Introduction

The First Amendment rights of lawyers in the United States are ethereal. Although attorneys are largely responsible for the realization of the power of the First Amendment of the United States Constitution in protecting the rights of others, attorneys have failed to appropriately realize and invoke the power of the First Amendment to protect their own speech, association, assembly, and petitioning. But this failure affects far more than merely securing the individual lawyer's exercise of constitutional rights – for the First Amendment rights of lawyers, when properly defined, protect the integrity of the justice system itself.

Most lawyers don't realize that they lack First Amendment rights. They are aware of the Supreme Court's protection of lawyer advertising and proceed on the assumption that they possess the full panoply of First Amendment rights. Yet the caselaw does not bear that out in many regulatory and disciplinary contexts. Particularly, when attorneys are acting *as an attorney* in their role as an "officer of the court," attorneys cannot and should not assume that they can obtain First Amendment protection from regulation or professional discipline.

Yet it is precisely in that context – where attorneys engage in speech and association for the very purpose of securing client rights and obtaining justice – that First Amendment protection must instead be understood as indispensable. The lawyer's role in the justice system, the client's rights, and even justice itself can be undermined where attorneys lack First Amendment rights to speak and associate as lawyers.

Nevertheless, a dominant premise in modern state court cases – and one that members of the US Supreme Court endorse from time to time – is that attorneys voluntarily relinquished their First Amendment rights when they became members of a State's bar and swore to abide by regulations imposed upon them. Other scholars and courts – including, again, the US Supreme Court – purport to allow attorneys full First Amendment rights when acting as independent citizens, but deny them First Amendment protection when acting as an attorney or in a representative capacity.

The US Supreme Court has only amplified lower court confusion regarding attorney First Amendment rights. The Court's protection and recognition of attorney speech and association rights is near schizophrenic – widely vacillating between recognizing First Amendment rights for attorneys and refusing them any such rights. Moreover, the Court often fails to even acknowledge its own authority to the contrary. On the whole, conflicting cases are not distinguished; they are ignored. Scholarship as to the scope of attorney First Amendment rights, where it exists, similarly runs the gamut from the view that attorneys have full First Amendment rights to a complete denial of any such rights for attorneys. If there is a dominant consensus, legal scholarship would deny First Amendment rights to lawyers when acting in their role as attorneys. The result is that State Supreme Courts can selectively choose a line of cases to either protect or refuse attorneys' appeals to First Amendment protection. And where State regulations are under attack, refusal is a natural choice.

What is more, the practice of law is performed nearly entirely through speech, meaning the written and spoken word. This fact itself creates several challenges to recognizing and protecting attorneys' First Amendment rights. First, nearly all regulations on attorneys can be perceived as restrictions on attorney speech. Further, many restrictions on attorney speech are in fact essential to the just and proper functioning of the judicial system. Thus, courts and scholars have supposed that recognition of First Amendment rights for lawyers would either frustrate the United States justice system or would undermine the First Amendment itself – or both.

But the problems with recognizing lawyers' First Amendment rights are illusory and come from a misconception of the appropriate and powerful role that the First Amendment should play in protecting the rights of attorneys, their clients, and, perhaps most importantly, the integrity of the justice system. United States lawyers no longer practice in a local self-regulation bubble. Rather, attorneys are subject to regulation from state and federal legislatures, agencies, and even intergovernmental entities on a global scale. Such governing bodies can be subject to majoritarian pressures and may lack specialized knowledge regarding the proper functioning of the justice system. Because lawyers can only obtain justice for their clients through speech, regulators can undermine justice itself by limiting and punishing attorney speech made to that end. Thus, contrary to prevailing views, the core of First Amendment protection for attorneys should encompass speech made as attorneys – specifically, attorney speech invoking and avoiding government power in the protection of client life, liberty, and property.

Regulation of attorney speech, association, and petitioning surrounding litigation can also interfere with the proper functioning of the judicial power itself – as that branch of government is limited to adjudicating cases and controversies. Attorneys play a critical role in our system of justice by enabling the effective exercise of the judicial power. Regulation that undermines the ability of the attorney to bring and argue colorable cases equally undermines the power of the judiciary.

First Amendment protection, thus, must be shaped to safeguard the role of the attorney in the justice system. Such shaping has a two-fold beneficial effect: It recognizes and protects the First Amendment rights of attorneys and their clients, and it creates a constitutional protection for the essential role of the attorney in our system of justice from regulation that would undermine that role. The results are truly First Amendment rights *for* lawyers – defined both to fit their role and to protect that role.

