might ultimately be replaced by a more experienced advocate for oral argument. As one respondent explained, the attorney who “does a poor job in hopes that cert will be granted against [the] client’s interest” is one who “runs the risk of not being the attorney who argues the case in the end.”¹⁰⁸ Second, respondents noted that counsel might prefer to challenge the cert petition zealously because if the Court grants, there is a substantial chance (nearly two-thirds) that the Court will reverse the decision below.¹⁰⁹

Yet both of these constraints are more likely to check the regular Supreme Court practitioner than the attorney who seeks a once-in-a-lifetime opportunity to argue in the Court. First, the one-time attorney is less likely to represent a sophisticated client who will know whether to fire him if the cert opposition fails. Criminal defendants, for instance, often stick with their court-appointed lawyers and public defenders even after cert is granted.¹¹⁰ Second, repeat players might care about win-

107. But as I have alluded to above, there are reasons why this data might understate the severity of the ethical problem. First, the data is based on self-reported responses from some of the very attorneys whom the conflict might adversely affect. Second, attorneys who are guilty of placing their personal desire to argue ahead of their client’s objectives are unlikely to consistently make that fact public knowledge in ways that a survey like this would be able to detect.

108. Anonymous survey respondent #81.

109. McGuire, *supra* note 17, at 193–94.

110. Compare Brief in Opposition, *Kentucky v. King*, 131 S. Ct. 1849 (2011) (No. 09-1272), with *Kentucky v. King*, 131 S. Ct. 1849, 1853 (2011) (respondent retained the same counsel from the failed opposition briefing at the merits stage); compare Respondent’s Brief in Opposition, *Oregon v. Guzek*, 546 U.S. 517 (2006) (No. 04-

loss records in the Court and thus prefer not to argue a case bottom-side,¹¹¹ but a one-time-only attorney might not. It might well be the simple act of getting to the Court, and not the result at the Court, that will impress the one-time-only attorney's peers and future clients the most.¹¹²

Ultimately, the responses to Question Four suggest that there is not a large number of cases in the Court that are so riddled with conflicts of interest that representation at the opposition stage is inescapably compromised. But we should be cautious to infer too much from the positive results. As one survey respondent emphasized, the conflict is not merely theoretical: "Several years ago I represented an amicus in a case in which the respondent's counsel confessed that she was pleased when cert was granted because of the opportunity to argue and hinted that she had not gone all-out on the cert opp."¹¹³ In cases like this, however occasional they may be, there is a real risk of harm to the client, to judicial efficiency in the Supreme Court, and to the development of the law itself.¹¹⁴

B. *Analyzing Actual Failed Briefs
in Opposition to Certiorari*

Apart from survey data, an additional source of evidence exists concerning the ethical conflict in opposing certiorari: the briefings from Supreme Court cases in which an attorney's personal desire to argue at the Court might have had an actual adverse impact on the zealotry of the attorney's advocacy at the opposition stage. That is to say, where self-reported data can provide one angle of evidence on whether attorneys act against their client's best interests when opposing certiorari, an altogether different angle can be taken by examining actual opposition briefs to see the various ways in which an attorney might stealthily write an unpersuasive brief and undermine the client's chances for getting cert denied.

928), *with Oregon v. Guzek*, 546 U.S. 517, 519 (2006) (same); *compare* Brief in Opposition, *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (No. 99-161), *with Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000) (same).

111. *But see supra* note 52 and accompanying text for evidence that even repeat players are not as concerned with winning percentages as they are with total numbers of oral arguments.

112. *See supra* text accompanying notes 12–22.

113. Anonymous survey respondent #37.

114. *See infra* Part IV.

It should be mentioned as a preliminary matter, however, that unlike the risk of false negatives in the survey data, where respondents were likely to understate the severity and frequency of the conflict because of self-reporting bias, the risk in looking at individual briefs in opposition as evidence of the conflict is a risk of false positives. There are two sensible explanations for why a brief in opposition to certiorari may have missed an important argument. The culpable explanation is that the attorney drafting the brief intentionally ignored a strong argument for why cert should be denied to increase his chances of arguing in the Court. But the innocent explanation is that the attorney simply missed the argument for lack of knowledge or expertise in Supreme Court practice. Thus, the following discussion of particular opposition briefs is not intended to suggest that intentional oversights occurred in any of the underlying cases, but rather to demonstrate that, for the respondent's attorney who is set on arguing before the Court, there are ways to write an ineffective brief in opposition without creating suspicion regarding the attorney's motives.

Perhaps the easiest way to write an unpersuasive opposition brief is to concede a circuit split in a case where the circuit court of appeals below reached a result that might have been in conflict with that of another circuit.¹¹⁵ Rule 10 of the Supreme Court Rules lists conflict among the circuit courts as its first consideration in deciding whether to grant certiorari review, and so naturally if an advocate concedes that such a split exists, that concession will have a profound effect on the Supreme Court's decision whether to grant certiorari.¹¹⁶ This is what occurred in *Weisgram v. Marley*, where the petition for a writ of certiorari argued extensively that the decision of the Eighth Circuit below was in conflict with the established law in four other courts of appeals—the Fifth, Sixth, Ninth, and Eleventh circuits.¹¹⁷ After citing relevant decisions from each of these

115. See *supra* note 102 and accompanying text, where an anonymous survey respondent hypothesized that a “non-Supreme Court litigator” might “intentionally concede a circuit split . . . but otherwise do a good job in the opposition brief, in hopes of snagging a once-in-a-lifetime argument.”

116. SUP. CT. R. 10(a) (Court will consider granting review where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .”).

