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WHAT JUSTICE BRANDEIS TAUGHT US ABOUT CONFLICTS OF INTEREST

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INTRODUCTION

Louis Dembitz Brandeis, as a Justice of the Supreme Court, is a god-like, mythic figure in the pantheon of American jurisprudence. As such a figure, though, he was not born of other gods without the flaws or perceived flaws of humankind. As in the case of many Justices, Brandeis was first a practicing attorney; a professional who confronted the daily nuances of conflict that inhere in one's legal practice. Brandeis's legacy as a visionary legal mind rests not only on his celebrated judicial works but also his reputed skill in both his corporate law and litigation practice. He was a real world lawyer who managed practical legal and business affairs on a day-to-day basis for several decades before becoming a jurist. This article examines the ethical bounds of his practice regarding client conflicts. More broadly, it reflects upon how the world looks at the role of lawyers, and how true legal statesmen can rise above the billable hour business for the public good, as did Louis Brandeis.

Throughout his life, Brandeis was a devoted American who took his civic duties seriously and who chose to use his status in, and his knowledge of, the law to promote social change. Brandeis had no theoretical perch from which he spoke; his words were powerful and commanded respect because of their pragmatic grounding. As such, he labored with

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Inspiration for this article, and most of the historical accounting on Brandeis's ethics, came from the following four sources: A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); and Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996).

the overlay of occasionally having publicly promoted policy and governance not always symmetrical with his clients' causes and the litigative stances he took on their behalf. Brandeis was, in many ways, a paradox: a statesman who guided legal and legislative reform in the public interest, while at the same time advocating for independence from the state in matters where the vindication of his clients' individual rights and interests were concerned.

The trajectory of Brandeis's life as a lawyer made him an uncommon force for change, but still he was a lawyer who both the business elite and the middle class wanted for corporate America at a time of great social unrest. The turn of the 20th century brought with it the second American industrial revolution and the rise of the Progressive Era, when people sought out government regulation of business practices to replace the laissez-faire mantra of the Gilded Age.[2] Brandeis embraced the reformist energies of the time and lauded the rise of industrial capitalism and protective legislation for the good of the people. For his own part, Brandeis progressed naturally from being a brilliant corporate litigator into his famed role as "The People's Attorney" as he gained notoriety in advocating social, political and legal upbuilding to fortify individual freedom and progress. To his profession he gave his best talents, being an active and aggressive practitioner, a tireless legal scholar and ultimately a Supreme Court jurist. He was a man ever true to himself and, critically here, always an independent contractor, never bowing as a slave to either a cause or a client. He led by example and was a provocative figure indeed.

BRANDEIS'S SUPREME COURT NOMINATION

On January 28, 1916, President Woodrow Wilson nominated Brandeis to the nation's highest court. It has been said that few episodes in American history shed as much light in their era as that nomination.[3] The unanimity of support for Brandeis by independent progressives was matched only by the unanimity with which financial capitalists and conservative non-reformists opposed the nomination. Both sides recognized the struggle that was upon them, and they viewed it as nothing less than a battle for the "soul of the Supreme Court."[4] Thus, when it came to his confirmation by the United States Senate, Louis Brandeis faced an unparalleled uproar from his opponents in the legislature. This was hardly surprising, given his intertwining role as an advocate for and against both industrial expansion, in the form of "Big Business," and political constituents with deep

2. For a relevant synopsis of this turbulent age, *see* JACKSON LEARS, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA 1877-1920, at 1-12 (2009).

3. *See* UROFSKY, *supra* note 1, at 437.

4. *Id.* at 438.

pockets. Indeed, Brandeis's fiercely independent and freewheeling nature commanded nothing less.

The political opposition did not primarily aim its arrows at the socio-legal (and potentially partisan) agenda that Brandeis might choose to advocate once on the Court, as has become the standard practice with contentious judicial nominations since the days of Robert Bork.[5] Rather, in Brandeis's case, opposition leaders from both sides of the political aisle focused on problematic ethical quandaries that confronted Brandeis during the course of his legal career, both in the clients and causes on whose behalf he advocated.

By all accounts, the opposition to President Wilson's nomination of Brandeis took on a life of its own, even by modern-day measures. At the time of his nomination, it was not the practice of the Senate or its committees to hear testimony from Supreme Court nominees.[6] For Brandeis, a subcommittee of the Senate Judiciary Committee chose to conduct its own investigations, often in executive session and with scant record of their deliberations. The committee's Brandeis Hearings, as they came to be called, began on February 9, 1916 and went on for an unprecedented four long months. During that time, numerous witnesses were called for and against the nominee, but Brandeis himself was not permitted to testify at or even attend the hearings before the committee that was investigating his fitness for appointment to the Supreme Court. At least on some level, Brandeis was still able to keep up with and "influence" the committee's deliberations, by sending telephone and telegraph messages to the witnesses appearing on his behalf "in an effort to rebut the staunch opposition to his nomination."[7] It was not until June 1, 1916 that Brandeis was finally confirmed by the Senate, in a 47 to 22 vote, pushed through by Democrats who eventually voted along party lines.

Some might argue that the Senate's investigating committee scrutinized Brandeis so severely by not because the issues raised against him

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5. In the candid words of Sen. Ted Kaufman (D-Del.), member of the Senate Judiciary Committee, during a June 26, 2009 interview, "[t]he big difference was, after [Robert] Bork, the process became like the Super Bowl." *See* David Ingram, *Inside the Supreme Court Confirmation Process: Q&A With Sen. Ted Kaufman*, NAT. LAW JOURNAL, June 29, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202431824633. Further, Sen. Orrin Hatch (R-Utah) stated that "[j]udicial appointments have become increasingly contentious." *See The Nomination of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the* Judiciary, 111th Cong. (2009) (statement of Sen. Orrin Hatch, Member, S. comm. On the Judiciary), http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=51. Brandeis's confirmation hearings may represent the one exception to this otherwise generally true statement.

6. *See* History of the Senate Committee on the Judiciary, *available at* http://judiciary.senate.gov/about/history/index.cfm.