Attorneys are the voice of justice. That is so not because all lawyers are altruistic warriors for the public good – they certainly are not. The legal profession includes its fair share of those who are jaded, crass, stingy, or self-centered, to identify only a few faults. Nevertheless, lawyers are still the voice of justice precisely because justice can only be achieved through their voice – by invoking and avoiding government power in protecting client life, liberty, and property and by enabling the judiciary to exercise its power to interpret the law and protect constitutional and other legal rights. If regulators can silence that voice, they can silence justice.

PART I

Understanding the Puzzle

1

Do Lawyers Have First Amendment Rights?

"They say that Justice is blind, but it took Municipal Judge Willard Dullard to prove that it is also DEAF and DUMB!" So began a leaflet written and distributed by Gene W. Glenn, an attorney in Ottumwa, Iowa. Glenn apparently believed, as most attorneys probably do, that he had a First Amendment right to free speech to publish his bitter brochure. But ultimately he found himself completely bereft of the First Amendment, and instead received a one-year suspension from the practice of law.[1]

In numerous contexts, lawyers have, like Glenn, discovered to their dismay that they lack access to the protective shield of the First Amendment as to their speech, association, and petitioning. Nevertheless, at other times courts assert their commitment to lawyers' First Amendment rights. The caselaw and commentary on the subject is nothing short of a morass. Yet distilling the primary theoretical bases both for rejecting and for recognizing attorney First Amendment rights is the first step to unraveling this puzzle and to framing a workable methodology that will protect both attorney First Amendment rights and the administration of justice.

THE CONSTITUTIONAL CONDITIONS THEORY

A century ago, Benjamin Cardozo stated what has become the traditional theoretical conception of attorneys' First Amendment rights – or, rather, the lack of such rights. "[T]he practice of law is a privilege burdened with conditions."[2] That is, attorneys voluntarily relinquish their First Amendment rights as a condition of the "privilege" of a license to practice law as a member of a State's bar. A more recent source for the theory – relied on by State Supreme Courts to this day – is the concurrence of Justice Stewart in *In re Sawyer*.[3] Justice Stewart said:

[1] *In re Glenn*, 130 N.W.2d 672, 675 (Iowa 1964).
[2] *In re Rouss*, 221 N.Y. 81, 84 (N.Y. 1917).
[3] 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring).

> If . . . there runs through the principal opinion an intimation that *a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct*, it is an intimation in which *I do not join*. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. *Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech*.[4]

The problem with this formulation is apparent from the opening line – it has no limits. Justice Stewart asserts that whenever there is "even-handed discipline for proven unethical conduct" – apparently any violation of a rule of professional conduct – a lawyer cannot "invoke the constitutional right of free speech" as a defense.[5] Stewart assumes that *all* "inherited standards of propriety and honor" or "ethical precepts" are "necessary in a calling dedicated to the accomplishment of justice" and thus must be complied with, even though they "may require abstention" from First Amendment rights. For Stewart, attorneys *cannot* "invoke the constitutional right of free speech" in the face of professional regulation, but instead "must conform" and "[o]be[y]."

This constitutional conditions theory is often undergirded by reliance on the oath to which an attorney is required to swear when admitted to a State's bar. In *Gentile* v. *State Bar of Nevada*,[6] Justice Rehnquist, speaking for four members of the Court, adopted the constitutional conditions theory, relying on the attorney's oath taken at admission. He stated:

> When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now *or may hereafter* be adopted by the Supreme Court . . ." *The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him* by the Supreme Court of Nevada.[7]

According to this variant on the constitutional conditions theory, attorneys are apparently irrevocably bound by their oath to abide by whatever rules of professional conduct or other attorney regulations are created by the State Supreme Court or bar – regardless of how patently unconstitutional or violative of First Amendment rights such a rule may be. And this divestiture of constitutional rights is achieved very simply – by requiring anyone who wishes to practice law to swear at their admission to obey the rules that the judiciary will impose upon them.

[4] *Id.* (emphasis added).
[5] *See also Gardner*, 793 N.E.2d at 429 (paraphrasing and concluding from Stewart's concurrence that "attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct").
[6] 501 U.S. 1030, 1081 (1991) (Rehnquist, J.).
[7] *Id.* (emphasis added).

