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## ARTICLE

# THE EMPEROR’S CLOTHES AND OTHER TALES ABOUT THE STANDARDS FOR IMPOSING LAWYER DISCIPLINE SANCTIONS

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## INTRODUCTION

More than twenty-five years ago, the American Bar Association’s Special Committee on Evaluation of Disciplinary Enforcement studied lawyer discipline systems throughout the country and pronounced the state of lawyer discipline “scandalous.”<sup>1</sup> Using language that suggested the horror of looking under a rock and finding dark and slimy things, the Committee, known as the Clark Commission, chronicled a host of deficiencies with underfinanced, bar-controlled disciplinary systems that investigated relatively few complaints, sanctioned few of the lawyers investigated, imposed sanctions secretly and inconsistently, and protected the bar’s elite.<sup>2</sup> The Clark Commission recommended a number of fundamental changes in disciplinary enforcement, including statewide

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1. See SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS’N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter PROBLEMS IN DISCIPLINARY ENFORCEMENT].

2. *Id.* at 1-2, 24-25, 175-78. The Clark Commission was named for its Chair, former Supreme Court Justice Tom C. Clark. In the introduction to its findings on the state of lawyer discipline, the Commission reported it found:

in some instances disbarred attorneys are able to continue to practice in another locale; that lawyers convicted of federal income tax violations are not disciplined; . . . that even after disbarment lawyers are reinstated as a matter of course; that lawyers fail to report violations of the Code of Professional Responsibility committed by their brethren, much less conduct that violates the criminal law; that lawyers will not appear or cooperate in proceedings against other lawyers but instead will exert their influence to stymie the proceedings; that in communities with a limited attorney population disciplinary agencies will not proceed against prominent lawyers or law firms and that, even when they do, no disciplinary action is taken, because the members of the disciplinary agency simply will not make findings against those with whom they are professionally and socially well acquainted; and that, finally, state disciplinary agencies are undermanned and underfinanced, many having no staff whatsoever for the investigation or prosecution of complaints.

*Id.* at 1-2.

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centralization of disciplinary jurisdiction under the control of the states' highest courts.<sup>3</sup>

The Clark Commission's scathing indictment of lawyer discipline systems is widely credited with moving state courts and the organized bar to action.<sup>4</sup> By the mid-1970s, states began to review lawyer disciplinary systems and initiated substantive and procedural changes.<sup>5</sup> A few years later, the ABA adopted procedures for lawyer disciplinary proceedings.<sup>6</sup> In 1986, the ABA also adopted the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards"),<sup>7</sup> which attempted to provide a framework for the consistent imposition of sanctions.<sup>8</sup>

Since the Clark Report, the ultimate responsibility for the administration of lawyer discipline in most states has moved, at least nominally, from the state bars to the state courts.<sup>9</sup> State courts have

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3. See *id.* at 8, 24.

4. The speed with which the movement occurred is, however, debatable. Compare Michael C. Dorf, Note, *Disbarment in the United States: Who Shall Do the Noisome Work?*, 12 COLUM. J.L. & SOC. PROBS. 1, 14 (1975) (noting that within five years of the Clark Report, almost half the states had hired professional staff to work in their disciplinary agencies), with Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 942 (noting no significant changes in many jurisdictions since the Clark Report).

5. See MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 146-47 (1988); Dorf, *supra* note 4, at 15 (discussing New York's establishment of a Committee on Disciplinary Enforcement to study the state's disciplinary procedures and offer recommendations for improvement); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 536-37 (1995) (detailing the California Bar's efforts to "clean house"); Steele & Nimmer, *supra* note 4, at 942 (noting "extensive discussions and some reform" following the Clark Report); Timothy K. McPike & Mark I. Harrison, *The True Story of Lawyer Discipline*, A.B.A. J., Sept. 1984, at 92, 94-96 (describing the ways in which lawyer discipline practices have been "transformed").

6. See ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979). These standards streamlined the disciplinary process, included members of the public on disciplinary boards and made the discipline process more public. By 1985, the ABA House of Delegates adopted the Model Rules for Lawyer Disciplinary Enforcement, which were revised a few years later to provide a single statement of ABA policy with respect to disciplinary procedures. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Executive Summary (1989). For the history of the development of these standards, see Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 928-29 (1994).

7. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986). The ABA House of Delegates approved the most recent amendments to the ABA Standards for Imposing Lawyer Sanctions on February 4, 1992. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991 & Supp. 1992) [hereinafter ABA STANDARDS].

8. See James Duke Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 ARIZ. ST. L.J. 91, 94 (1987); see also Cynthia A. Kelly, *Lawyer Sanctions: Looking Back Through the Looking Glass*, 1 GEO. J. LEGAL ETHICS 469, 476-77 (1988). For a discussion of the jurisdictions that rely on the ABA Standards, see *infra* notes 153-57 and accompanying text.

9. See ABA Compilation of Lawyer Disciplinary Procedures 1 (1996) (unpublished compilation on file with American Bar Association) [hereinafter COLD]. In some states, this movement is more theoretical than real. While the courts claim exclusive responsibility to administer the state discipline systems, most state courts have delegated the authority to

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become more actively involved in lawyer discipline.<sup>10</sup> Most courts appoint members of disciplinary boards rather than rely on bar organizations for that function.<sup>11</sup> Lawyer discipline systems are better funded<sup>12</sup> and more public than they used to be.<sup>13</sup> More complaints received by disciplinary agencies are investigated.<sup>14</sup> Most state discipline agencies have full-time professional disciplinary counsel and investigators.<sup>15</sup> Many of the state discipline systems are better equipped to deal with the most common client complaints about lawyers—such as fee disputes and failures to communicate—that often were not formally addressed by lawyer discipline systems.<sup>16</sup> Although serious questions remain concerning whether the current state lawyer discipline systems are as effective as they could be,<sup>17</sup> there is little question that these systems are *better* in certain respects than

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administer the system to another entity. In at least 13 states, the responsibility is delegated to a “unified” or mandatory state bar. *See id.* at 1-2; *see also infra* note 41. Most lawyer disciplinary agencies perform similar functions regardless of whether they are directly affiliated with the state bar or are separately constituted agencies. Disciplinary agencies typically have prosecutorial and adjudicative functions and usually consist of statewide boards, hearing committees, disciplinary counsel, staff and investigators. *See COLD, supra*, at 3-4. In a few jurisdictions, the prosecutorial and adjudicative functions are not housed within the same agency. *See id.* at 3.

10. State court involvement takes many forms. In many states, it is reflected in the establishment of disciplinary agencies that report to the courts. In a few states, courts promulgate standards for imposing discipline on lawyers. *See, e.g.*, FLA. STANDARDS FOR IMPOSING LAWYER SANCTIONS (1998). In some states, a single judge or an appellate court reviews all recommendations of public discipline. *See, e.g.*, COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.15 (b) (3); OHIO B.R. V §§ 6(L), 8(D).

11. In at least 31 states, the highest court appoints members of the disciplinary board. *See COLD, supra* note 9, at Q 7B. The boards typically have statewide jurisdiction to propose rules and procedures for disciplinary proceedings. In many states, the boards also perform appellate review of the hearing committees’ findings and conclusions with respect to formal charges. *See id.* at Q 10A, Q 13A.

12. For example, in 1974 the California Bar allocated \$1,092,780 to discipline, which constituted 26% of its total annual general budget. *See Gallagher, supra* note 5, at 537 n.313. In 1995, the California Bar spent \$29.7 million, or 73.9% of its total budget on lawyer discipline. *See Independent Auditors’ Report*, CAL. B.J., Dec. 1996, at 20. *But see* COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS’N, LAWYER REGULATION FOR A NEW CENTURY xviii (1992) [hereinafter LAWYER REGULATION] (noting that absolute levels of funding have not kept pace with the growth of the profession); Lawrence A. Dubin, *How the Michigan Supreme Court Can Better Protect the Public from Bad Lawyers: The Ball is in Their Court*, 73 U. DET. MERCY L. REV. 667, 676-80 (1996) (discussing continued inadequate funding of Michigan’s lawyer discipline system).

13. *See, e.g.*, LAWYER REGULATION, *supra* note 12, at xiv.