117. Joint Petition for Writ of Certiorari at 10–11, *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (No. 99-161).

conflicting circuits, the petition asked the Supreme Court to “grant the present petition for certiorari” to “maintain and secure the uniformity of decisions and to resolve conflicts between the Circuits” on the issue in question.¹¹⁸

In light of the petitioners’ argument that certiorari should be granted to resolve a conflict among the circuit courts of appeals, one might expect that the respondent’s brief in opposition would make a considerable effort to diffuse the alleged split, either by distinguishing its own case on the facts from the cases cited from the other circuits, or by reconciling those cases so as to minimize the appearance of a conflict.¹¹⁹ Yet in *Weisgram*, the brief in opposition did not mention the circuit split or attempt to attack the petitioners’ characterization of the conflict.¹²⁰ In the end, the Court granted the petition and explained that it was doing so expressly because of the circuit conflict that the petitioner had identified. As Justice Ginsburg wrote for the Court:

Courts of Appeals have divided on the question whether Federal Rule of Civil Procedure 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case. *We granted certiorari to resolve the conflict . . .*¹²¹

Another way in which an attorney who wishes to argue in the Court can write an ineffective brief in opposition is to fail to identify a procedural defect in the proceedings below that would otherwise prevent the Court from taking up the case. An example of this can be seen in *Oregon v. Guzek*, a 2006 Supreme Court decision that considered whether the Eighth and Fourteenth Amendments guarantee a capital murder defendant the right to present additional alibi evidence at his resentencing hearing beyond that which was presented at trial.¹²² *Guzek* had been tried and convicted for capital mur-

118. *Id.* at 11.

119. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 502–04 (9th ed. 2007).

120. See Brief in Opposition, *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (No. 99-161).

121. *Weisgram v. Marley Co.*, 528 U.S. 440, 446 (2000) (emphasis added).

122. 546 U.S. 517, 519 (2006). The Court answered the question in the negative. *Id.* at 527.

der by the state of Oregon.¹²³ On three separate occasions he was sentenced to death, and on each occasion the Oregon Supreme Court found the sentencing procedures to be faulty, ordering a rehearing.¹²⁴ During his third appeal, the Oregon Supreme Court considered Guzek's argument that he should be allowed to introduce alibi testimony from his mother and grandfather to establish "residual doubt" of his guilt as a mitigating factor at his next sentencing hearing.¹²⁵

The Oregon Supreme Court agreed with Guzek. With respect to the grandfather's testimony, the Oregon court held that a transcript of the earlier testimony was admissible as a matter of state law, which required the admissibility at sentencing of transcripts of testimony "previously offered and received" during the trial.¹²⁶ But because the Oregon Supreme Court apparently did not realize that a transcript also existed of Guzek's mother's testimony from trial, the Oregon Supreme Court ruled that her live testimony should be admitted as a matter of federal law under the Eighth Amendment.¹²⁷

The State filed a petition for certiorari seeking reversal on the Eighth Amendment issue. The brief in opposition, however, failed to mention the fact that there was a clear procedural reason for the Court to deny cert: the presence of an adequate and independent state ground that required the admission of the transcript of the mother's alibi testimony from trial—the same state ground that required the admission of the grandfather's trial transcript.¹²⁸ Cert was thus granted despite this adequate and independent state ground, and the Court would go on to reverse the Oregon Supreme Court's ruling in an 8-0 decision.¹²⁹

123. *Id.* at 519.

124. *Id.* at 520.

125. *See id.* at 524–25.

126. *State v. Guzek*, 86 P.3d 1106, 1121 (Or. 2004) (citing OR. REV. STAT. § 163.150(1)(a)).

127. *Guzek*, 86 P.3d at 1127; *see also* Respondent's Motion to Dismiss the Writ at 3–4, *Guzek*, 546 U.S. 517 (No. 04-928).

128. Respondent's Motion to Dismiss the Writ, *Guzek*, 546 U.S. 517 (No. 04-928).

129. *Guzek*, 546 U.S. at 527. During oral argument, both Justices Stevens and Breyer tried to press Guzek's counsel to accept that state law allowed his client to introduce his mother's trial transcript during his sentencing hearing, thus leaving the mother's live testimony unnecessary and rendering the writ open to dismissal as improvidently granted. But counsel failed to recognize these as friendly questions designed to create room for a DIG [dismissed for improvidently granted],

Another example of a brief in opposition that failed to flag a clear vehicle problem took place in a 1997 case, *Adams v. Robertson*.¹³⁰ The case concerned a class action settlement an Alabama trial court approved under the Alabama Rules of Civil Procedure, which do not afford class members the right to exclude themselves from a class.¹³¹ After the state court approval the settlement, certain members of the class filed suit in the Alabama courts, arguing that the settlement, which prevented them from individually suing the defendant, should be struck down for violating their right to a jury trial as guaranteed under the Alabama Constitution.¹³² The Alabama courts rejected this argument, and the class members then petitioned for a writ of certiorari to the Supreme Court on the grounds that the settlement violated their rights under the Due Process Clause of the U.S. Constitution.¹³³

Because the petitioners had not raised the federal issue in the state courts below,¹³⁴ it should have been simple for the respondents to get certiorari denied on that ground—and indeed the Court ultimately dismissed the writ as improvidently granted for that very reason.¹³⁵ But the respondent's brief in opposition to certiorari neglected to point out the petitioners' failure to preserve the federal issue below.¹³⁶ Indeed the Court only became aware of the petitioner's procedural error in a brief written at the merits stage not by the attorney who had drafted the brief in opposition, but by the Supreme Court experts whom the respondent hired to replace the original local counsel.¹³⁷ The clients were therefore able to preserve the favorable judgment below, albeit at the substantial additional cost of hiring expert Supreme Court counsel to represent them at the merits stage (a cost that

and instead maintained that the Eighth Amendment allowed his client to go further than state law required. See Transcript of Oral Argument at 37–40, *Oregon v. Guzek*, 546 U.S. 517 (No. 04-928).

130. 520 U.S. 83 (1997) (per curiam).

131. *Id.* at 85–86.

132. *Id.* at 89.

133. *Id.* at 86.

134. *Id.*

135. *Id.* at 85.

136. See Brief of Respondent in Opposition, *Adams*, 520 U.S. 83 (No. 95-1873).

137. See Brief for Respondent Charlie Frank Robertson at 16–19, *Adams*, 520 U.S. 83 (No. 95-1873).

would not have arisen had the brief in opposition flagged the petitioners' failure to preserve).¹³⁸

In each of the three cases just discussed, the Supreme Court granted certiorari despite the existence of reasons why cert might not have been warranted in the first place. Indeed, the unsettled nature of a circuit conflict, the presence of an adequate and independent state ground, and the petitioner's failure to preserve an issue below are among the most commonly cited reasons for why the Court should deny cert.¹³⁹ A respondent's attorney bent on arguing in the Court (notwithstanding his client's best interests to the contrary) can thus improve his chances of securing that opportunity by failing to make these arguments. And even if a failure to make these arguments might not give rise to a clear determination of attorney misconduct in any particular case, *Weisgram*, *Guzek*, and *Adams* stand for a broader proposition: The lawyer who wants to write an ineffective brief in opposition has subtle ways to do so. I examine next the effect of this reality on both clients and the judicial system at large.

