Exhibit C

With the Bench Cozied Up to the Bar, the Lawyers Can't Lose

Dennis G. Jacobs, the chief judge of the federal appeals court in New York, is a candid man, and in a speech last year he admitted that he and his colleagues had "a serious and secret bias." Perhaps unthinkingly but quite consistently, he said, judges can be counted on to rule in favor of anything that protects and empowers lawyers.

Once you start thinking about it, the examples are everywhere. The lawyer-client privilege is more closely guarded than any other. It is easier to sue for medical malpractice than for legal malpractice. People who try to make a living helping people fill out straightforward forms are punished for the unauthorized practice of law.

But Judge Jacobs's main point is a deeper one. Judges favor complexity and legalism over efficient solutions, and they have no appreciation for what economists call transaction costs. They are aided in this by lawyers who bill by the hour and like nothing more than tasks that take a lot of time and cost their clients a lot of money.

And there is, of course, the pleasure of power, particularly in cases involving the great issues of the day.

"Judges love these kinds of cases," said Judge Jacobs, whose speech was published in The Fordham Law Review in May. "Public interest cases afford a judge more sway over public policy, enhance the judicial role, make judges more conspicuous and keep the law clerks happy."

There are costs here, too, he said, including "the displacement of legislative and executive power" and "the subordination of other disciplines and professions."

Yet, at the conclusion of a big public-policy case, the bar and bench rejoice. "We smugly congratulate ourselves," Judge Jacobs said, "on expanding what we are pleased to call the rule of law."

Benjamin H. Barton, a law professor at the University of Tennessee, examined some of the same issues in an article to be published next year in The Alabama Law Review titled "Do Judges Systematically Favor the Interests of the Legal Profession?"

That question mark notwithstanding, there is little doubt

about where Professor Barton comes out.

He noted, for instance, that the legal profession is the only one that is completely self-regulated. "As a general rule," Professor Barton wrote, "foxes make poor custodians of hen-houses."

Professor Barton explored a long list of examples, including the aftermath of the Supreme Court's 1966 decision in Miranda v. Arizona. Miranda, as everyone with a television set knows, protected the right to remain silent and the right to a lawyer.

Over the years, though, courts have approved all sorts of police strategies that have eroded the right to remain silent. At the same time, Professor Barton wrote, the courts "chose to retain quite robust protections for accused who clearly expressed a desire for a lawyer."

"The advantages to the legal profession are clear," he added. "Whatever else an accused should know, she should know to request a lawyer first and foremost."

And the cases keep coming.

This month, a New Jersey appeals court basically immunized lawyers from malicious prosecution suits in civil cases. Even lawyers who know their clients are pushing baseless claims solely to harass the other side are in the clear, the court said, unless the lawyers themselves have an improper motive.

Lester Brickman, who teaches legal ethics at Cardozo Law School, said the decision was just one instance of a broad phenomenon.

"The New Jersey courts have determined to protect the legal profession in a way that no other professions enjoy," Professor Brickman said. "It's regulation by lawyers for lawyers."

Other professions look for elegant solutions. It is the rare engineer, software designer or plumber who chooses an elaborate fix when a simple one will do. The legal system, by contrast, insists on years of discovery, motion practice, hearings, trials and appeals that culminate in obscure rulings providing no guidance to the next litigant.

Last month, Judge Jacobs put his views into practice, dissenting from a decision in a tangled lawsuit about something a college newspaper published in 1997. The judges in the ma-

jority said important First Amendment principles were at stake, though they acknowledged that the case involved, at most, trivial sums of money.

Judge Jacobs's dissent started with an unusual and not especially collegial disclaimer. He said he would not engage the arguments in the majority decision because "I have not read it."

He was, he said, incredulous that "after years of litigation over $2, the majority will impose on a busy judge to conduct a trial on this silly thing, and require a panel of jurors to set aside their more important duties of family and business in order to decide it."

Writing with the kind of verve and sense of proportion entirely absent in most legal work, Judge Jacobs concluded that "this is not a case that should occupy the mind of a person who has anything consequential to do."