14. In 1996, lawyer disciplinary agencies investigated more than 54% (64,763 of 118,891) of the complaints they received. *See* STANDING COMM. ON PROF’L DISCIPLINE, AMERICAN BAR ASS’N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1996 4 fig. I (1998) [hereinafter SOLD 1996]. This represents a significant improvement from twenty years before, when more than 90% of all complaints were dismissed without investigation. *See Steele & Nimmer, supra* note 4, at 982-83.

15. *See COLD, supra* note 9, at 4, 26 (reporting that 41 state discipline agencies have full-time disciplinary counsel and that 32 state discipline agencies have investigators).

16. *See infra* notes 120-21, 124-28 and accompanying text; *see also* Steele & Nimmer, *supra* note 4, at 968, 974.

17. *See, e.g., infra* notes 29, 33-38 and accompanying text.

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the systems studied by the Clark Commission.

While lawyer discipline systems are better according to certain measures, one aspect of lawyer discipline that has been underexamined is the sanctions imposed on lawyers by these systems.<sup>18</sup> Indeed, relatively little attention has been given in recent years to the manner in which state lawyer discipline sanctions are determined or to the consistency or efficacy of the sanctions imposed.<sup>19</sup> Yet even casual observation of the vague, often unarticulated standards used by state decision-makers when imposing discipline raises serious questions about whether sanctions could be imposed fairly. As will be discussed later in this Article, the lack of well-defined standards, the tendency to impose non-public sanctions on lawyers, the failure to publicize the “public” sanctions, and the amount of recidivism that seems to occur,<sup>20</sup> also raise serious

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18. Some commentators have focused broadly on the efficacy of state discipline systems by considering measures such as the number and type of complaints, number and type of resolutions, and speed of resolution. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 143-50 (1989); Gallagher, *supra* note 5, at 537-46; Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique and Recommendations for Change*, 62 U. CIN. L. REV. 947, 1028 (1994). Others have explored the limitations of state lawyer discipline systems that prevent them from addressing more misconduct. See, e.g., Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 716-22, 737 (1981) (exploring the failure of lawyer discipline systems to address lawyer competence); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 247-54 (1998) [hereinafter Schneyer, *A Tale of Four Systems*] (describing the inability of state discipline systems to address problems arising from a law firm’s infrastructure); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 822-30 (1992) (discussing structural limitations of disciplinary controls). Commentators have made few efforts, however, to look closely at the standards for imposing lawyer discipline sanctions or to examine the fairness or efficacy of the sanctions imposed. The main exceptions are student commentary focusing on a few cases in a single jurisdiction, see, e.g., Michael Goldman, Note, *Discipline of McLendon and Discipline of Peterson: Adding Chaos to Confusion in Washington Legal Ethics*, 29 GONZ. L. REV. 187, 193-203 (1993/94) (criticizing the Washington Supreme Court’s disparate decisions in cases regarding improper conversion of a client’s funds); Michele J. Woods, Note, *The Adoption of the ABA Standards for Imposing Lawyer Sanctions by the Alaska Supreme Court—In re Buckalew*, 6 ALASKA L. REV. 365, 371-72, 377-78 (1989) (identifying examples of inconsistencies in Alaska disciplinary cases and considering the implications of Alaska’s adoption of the ABA Standards), and proposals to expand the range of sanctions imposed on lawyers, see Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and “Disclosure Advertising”: Towards a New Ethos*, 72 N.C. L. REV. 351 (1994) (proposing that lawyers be required to self-advertise disciplinary sanctions); Stephen G. Bene, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907 (1991) (arguing that monetary fines should be used as an attorney discipline sanction). See generally Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 31-37 (1991) [hereinafter Schneyer, *Professional Discipline*] (arguing that disciplinary sanctions should be imposed on law firms).

19. The failure to look closely at these issues is somewhat surprising in view of the considerable scholarship examining the sanctions imposed on lawyers under Rule 11. See, e.g., Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 501-04 (1997) (citing to extensive scholarship relating to Rule 11 sanctions).

20. See *infra* notes 218-19 and accompanying text; ABEL, *supra* note 18, at 148 (noting that 27% of New Jersey lawyers who were disciplined but not disbarred for stealing client money were found to have stolen again); Dubin, *supra* note 12, at 695-96 (reporting a 75% recidivism

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questions about how well the sanctions imposed on lawyers achieve the basic goals of lawyer discipline: protection of the public, protection of the administration of justice and preservation of confidence in the legal profession.<sup>21</sup>

The failure to look closely at these issues may be due, in part, to the mistaken belief that the problems with sanctions identified in the Clark Report have since been adequately addressed by the ABA Standards for Imposing Lawyer Sanctions.<sup>22</sup> The Standards were an important first attempt to provide consistency and fairness in the imposition of sanctions, and perhaps for that reason they were warmly—and uncritically—greeted.<sup>23</sup> Indeed, for more than a decade, the ABA Standards have been the most commonly used standards when imposing sanctions on lawyers. A review of the ABA Standards and their application by the courts shows, however, that their voluntary nature and their lack of specificity invite inconsistency in their application. They provide little more than a loose framework for approaching the sanctioning decision and, as a result, they leave considerable room for bias in the process and for ineffective discipline.

Before exploring the standards used to impose lawyer discipline sanctions, one caveat is in order. It is difficult to obtain a clear picture of the consistency, efficacy or fairness of these sanctions. Inadequate record-keeping by many jurisdictions, differing reporting methods,<sup>24</sup> uninformative published opinions, private discipline, limited empirical research<sup>25</sup> and the failure to report much lawyer

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rate among Michigan attorneys who received reprimands); Steele & Nimmer, *supra* note 4, at 997-98.

21. See *infra* notes 77-79 and accompanying text.

22. See *supra* notes 7-8 and accompanying text.

23. See *infra* note 176.

24. The failure, until relatively recently, of many jurisdictions to maintain records of complaints and the disposition of matters has hindered efforts to evaluate lawyer discipline systems. See Steele & Nimmer, *supra* note 4, at 920 n.2 (noting their inability to analyze the historical pattern of disciplinary enforcement due to lack of data). This problem was only partially addressed by the development in 1968 of the ABA National Discipline Data Bank, which was established to receive reports from courts and disciplinary agencies of all formal discipline imposed on lawyers. See PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 158; see also LAWYER REGULATION, *supra* note 12, at 83. Even the Data Bank is not entirely reliable due to the failure of some jurisdictions to report their disciplinary actions. See Steele & Nimmer, *supra* note 4, at 920 n.2; see also CENTER FOR PROF'L RESPONSIBILITY, AMERICAN BAR ASS'N, FIVE-YEAR REPORT FOR THE AMERICAN BAR ASS'N NATIONAL LAWYER REGULATORY DATA BANK, 1993-97 1-35 (undated) (on file with American Bar Ass'n) [hereinafter FIVE-YEAR REPORT] (indicating that six states did not report 1996 sanctions to the Data Bank). Moreover, the methods of reporting data often vary significantly from jurisdiction to jurisdiction and from year to year, making comparisons difficult.

25. Data measuring attorney compliance with basic norms of professional conduct are difficult to obtain. See Steele & Nimmer, *supra* note 4, at 934. See generally JEROME E. CARLIN, LAWYERS' ETHICS 41 (1966) [hereinafter CARLIN, LAWYERS' ETHICS]. As a result, there is

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misconduct<sup>26</sup> make accurate evaluation difficult. The available statistics tend to be interpreted optimistically by the organized bar<sup>27</sup> and pessimistically by critics of lawyer discipline.<sup>28</sup> Even cautious interpretation of the existing data indicates that while there have been improvements in the states' approach to imposing lawyer discipline, much work remains to be done.

Part I of this Article identifies some of the problems with the manner in which sanctions are currently imposed on lawyers, both in states that purport to follow the ABA Standards and those that do not.<sup>29</sup> Part II identifies the goals of lawyer discipline, the sanctions

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relatively little empirical research relating to actual attorney compliance with professional responsibility rules or norms. *But see id.* at 42-48, 53-61; JEROME E. CARLIN, LAWYERS ON THEIR OWN 97, 155-64 (1994); JOEL F. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY 106-15 (1967); KENNETH MANN, DEFENDING WHITE COLLAR CRIME (1985); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994). There is also little empirical research relating to the personal characteristics of lawyers who engage in misconduct or to the prevalence of recidivism.