III. THE HARMFUL EFFECTS OF THE ETHICAL DILEMMA IN OPPOSING CERTIORARI

In one sense, the harm that occurs when an attorney willfully fails to oppose certiorari effectively on behalf of his client is self-evident: The client loses. But an attorney's selfish misconduct at the cert stage can injure not just the client but also the judicial system as a whole. I now will explore both of these harms.

138. Not all clients are so lucky, however. Compare, for example, the Court's decision to dismiss the writ in *Adams* after acknowledging that petitioners had failed to properly preserve an issue below with the Court's decision in *Oklahoma City v. Tuttle*, 471 U.S. 808, 815–16 (1985), where the Court proceeded to reach the merits of an issue despite the existence of a similar failure-to-preserve defect. See also SUP. CT. R. 15.2 (“[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.”).

139. GRESSMAN ET AL., *supra* note 119, at 501–06.

A. *Harm to the Client*

In every case that goes to the Supreme Court, there are in principle two possible outcomes for the respondent. First, the Court can reverse the decision below, undoing the status quo in which the respondent previously had been victorious. This is statistically the most likely outcome, as the Court reverses roughly two-thirds of the cases in which it grants cert.¹⁴⁰ The fact that respondents' attorneys have a built-in incentive to throw briefs in opposition is thus particularly troubling because the result is more often than not a reversal for the client. When the Court reverses the decision below, sometimes the Court will remand for further proceedings in the courts below, but other times the Court will institute a judgment directly against the respondent.¹⁴¹ But in either instance the net result is as clear as it is harmful to a respondent's interests: the earlier victory is called into question alongside additional costly litigation.

If the Court does not reverse, the alternative is far better for the client—the Court will affirm the judgment below.¹⁴² Even in this case, however, the respondent will have preserved the victory below at great cost—months of uncertainty and potentially thousands of dollars in fees. The case of *Adams v. Robertson* is instructive on this point.¹⁴³ Even though the respondents prevailed in the Supreme Court in that case, they had to retain counsel from the elite D.C. firm Jenner & Block to do so.¹⁴⁴ The respondents would have been better off financially if their original local attorney had just pointed to the clear failure of the petitioners to preserve the federal constitutional issue at the

140. See *supra* note 17 and accompanying text.

141. For an overview of the Supreme Court's power to issue remand orders to the lower courts and their many implications, see Michael A. Berch, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493 (2004).

142. There are versions of this second outcome beyond an outright affirmance, such as a dismissal of the writ as improvidently granted (which has the effect of leaving the decision below intact). Note also that the Court may take an intermediate position between reversal and affirmance—the Court can grant, vacate, and remand a case, which it often does to obtain further clarity from the court below. See generally Sena Ku, *The Supreme Court's GVR Power: Drawing a Line Between Deferral and Control*, 102 NW. U. L. REV. 383 (2008).

143. See *supra* notes 130–37 and accompanying text.

144. Brief for Respondent, *Adams v. Robertson*, 520 U.S. 83 (1997) (No. 95-1873).

brief in opposition stage, obviating the need to hire Supreme Court counsel.

There is a notable exception, however, to the otherwise universal default rule that the respondent would rather her attorney win at the opposition stage *before* cert is granted than at the merits stage *after* cert is granted. In some cases, it might actually be the client's preference to have a case go up to the Supreme Court, even if the client prevailed in the court below. This possibility, though relatively rare, is most likely to occur for two kinds of clients: (1) parties who for personal or policy reasons would prefer to extend the application of a particular rule of law uniformly throughout the nation (even if doing so risks disturbing the judgment below), and (2) government parties who desire certainty with respect to the legality of a particular government practice that only a final Supreme Court judgment can bring.

An example of the former situation arose in the case of *Spector v. Norwegian Cruise Line Ltd.*, a 2005 Supreme Court decision that addressed whether Title III of the Americans with Disabilities Act (ADA) should apply to so-called foreign flag cruise ships.¹⁴⁵ In that case, Norwegian Cruise Line (NCL) actually prevailed below in the Fifth Circuit Court of Appeals, which held that Title III of the ADA did not apply aboard the company's ships.¹⁴⁶ NCL, however, lost on the exact same question five years earlier in the Eleventh Circuit.¹⁴⁷ Because the company's ships were predominantly located in the Eleventh Circuit and not the Fifth Circuit, it made sense for the company to double down on the Fifth Circuit's decision in hopes that the Supreme Court would extend the Fifth Circuit's more favorable interpretation of the ADA to apply in the Eleventh Circuit as well. As a result, NCL took the unusual step of acquiescing to certiorari, declaring in its response brief that "[a]lthough petitioners and NCL disagree about many aspects of the case, including both the question presented and the proper answer to that question, NCL agrees that this is an important case raising a significant issue of federal law that this Court should decide."¹⁴⁸

145. 545 U.S. 119, 125 (2005).

146. *Id.*

147. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1243 (11th Cir. 2000).

148. Response to Petition for Certiorari at 7, *Spector*, 545 U.S. 119 (No. 03-1388).

Like NCL in *Spector*, government respondents often find it in their best interests to acquiesce to cert as well. For example, the state of Pennsylvania acquiesced to certiorari in *Allshouse v. Pennsylvania*.¹⁴⁹ In that case, petitioners sought review of the Pennsylvania Supreme Court's decision that a statement by a four-year-old child to a county caseworker regarding the father's alleged physical abuse of the child's younger brother was nontestimonial and thus its admission did not violate the Confrontation Clause.¹⁵⁰ Instead of defending the judgment below in which the state had prevailed, the state's brief in opposition began by explaining that:

Although your Respondent prevailed in the Pennsylvania Supreme Court, it would be intellectually dishonest to argue that there is not a considerable difference of opinion in the courts of this nation as to how the precepts of *Crawford v. Washington* . . . and *Davis v. Washington* . . . should be applied to the statements of child declarants. . . .

Thus, if this Court chooses to take up the issue of *Crawford's* application to a child declarant's statements to a child protection worker, the Court would bring clarity to Confrontation Clause jurisprudence that is presently lacking.¹⁵¹

From the state's perspective, in other words, it made sense to acquiesce because it was more important to obtain clarity over how child statements to case workers may be used at trial than it was to preserve a victory below.