7. *Id.* Brandeis also sent long letters to his law partner Edward McClennen, who appeared before the Committee as the "field manager" of the confirmation process, explaining his actions in particular matters. *See generally* UROFSKY, *supra* note 1, at 443-44.

were meritorious, but rather because these issues were mere smokescreens fomented by the anti-Semitism of the day. The nomination of the first Jew to the Supreme Court no doubt innerved prejudices in some. Others might opine that the senatorial displeasure of Brandeis was more the product of powerful political ties and undue friendships with the interests of Wall Street, which were by then generally anti-Brandeis. Notably, though, scholars generally agree that President Woodrow Wilson nominated Brandeis not because of his religion or politics but because of Wilson's deep respect for Brandeis's intellect and independence of thought. President Wilson was a staunch supporter of judicial independence and once wrote the government "keeps its promises, or does not keep them, in its courts. For the individual, therefore, who stands at the centre of every definition of liberty, the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts."[8]

Nonetheless, and irrespective of whether a religious or socio-economic bias caused the Senate's "strict scrutiny" (to use the language of today) into Brandeis's past, the raw fact is that his conduct as an attorney did indeed raise nettlesome ethical questions deserving of analysis. These questions are considered not in an attempt to unfairly and ahistorically judge Brandeis, but rather to learn from this great man through introspection and debate. Brandeis himself would likely have approved of such an effort, given his penchant and lifelong spirit for provoking thought and promoting dialogue. In reflecting upon Brandeis's views on free speech, which ultimately proved seminal in advancing First Amendment jurisprudence, a leading Brandeis scholar opined that Brandeis's goal was always to spark debate. Brandeis approved of open discourse to make people with radical ideas challenge the mainstream and to make people think about why they held dear the values they did and to not be complacent about them.[9] The following represents an attempt to do just that.

To soften the perceived motives of his attackers and focus on the "lessons learned," this article sets aside the issue of whether the scrutiny of Brandeis was politically or religiously motivated and considers solely whether his legal conduct addressed during the hearings would be objectionable through the prism of today's ethical mores and professional codes of conduct. Did Brandeis behave ethically as a practicing attorney with ongoing duties to his clients? Would his behavior be challenged as being professionally irresponsible or unethical by today's standards? It is not the intent of the author to retrospectively imbue the lionized Justice with any maladroitness. Instead, this article seeks to consider how we as lawyers

8. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 17 (1911).
9. UROFSKY, *supra* note 1, at 637-38.

(including those of us who do not aspire to a judicial appointment) can learn from and modify our conduct as legal advocates when faced with the conflicts that faced Brandeis. The issue of questioning the ethical bounds of our behavior is a perennial one for lawyers, as a self-governing bar that both creates and enforces our own code of ethics for and against ourselves as a whole. Stated more eloquently, in the words of Scripture, "[f]or in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you."[10] The piece proceeds in this vein and with the goal of learning from Justice Louis Brandeis's experiences, both good and bad.

There were several attacks made about Brandeis's legal ethics in the course of his legal practice during his confirmation hearings. This article focuses on the one that consumed the most time and focus of the Senate committee: the issue of former clients and what we now term "situational" conflicts of interest. This issue involves potential breaches of client confidence and, as such, implicates myriad quintessential ethical considerations.

THE TALK OF THE TOWN: THE BRANDEIS HEARINGS

The issue of client conflicts dominated Brandeis's confirmation hearings throughout the spring of 1916. Prior to his nomination by President Wilson, Brandeis had been a named founder of a New England law partnership with his law school classmate, Samuel Warren, for thirty-seven years. Brandeis successfully positioned himself as an expert legal strategist on commercial matters at a time of great turbulence for American business. When the "great merger wave" created megacorporations in industries ranging from steel to petroleum to tobacco, Brandeis remained circumspect about the nationalistic fervor for bigness.[11] In the midst of cataclysmic social change, he ventured to reconnoiter the emerging business and legal landscape for himself, by keeping apace of complex industry developments and by publicly expatiating on the ways in which the law needed to adapt to keep up. As a result, corporate clients valued Brandeis's precociously judicious spirit and relied on him for sage business advice as well as legal counsel.

Brandeis had an innate sense of enterprise that served him well in practice, yet was considered distasteful to some politically influential Boston Brahmins during that tumultuous period of reform. Perhaps because of the inescapable plaiting of public and private issues that occurred as Brandeis advanced contrasting social policy and client positions in public

10. *Matthew* 7:2.

11. *See* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865-1900, at 22-24 (2008).

fora, he faced fierce accusations in his confirmation hearings that he had violated legal ethics in his law practice. Of all the ethical fitness issues the investigating committee considered, the two largest debates focused on former client conflicts of interest; the one that consumed the most committee floor time was the matter of United Shoe Machinery Company—one of Brandeis's largest former clients.

The United Shoe Machinery Company ("United") was formed at the end of the 19th century by a consolidation of several smaller companies. One of the groups that became a large shareholder in United was Brandeis's client. Brandeis subsequently became a director of United and also served United as legal counsel. The fact that Brandeis had to buy some shares of common stock in United to become a director was the first, and perhaps only, time Brandeis violated his own cardinal rule not to invest in a client. One Brandeis historian viewed this action itself as the single largest lapse of judgment on Brandeis's part that incited the most acrimony at the hearings; it was the proverbial yanking of one piece of string that began the whole ball's unraveling.[12] On this view, everything that Brandeis did subsequently was done with the personal knowledge he gained about United (and its putatively monopolistic business practices) from having sat on the company's board. The grave implications of this fact will soon become clear.

United held several patents on shoe-manufacturing equipment. Prior to the enactment of the Sherman Anti-Trust Act, which Congress passed in 1890 "to protect trade and commerce against unlawful restraints and monopolies,"[13] United and its predecessors had been leasing their patented shoe machinery for use by shoe manufacturers. The lease agreements contained "tying" clauses, which required a lessee to use the patented machinery only in conjunction with other patented machinery. This gave the lessor considerable market advantage and control.

At first blush, United's practice of precluding its customers (the shoe manufacturers) from using third-party machinery—or put another way, United's practice of forcing shoe manufacturers to use only United products, if they used any—seems plainly anticompetitive. However, it is important to consider the prevailing law at the time. In 1895, the Supreme Court refused to apply the Sherman Act to the American Sugar Refining Company, which controlled a majority of the manufactories of refined sugar in the United States and had a "practical monopoly" of the business,

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12. *See* UROFSKY, *supra* note 1, at 310, 451 (noting that Brandeis's allies "understood from the beginning" that the United matter would be the most damaging of all the ethical charges leveled against Brandeis in his confirmation hearings); *accord* TODD, *supra* note 1, at 151 (noting that Brandeis's camp recognized the United matter "as the stickiest part of the combined campaign to defeat the nomination").

13. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209, 209 (1890) (current version at 15 U.S.C. § 12(a) (2002)).

on the grounds that Congress had the ability to regulate commerce but not manufacturing.[14] In fact, the conservative Court opined that Congress's power to regulate commerce did not extend to the regulation of manufacturing in a host of cases throughout the late 1800s and early 1900s. It would be years before the Court shifted and, in the dawning of the New Deal era, recognized that the effects of many kinds of intrastate activity upon interstate commerce made them a proper subject of federal regulation. The Commerce Clause was, in the early 1900s, a mere shadow of its current self.

Against that backdrop, United operated its lease system relatively safely under the Supreme Court's narrow reading of the antitrust laws at the time Brandeis served as its counsel. The issue was not without debate in the legislatures, however. In 1906, a bill was introduced in the Massachusetts Legislature to do what the Sherman Act was not accomplishing and to restrict tying clauses. At United's request, Brandeis reluctantly agreed to appear before the legislature and seek the defeat of the bill that would have outlawed the tying clauses in United's contracts with shoe manufacturers.[15] In his appearance, Brandeis identified himself as both a director and shareholder of United. He also billed the client and received payment as counsel for his appearance and for submitting a brief on the matter.

At the time of his testimony, Brandeis was also counsel to a number of shoe manufacturers. The conflict between his advocacy for United and his representation of the other shoe companies—all licensees of United—had been "waived." Indeed, the shoe manufacturers had consented to the dual representation as part of their agreement with United that they would not support the legislation in exchange for receiving a favorable rate on United's products should the contracts remain enforceable. Setting aside the voluntary nature and reasonableness of that waiver, Brandeis's decision to appear before the Massachusetts legislature in defense of practices that placed significant restraints on both the manufacturers and competing shoe machineries' right to do business was both legally and ethically debatable.

This was not the issue, however, that got Brandeis into trouble with the Senate's investigating committee. After Brandeis appeared before the Massachusetts legislature for United, and helped prevent the state legislation from becoming law, he continued to monitor the developing jurisprudence and became doubtful about the legality of United's tying arrangements after reading a case that cogently laid out the grounds by which the

14. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 238 (1899); *see* United States v. E. C. Knight Co., 156 U.S. 1 (1895).

15. For a discussion and first-hand sources relating to the United matter, see ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 215-224 (1946).

enforcement of patents could constitute an unlawful restraint of trade.[16] Brandeis called this opinion to the attention of United counsel, expounded his concern on the issue, and later that same year tendered his resignation, first as a director and then as counsel for United. Notwithstanding Brandeis's resignation and his expressed opinion, United and its successor corporation continued to employ various tying arrangements in its business.[17]

Meanwhile, in 1907, shortly after Brandeis had ceased working for United, the Massachusetts Legislature enacted a law making such leases and tying clauses illegal. Brandeis had no role in that legislation and for some years thereafter he refused—on ethical grounds—requests by his remaining shoe manufacturer clients to assist them in opposing United's increasingly sophisticated leasing practices. Indeed, in 1908, Brandeis was quoted as saying he still believed that the operations of United were "on the whole beneficial to the trade," while alluding that his reservations with the company's practices had to do with their effect in the future.[18]

In 1910, after the Supreme Court had begun to embrace a broader reading of the Sherman Act, Brandeis advised another shoe machinery manufacturer that tying clauses were illegal. Brandeis's opinion was based on the 1909 Supreme Court holding that a combination of wallpaper companies had violated the Sherman Act by forcing exclusive patronage to the conglomerate and by raising wholesaler and consumer prices, which was detrimental to the public interest.[19] Small wonder this reasoning spoke to Brandeis—ever the statesman—who felt a strong duty to advocate for whatever he believed to be in the public's best interest.

The following year, Brandeis undertook the representation of the Shoe Manufacturers' Alliance, a consortium of shoe manufacturers opposed to United's market strategies and control. The federal government then commenced an antitrust prosecution of United, in which Brandeis had no direct role. However, between 1911 and 1913, at the request of his client Shoe Manufacturers' Alliance, Brandeis testified before several congressional committees and federal agencies in support of legislation that later became the Clayton Act. In his appearances, Brandeis cited United's continued oppressive behavior and coercive market practices as evidence of the need for changes in the antitrust laws.[20] He reasoned that United's practices were hindering the Shoe Manufacturers' Alliance from passing

16. *See* Ind. Mfg. Co. v. J. I. Case Threshing Mach. Co., 148 F. 21 (E.D. Wis. 1906), *rev'd*, 154 F. 365 (7th Cir. 1907).

17. These eventually formed part of the landmark antitrust decision, United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam).

18. *See* UROFSKY, *supra* note 1, at 312.

19. *See* Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909).

20. A colorful historical anecdote illustrates the glacial rate of acceptance of such change by corporate America. In 1912, Andrew Carnegie made the following breezy statement to a congressional committee that was investigating U.S. Steel: "Nobody ever mentioned the Sherman Act to me, that I can remember." *See* BEATTY, *supra* note 11, at 220.

on to the consumer some of the price savings that could be realized once competition was properly restored. That sequence of events—first counseling United to the legality of its practices and then acting for United's competitors in challenging United's practices—is what inspired the harshest attacks on Brandeis's character by Republican senators during his nomination debacle.

The Senate's investigating committee viewed Brandeis's behavior as bedeviled by conflicts. The gravamen of the charge was that Brandeis acted against his former client United, having previously acted for that client in a related matter. The president of United, Sidney Winslow, took the witness stand before the committee for over five hours and virtually crucified Brandeis. Winslow testified that Brandeis helped devise the company's business practices, abandoned his client, and, finally, used his inside knowledge of his former client's business to attack it. He accused Brandeis of "unprofessional conduct and of conduct not becoming an honorable man" and excoriated him for having "attacked as illegal and criminal the very acts and system of business in which he participated, which he assisted to create, and which he advised were legal . . . ." He further accused Brandeis of making false and misleading statements regarding United's business and stated that "[t]he lease system which he has attacked is the same lease system which he previously approved of so heartily . . . ."[21]

Unwilling to disclose confidential client information, Brandeis defended his position in tightly conscribed written statements. Brandeis framed his retort in largely conceptual and ideological terms. No doubt some saw this as equivocating. In his writings put forth by proxy, Brandeis addressed the inherent difficulties of the "independent lawyer" struggling to break free of a former client's coercion. Those doing moral bookkeeping at the Brandeis hearings might well have believed by that point, if not earlier, that Brandeis was speaking out of both sides of his mouth about concepts of free market competition and industrial injustice as it best suited his client du jour.