26. *See* ABEL, *supra* note 18, at 144; Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 694-95 (1994); Steele & Nimmer, *supra* note 4, at 949, 957-60; Wilkins, *supra* note 18, at 822-23.

27. *See* McPike & Harrison, *supra* note 5, at 92 (claiming that "[l]awyer disciplinary practices have been transformed in the last 14 years from what was called in 1970 a 'scandalous situation' to a sophisticated, effective system of self-regulation today"). *See generally* Gallagher, *supra* note 5, at 545-50 (describing the efforts of the California Bar to defend the success of its discipline system).

28. Lawyer discipline systems face many obstacles and it is easy to present statistics in a way that paints a bleak picture of those systems. *See, e.g.*, ABEL, *supra* note 18, at 145-48 (describing, *inter alia*, the number of complaints received about attorneys and the relatively small number of sanctions imposed); Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS 48-54 (Ralph Nader et al. eds., 1976) (comparing the number of sanctions imposed to the number of attorneys admitted to practice). Sometimes the numbers involving lawyer discipline are juxtaposed in ways that may not be entirely fair. For example, comparisons of the number of sanctions imposed on lawyers to the number of admitted attorneys *may* reflect a failure by the discipline systems to impose enough sanctions. On the other hand, such comparisons *may* reflect that most lawyers do not engage in misconduct.

29. While this Article focuses on the sanctions imposed by state discipline systems, it is important to note that state systems deal with only a fraction of lawyer misconduct. This is true for a variety of reasons. First, lawyers and judges are unwilling to report the misconduct of other lawyers and even clients may have reasons for not reporting misconduct by their lawyers. *See* ABA STANDARDS, *supra* note 7, at 2; Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Ethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 979 & n.16 (1988); *see also supra* note 26 and accompanying text. Second, state disciplinary agencies sometimes divert complaints about lawyer misconduct to other agencies or label them in ways that place them outside the jurisdiction of the disciplinary agency. *See* Gallagher, *supra* note 5, at 569-76 (describing the screening and diversion of complaints by the California State Bar's intake unit); *see also infra* notes 127-28 and accompanying text. Third, structural, jurisdictional and economic limitations on state discipline systems prevent them from addressing more misconduct. For example, underfunding of the systems limits the degree to which they can be proactive in investigating lawyer misconduct. The absence of rules permitting the disciplinary authority to sanction law firms also limits the ability to address misconduct. *See* Schneyer, *Professional Discipline*, *supra* note 18, at 7-11. Fourth, codes of conduct governing lawyers tend to

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commonly imposed on lawyers, and the reasons for devising standards for imposing sanctions. Part III reviews in some detail the problems with the ABA Standards for Imposing Lawyer Sanctions and their implementation by the courts. Part IV recommends ways to draft standards so that they will better meet the goals of lawyer discipline. The recommendations include the use of mandatory standards rather than voluntary standards that may be disregarded by decision-makers. The recommended standards would provide more guidance to assist in categorizing lawyer misconduct and would eliminate the consideration of certain factors in order to reduce the opportunities for bias and unwarranted inconsistency. Standards should also be drafted to promote the effective use of suspensions and public reprimands, and to eliminate private sanctions. Finally, standards should address the imposition of less conventional sanctions, such as publicity and fines, which may be more effective than some of the more frequently used forms of discipline.

#### I. THE PROBLEM

To understand some of the problems with the imposition of lawyer sanctions, it is useful to start with the statistics. There are over one million lawyers with active licenses in the United States.<sup>30</sup> In 1996, state lawyer disciplinary agencies reported 118,891 complaints concerning alleged lawyer misconduct.<sup>31</sup> The actual number of complaints was undoubtedly higher.<sup>32</sup> Only about five percent of all

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be vague and general, making it difficult to determine what conduct is unacceptable in certain practice settings. *See, e.g.*, Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 650-64 (1994). State discipline agencies shy away from pursuing cases in which the rules are unclear, due in part to concerns about giving fair notice to lawyers who are subjected to the disciplinary process. *See id.* at 664. Fifth, the availability of other client controls on lawyer misconduct, such as the threat of taking business elsewhere or malpractice actions, address some lawyer misconduct. *See Wilkins, supra* note 18, at 824-32. Finally, the willingness and in some cases, superior ability, of the federal judiciary and federal agencies to discipline lawyers addresses some lawyer misconduct.

Notwithstanding the factors that keep many cases of lawyer misconduct out of state discipline systems, it appears that more *detected* misconduct is handled within the state discipline systems than by other bodies. The issues raised in this Article concerning the fairness and effectiveness of lawyer sanctions have implications for other sanctioning bodies which presumably also seek to impose fair and effective sanctions.

30. *See* SOLD 1996, *supra* note 14, at 4 fig. I.

31. *See id.* The 1996 ABA Survey defines "complaint" as "[a]ny information received by the disciplinary agency regarding lawyer conduct that requires a determination as to whether the disciplinary agency has jurisdiction . . . or whether sufficient facts are alleged that would, if true, constitute misconduct." *Id.* at app. pt. 1 (Terms and Phrases).

32. The actual number of complaints received by state lawyer discipline systems was higher than 118,891 because ten states did not respond to the ABA's 1996 Survey. *See id.* at 4 (noting that Arkansas, Idaho, Iowa, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, and South Dakota did not provide data).

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complaints result in any sanctions against lawyers.<sup>33</sup>

It appears the sanctions imposed on lawyers are often light and inconsistent.<sup>34</sup> While the claim that discipline is “light” is essentially normative, it can also be tested against how well the sanctions promote the goals of lawyer discipline. Consider these facts: Private sanctions—the lightest form of discipline—are imposed almost twice as often as any other type of sanction.<sup>35</sup> Lawyers often receive several private admonitions before they receive any public discipline.<sup>36</sup> If a lawyer is suspended from practice, the period of suspension is frequently so brief that it does not interrupt a lawyer’s practice.<sup>37</sup> In many of these cases, sanctions fail to achieve the primary goal of lawyer discipline, which is protection of the public.<sup>38</sup>

These sanctioning practices are due, in large part, to the absence of well-conceived standards for imposing discipline and to the biases

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33. According to the ABA, state lawyer discipline systems received 118,891 complaints and imposed 6411 sanctions in 1996. *See id.* at 4 fig. I, 9 fig. II. On average, it takes at least one year from the receipt of a complaint until a public sanction is imposed. *See id.* at 19-23 fig. IV. Consequently, many of the sanctions imposed in 1996 arose from complaints initiated in earlier years. Nevertheless, the ratio of sanctions to complaints over the last few years has ranged from five to six percent, suggesting that the estimate in the text is reasonably accurate. *See* STANDING COMM. ON PROF’L DISCIPLINE, AMERICAN BAR ASS’N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1995 1-5 fig. I-pt. 1, 8-12 fig. II (1997); STANDING COMM. ON PROF’L DISCIPLINE, AMERICAN BAR ASS’N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1993-94 fig. I-pt. 1, fig. II (1996); STANDING COMM. ON PROF’L DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1991-92 fig. I-pt. 1, fig. II (1995).

The five percent figure does not include complaints that were referred to diversion programs. *See infra* notes 127-29 and accompanying text (discussing state diversion programs and other programs designed to deal with minor lawyer misconduct). Moreover, the figure does not in itself indicate whether more sanctions should have been imposed. *See supra* note 28. Analysis of the cases in which sanctions were not imposed would be required to conclude whether the sanction rate is “too low.” Unfortunately, in most jurisdictions those files are not publicly available.

34. The problem of inconsistency in the imposition of sanctions is discussed *infra* notes 61, 141, 164-74, 185-86, 194, 225, 240-41 and accompanying text.