In both of these rare situations where respondents acquiesce to the Court's certiorari review, there is little concern of an ethical conflict of interest. This is because in both circumstances, the attorney's decision to acquiesce to cert is *directed by the client herself*. In the case of an attorney who underhandedly rigs a brief in opposition *without* her client's approval,¹⁵² however, the client's instructions are to do exactly the opposite and persuade the court to deny certiorari. It is in these cases where the injury to the client in terms of financial losses

149. *Commonwealth v. Allshouse*, 985 A.2d 847 (Pa. 2009), *vacated*, 131 S. Ct. 1597 (2011).

150. Petition for a Writ of Certiorari at 3, *Allshouse*, 131 S. Ct. 1597 (2011) (No. 09-1396).

151. Brief in Opposition at 1, *Allshouse*, 131 S. Ct. 1597 (No. 09-1396).

152. See *supra* Part II.B.

from additional lawyers' fees and a reversal of the judgment below are so troubling.

B. *Harm to the Judiciary*

The injury to the client is just one aspect of the harm that results from the conflict inherent in the ethics of opposing certiorari. The other, perhaps more severe, injury is one to the judicial system itself. To understand the nature of this injury, one must begin by observing the nature and limits of the Supreme Court's plenary docket. The Court handles fewer cases today than at any time in its history. In a 2006 article in the *Minnesota Law Review*, former Solicitor General Ken Starr noted that in 1926, the Supreme Court disposed of 223 cases by signed opinion—18.9% of the 1183 cases that appeared on its docket during that year.¹⁵³ Since 1926, however, the number of cases on the Court's docket has skyrocketed as more parties seek certiorari review. By 2004, the number had grown to 8593 cases.¹⁵⁴ Instead of taking on more cases over this period to cope with the rising demand for judicial review, however, the Court substantially *reduced* its caseload—it decided only eighty-five cases by signed opinion in 2004, good for just 1% of its total docket.¹⁵⁵

The academy has given considerable attention to the various consequences engendered by the Court's shrinking docket.¹⁵⁶ But for our purposes, the key consequence is that the simultaneous rise in the number of cases where review is sought and decrease in the number of cases where review is actually granted has produced a situation in which each case that receives Court review must be of especially paramount importance to justify the Court's devotion of one of its increasingly

153. Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2006).

154. *Id.*

155. *Id.*

156. For detailed discussion of the phenomenon and its many effects, see generally Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; Starr, *supra* note 153, at 1369.

rare slivers of attention.¹⁵⁷ In other words, one way to understand the effect of the Court's shrinking docket is that the Court's power to set its agenda and choose which cases to hear (and not to hear) is more important now than ever before. Or as one commentator suggested, "the Supreme Court's power to set its agenda may be *more* important than what the Court decides on the merits."¹⁵⁸

Yet the Court's ability to effectively set its agenda by picking only the most critical cases for review is precisely where the injury from the ethical conflict in opposing certiorari is greatest. The ethical dilemma undermines the Court's ability to set its agenda because when respondent counsel succumbs to a personal desire to argue before the Court and intentionally fails to bring crucial reasons why certiorari ought to be denied to the Court's attention, the Court will be more likely to grant certiorari—and waste precious time—in some cases where its review is simply not warranted.¹⁵⁹

If the Court had a mechanism for quickly identifying these wasted cases, perhaps judicial economy would be no worse for the wear. But all too often the Court only comes to realize that it should have denied certiorari to begin with *after* the briefings and oral argument,¹⁶⁰ long after it could have given its attention to another important case. One pernicious downstream effect of the ethical dilemma in opposing certiorari, in other words, is the crowding out of meritorious cases that actually need the Court's attention. This crowding-out effect is no small phenomenon in light of the Court's ever-decreasing docket size; there is widespread agreement that far more than eighty issues arise each year that present an

157. See SUP. CT. R. 10. ("A petition for a writ of certiorari will be granted only for *compelling* reasons. . . . [such as when] a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same *important* matter") (emphasis added); see also Starr, *supra* note 153, at 1364 (describing one basic premise of Congress's decision to authorize the Supreme Court's certiorari review as that of allowing the Court to "exercise its discretion responsibly and prudently" to "resolve important questions of law").

158. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1737 (2000).

159. See, e.g., *supra* notes 134–38 and accompanying text.

160. See, e.g., *Roper v. Weaver*, 550 U.S. 598 (2007), where the Court dismissed a writ as improvidently granted (after briefings and oral arguments) because of a district court procedural error that the respondent's counsel failed to bring to the Court's attention at the opposition stage.

important question upon which lower courts are in conflict—one study suggests that roughly *four hundred* such conflicts emerge *each year*.¹⁶¹

The ethical dilemma in opposing cert has the potential to harm judicial economy in other ways, too. Upon discovering that it has granted cert in a case that might not be well suited to disposition, the Court will not necessarily decide to dismiss the writ as improvidently granted—indeed it dismissed as improvidently granted only eleven cases over the six year period from October Term 2004 through 2009.¹⁶² Instead, sometimes the Court will keep the case and issue a decision notwithstanding defects in the vehicle because, as Justice Stevens explained, “Once a case has been briefed, argued, and studied in chambers, sound principles of judicial economy normally outweigh most reasons advanced for dismissing a case.”¹⁶³

But when this happens, a different kind of injury might befall the development of the law. Consider a case in which, because of concerns with judicial economy, the Supreme Court issues a decision on a matter of federal law notwithstanding the existence of an adequate and independent state ground. In such an event, the case will return to the state court on remand, where the court will ultimately dispose of the case in precisely the same manner as it had before, regardless of the Court’s intervening decision.¹⁶⁴ If this were to happen, the Court’s decision

161. See Cordray & Cordray, *supra* note 156, at 772.

162. *Robertson v. United States*, 130 S. Ct. 2184 (2010); *Sullivan v. Florida*, 130 S. Ct. 2059 (2010); *Philip Morris USA, Inc. v. Williams*, 556 U.S. 178 (2009); *Bell v. Kelly*, 555 U.S. 55 (2008); *Roper*, 550 U.S. 598; *Toledo-Flores v. United States*, 549 U.S. 69 (2006); *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006); *Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006); *Maryland v. Blake*, 546 U.S. 72 (2005); *Medellin v. Dretke*, 544 U.S. 660 (2005); *Howell v. Mississippi*, 543 U.S. 440 (2005). Note also that not all of these dismissals of the writ of cert as improvidently granted were for reasons that could have been identified in a brief in opposition to certiorari. In *Mohawk Industries*, for instance, the Court dismissed the case as improvidently granted in light of an intervening decision it had issued. 547 U.S. at 516–17.