Later, when the floor became open to witnesses supporting the nominee, some Brandeis advocates tried to spin the situation for the better. Numerous witnesses, including former clients, defended Brandeis's unorthodox litigation practices. They argued that his ability to be flexible and amend his views with changing circumstances was a judicious virtue deserving of approbation, not condemnation, particularly in the context of consideration for a judicial appointment. For example, one witness testified: "If there is one characteristic of Mr. Brandeis'[s] thinking, it is his capacity to see both sides; it is his capacity not only for judicial statement,

21. *See* TODD, *supra* note 1, at 111.

but for judicial thought."[22] Other testimony echoed these sentiments and argued that Brandeis's adaptability of mind would help apply the law to the ever-changing realities of modern industrial democracy.

The unsympathetic objectors at the Brandeis Hearings constructed some fairly tendentious arguments in an attempt to sustain their objections to his appointment. As the *Wall Street Journal* stated, "[e]very technical legal safeguard has been thrown around Brandeis'[s] character at the hearings . . . It is as though he were on trial for some offense and his life or liberty were at stake."[23] Because so many of the criticisms weren't tethered to any enforceable regulation or rule of professional conduct *per se*, they simply took aim at the general unseemliness of Brandeis's behavior. But despite what shrill polemicists were saying about his legal ethics, the truth is that the seismic shift in the law between the time when Brandeis represented United in 1906 and when he opposed United in 1911-1913 would seem to have effectively precluded any actual and direct conflict with a former client. Legitimate questions remained though, about whether the matters on which Brandeis switched sides and views were still substantially related, at least in spirit, so as to mar Brandeis's credibility in acting against United's interest in the context of its Brandeis-advised licensing practices.

If Brandeis was to be reprimanded for providing legal representation on antitrust issues to the Shoe Manufacturers' Alliance, what message were the senators sending him, as a practicing member of the legal profession? Must lawyers refuse to embroil themselves in any representation that could even potentially conflict with an earlier representation, in the broadest terms possible and irrespective of a volte-face change in the law? That hardly seems reasonable. So what is one to do with this set of facts; what can lawyers learn from the United matter, to better understand their ongoing ethical obligations to former clients? This article provides a brief overview of this area of law as it stands today, not to judge Brandeis's legal ethics under modern day scholarship, but rather to facilitate the analysis and takeaway considerations of Brandeis's dilemma for current practitioners.

ETHICAL OBLIGATIONS TO FORMER CLIENTS

As any attorney with his or her own book of business knows, perhaps the most vexing part of law firm practice is the inevitable problem of client conflicts of interest. Whether a lawyer can take on a new client de-

22. *Id.* at 153 (quoting testimony from Henry Moskowitz, Clerk of the Board of Arbitration covering the New York garment industry, which had benefited from Brandeis's arbitration system).

23. *Brandeis Losing Votes for Supreme Court Justice*, WALL ST. J., Mar. 8, 1916, at p. 7.

pends on what work that lawyer and other lawyers in the firm are doing and have done in the past.

The prevailing wisdom is that a conflict of interest arises when a lawyer's professional judgment is compromised, or appears to be compromised, due to contrary influences or diverging interests between clients. A conflict can also arise when there are competing interests between the lawyer and the client, e.g., if the lawyer has a financial interest that could affect his client loyalties.[24] Legal ethics rules governing conflicts of interest apply to individual clients and corporate clients alike and are very general, *e.g.,* American Bar Association ("ABA")'s Model Rules of Professional Conduct 1.7 (for concurrent conflicts); 1.8 (for specific conflicts); 1.9 (for successive conflicts); and 1.10 (for imputation of conflicts). These rules aim to provide workable guidelines to help lawyers establish a system for siphoning out clear conflicts and for recognizing when conflicts may be permitted after appropriate disclosure and voluntary client waiver of any objection.

Practitioners are often frustrated by the open-ended nature of these Model Rules. The Rules seem to lend themselves more to academic study by than to actual practical application to assist and benefit practicing lawyers and their clients in the quotidian environs of the law. In the deadpan words of today's Chief Justice Roberts: "…the law professors aren't the ones who deal with this question on a day-to-day basis and have to worry about going to jail."[25] This article considers the tension between an important client conflict rule's intent and its practical implications, as exemplified in the controversy involving Justice Brandeis.

The basic law is that after one client relationship terminates, a lawyer has continuing fiduciary duties with respect to confidentiality, loyalty, disclosure and acting in the former client's best interests within the scope of certain matters that cannot be rescinded on behalf of a new client. At the same time, a lawyer has the duty to offer a prospective client legal representation unfettered by conflicts from the lawyer's prior representation of clients with interests in matters adverse to the prospective client and prospective matter.

Rule 1.9 of the ABA Model Rules deals with a lawyer's professional obligations to former clients. It sets forth the legal standard under which a practicing attorney should operate. The Rule states that a lawyer "who has *formerly represented a client* in a matter shall not thereafter represent

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24. *See, e.g.*, United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (lawyer was disqualified due to an interest in another client's retainer, which created an actual conflict of interest and violated the defendant's Sixth Amendment right to effective assistance of counsel). A conflict could also arise when the lawyer has some form of ownership interest in the client being represented, e.g., recall when Brandeis was both counsel for and a director of United.

25. *See* Transcript of Oral Argument at 39:7-10, Mohawk Indus. Inc. v. Carpenter, 130 S. Ct. 599 (2009) (No. 08-678).

another person in the same or a *substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client" unless the former client consents.[26] The italicized language highlights the three questions for representation (or disqualification): Is there a former client; is the new matter substantially related; and are the former client's interests materially adverse to the prospective client's interests.[27] All three of these questions must be answered in the negative before the lawyer can bring the new client and matter in the door.