35. In 1996, reporting state discipline systems imposed 2634 private sanctions. *See* SOLD 1996, *supra* note 14, at 9 fig. II. In contrast, there were 757 public reprimands, 1324 suspensions of varying length and 542 disbarments. *See id.* Certain jurisdictions display an even greater preference for private discipline. *See* COMM. ON PROF’L DISCIPLINE, N.Y. STATE BAR ASS’N, ANNUAL REPORT ON LAWYER DISCIPLINE IN NEW YORK STATE FOR THE YEAR 1996 1 (1996-97) [hereinafter ANNUAL REPORT ON LAWYER DISCIPLINE IN NEW YORK STATE] (reporting public discipline imposed in approximately 250 cases and private sanctions imposed in over 900 cases). Six jurisdictions do not impose private sanctions. *See infra* note 329.

36. *See infra* notes 218-19 and accompanying text.

37. As discussed later in this Article, brief suspensions do little more than delay the performance of legal work and sometimes they do not cause any interruption of a lawyer’s practice. *See infra* notes 201, 305-06 and accompanying text.

38. *See infra* note 77 and accompanying text. Although I describe lawyer sanctions as “light,” I do not contend that lawyer sanctions should, as a general matter, be more severe. In some cases, light sanctions may be consistent with the goals of discipline. In other cases, light sanctions may undermine those goals. *See infra* notes 110-14, 123-25, 210-20, 305-08, 325 and accompanying text.

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of those who determine the sanctions. In many of the most populous states, sanctions are imposed on lawyers without the use of standards that provide a framework for approaching the sanctioning decision or for selecting the most appropriate sanction.<sup>39</sup> Reinstatement to practice following suspension or disbarment is often granted based on ill-defined standards.<sup>40</sup>

The absence of standards leaves the sanctioning decisions largely to the discretion of the bar, which remains heavily involved in the discipline process.<sup>41</sup> Indeed, in many states, lawyers—not judges—continue to impose most lawyer discipline and their determinations often are not reviewed by courts.<sup>42</sup> Even when a court does review

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39. For example, New York has virtually no written standards that guide the decision-maker in the imposition of sanctions, except for rules specifying the sanctions for lawyers convicted of certain criminal conduct. See N.Y. JUD. LAW § 90(4)(a), (f) (McKinney 1997). While Texas also has rules specifying the sanctions for certain criminal conduct, see TEX. GOV'T CODE ANN. § 81.078(c) (West 1998); TEX. R. DISCIPLINARY P. 8.05, and a court rule setting forth the aggravating and mitigating factors that may be considered when imposing lawyer discipline, see TEX. R. DISCIPLINARY P. 3.10, it has no other guidelines to guide the imposition of sanctions for particular misconduct. New Jersey also has no clear standards, other than a few common law rules suggesting presumptive sanctions for certain types of misconduct. See, e.g., *In re Toronto*, 696 A.2d 8, 11 (N.J. 1997) (stating that the court will ordinarily suspend an attorney convicted of domestic violence); *In re Wilson*, 409 A.2d 1153, 1157-58 (N.J. 1979) (noting that disbarment is usually the only appropriate discipline for an attorney who misappropriates a client's funds). Illinois has only a few weakly articulated common law standards. See, e.g., *In re Blank*, 585 N.E.2d 105, 115 (Ill. 1991) (noting that commingling and conversion of client funds "may" be grounds for disbarment absent mitigating circumstances). Pennsylvania has declined to adopt common law standards, even for egregious misconduct. See *Office of Disciplinary Counsel v. Chung*, 695 A.2d 405, 407 (Pa. 1997) (noting that the court has declined to adopt a *per se* rule requiring disbarment for serious misconduct). In 1996, these five states reported having 356,562 lawyers with active licenses, which was approximately one-third of the lawyers with active licenses in this country. See SOLD 1996, *supra* note 14, at 1-4 fig. 1.

40. See *infra* notes 72, 313-20 and accompanying text. See generally Ann Davis, *Toughening Readmission Procedures*, NAT'L L.J., Aug. 19, 1996, at A1 (discussing the ease with which lawyers gain readmission to the bar).

41. It appears that disciplinary counsel in more than 20 states are affiliated with the state bar. See NATIONAL ORGANIZATION OF BAR COUNSEL, INC. DIRECTORY 6-20 (June 1998). Control by state bar officials over disciplinary counsels' budgets and personnel has in some instances impeded the work and the prosecutorial decisions of disciplinary counsel. See LAWYER REGULATION, *supra* note 12, at 29. In California, where the legislature established a bar-funded Bar Court that is staffed by paid hearing judges, serious questions have been raised about the Bar Court's independence from the State Bar. See Lise A. Pearlman, *Declare Independence*, CAL. LAW., Apr. 1996, at 27.

Although courts in other states have established separate disciplinary boards or agencies to process, investigate and prosecute complaints against lawyers, see *supra* note 9 and accompanying text, volunteer lawyers make up the majority of disciplinary hearing panels, see COLD, *supra* note 9, at Q 20; LAWYER REGULATION, *supra* note 12, at 8, and members of the bar elite are often appointed to perform investigative and adjudicative functions, see, e.g., MD. R. 16-705 (providing that state inquiry committee members and review board members are composed mainly of lawyers selected by bar associations); *infra* notes 56, 60. While many states now include members of the public on disciplinary hearing panels, the lay members are in the minority. See COLD, *supra* note 9, at Q 20; MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 3A (1996). The effectiveness of lay members when serving on lawyer-dominated panels is, in itself, a large and interesting topic.

42. Private sanctions are the most frequently used form of discipline, see *supra* note 35, yet

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these determinations, they may be afforded great deference.<sup>43</sup> Who you are, where you practice, and who you know can directly affect the severity of the sanction imposed and the lawyer's ability to continue the practice of law.<sup>44</sup> The following tale of two classmates illustrates

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the imposition of private discipline typically is not subject to review by courts, *see, e.g.*, PA. R. DISCIPLINARY ENFORCEMENT 208(a)(6) ("A respondent-attorney shall not be entitled to appeal an informal admonition, a private reprimand or any conditions attached thereto in cases where no formal process has been conducted . . ."). The imposition of public discipline by a hearing panel often may be appealed to a higher disciplinary board, but may not always be appealed as of right to a court. *See, e.g.*, ARIZ. SUP. CT. R. 53(e)(1), (5); ILL. SUP. CT. R. 753; MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 11(F) (1996) (providing that the court may, within its discretion, review disciplinary matters); *see also* N.J. CT. R. 1:20-16(b) (stating that leave of the court is required for review of sanctions other than disbarment); OR. B.R. 10.1 (providing that only sanctions exceeding a 60-day suspension must be reviewed by the court); WASH. R. LAWYER DISCIPLINE 5.5 (stating that the Board's imposition of reprimands is not subject to further review). In some states, the courts only infrequently grant leave to appeal. *See, e.g.*, Marcy A. Hahn, Note, *The Constitutionality of Michigan's Attorney Discipline System*, 43 WAYNE L. REV. 1565, 1572 (1997) (noting that the Michigan Supreme Court only rarely grants leave to appeal).

There are, however, some state courts that are more actively involved in the adjudication and review of discipline decisions. For example, in Maine, Maryland, and Massachusetts, a single judge hears or reviews most disciplinary cases that may result in public discipline. *See* ME. B.R. 7.2(b)(2); MASS. SUP. JUD. CT. R. 4:01, § 1(2); MD. R. 16-709(b), 16-710(c). In a few states, all recommendations concerning the imposition of public discipline are reviewed by the highest state court. *See, e.g.*, COLO. R.P. REGARDING ATTORNEY DISCIPLINE § 241.15(b)(3); OHIO B.R. V §§ 6(L), 8(D).