163. *New York v. Uplinger*, 467 U.S. 246, 250–51 (1984) (Stevens, J., concurring).

164. See, e.g., *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) (where, after the Court reached the merits of an Eighth Amendment question and remanded the case to the state court, the state court ultimately allowed the respondent’s evidence to be considered at a sentencing hearing, under an adequate and independent state ground); see also *State v. Guzek*, 153 P.3d 101, 109 (Or. 2007).

would be rendered little more than an advisory opinion, with all of the jurisprudential problems that the moniker carries.¹⁶⁵

In sum, once we acknowledge that the perverse incentives facing respondents' attorneys at the certiorari opposition stage may result in some number of cases appearing worthy of certiorari when they are in fact not (perhaps because the self-interested attorney underhandedly conceded a circuit conflict or failed to point out a crucial procedural defect)¹⁶⁶, we must begin to grapple with the consequences that the ethical conflict produces for the judicial system as a whole. In some cases the consequence will be that the Court will dismiss a case as improvidently granted, losing valuable time that it could have spent resolving a different, well-presented issue of national importance. In other cases the Court will reach the merits in a less than desirable context, perhaps one involving a faulty vehicle. In either event, the fact remains that the presence of conflicting interests between attorney and client at the certiorari opposition stage harms not just the client, but also the Supreme Court's ability to effectively adjudicate cases and maintain uniformity of law.

IV. POSSIBLE SOLUTIONS TO THE ETHICAL DILEMMA IN OPPOSING CERTIORARI

If the Supreme Court's process of asking (and relying upon) self-interested attorneys to oppose certiorari review does indeed produce the harms I described for clients and for the judiciary, the logical follow-up question is whether sensible measures that can counterbalance the ethical dilemma exist. As I explain below, there are a variety of approaches that private parties, the bar, and the Supreme Court itself could take to check the conflict of interest in certiorari opposition, although the various options differ in their degree of appropriateness depending on both the kind of client and the kind of attorney at issue.

As a general matter, the most common tool used to mitigate conflicts of interest between clients and their attorneys is the

165. For a thorough review of the doctrine against advisory opinions and its historical evolution, see STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997).

166. See *supra* Part II.B.

private contract.¹⁶⁷ Individually negotiated contractual agreements can head off conflicts of interest that are predictable in the context of the attorney-client relationship. For instance, in the fees context, when a client is concerned that her attorney might work an excessive number of hours on a matter because of the incentives produced by the standard hourly fee arrangement, one common contractual workaround is for the client to reserve the power to approve additional work at various important stages in the matter.¹⁶⁸

Similarly, in the opposition to certiorari context, private contractual agreements can provide a powerful counterweight against the attorney's self-interested desire to throw a brief in opposition. For instance, a client can specify in the retainer agreement governing the attorney's work on the brief in opposition that if the Court decides to grant cert, the attorney will be removed from the case and deprived of the opportunity to argue at the Court on the merits, subject to the client's discretion to change her mind. By creating the possibility that the attorney's self-interested desire to argue in the Court, if acted upon, will result in the loss of the very privilege the attorney seeks, the result is that the attorney's interests will better converge with her client's. Alternatively, the agreement could specify a financial penalty against the firm if cert is granted, such as a two-tiered payment plan where the client will pay three times X if cert is denied but just X if it is granted. Other possibilities exist as well, but the point is that sophisticated clients are bounded principally by their imagination in the ways in which they can ensure that their lawyers have clear and overriding incentives to zealously oppose cert.¹⁶⁹

167. See Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 *FORDHAM L. REV.* 579, 580–81 (1992); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 *IOWA L. REV.* 965, 972–73 (1997).

168. Robert E. Litan & Steven C. Salop, *Reforming the lawyer-client relationship through alternative billing methods*, 77 *JUDICATURE* 191, 193 (1994).

169. These arrangements all presuppose an ex ante contractual agreement, but, of course, an obvious ex post private contractual alternative exists: the client can simply exercise her right to hire a different counsel for the merits argument (so long as the initial contract did not include some guarantee that the attorney would have that right). Another ex post private regulatory mechanism to incentivize zealous advocacy would be a legal malpractice action. But for a variety of reasons such as the difficult standards of proof

Reliance on private contractual agreements, however, might do little to secure the interests of the kinds of parties who stand the highest chance of being represented by a conflicted attorney at the opposition stage because for a client to negotiate the kinds of clauses described above, she must possess both the capacity to negotiate and an awareness of the ethical dilemma. Although sophisticated clients who are repeat players in appellate litigation might fit that description, indigent clients who do not routinely litigate do not. Furthermore, because indigent clients do not pay their attorneys, their ability to exercise leverage in the form of financial penalties is severely curtailed. An attorney might agree to represent a wealthy client at the opposition stage, even under a contractual arrangement where the merits argument will automatically go to a different lawyer if cert is granted, because the client can still pay a handsome fee for the attorney's work on the brief in opposition alone. In contrast, an indigent client cannot make an analogous arrangement. For when given the choice between writing a brief in opposition for the indigent client for no (or a paltry) fee where no merits argument is possible, and just walking away from the case altogether, the indigent client's attorney might well choose the latter.

It is in these situations, where private contracts do not work because of a lack of leverage and information on the part of indigent clients, that the bar's self-enforced ethical codes of conduct might be utilized as gap-filling default rules that can help to mitigate conflicts of interests.¹⁷⁰ The ethical code of greatest relevance here is Rule 1.7 of the Model Rules of Professional Conduct, which declares that "a lawyer shall not represent a client" if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."¹⁷¹ Rule 1.7 is not an absolute bar on representation by a conflicted attorney, however. The rule allows an attorney to continue her representa-

needed to show causation, that mechanism is unlikely to be a viable approach moving forward. See Erik M. Jensen, Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 670 (1978) (arguing that a "but for" causation test effectively immunizes negligent attorneys from punishment for even the most reprehensible behavior).