The "substantial relationship test" in Model Rule 1.9 also appears in several counterpart state ethics rules governing former client conflicts. Generally, the test serves as a proxy for court inspection.[28] Most courts now recognize that conducting a factual inquiry into whether confidences had actually been revealed should be avoided whenever the rule's presumption can be utilized due to the unsatisfactory nature of the potential evidence.[29] The inference behind the rule boils down to a question of whether the lawyer could have obtained confidential information in the first representation that would have been relevant in the second representation. If the answer is yes, the lawyer or law firm cannot represent the second client, in the matter in question, unless the former, affected client gives informed written consent. It is of no moment whether the lawyer or law firm would or could use the information. In the candid words of Judge Posner, "[f]or a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar—by… denying that improper communication has taken place or will take place…."[30]

While a lawyer's conflicts are ordinarily imputed to the lawyer's firm, based on the presumption that "associated" attorneys share client confidences, there is an exception to this presumption. The ABA now permits the presumption that confidences were revealed to be rebutted in some circumstances through the use of certain institutional mechanisms at law

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26. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2009) (emphasis added) (consent must be informed and confirmed in writing).

27. The origin of the "substantial relationship" test is generally credited to Judge Weinfeld's opinion in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953) (explaining the policy reasons why a substantial relationship test exists for former clients but not current clients).

28. The test was formulated so that the court need not make the inappropriate inquiry into whether actual confidences were disclosed. *See id.* at 269 ("To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship.").

29. *See, e.g.*, Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983) (noting that the only witnesses would be the lawyers whose interest "in denying a serious breach of professional ethics might outweigh any felt obligation to 'come clean.'").

30. *Analytica, Inc.*, 708 F.2d at 1269.

firms—like screens and ethical walls. This is limited though, and generally only applies when a lawyer switches firms and an adversary of a client of that lawyer or his former firm then retains the new firm. The new firm can avoid disqualification by imputation, under ABA Model Rule 1.10, by showing that protective steps were taken to prevent confidences from being received by lawyers in the new firm handling the new matter. However, not all states permit the uses of screens, while other states recognize screening mechanisms only to avoid disqualification but not as an ethical matter.[31] This ethical wall exception is therefore limited and would not have applied in Brandeis's situation, i.e., it could not have saved Brandeis from the allegation that he himself used his former client's privileged information against that client in a substantially related matter, i.e., the business and licensing practices of United.

The nature of legal practice today bespeaks the need for law firms to deal with client conflict issues prospectively and long before anything rears its ugly head in a courtroom. Nowadays, most large firms require that their clients sign waivers upon retention; these waivers seek to avoid future conflicts by having the client waive certain of their rights in advance. While these sorts of prospective or advance conflict waivers were once rarities, they are now commonplace.[32] An advance waiver should identify the potential opposing party or industry, the nature of the likely subject matter in dispute, and permit the client to appreciate the potential effect of the waiver.[33]

Most clients are familiar with the process whereby once they express interest in retaining a law firm, they receive an engagement letter detailing some of the basic terms upon which the firm will provide legal services. While some clients or lawyers might prefer less formal methods of confirming the terms of the lawyer-client relationship, it is considered good ethical practice and is infinitely useful to have a letter that lays out the terms of engagement—both to the lawyer and to the client—prior to beginning work on the matter. Moreover, the law in some states now requires such engagement or retention letters before beginning a client representation.[34]

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31. *See, e.g.*, Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) (explaining that not every violation of a disciplinary rule requires disqualification because disqualification is only warranted where "an attorney's conduct tends to taint the underlying trial," while ethical violations can be left to federal and state disciplinary mechanisms. (quoting Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)).

32. Both the ABA and the American Law Institute have formally approved the use of advance waivers. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993); RESTATEMENT (THIRD) OF THE LAW GOVERNING *Lawyers*, § 122, cmt. d (2000).

33. *See* City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219, 243 (W.D. Mich. 2000).

34. In New York, for example, engagement letters are required as an ethical matter under New York Rule of Professional Conduct 1.5, and that rule in turn makes reference to a state rule that makes

Typical language in a client engagement letter grants written permission for the law firm to be adverse to that client in all but the same, or substantially the same, matter. Some waiver language may grant permission for the firm to represent future clients adverse to present clients in related areas under certain conditions but usually excludes direct litigation against the current or former client. Other waiver language may grant permission for the firm to represent future clients in substantially related areas only after the present client matter is completed. The enforceability of some of the more extensive contractual provisions is often temporally limited and may be either expressly or inherently limited in the context of binding large corporate families. Courts have generally held that the permissibility of advance waivers depends on how specific the waiver is in terms of what it covers and the sophistication of the client.[35] The danger of broad and unlimited waiver language is that it may not be sufficient to establish that full disclosure was made, and that the client made an informed waiver at the time. This form of misstep can come back to bite counsel by resulting in the disqualification of an attorney or an entire law firm in a future representation of an adversary of a client in a different matter.[36]

Clearly, advance waivers are not panaceas as the contractual language can vary from client to client, and some clients may refuse to waive any rights in advance.[37] Whether the law firm will still agree to act for the client, if the client refuses to sign its "standard" waiver provisions, depends on a host of factors that includes the amount of business the client brings to the firm and the history of the client's relationship with the firm. Moreover, corporate clients have their own ways of "conflicting out" law firms by spreading work around to a myriad of outside counsel so as to prevent them from taking on future work against that client.[38]

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most fee arrangements subject to a writing requirement. *See* N.Y. COMP. CODES R. & REGS. Tit. 22, § 1215.1.

35. For example, the court in Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 582-84 (D. Del. 2001) found that Apple was sufficiently informed about the conflict in granting a full waiver and not merely a transactional waiver, based on the extent and nature of high-level discussions the firm had with Apple's in-house counsel.

36. *See, e.g.*, Concat LP v. Unilever, PLC, 350 F.Supp.2d 796, 820 (N.D. Cal. 2004) (holding that blanket waiver language in an engagement letter was not adequate to demonstrate advance informed consent, noting that: "(1) the terms of the waiver are extremely broad and were evidently intended to cover almost any eventuality; (2) its temporal scope is likewise unlimited; (3) the record contains no evidence of any discussion of the waiver; (4) the waiver lacks specificity as to the conflicts that it covers and effectively awards [the law firm] an almost blank check . . .").

37. *See, e.g.*, Zusha Elinson, *Wet Blankets: GCs Don't Waiver*, THE RECORDER, June 9, 2008 (discussing the trend of Silicon Valley technology companies to balk at engagement letters by outside counsel requesting up-front, blanket unconditional waivers of future conflicts of interest).

38. In the related "self-help" of interviewing many law firms, the ABA Model Rules provide a screening mechanism worth noting. Model Rule 1.18 permits lawyers or law firms who have received certain "disqualifying information" from a client seeking representation to still represent a client with interests materially adverse to the prospective client in a substantially related matter under certain

Notwithstanding this somewhat aggressive and "self-help" form of pushback, tacit concerns remain about adhesive waivers and the associated risk of breaching an attorney's duty of loyalty to the original client. If litigation is war, veteran lawyers know to think of former client conflicts as tripwire grenades on the battlefield.