43. *See In re Brady*, 923 P.2d 836, 839 (Ariz. 1996) (explaining that the court gives "great weight" to the Commission's recommendations); *Idaho State Bar v. Daw*, 910 P.2d 752, 754 (Idaho 1996) (explaining that the court gives "great weight" to recommendations from the hearing committee); *In re Fordham*, 668 N.E.2d 816, 821 (Mass. 1996) (stating that the recommendations of the disciplinary board are entitled to "great weight"); *In re Ganley*, 549 N.W.2d 368, 369 (Minn. 1996) (noting that "great weight" is afforded the referee's recommendations); *State v. Wilkins*, 898 P.2d 147, 150 (Okla. 1995) (explaining that the recommendations of the Professional Responsibility Committee are given "great weight"); *Office of Disciplinary Counsel v. Monsour*, 701 A.2d 556, 558 (Pa. 1997) (noting that the findings and recommendations of the hearing committee are given "substantial deference"); *In re Pressly*, 628 A.2d 927, 929 (Vt. 1993) (explaining that the court gives deference to board recommendations on sanctions and will not set aside its judgment unless clearly erroneous); *see also In re West*, 805 P.2d 351, 353 n.3 (Alaska 1991) (explaining that findings of fact by the Board are entitled to "great weight"); *In re Morse*, 456 S.E.2d 52, 53 (Ga. 1995) (stating that the court is bound by the review panel's findings of fact when there is "any evidence" to support them); *Office of Disciplinary Counsel v. Tantlinger*, 490 S.E.2d 361, 363 (W. Va. 1997) (stating that substantial deference is given to the Committee's findings of fact). *But see* *Disciplinary Counsel v. Lau*, 941 P.2d 295, 297 (Haw. 1997) (stating that the court is not bound by findings of the Disciplinary Board); *In re Altstatt*, 897 P.2d 1164, 1166 (Or. 1995) (noting that the court reviews disciplinary matters de novo); *In re Olson*, 537 N.W.2d 370, 372 (S.D. 1995) (stating that the Board's recommendations are given "no particular deference").

44. *See* *Dubin*, *supra* note 12, at 670-72 (describing a scandal that arose when disciplinary investigations of prominent Detroit lawyers were improperly terminated); Paula A. Monopoli, *Legal Ethics and Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEGAL ETHICS 423, 425 (1997) (discussing a disciplinary case suggesting that politically connected lawyers obtained lenient treatment); Rhode, *supra* note 26, at 696 (noting that sanctions are rarely directed at mainstream firms and organizations); *Panels on Criminal Practice Mull Need for Special Rules*, 13 *Laws. Manual on Prof'l Conduct (ABA/BNA)* 164-65 (June 11, 1997) (reporting anecdotal evidence that criminal lawyers are more frequently investigated for single act of neglect and receive more severe sanctions than other practitioners). *See generally*

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some of these problems.

Daniel Cooper and Ilan Reich were two of the best and the brightest of Columbia Law School's Class of 1979. Both were Ivy League college graduates and members of the *Columbia Law Review*.<sup>45</sup> They left law school full of promise and within a relatively short time, became partners in highly profitable Manhattan law firms.<sup>46</sup>

Within eight years after graduation, Reich pleaded guilty to charges of insider trading based on confidential client information.<sup>47</sup> He was sentenced to a one-year prison term and disbarred.<sup>48</sup> A few years later Cooper pled guilty to charges of overbilling a client by \$550,000; he avoided jail by cooperating with federal authorities, and was suspended from practice for one year.<sup>49</sup> Both men committed felonies that, at a minimum, breached their professional and fiduciary duties to their clients; both have since resumed law practice in New York.

New York has an automatic disbarment rule for lawyers convicted of crimes that would constitute felonies under New York law.<sup>50</sup> Its courts rarely readmit lawyers who have been disbarred under this rule.<sup>51</sup> In addition, New York suspends lawyers convicted of other

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Garbus & Seligman, *supra* note 28, at 53-54 (noting the ease with which well-paid corporate attorneys get away with ethics violations while attorneys serving the poor are disciplined far more often); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70, 89 (1995) (noting that federal prosecutors are rarely disciplined).

45. See 12 MARTINDALE-HUBBELL LAW DIRECTORY NEW YORK CITY, PROFESSIONAL BIOGRAPHIES SECTION 1359B (1998) (profiling Daniel Cooper) [hereinafter MARTINDALE-HUBBELL]; see also 12 MARTINDALE-HUBBELL LAW DIRECTORY NEW YORK CITY, PROFESSIONAL BIOGRAPHIES SECTION 1304B (1997) (profiling Ilan Reich).

46. Reich was a corporate take-over partner at Wachtell, Lipton, where he was reportedly making \$500,000 per year. See Steven Brill, *Redemption?*, AM. LAW., Mar. 1996, at 4. Cooper became a partner at Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, the fourth largest law firm in the country. When that firm collapsed in 1987 and filed for bankruptcy, he moved firms with his mentor, Harvey Myerson, who formed Myerson & Kuhn. See Rita Henley Jensen, *Novel Trial on Billing Set to Begin; How Will Alleged Practices at Myerson & Kuhn Be Judged?*, NAT'L L.J., Mar. 9, 1992, at 1.

47. See *In re Reich*, 515 N.Y.S.2d 775 (App. Div. 1987).

48. See Ann Davis, *The Descent and Rise of Ilan K. Reich*, NAT'L L.J., Dec. 4, 1995, at A1 [hereinafter Davis, *The Descent and Rise*]. Following his conviction, Reich was incarcerated for seven months and then spent six weeks in a half-way house. See Brill, *supra* note 46, at 4. Thereafter, he was employed by a Manhattan investor's company, where he earned more than \$300,000 annually. See *id.*; see also Ann Davis, *One-Time Outcast Returns to the Bar*, NAT'L L.J., Dec. 18, 1995, at A5.

49. Cooper was sentenced to six months of home confinement, three years of probation, and 200 hours of community service. See *Today's News Update*, N.Y. L.J., July 22, 1992, at 1. He received a one-year suspension from practice, retroactive to the time of his interim suspension. See *In re Cooper*, 613 N.Y.S.2d 396, 397 (App. Div. 1994).

50. N.Y. JUD. LAW § 90(4)(a) (McKinney 1997) (stating that any attorney convicted of a felony shall upon such conviction cease to be an attorney). A "felony" is defined as a felony under the laws of New York or any criminal offense committed in any other state which, if committed in New York, would constitute a felony there. See *id.* § 90(4)(e).

51. Prior to 1979, there was no opportunity for readmission after automatic disbarment

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“serious crimes” pending a determination of the appropriate sanction.<sup>52</sup> On one level, these rules help protect the public and promote consistency because they deal swiftly with all attorneys who have been convicted of serious crimes by removing them from practice. Viewed more closely, however, it is clear that even in these cases, sanctions are not applied consistently, in part because judges and disciplinary boards identify with the upper echelons of the bar, and the best and the brightest often get the breaks.

In Cooper’s case, his conviction arose from his submission of fraudulent billing statements to a client over a two-year period while he was a partner in the law firm of Myerson & Kuhn.<sup>53</sup> He was suspended from the practice of law immediately upon his federal conviction of a “serious crime.”<sup>54</sup> Following a hearing, which included character testimony from a federal judge and a partner at a large Manhattan law firm,<sup>55</sup> the disciplinary committee hearing panel, composed of two members of the bar elite,<sup>56</sup> one other lawyer and a layperson, recommended a one-year retroactive suspension—essentially a sanction of “time served.” The court affirmed the panel’s recommendation without a single reference to any standards or to its own precedent, noting the panel’s finding that “the inflation

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unless the conviction was reversed or pardoned. *See id.* § 90 Historical Note; *see also In re Glucksmann*, 394 N.Y.S.2d 191, 192 (App. Div. 1977) (holding that a disbarred attorney could not apply for reinstatement without reversal of, or pardon from, his felony conviction); Edward Albert, *How 42 Lawyers Were Disbarred in New York*, BARRISTER, Summer 1980, at 6, 40. Since then, only a handful of lawyers who were automatically disbarred for felony convictions have been readmitted. *See In re Reich*, Report and Recommendation of Hearing Panel of the Departmental Disciplinary Committee, First Judicial Department of New York, at 30-31 & n.31 (June 19, 1995) [hereinafter Report of Reich Hearing Panel] (noting that since 1978, only five attorneys who have been subjected to felony disbarment have been reinstated).

52. *See* N.Y. JUD. LAW § 90(4)(f) (McKinney 1997). The suspension continues until the attorney shows cause why a final order of suspension, censure or removal shall not be made and a final order is entered. *See id.* § 90(4)(g). A “serious crime” includes any criminal offense denominated a felony under the laws of another state or the United States which does not constitute a felony in New York. *See id.* § 90(4)(d).