170. Macey & Miller, *supra* note 167, at 967.

171. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2011).

tion of a client despite the presence of a conflicting personal interest (such as a personal desire to argue at the Court) if the attorney “reasonably believes” that she will be able to provide “competent and diligent representation” and her client gives written, informed consent with respect to the representation in light of the conflict.¹⁷²

Thus, for clients who do not have the wherewithal to enter into private contractual agreements with their attorneys that would minimize the ethical dilemma of opposing certiorari, the possibility exists that the bar could intervene and accomplish the same objective by enforcing Rule 1.7, requiring attorneys (perhaps on pain of sanction or some other penalty) to inform their clients about their personal desire to argue in the Court and to obtain written consent for the representation to continue. The obvious benefit of this approach is that it would put every party who faces a petition for certiorari on notice that their attorneys enjoy motivations in opposing certiorari that diverge from their own, and that they should monitor the attorney more closely as a result. Enforcing Rule 1.7 might also have the salutary effect of forcing attorneys to be more cognizant of their own conflicting interests. By compelling an open discussion of the conflict with their clients, the rule might well persuade some attorneys to put forth a zealous effort where they might not otherwise have done so in a regime where the conflict was allowed to remain under the surface.

There is a major problem with this approach, however. Put succinctly, Rule 1.7 is a blunt instrument that adopts a rather cynical view of the ability of attorneys as a class to put their clients’ interests first. For starters, Rule 1.7 is an *ex ante* rule that operates at the outset of an attorney’s representation, so a literal application would require every attorney who is tasked with opposing certiorari to divulge a conflict of interest and obtain written informed consent before beginning work on a brief in opposition. However strongly one wishes to interpret the survey results and discussion of actual briefs in opposition as presented above,¹⁷³ to apply Rule 1.7 so as to force every attorney to confess to an ethical conflict would go too

172. *Id.* R. 1.7(b). Note that some conflicts cannot be consented to, such as claims brought by one of the lawyer’s clients against another client in the same tribunal. See R. 1.7, cmts. 14–17.

173. See *supra* Part II.

far. Given that the majority of the survey participants responded that there is no conflict of interest inherent in cert opposition,¹⁷⁴ it seems to be an overreaction to require *every* attorney who opposes cert to confess to her client a “personal interest” that poses a “significant risk” of “materially limit[ing]” the quality of her representation.¹⁷⁵

If enforcing Rule 1.7 in this manner is too drastic an approach to protect the interests of indigent respondents who are unable to protect themselves via private contractual arrangements, a more targeted alternative exists: Supreme Court intervention in cases where certiorari review is warranted and where an attorney submitted a brief in opposition that is objectively deficient. The major advantage of this approach over general bar regulation per Rule 1.7 is that it allows for a more narrowly tailored intervention. That is to say, instead of applying *ex ante* to all attorneys who do certiorari opposition work, like bar enforcement of Rule 1.7, the Supreme Court could decide to punish only those attorneys whose performance on a brief in opposition is determined to be objectively below the minimum quality of work product that would be delivered by a reasonably competent attorney (that is, if the attorney misses obvious reasons for denying cert in the brief in opposition)¹⁷⁶. The Court then could punish a culpable attorney through sanctions such as a requirement that the attorney refer her client to another lawyer for oral argument. By disassociating representation at the opposition stage from the ultimate goal of representation on the merits, the Court thereby would deter any initial incentive for the attorney to soft-pedal the opposition brief. Requiring the punished attorney to offer her client a referral also has the benefit of leaving the client with the final choice of whether to keep the attorney.

Two challenges might be raised against deploying the Supreme Court in this kind of supervisory role, however. The first is an institutional capacity concern. The Court already is an institution with manifold responsibilities.¹⁷⁷ Asking it to

174. See *supra* Tables 3, 4.

175. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

176. See *supra* Part II.B.

177. Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 522–23 (1983) (noting that “re-

take on a new obligation in the form of sanctioning lawyers who fail to zealously oppose certiorari on behalf of their clients might be to ask the Court to take on a task not worth its limited time.

A logical rebuttal, however, might suggest that the Court actually will improve the efficacy of its discretionary review process by promoting aligned incentives between attorney and client at the opposition stage.¹⁷⁸ Moreover, the nitty-gritty work of reviewing briefs in opposition to see whether an attorney has improperly undermined her client's position (by, say, failing to challenge a circuit conflict or failing to identify a vehicle problem) is similar to the work already done by Supreme Court law clerks who, as part of the "cert pool" memo process, routinely evaluate petitions for certiorari and draft pool memos describing the cert-worthiness of each petition.¹⁷⁹ To ask the clerks to read briefs in opposition with the background understanding that some respondents' attorneys might possess personal interests adverse to those of their clients and to therefore keep an eye out for additional reasons to deny cert beyond those that appear on the face of the opposition brief might be a sensible approach to the problem.¹⁸⁰ In other words, by tying the Court's supervision of rigged briefs in opposition to the Court's existing process for evaluating cert petitions, it might well be that the Court can protect respondents from unethical behavior by their lawyers without posing an insuperable burden on the Justices at all.

If the practical challenges with implementing a process for the Court to sanction self-interested attorneys who fail to zeal-

spected judges, scholars, and practitioners have begun to question whether nine mortal men and women, constrained by the structure and procedures of appellate adjudication, can do everything that is necessary to maintain clarity and uniformity in the national law").

178. *See supra* Part III.B.

179. For an overview of the law clerks' role in drafting cert pool memos recommending various courses of action on the thousands of cert petitions that come before the court, see generally TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006).