It is hardly surprising that even the best of lawyers can find themselves muddling these ethical obligations when trying to be a good rainmaker and get new clients in the door. None of us is immune to the temptation to just fix the problem (if hope against hope it arises) later and then to ask for forgiveness instead of seeking permission. As global law firms continue to increase in size, many attorneys view the practice of securing advance waivers in engagement letters as a virtual *sine qua non* for bringing in new business. With potential conflicts arising from former clients in particular, the enticement to gloss over ties to past relationships to present oneself or one's firm as being available for future opportunities can be hard to resist. In the workaday business that the legal profession has become, we may wonder how effective our Model Rules of Professional Conduct have been in providing actual, rather than just aspirational, guidance to avoid ethical lapses in attorney conduct of the sort that faced Brandeis.[39]

LESSONS LEARNED FROM BRANDEIS'S BEHAVIOR

Bringing the issue back to Brandeis, what was he to do when faced with acting against United's interests and supporting the antitrust regulations that were coming of age? Should he have had the improbable "foresight" to have refused to represent United in its initial dispute with the shoe manufacturers, or should he have not accepted the written conflict waiver by the shoe manufacturers and instead refused them as a client? Hindsight is a powerful analytic tool to wield, and what may seem ill-founded after the fact might well have seemed laudably sagacious at the time. If it is possible to parse apart the politics from the facts, was the Senate committee voicing a valid ethical objection to the arguably aggressive legal practice of taking on clients whose interests are nonaligned with former clients? While modern ethics rules can inform the question, they may fall far short of providing any "right" or even satisfying answer.

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conditions. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(d)(2) (2009). The intent of this rule is to allow a client to gain enough information to screen for conflicts before taking on the new matter, but it can also help guard against client attempts to conflict out law firms prematurely. *See also* Rule 1.0(k) (requirements for screening procedures). Many states recognize this screen.

39. On this note, one Brandeis biographer opined that the ABA's ongoing attempts to provide guidance on client conflicts have failed because: "[a] profession used to seeing its members primarily as advocates for their clients' interests has trouble defining a practice that seeks fairness for all parties." *See* UROFSKY, *supra* note 1, at 68.

A lawyer must not act against a former client when the lawyer has relevant confidential information about that client or the matter from an earlier retainer that may be used against the former client. It does not matter whether the information is used or not. The appearance of impropriety is sufficient to bar the future representation, unless the former client consents. Even if the lawyer didn't actually obtain any relevant or confidential information, the fiduciary duty of loyalty to the former client extends the lawyer's prohibition to not act in the *same or a substantially related matter* adversely to the former client, again absent consent or a waiver in writing.

That said, a lawyer cannot realistically be forever bound by the interests of a former client for all public and private matters of interest to the lawyer. Life is long, information inevitably gets disseminated, and the legal scope of substantially related matters can ebb and flow over time in a way that would make it unfair to bind a lawyer to a "conflict" for the duration of a legal career. Brandeis argued, somewhat cagily by sending telephone and telegraph messages to the witnesses appearing at the investigative hearings on his behalf, that he supported the Clayton Act on a personal level and that he represented himself whenever he acted to advance the public interests. In support of this contention was the fact that he took no fee from (actually, he donated his fee back to) the Shoe Manufacturers' Alliance. Yet, this didn't fully exculpate Brandeis from his ongoing obligations to his former client United.

Brandeis garnered some support from senators in propounding the notion that a lawyer's opinion on matters of public interest should not be circumscribed by client preferences so long as the lawyer does not violate client confidences in expounding his own views. Lawyers are not their clients. Indeed, it is often acknowledged that it is a mistake to judge a lawyer by the clients he or she represents. Lawyers often find themselves accepting legal work on behalf of a client in whose activities the lawyer does not personally believe. Many criminal defense attorneys would be out of work if they did not have the freedom to separate their personal convictions from their professional representations. In concurrence with one author who defended Brandeis, it would be tough to practice law indeed if a lawyer was required to underwrite the character of each of his clients.[40]

A temporary incursion on a lawyer's time and life by a pressing client matter, or by confidences disclosed to the lawyer by the client, is an unenviable but wholly expected and acceptable part of legal practice. A permanent incursion, however, is not. Legal ethics do not require a practicing attorney to become a minion to a client merely because, at one time,

40. *See* Frank, *supra* note 1, at 686.

she subordinated her own interests or defined her public persona principally by her client's goals. ABA Model Rule 1.9 recognizes that the "substantial relationship" test does not persist *ad infinitum*. Confidential information that was or could have been gained in the course of a former client relationship can be rendered innocuous and obsolete by the passage of time or if the information has been disclosed to the public.[41]

The transition of private to public knowledge is, in fact, a fundamental part of legal ethics that allows lawyers to maintain confidences and abide by the other fiduciary duties to their past and current clients, whilst also maintaining a functioning life in public society. A lawyer has the right to engage in public debate, take seriously their civic duties and get involved in political and social justice causes, as do all citizens. Lawyers just have to remember to parse out "public" questions from "private" questions insofar as they concern client confidences. Particularly in the case of former client conflicts, confidences can be construed ambiguously. How much information, knowledge and wisdom a lawyer gains from a prior representation that can ethically be construed as a client confidence is a vexatious question. What is the provenance of a lawyer's sapience? The issue is existential in nature. Brandeis recognized this and refused to unduly fetter his public opinions on behalf of his private clients. Legal ethics should find a way to embrace, rather than shun, this ethos.

Brandeis's response to the senators' upbraiding is emblematic of his character, for two reasons. First of all, Brandeis brought a moral dimension to his legal practice: He regularly engaged in informal *pro bono* practice, refusing compensation for legal work that he believed was in the public interest. Indeed, he reputedly refused to take on paying cases in whose justness he did not believe, and he sternly counseled clients against taking positions in their legal disputes that adopted unfavorable social policy. Secondly, Brandeis brought an autonomous lawyering ethic to his practice that was antithetical to the New England "clubbiness" mores of legal practice. Brandeis rejected any close alliances with any group, political party, cause, or client. He was, in many ways, an outsider and proud of it.