53. *In re Cooper*, 586 N.Y.S.2d 250, 250 (App. Div. 1992).

54. *See id.* Cooper was convicted of “conspiring to devise a scheme to defraud in violation of 18 U.S.C. § 371.” *Id.*

55. *See In re Cooper*, Report of Hearing Panel of the Departmental Disciplinary Committee, First Judicial Department of New York, at 14-15 (Jan. 20, 1994) [hereinafter Report of Cooper Hearing Panel].

56. Joseph Irom, the chair of the hearing panel, was the former president of the Bronx County Bar Association. *See* Shawn Assael, *New Chief Aims to Calm Bronx Court*, MANHATTAN LAW., Aug. 30-Sept. 12, 1988, at 1. Another panel member, Joan Ellenbogen, was former Chair of the Executive Committee of the prestigious Association of the Bar of the City of New York. She was also active in other bar associations and a former Commissioner on the Commission on Judicial Nominations to the New York Court of Appeals. *See* 12 MARTINDALE-HUBBELL, *supra* note 45, at 384B. For a discussion of the close relationship between segments of the New York City Bar and the state courts, *see* POWELL, *supra* note 5, at 149.

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of billables was due in large part to the pressure put on the respondent as a young lawyer by Harvey Myerson, a ‘father figure’ to him at his law firm.”<sup>57</sup> Cooper, who was thirty-eight years old and ten years out of law school when younger lawyers blew the whistle on the criminal conspiracy within his firm to overbill clients,<sup>58</sup> has since resumed the practice of law. His *Martindale-Hubbell* listing touts his Ivy-League background and his one-year stints as a law clerk to a federal judge and as counsel to the Manhattan Borough president. It makes no reference, however, to his association with the Myerson law firm, his criminal conviction, or his suspension from the practice of law.<sup>59</sup>

Cooper’s tale illustrates some of the current problems with the imposition of lawyer discipline sanctions. First, the disciplinary committee hearing panel composed of members of the bar elite<sup>60</sup> recommended the lightest sanction possible under the circumstances of the case. Second, the court approved the recommendation, even though it had previously imposed harsher sanctions for similar misconduct.<sup>61</sup> Third, the court does not refer to any standards when

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57. *In re Cooper*, 613 N.Y.S.2d 396, 397 (App. Div. 1994). The court also noted Cooper’s cooperation with the government in its investigation of Myerson, although the cooperation apparently was not as swift as it could have been. *See* Report of Cooper Hearing Panel, *supra* note 55, at 11.

58. *See* Jensen, *supra* note 46, at 1.

59. *See* 12 MARTINDALE-HUBBELL, *supra* note 45, at 1359B.

60. Historically, bar associations have been composed of the bar elite. *See* ABEL, *supra* note 18, at 44-45; POWELL, *supra* note 5, at 7-16. Although bar associations have become more heterogeneous, lawyers often seek bar membership precisely because of the perceived opportunities it may provide for contact with members of the bar elite and with judges. Lawyers who are active in bar discipline committees often find themselves in symbiotic relationships with judges. These relationships may make it difficult for lawyers to disregard character testimony from judges, and perhaps less obviously, for judges to disregard the recommendations of lawyers who sit on hearing panels. For example, in *In re Cooper*, 613 N.Y.S.2d 396 (App. Div. 1994), one of the members of the hearing panel frequently served on court-appointed commissions and was well-known to some of the judges who later considered and adopted the panel’s recommendations. *See supra* note 56.

61. *See In re Gieger*, 572 N.Y.S.2d 11, 13 (App. Div. 1991) (disbarring a partner in a law firm for overbilling clients); *see also In re Kroll*, 630 N.Y.S.2d 512, 514 (App. Div. 1995) (disbarring a partner in a law firm for overbilling clients and other related misconduct). *See generally In re Shapiro*, 644 N.Y.S.2d 894, 895 (App. Div. 1996) (permitting a partner in a law firm who submitted false bills to clients to resign in lieu of disbarment). In *Gieger* and *Kroll*, the court characterized the overbilling of clients as “conversion.” *See In re Kroll*, 630 N.Y.S.2d at 515; *In re Gieger*, 572 N.Y.S.2d at 13. Although the court did not characterize Cooper’s overbilling as “conversion,” it readily could have done so: Cooper deliberately overbilled the client; the client paid the money; the money was used by the firm and not returned; and the client was forced to seek the return of \$500,000 in the Myerson & Kuhn bankruptcy. *See* Jensen, *supra* note 46, at 1.

Interestingly, it appears that New York lawyers who attempt to defraud their partners or employers through billing schemes are sometimes sanctioned more severely than lawyers who attempt to defraud their own clients. *Compare In re Cooper*, 613 N.Y.S.2d at 397 (imposing a one-year retroactive suspension for overbilling a client), *and In re Segall*, 638 N.Y.S.2d 444, 445 (App. Div. 1996) (imposing public censure for deliberately overbilling a client by \$1.2 million), *with In re Chernoff*, 611 N.Y.S.2d 6, 8 (App. Div. 1994) (imposing disbarment for secretly billing

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imposing discipline and its opinion provided no basis for predicting the likely outcome in future cases.<sup>62</sup> Fourth, the public was left with no easy way to learn of Cooper's disciplinary history when he resumed practice.<sup>63</sup>

While Ilan Reich was disbarred under the automatic disbarment rule for felonies and was required to wait a statutory seven-year waiting period for reinstatement,<sup>64</sup> his tale is equally troubling in certain respects. Since 1978, only five people had been reinstated to the New York Bar following automatic disbarment for a felony conviction.<sup>65</sup> After Reich's disbarment for tipping an investment banker about twelve deals in which his law firm was involved,<sup>66</sup> Reich mounted a well-orchestrated public relations campaign involving a dozen luminaries from Wall Street law firms to gain reinstatement. Using testimonials from leading lawyers whom he barely knew, he amassed an impressive record.<sup>67</sup> He was helped in his reinstatement campaign by his brother, a partner in one of Manhattan's most prestigious law firms, and by his employer, a wealthy Manhattan investor.<sup>68</sup>

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and collecting fees belonging to law firm), *and In re Cea*, 610 N.Y.S.2d 229 (App. Div. 1994) (imposing disbarment on an in-house lawyer for secretly billing and collecting loan processing fees due employer).

62. A later discipline case involving another Myerson & Kuhn lawyer who overbilled clients suggests the court's concern with comparably treating lawyers who worked with Myerson. Thus, Mark Segall, a Harvard-educated lawyer who overbilled clients by \$1.2 million was publicly censured because, unlike Cooper, he cooperated with the government from the outset of its criminal investigation. *See In re Segall*, 638 N.Y.S.2d at 445. In contrast, the following year the court imposed a one-year suspension, with a requirement that the lawyer apply for reinstatement, on a solo criminal practitioner who, while suffering from depression, overbilled an assigned counsel plan in the amount of \$6,000. *See In re Stone*, 657 N.Y.S.2d 2, 3 (App. Div. 1997).

63. *See supra* note 59 and accompanying text.

64. *See* N.Y. JUD. LAW § 90(5)(b) (McKinney 1997) (providing that if disbarment was based upon a felony conviction, the court may modify or vacate the disbarment after seven years).

65. *See* Report of Reich Hearing Panel, *supra* note 51, at 30-31 & n.31. It is not known how many reinstatement petitions were denied because the court does not maintain statistics concerning the number of lawyers who apply for reinstatement following automatic disbarment. *See* Telephone Interview with Sidney Gribetz, Secretary, New York Appellate Division First Department, Committee on Character and Fitness (Mar. 6, 1998).

66. Reich began providing inside information to investment banker Dennis Levine in March 1980, and did so sporadically until August 1984. He abandoned the scheme shortly before he became a partner in the firm. *See* Report of Reich Hearing Panel, *supra* note 51, at 16-19.