Courts continue to require attorneys to promise compliance with rules enacted by the judiciary (even ones of dubious constitutionality) as a condition of obtaining or maintaining a law license. The Utah State Bar (of which I am an inactive member) adopted "Standards of Professionalism and Civility" in 2003, which, among other things, require attorneys to "treat all other counsel, parties, judges, witnesses, and other participants in all proceedings *in a courteous and dignified manner*" and "*avoid hostile, demeaning, or humiliating words in written and oral communications* with adversaries."[8] Even a First Amendment novice would recognize that the rule directly prohibits speech and thus enforcement may have constitutional ramifications.[9] Yet in June 2017, as part of the online annual registration with the Utah State Bar, attorneys were only able to complete and submit the registration if the attorney checked a box that said "Affirm that you are familiar with and *pledge to abide by* the Utah Standards of Professionalism and Civility." Attorneys could not complete the registration without checking the box (I know because I tried), which means that every attorney who wanted to renew their license for 2017–18 had to "pledge to abide by" the Professionalism and Civility standards. Under Rehnquist's view, that pledge exposes the attorney to discipline for violation of the standards while stripping the attorney of any First Amendment defense thereto.

An important, yet distinct, corollary to the constitutional conditions theory is that attorneys also have no speech rights for speech that they are enabled to engage in by virtue of their license to practice law. Thus, because attorneys could not have spoken as representatives of a client in court proceedings or filed anything on behalf of litigants prior to becoming attorneys, they have no preexisting free speech right that could be violated by punishing or restricting that speech as an attorney.[10]

The constitutional conditions theory has retained an astonishing staying power in the area of lawyer First Amendment rights in general – despite being rejected as unconstitutional in other contexts[11] and despite the comprehensive transformation

[8] Utah Standards of Professionalism and Civility ¶¶ 1 and 3 (emphasis added); *see also id.* ¶ 3 ("Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.").

[9] Chapter 14 discusses the constitutionality of civility codes.

[10] Bradley Wendel illustrated the corollary in the following hypothetical:

> Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is to no avail to claim that the disciplinary agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state because the lawyer *had no preexisting right to address a jury in a courtroom*. W. Bradley Wendel, *Free Speech for Lawyers*, 28 Hastings Const. L. Q. 305, 373–74 (2001) (emphasis added).

[11] The normal understanding of this idea is the exact reverse of what it is in the attorney context: It is the "unconstitutional conditions" doctrine, because it is unconstitutional to make relinquishment of a constitutional right a condition of obtaining a government-supplied benefit. *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989) (explaining that the unconstitutional conditions doctrine "holds that government may not

of First Amendment doctrine over the last century since Cardozo made his statement in 1917. Indeed, when Cardozo made his statement, the First Amendment had not even been incorporated by the Fourteenth Amendment as being applicable to states, and thus it was not even applicable to state bars and judiciaries, which would happen in 1925. Yet on March 6, 2018, the American Bar Association (ABA) issued Formal Opinion 480 regarding client confidentiality and seemingly embraced the constitutional conditions theory – explaining that a lawyer only has a "privilege of practicing law" and that a lawyer's free speech rights are "not without bounds." The ABA concluded: "Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs."[12] The ABA cited modern cases espousing the constitutional conditions theory, most of which arose out of the specific context of attorney speech that impugns judicial integrity – a context where the constitutional conditions theory has maintained particular resilience.[13] As the Missouri Supreme Court summarized: "[A]n attorney's voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary."[14] Importantly, the resilience of the theory in that specific context is not happenstance – it is an intrinsic piece of the misconception of the attorney's power and role in the United States justice system, as will be addressed in Chapter 4.

THE FIRST AMENDMENT IS INAPPLICABLE

While scholarly commentary has not entirely embraced the constitutional conditions theory, it fails to account for or persuasively counter it and generally offers an equally emasculated – and frankly misconceived – account of attorney First Amendment rights. Frederick Schauer argues that because attorney speech – especially when made as an attorney – is subject to a near "omnipresence of speech regulation," "the First Amendment has, … properly never been thought to apply" to "a vast array of lawyer and legal system activity." Thus speech made as a lawyer is (and should remain) "unencumbered by either the doctrine or the discourse of the First Amendment."[15]

One of the major problems with the constitutional conditions approach and Schauer's argument that the First Amendment is inapplicable is that the Supreme Court has repeatedly held attorney regulations unconstitutional as violative of

grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether").

[12] Am. Bar Ass'n, Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 480, at 4–5 (2018).

[13] *See id.* at 4 n. 18.

[14] *In re Westfall*, 808 S.W.2d 829, 834 (Mo. 1991).

[15] Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 Ark. L. Rev. 687, 694–95 (1997).