180. Asking law clerks to serve this investigatory role would comport with the incentives clerks already have to scrutinize petitions and briefs in opposition closely for reasons to deny cert. As Stephanie Francis Ward has explained, clerks routinely search for reasons to deny in order to avoid the embarrassing outcome of having recommended a grant in a case that the Court later dismisses as improvidently granted. Stephanie Francis Ward, *Clerks Avoid Getting Their DIGs In*, A.B.A. J., Mar. 2007, at 12.

ously represent their clients at the opposition stage can be overcome, a second challenge might be raised in the form of concerns over the Court's limited institutional authority to regulate the practice of law. After all, as a general proposition, the authority to regulate conflicts of interest and the bounds of ethical attorney behavior is left to the province of state supreme courts.¹⁸¹ As a consequence, perhaps the Supreme Court should not be responsible for sanctioning unethical conduct by lawyers at the cert stage because the Court has never recognized a broad "general ethics authority" under which federal courts would have an inherent authority to regulate lawyers in the first instance.¹⁸²

This institutional authority attack fails, however, in light of earlier decisions upholding the authority of federal courts to regulate lawyer conduct that affects the judicial function. As Professors Zacharias and Green explained, "[T]he United States Supreme Court has long maintained that, when necessary to enable the courts to operate efficiently, federal courts have broad authority to hold lawyers in contempt, require compliance with rules governing litigation, and prevent interference with court processes."¹⁸³ In *Link v. Wabash Railroad Co.*, for example, the Supreme Court upheld a district court's dismissal of a case without notice or a hearing because the plaintiff's attorney acted repeatedly to delay the proceedings, including a failure to attend scheduled pre-trial conferences.¹⁸⁴ The Court explained that the dismissal was appropriate as a manifestation of the federal courts' inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."¹⁸⁵ That same inherent authority easily could be interpreted to confer a power unto the Supreme Court to monitor the behavior of attorneys who have incentives to underhandedly oppose the Court's discretionary review.

181. See *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 226 n.2 (1967) (Harlan, J., dissenting) (citing state supreme court claims of the right "to promulgate and enforce standards of professional conduct drawn from the common law and the closely related prohibitions of the Canons of Ethics").

182. Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1313 (2003).

183. *Id.* at 1311-12.

184. 370 U.S. 626, 633 (1962).

185. *Id.* at 630-31.

To summarize, there are three primary mechanisms that might be used to remedy the conflict of interests between a respondent's attorney who wishes to argue in the Supreme Court and the respondent herself, who would rather see certiorari denied: private contract terms, enforcement of Model Rule 1.7, and targeted Supreme Court intervention. The first approach might be sufficient to protect the interests of sophisticated clients who have the ability to negotiate terms that will align their attorneys' interests with their own, but that approach will do little to protect unsophisticated, often indigent, clients from the adverse effects of the ethical conflict. The second approach—bar enforcement of Rule 1.7 so as to require every attorney representing a respondent at the opposition stage to disclose a conflict of interest to her client—suffers from the opposite kind of problem as it is too drastic a response to the problem presented. The third approach, however, in which the Supreme Court would identify deficient briefs in opposition (largely by incorporating this work into similar tasks that law clerks already perform) and potentially impose sanctions on guilty parties (such as mandatory referral to new counsel for the actual oral argument)—is preferable to bar enforcement of Rule 1.7, because Supreme Court oversight represents a measured approach that is more in line with the nature and scope of the ethical dilemma itself. Further, even if, because of institutional capacity or authority concerns, the court were reluctant actually to impose this sanction, the possibility that it might do so could be enough to properly incentivize attorneys.

CONCLUSION

It might be appropriate to end on a positive note, given that my purpose here is not to overstate the nature of the problem. By and large, the survey data¹⁸⁶ and the work of legal academics¹⁸⁷ suggest that respondents whose cases make their way to the Supreme Court are likely to receive quality representation

186. *See supra* Part II.A.

187. *See Lazarus, supra* note 5, at 1510–12 (describing the high quality work being delivered, particularly by Supreme Court specialists, on briefs in opposition to certiorari).

at the cert stage, notwithstanding the personal desires of their lawyers. As one survey respondent explained:

Attorneys face “conflicts” like this all the time While we may joke about throwing the client under the bus in order to get the experience, in fact in my 30+ years of experience I can honestly say that I have never seen anyone do anything other than what they thought was in their client’s best interest when it came to questions like this. I think it’s important for each of us to recognize our self-interest and then do what we are pledged to do as lawyers, which is to zealously represent our clients, and not our own interests.¹⁸⁸

The respondent’s confidence in the ethical purity of her colleagues’ behavior is reason for optimism. Indeed, the rise of the modern Supreme Court bar and experts in Supreme Court litigation, the frequent employment of these experts by clients seeking to oppose certiorari,¹⁸⁹ and the importance of reputational concerns for the experts all combine to create a situation in which there might be a fundamental alignment of interests between many attorneys and their clients at the opposition stage after all. That is to say, in the words of another survey participant (one who has argued nearly twenty times before the Court), for the Supreme Court expert who represents a respondent at the certiorari stage, “winning is getting cert denied.”

At the same time, it would be foolish to ignore the fundamental reality that high stakes make for the most pressing ethical quandaries. The survey evidence reveals this rather starkly: A majority of those with the greatest expertise in the Court believe that one-time attorneys face a conflict of interest while opposing certiorari,¹⁹⁰ and 17.4% have personally encountered a case in which they believe the conflict undermined the zealotry of a lawyer’s representation.¹⁹¹ Anecdotal stories suggest that this might be a problem as well.¹⁹² The harms produced by this ethical conflict, both for

188. Anonymous survey respondent #18.

189. See Lazarus, *supra* note 5, at 1511 (discussing the increasingly common use of Supreme Court experts as “ghost” writers of briefs in opposition).

190. See *supra* Table 3.

191. See *supra* Part II.A.3.

192. See, e.g., *supra* note 113 and accompanying text.

individual clients and for the Supreme Court as an institution, are of definite significance.¹⁹³

The question, then, is not *whether* the understandable desire that attorneys harbor to argue before the Supreme Court produces a risk of a conflict of interests between attorney and client, but rather *what*, if anything, we should do about it. Private regulation by well-informed clients might go some of the way toward mitigating the conflict of interest, but intervention by a third party such as the Supreme Court itself might turn out to be necessary—particularly to protect indigent clients who are at greatest risk of being represented by conflicted, one-argument-only attorneys for whom reputational concerns hold less sway.¹⁹⁴ More must be learned and much discussion remains to be had about the nature and severity of the conflict, of course, before any aggressive intervention is warranted. But with any luck, the data and arguments presented herein will represent the start—and not the end—of the conversation.