67. It has been reported that "[a]fter making dozens of cold calls to eminent names and humbling visits to mentors and friends of friends, Mr. Reich has organized his application to the bar the way he once plotted billion-dollar takeover defenses." Davis, *The Descent and Rise*, *supra* note 48, at A1. He managed to enlist testimonials from bar luminaries including Alexander D. Forger, president of the Legal Services Corp., Evan A. Davis, former counsel to then-Governor Mario M. Cuomo and a law partner of Reich's brother, and former New York City Police Commissioner Robert McGuire. *See id.*

68. Ilan Reich's employer, Richard Bernstein, reportedly encouraged friends and at least

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Reich may have also benefited from the fact that the chair of the disciplinary hearing panel was well-connected in the Manhattan bar and, like Reich, was a partner in a well-respected corporate takeover law firm.<sup>69</sup> The chair of the panel supported reinstatement and wrote a lengthy dissenting opinion noting that Reich “has offered a convincing explanation as to how he found it within himself to engage in insider trading and how he has changed since the commission of his crimes.”<sup>70</sup> The other members of the hearing panel, a solo practitioner and the panel’s only non-lawyer, disagreed and recommended against reinstatement.<sup>71</sup> Nevertheless, in a one paragraph opinion which contained no explanation of its reasoning, the New York court unanimously reinstated Mr. Reich.<sup>72</sup> Reich resumed law practice shortly after his reinstatement.<sup>73</sup>

This tale of two classmates illustrates some of the problems with the imposition of sanctions on lawyers, even in a state that purports to utilize consistent rules for the treatment of lawyers convicted of serious crimes. In Cooper’s case, no discernible standards were used when imposing sanctions and the sanction actually imposed was inconsistent with the sanctions imposed in other New York cases.<sup>74</sup> As Reich’s case suggests, the chances for resumption of the practice of law may depend on “whom you know,” not “what you did.”<sup>75</sup>

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one of his own white-shoe lawyers to write recommendations on Reich’s behalf. *See id.*

69. Jonathan Lerner, the chair of the panel, is head of the litigation department at Skadden, Arps, Slate, Meagher & Flom, one of New York’s most prestigious law firms. *See* 12 MARTINDALE-HUBBELL, *supra* note 45, at 1336B. He has also been involved for many years in the activities of the Association of the Bar of the City of New York, *see* FEDERAL BAR COUNCIL, SECOND CIRCUIT REDBOOK 1997-1998 1157 (Vincent C. Alexander ed., 1997), and undoubtedly was acquainted with several of the elite lawyers who were writing letters to the panel on Reich’s behalf.

Mr. Lerner has worked to improve the ethics of the bar for many years, and I do not mean to suggest that his conduct was improper. Nevertheless, his acquaintance with some of Reich’s supporters may have colored his views and his opinion in the case clearly reflects his ability to see the world from Reich’s perspective.

70. Report of Reich Hearing Panel, *supra* note 51, at 42.

71. *See* Davis, *The Descent and Rise*, *supra* note 48, at A1. In recommending against reinstatement they wrote, “[w]e were somewhat off-put by what appeared to be a ‘campaign’ for reinstatement, supported by letters from prominent persons who had no particular knowledge of Reich.” Report of Reich Hearing Panel, *supra* note 51, at 9.

72. *See In re Reich*, 636 N.Y.S.2d 674 (App. Div. 1995). The court’s failure to articulate its reasoning was particularly striking in view of the observation of the chair of the hearing panel that recent court decisions “do not provide readily discernible guidelines for evaluating such petitions.” Report of Reich Hearing Panel, *supra* note 51, at 24.

73. *See* Ann Davis, *Back to M & A Work*, NAT’L L.J., July 15, 1996, at A4 (reporting that seven months after his reinstatement to the New York State Bar, Mr. Reich had become of counsel to a 40-lawyer corporate law firm).

74. *See supra* note 61.

75. While this Article identifies examples of possible bias in the imposition of lawyer sanctions, I do not mean to suggest that all decision-makers are biased in favor of lawyers or in favor of lawyers who practice in certain settings. Nevertheless, there is undeniably some bias at work in the lawyer discipline process, and that bias typically works to the benefit of lawyers.

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Moreover, when practice resumes, the general public is left with no easy way to learn of the lawyer's misconduct.<sup>76</sup>

Before further exploring the problems with the ways in which the sanctions imposed on lawyers are currently determined—and the problems with the ABA Standards, in particular—it is useful to consider the goals of lawyer discipline and the sanctions used to achieve these goals. Only with these goals in mind is it possible to understand fully the shortcomings of the current approaches to the imposition of discipline and to identify ways to draft more effective standards for the imposition of sanctions on lawyers.

## II. THE PURPOSE OF SANCTIONS AND STANDARDS

### A. *The Goals of Lawyer Discipline*

Three reasons are typically cited for imposing discipline on lawyers: first and foremost, protection of the public,<sup>77</sup> second, protection of the administration of justice<sup>78</sup> and third, preservation of confidence

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76. The sanctions imposed on Cooper and Reich were publicized at the time they were imposed. *See Reich is Disbarred for Role in Inside-Trading Scandal*, WALL ST. J., May 29, 1987, at 8; *Today's News Update*, *supra* note 49, at 1. However, it is unlikely that most members of the public would have an easy way of learning of these sanctions once the lawyers resumed practice. *See infra* notes 332-33 (explaining why most clients are unlikely to find and read published notices of discipline).

77. *See, e.g., In re Merrill*, 875 P.2d 128, 131 (Ariz. 1994); *In re Abrams*, 689 A.2d 6, 12 (D.C. 1997); *In re Brown*, 674 So. 2d 243, 246 (La. 1996); *Board v. Dineen*, 557 A.2d 610, 614 (Me. 1989); *Attorney Grievance Comm'n v. Garland*, 692 A.2d 465, 472 (Md. 1997); *In re Olson*, 577 N.W.2d 218, 220 (Minn. 1998); *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994); *In re Imbriani*, 694 A.2d 1030, 1035 (N.J. 1997); *In re Curran*, 801 P.2d 962, 974 (Wash. 1990); ABA STANDARDS, *supra* note 7, at Standard 1.1 Commentary.

78. *See, e.g., In re Brady*, 923 P.2d 836, 840 (Ariz. 1996); *Statewide Grievance Comm. v. Botwick*, 627 A.2d 901, 906 (Conn. 1993); *In re Chandler*, 641 N.E.2d 473, 479 (Ill. 1994); *In re Quaid*, 646 So. 2d 343, 350 (La. 1994); *In re Hartke*, 529 N.W.2d 678, 683 (Minn. 1995); *In re Bourcier*, 939 P.2d 604, 608 (Or. 1997); ABA STANDARDS, *supra* note 7, at Standard 1.1. In its narrowest sense, the concern is with lawyers who subvert the judicial process by misrepresenting the facts or law to the court, suborning perjury, or otherwise engaging in conduct that unfairly interferes with the truth-seeking activities of the courts or the smooth functioning of the legal system.

Viewed more broadly, the concern about protecting the administration of justice also reflects an effort to preserve the public's support for legal institutions. Lawyers, by virtue of their education and their near monopoly on legal practice, continue to be viewed as the gatekeepers to the law and the courts. While this may be changing as more lay people turn to self-help and non-lawyers assume roles traditionally filled by lawyers, *see generally* Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 214-16 (1990) (discussing the increased market for legal services provided by laypersons), the concern remains that if lawyers do not adhere to certain minimum standards of conduct and are not disciplined appropriately when they fail to do so, respect for the law and legal institutions will be undermined, *see In re Serstock*, 432 N.W.2d 179, 185 (Minn. 1988) (noting that stern sanctions are needed to restore the public's trust in legal system); *In re Curran*, 801 P.2d 962, 974 (Wash. 1990) (stating that sanctions must maintain public confidence in legal institutions and enhance respect for the law).