Brandeis's craftsman-like approach to legal practice epitomized his aversion to acting as a mere representative for an anterior interest and his desire to retain self-direction in his legal counseling. His work ethic demanded that every matter be a do-it-yourself project; if some of his methods appeared homespun, that was Brandeis's antidote to the formulaic and increasingly commercialized practice of law in the early 20th century. Brandeis frequently spoke out against law as a service-industry and counseled young lawyers and law students to think critically about why the law

41. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2009).

is what it is. It was apparent that Brandeis felt isolated and alienated from the changes that were sweeping through the legal profession at times, and he often came across as a *vox clamantis in deserto*, against the rise of law as a business instead of as a vehicle for social change.

It may well have been this aloofness, this isolation from others, this entrepreneurial spirit, combined with a view that every matter was new and unrelated to what went before, that caused Brandeis to lose sight of "normative" legal ethics in carrying out his own ideas and his own ideals. That Brandeis did not always work the way the others members of the profession did was grist for some testimony against him by members of the Boston bar during the hearings.[42] Perhaps, Brandeis erred by not staying grounded to the ideals of the profession as the informal bar saw them in its opposition to Brandeis. Indeed, only the informal bar opposed Brandeis. No bar association made any formal protest or resistance to Brandeis.[43] Nor could the bar associations, because there were no formal ethics standards governing lawyer's conduct in place. The standards were just "in the air." Still, it is hard to dispute that Brandeis's reliance on his own internal compass produced disconcerting results at times, at least in the minds of those who mattered when it came to his Supreme Court confirmation.

Another politicizing factor was that many of Brandeis's legal representations involved advocacy in the legislature, on a variety of social policy issues. As an advocate, Brandeis mobilized a stridently nonpartisan voice for the public interest that he strongly believed was needed to compete with hard-charging interest groups and political power at the dawning of an age of increased legislation and regulation. That Brandeis prided himself on being a detached, autonomous counselor, free of client dictation, is what led him to craft the now-infamous language that he was "counsel for the situation." When this personal depiction of Brandeis's view of his legal compass came before the Senate's investigating committee, it could hardly be considered anything other than a blunder of epic proportions, which served Brandeis none too well in extricating himself from the alleged client conflicts at hand.

Nonetheless, Brandeis's commitment to seek moral justice outside the conventional confines of the strict adversarial system of law, which is only now governed by a Model Code of Professional Responsibility, can hardly been viewed as reprobate. Brandeis was an advocate of several public

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42. *See, e.g.*, TODD, *supra* note 1, at 118 (quoting testimony by Boston lawyer Sherman Whipple: ". . . I think if Mr. Brandeis had been a different sort of man, not so aloof, not so isolated, with more of the camaraderie of the bar, gave his confidence to more men, and took their confidence . . . and talked it over with them, you would not have heard the things you have heard in regard to him.")

43. *Id.* at 129, 158 (noting that no bar association opposed Brandeis' nomination, although some former ABA presidents had signed a protest letter in their individual capacities).

causes and was insightful enough to recognize the benefits of legislative democracy over litigation. That is, Brandeis may have had the power as an active litigant to make law, or rather, to get law made for his clients and for himself. But in some cases he respectfully chose to support the legislative process, imperfect as it may be, to express his political views and to incorporate deliberation and compromise into the law-making process. We can hardly fault Brandeis for embracing the democratic political system in this manner. Brandeis did not try to legislate through lawsuits. It is almost ironic that his policy-making endeavors, properly aimed at the legislative branch, ended up almost sidelining his chances for a career in the judicial branch.

Certainly, we cannot judge Brandeis for failing to adhere to contemporaneous standards of behavior in the then absence of a professional code of conduct. Nor can we deem immoral his methods without apt respect for the then zeitgeist—the spirit of the times—and the manner in which his legal contemporaries comported themselves. Brandeis's actions reflected the attitudes of the culture in which he lived and the values with which he had been raised. In many ways he was a luminary for the legal profession. It would be a mistake to sanctimoniously deride his professional actions as being unaligned with current day thinking, just as it would be wrong to cast judgment based on the fact that he at one time spoke out against women's suffrage and later supported it, or that he married his second cousin.[44] The ethical and moral standards by which we live are not immutable. We must not retrofit today's standards onto yesterday's practices.

Giving fair value to the objections of the Senate committee members, however, we can still consider the following: Was Brandeis's alleged shirking of his ethical duties something we should dismiss as dated behavior but also disparage as not being a best practice for a lawyer nowadays, in the context of being accountable to their former and successive clients? The applicable legal ethics rule, indeed even now, is hardly a paragon of clarity. To what extent must lawyers subordinate their own views on policy to persuasive advocacy on behalf of not even a current but a former client's interest? Must every lawyer be so scrupulously cautious at the outset when engaging a new client to have prospectively considered and rejected the possibility that such representation might lead the lawyer to make arguments that could compromise their credibility on all other public issues of personal interest?

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44. *See* UROFSKY, *supra* note 1, at 85-86 (noting a talk Brandeis gave in 1884 in opposition to giving women the vote); 363-64 (describing suffrage as a privilege men earned through performance of duties like military service); and 105 (noting that Alice Goldmark, later to become Brandeis's wife, was his second cousin). Brandeis later came to strongly endorse women's suffrage and the Nineteenth Amendment giving women the vote. *See id.* at 86, 116, 223.

If so, what does that say about how we want lawyers to behave today—to stop thinking independently once we retain our first client, to give up all of our outside interests, and to slavishly serve our clients forevermore? Indeed, the "sweatshop" culture at some of the BigLaw firms suggests as much. But on an ideological level, do our Model Rules serve to promote and foster milquetoast lawyers who toe the line and act as mouthpieces for unchallenged client preferences—even when those clients are former clients? If so, we need to seriously think about reevaluating the balance of interests in the lawyer–client relationship. Some of our aspirational ethics standards may not provide sufficient distinction between a lawyer's public and private life to allow a practicing attorney to maintain both public autonomy and lawyerly zeal in the context of the lawyer-client relationship. Particularly in this day and age of strong and powerful corporate clients, where zealous representation is the industry standard, lawyers should reconsider their practice of advertising themselves as single-minded pursuers of a client's interest. It would be what Brandeis wanted. More importantly, without due circumspection, they may not know just what they are getting themselves into.