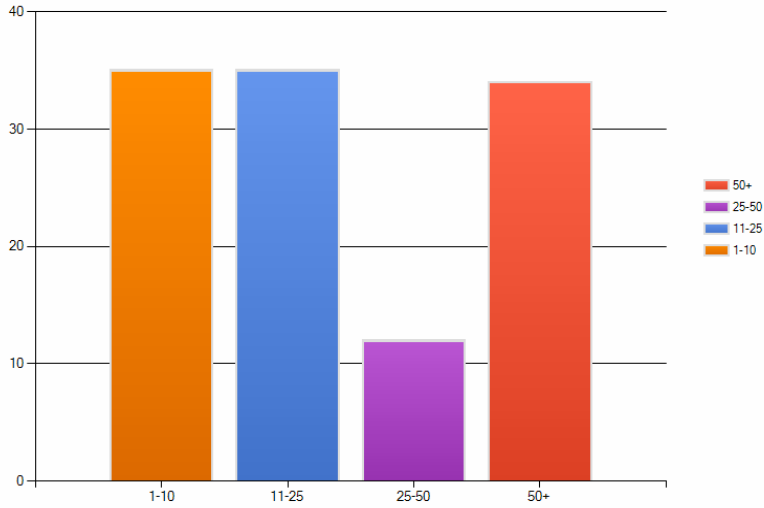
193. *See supra* Part III.

194. *See supra* Table 1.

Appendix

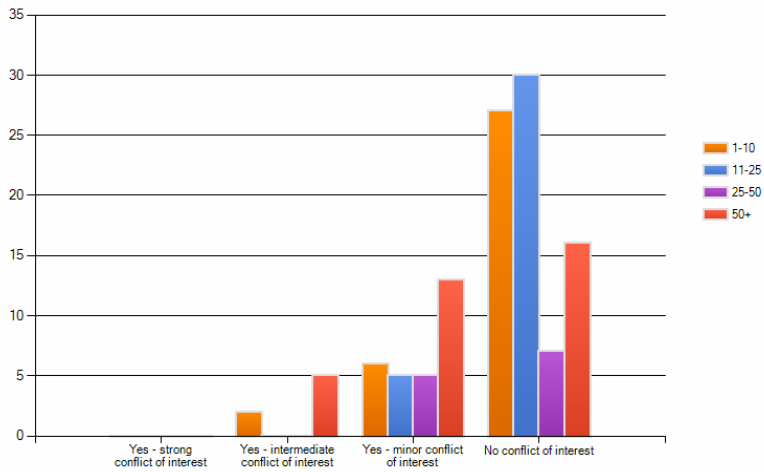
Question 1

Approximately how many Supreme Court litigation matters have you handled, including petitions for certiorari (whether granted or not), briefs in opposition, and merits cases?



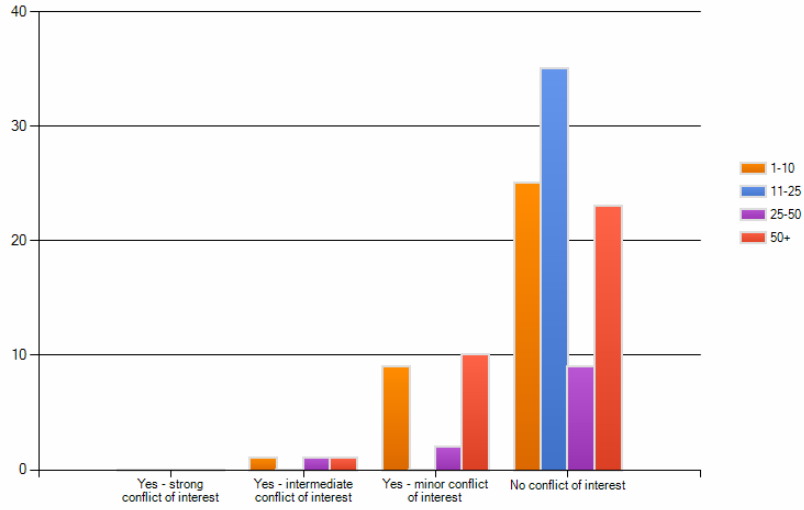
Question 2

Consider a case where cert has a reasonable chance of being granted, and where the attorney who represents the respondent at the opposition stage has never argued before the Supreme Court and is not likely to have a chance to do so outside of this case. In your opinion, does this attorney's personal desire to argue before the Supreme Court present a conflict of interest that may adversely affect the attorney's ability to zealously oppose certiorari on behalf of their client?



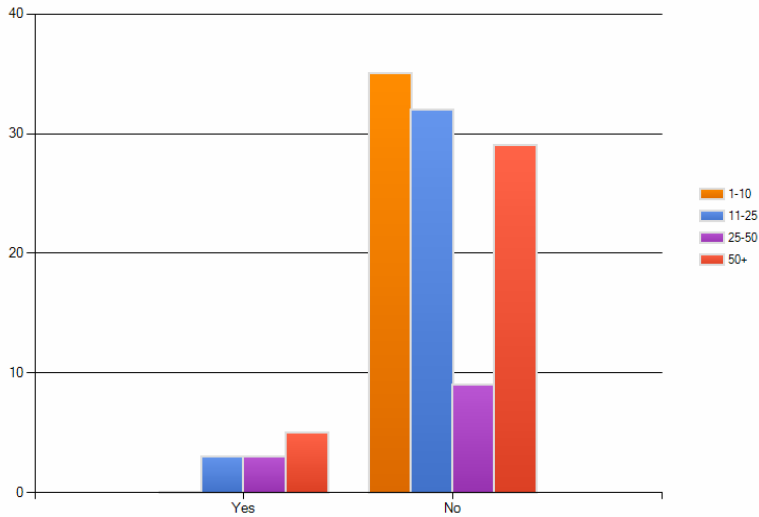
Question 3

Now consider a case where cert has a reasonable chance of being granted, and where the attorney who represents the respondent at the opposition stage has a regular Supreme Court practice. In your opinion, does this attorney's personal desire to argue before the Supreme Court present a conflict of interest that might adversely affect the attorney's ability to zealously oppose certiorari on behalf of their client?



Question 4

Have you ever encountered, either first-hand or by word-of-mouth, a situation in which you believe an attorney provided a less than completely zealous effort when opposing certiorari on behalf of a client due in some part to a personal desire to argue before the Court?



Question 5

(Optional) Can you share a story or case name where an attorney representing the respondent in a brief in opposition provided what you consider to be less than zealous representation on behalf of their client due to a personal desire to argue before the court? Or have you come across a different but similar kind of conflicts of interest in your practice? [23 total responses]

Question 6

(Optional) Please feel free to share any comments or questions you may have here. Also, if you are willing to be contacted regarding any of your responses in this survey, please place your name and email address in the field below. [49 total responses]