CONCLUSION

This article summarized Brandeis's attempts to be his own man, and while he ran up against some resistance in so doing, he forged on. He never sacrificed his beliefs that idealism itself can have pragmatic benefits. He reached for a *modus vivendi* that was workable for him. Brandeis relied on his own internal moral compass to guide him in times when he had no benefit of a rulebook or ethical lodestar in the form of Model Rules. He worked with what he had. He recognized that the law is not about the bottom line but the process and reductive logic must fail if it does not comport with the law or his own perception of appropriate legal ethics.

Perhaps the most important thing Justice Brandeis taught us from his days as a practicing attorney is that overall, the law should be viewed as an instrument of freedom, not a meaningless series of edicts that constrain or coerce. Brandeis lived by example and made both the law and freedom central in his own life. The law should instill people with freedom in choice and action, for its purpose is not only to maintain peace and order but also to bring the public administration of justice into touch with changing moral and political conditions so as to promote progress in society.[45] Legal statesmanship must have its place in our society. Brandeis's career should serve to guide lawyers today who wish not only to do good for society while also doing well in their own careers and for their clients.

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45. *See* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 314 (1985).

The role of the lawyer has greatly changed since Brandeis's day. Unfortunately, we can no longer act as counsel for the situation, though some others, like Attorney General Elliot Richardson during Watergate, have since tried to do so by being lawyers who find solutions to problems in the arguments and needs of the counterparty. Nowadays, law practices are too large, academic ethicists too commonplace and clients all too willing to challenge or second guess the tactics proposed by their lawyers. When a client's company is at stake, it is their prerogative not to want Brandeis's kind of "situation" lawyer; a lawyer actually willing to straddle both sides of an issue, either consecutively or concurrently, to effectuate a semblance of balance among competing interests. Maybe this is a good thing, especially when such tactics can ultimately result in making or agreeing to compromises on behalf of the client. In modern-day "bet the company" litigation, a lawyer who communicates a willingness to see the other side's merits and offer concessions is hardly desirable (if he ever was) to the side he purports to represent.

And so the client today, it seems, wants only gladiators and not statesmen. But is that really the best-tempered response to a rejection of the situational lawyer? By scattershot we have accomplished what might have been fixed with a scalpel. The statesmanlike lawyer, notwithstanding the macro merits of his moral judgment, has become an outlier at best (a fugitive, at worst) because too many lawyers aren't willing to risk a business or ethical conflict, or a loss of client loyalty, to enable meritorious efforts at situational resolution to allow meaningful social betterment.

The vexing situation in which we find ourselves, therefore, is one where a lawyer who truly sees shortcomings in the positions he advocates for his clients must hold his tongue even when the court day is over, lest the value he brings to his client, either in the courtroom or at the settlement table, be reduced to worthlessness. An antitrust lawyer, for example, would be hard pressed to truly question publicly the tactics that the antitrust bar pursues daily in the courtroom. Likewise, a plaintiff class action lawyer would have trouble publicly arguing for reform of the professional industry he daily purports to represent in courtroom skirmishes. Further still, a prosecutor who must enforce a death penalty statute would best avoid publicly decrying or even trying, in a positive fashion, to tinker with the machinery of death that they are sworn to uphold in their officialdom.

In some ways, the law is not only a jealous mistress but also a fickle lover. Those lawyers who truly come to love the law, inevitably also come to recognize that while the law denotes freedom and equal justice for all, it also binds lawyers in unique ways. At times, lawyers may feel as though they are relegated to automaton status, being forced to battle without engaging their professional wisdom (that they possess more than anyone) to challenge the norm, to serve the greater good, and to be instigators

of social change, at least without compromising their "zealous representation" obligations that may trump all their other duties at the bar combined. In other situations, most relevant to the Brandeis issues presented herein, the Model Rules may also enjoin lawyers from representing a competitor, supplier, or customer of another client. And even if it ends up not being a conflict forbidden by the ethics rules, it could still be a business conflict (whose ties bind as tightly) if it hinges on the unwillingness of an important client to allow the firm to represent another. The increasing size of law firms nowadays, with their increasingly sophisticated client relationship management and conflict procedures, serves only to reinforce this mentality.

Brandeis stood out against the ties that bind. His legacy stands for freedom and the eternal struggle against the notion that the law is immutable and unwilling to embrace lawyers as being skilled advocates for their clients, while also being high-minded advocates who can bring about social change in the law.[46] He continued to embrace the law's vast capacity for change while on the Supreme Court bench, stating that the law requires the continuous "capacity of adaptation to a changing world."[47] True to his nonconformist spirit, Brandeis espoused both judicial restraint and the concept of the living law as jurisprudential philosophies.

In Supreme Court confirmation hearings nearly a century after his own, now Justice Sotomayor echoed the view of Justice Brandeis that precedent is not an "inexorable command" [48] and that the law can be reexamined under circumstances the Court itself has outlined.[49] Other prominent jurists have also expressed such Brandeisian views, such as Seventh Circuit Judge Richard Posner who argued the constitution is "not a suicide pact," and that the law must adjust to necessity in a pragmatic but rational manner.[50] So the legacy of Brandeis lives on.

In seeking to provide some context into the struggles that faced one of our most brilliant and consequential legal minds throughout his career, we come to learn how a strong sense of self can give lawyers the courage to take on the critical and controversial issues of the day. While not every

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46. President Woodrow Wilson once described this struggle, as one where a lawyer "cannot be both a learned lawyer and a profound and public-spirited statesman, if he must plunge into practice and make the law a means of support." *See* Melvin I. Urofsky, *Wilson, Brandeis, and the Supreme Court Nomination*. 28 J. OF SUP. CT HISTORY 145, 150 (2003). The author went on to suggest that Wilson was drawn to Brandeis for his ability to achieve both of these seemingly irreconcilable goals. *Id.* at 151-52.

47. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

48. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 447 (1932) (Brandeis, J., dissenting).

49. *See* Responses of Judge Sonia Sotomayor to the Written Questions of Senator Jeff Sessions, Before the U.S. Senate Committee on the Judiciary, July 20, 2009, *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/633-680.pdf

50. *See generally*, Richard A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

lawyer will display Brandeis's breathtaking intuition and forecasting ability, a timely commemorative to Brandeis can remind us of our own abilities to be progressive and effect change by dint of hard work. Brandeis's career as a lawyer should help energize the professional introspection required to revisit the critical questions of legal practice. Questions that were raised so fundamentally in the storied career of one lawyer and jurist persist today. Brandeis' name, despite the public controversies that surrounded him over his own career as a lawyer, will shine on the entablatures of justice, judgment and wisdom forever.