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in the legal profession.<sup>79</sup> While most courts insist that the purpose of lawyer discipline is not to *punish* lawyers,<sup>80</sup> this assertion is probably incorrect.<sup>81</sup> In fact, many lawyer sanctions fit within classic definitions of “punishment”<sup>82</sup> and can be justified by the traditional utilitarian

79. While preservation of confidence in the legal profession is related to concerns about protecting the administration of justice, *see supra* note 78, it is often cited separately. *See, e.g., In re Agostini*, 632 A.2d 80, 81 (Del. 1993); *In re Addams*, 579 A.2d 190, 199 (D.C. 1990); *In re Hahm*, 577 A.2d 503, 506 (N.J. 1990); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991); *In re Felice*, 772 P.2d 505, 509 (Wash. 1989); Bene, *supra* note 18, at 912. In some cases the stated interest in protecting confidence in the legal profession seems to reflect a separate concern about preserving the professional status of lawyers. *See, e.g., Emil v. Mississippi State Bar*, 690 So. 2d 301, 327 (Miss. 1997) (voicing concern about the diminished status of lawyers and about the need to preserve the dignity and reputation of the profession).

80. *See, e.g., Ex parte Wall*, 107 U.S. 265, 288 (1882) (stating that disbarment proceeding “is not for the purpose of punishment”); *In re Brown*, 910 P.2d 631, 634 (Ariz. 1996); *In re Imbriani*, 694 A.2d 1030, 1035 (N.J. 1997); Office of Disciplinary Counsel v. Zdrok, 645 A.2d 830, 834 (Pa. 1994); ABA STANDARDS, *supra* note 7, at Standard 1.1 Commentary; Kelly, *supra* note 8, at n.6 (noting that the purpose of lawyer discipline proceedings is not to punish attorneys); Bene, *supra* note 18, at 912 & n.19 (noting that courts reject “punishment” of attorney as a justification for discipline). *But see In re Ruffalo*, 390 U.S. 544, 550 (1968) (noting that disbarment “is a punishment or penalty imposed on the lawyer”); *In re Fordham*, 668 N.E.2d 816, 824 (Mass. 1996) (stating that disciplinary sanctions constitute a punishment or penalty); *Stegall v. Mississippi State Bar*, 618 So. 2d 1291, 1294 (Miss. 1993); *In re Rentel*, 729 P.2d 615, 618 (Wash. 1986). *See generally Gay v. Virginia State Bar*, 389 S.E.2d 470, 474 (Va. 1990) (referring to lawyer sanctions as “punishments”); Committee on Legal Ethics v. Hobbs, 439 S.E.2d 629, 634 (W. Va. 1993) (considering what steps would “appropriately punish” the attorney); Wilkins, *supra* note 18, at 806 (arguing that disciplinary agencies, following a criminal justice analogue, mainly stress punishment and deterrence).

81. The claim that lawyer sanctions are not “punishment” appears in part to be a reflexive restatement of case law going back to Lord Mansfield, *see Ex parte Brounsall*, 98 Eng. Rep. 1385 (K.B. 1778), and in part designed to avoid claims that lawyer discipline proceedings are entitled to the rigorous constitutional protections afforded criminal proceedings.

The attempt to prescribe the circumstances under which stringent constitutional protections should be afforded persons subject to state-imposed sanctions has proved exceedingly difficult. *See, e.g., Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778 (1997). The lawyer discipline process traditionally has been viewed as not deserving the same protections afforded criminal punishment, but it is afforded some protections. As the Supreme Court has noted, the issue is not “whether lawyers are entitled to due process of law in matters of this kind, but, rather what process is constitutionally due them in such circumstances.” *Cohen v. Hurley*, 366 U.S. 117, 129 (1961), *overruled by Spevack v. Klein*, 385 U.S. 511 (1967); *see also Ruffalo*, 390 U.S. at 550 (holding that a lawyer is entitled to notice of charges and an opportunity to be heard in a disciplinary proceeding); *Spevack*, 385 U.S. at 514 (holding that privilege against self-incrimination is available in disciplinary proceedings); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 791-92 (5th ed. 1998) (describing other due process rights afforded lawyers in disciplinary proceedings).

82. Courts, philosophers and legal commentators have struggled to define the essence of punishment. *See, e.g., HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION* 19-34 (1968); Steiker, *supra* note 81, at 781-82. In one frequently cited definition, punishment is defined in terms of five elements which seem present in most lawyer sanctioning decisions:

- (1) It must involve pain or other consequences normally considered unpleasant.
- (2) It must be for an offence against legal rules.
- (3) It must be of an actual or supposed offender for his offence.
- (4) It must be intentionally administered by human beings other than the offender.
- (5) It must be intentionally administered by an authority constituted by a legal system against which the offence is committed.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968). This is, however, an incomplete

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justifications of criminal punishment: incapacitation, rehabilitation, and deterrence.<sup>83</sup>

Although the traditional approach to lawyer discipline follows a quasi-criminal model,<sup>84</sup> in recent years a consumer protection approach to lawyer misconduct has emerged.<sup>85</sup> The latter approach recognizes that much dissatisfaction with lawyers arises from their failure to perform legal services properly—often due to neglect, incompetence, or failure to communicate with clients—and attempts to respond to these problems in a manner that addresses consumer interests. Increasingly, some of the sanctions imposed on lawyers reflect a consumer dispute resolution approach to lawyer misconduct and are based on theories of restitution and reconciliation.<sup>86</sup>

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definition. At a minimum, “punishment” also connotes “a moral dimension of responsibility and blame.” See STEPHEN A. SALTZBURG ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 99 (1994).

83. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES—LAW WITHOUT ORDER* 106 (1973); PACKER, *supra* note 82, at 39-58. Judicial uncertainty about whether to characterize lawyer sanctions as civil or quasi-criminal further illustrates the relationship between theories of criminal punishment and lawyer discipline. See generally Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL’Y 6, 18 n.16 (1994) (noting that courts have difficulty categorizing lawyer discipline proceedings as civil or quasi-criminal); Dorf, *supra* note 4, at 18-22 (describing uncertainty regarding whether disbarment proceedings are civil or criminal); Steele & Nimmer, *supra* note 4, at 926 n.12 (describing disciplinary actions as a quasi-criminal process). At different times, the United States Supreme Court has characterized lawyer sanctions as both civil and quasi-criminal. Compare *Ex parte Wall*, 107 U.S. at 288 (stating that disbarment proceeding “is in its nature civil, and collateral to any criminal prosecution”), with *Ruffalo*, 390 U.S. at 551 (stating that disbarment involves “adversary proceedings of a quasi-criminal nature”). Other courts refer to lawyer disciplinary proceedings as neither civil nor criminal, but *sui generis*. See, e.g., *People v. Wechsler*, 854 P.2d 217, 221 n.2 (Colo. 1993); see also ABA STANDARDS, *supra* note 7, at Standard 2.1 Commentary; Dorf, *supra* note 4, at 20-21.

84. In most states, disciplinary counsel serve as prosecutors with the power to subpoena, investigate, and bring “charges” upon a finding of probable cause. See COLD, *supra* note 9, at Q 39A, Q 40A, Q 41; Deborah M. Chalfie, *Dumping Discipline: A Consumer Protection Model for Regulating Lawyers*, 4 LOY. CONSUMER L. REP. 4, 7 (Fall 1991). See generally MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rules 4, 11, 14 (1996) (providing that disciplinary counsel “shall perform all prosecutorial functions”).

85. Consumer advocates argue that the ideal consumer-oriented system is not a lawyer discipline system, but rather a consumer protection system with responsibility to mediate disputes. See Kay A. Ostberg, *The Conflict of Interest in Lawyer Self-Regulation*, PROF. LAW., Summer 1989, at 6, 9; see also Chalfie, *supra* note 84, at 4 (arguing that if consumer protection is key, then lawyer regulation should not be modeled after the criminal justice system).

86. See *infra* text accompanying notes 123-28. As the discussion in the following section demonstrates, all of the sanctions imposed on lawyers are designed, at least in part, to protect consumers of legal services. None is purely retributive.

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## B. *The Sanctions and Their Purpose*<sup>87</sup>

### 1. *Incapacitating sanctions*

The sanctions of disbarment and suspension have long been used to discipline lawyers and protect the public through incapacitation.<sup>88</sup> Incapacitation theory holds that punishment should protect the public by physically confining the wrongdoer or taking other steps to prevent the person from committing further wrongs.<sup>89</sup> In the criminal context, imprisonment, banishment, electronic surveillance, and castration are all forms of incapacitation.<sup>90</sup>

Disbarment and suspension are incapacitating sanctions because they are designed to prevent errant lawyers from committing future wrongs by precluding them from practicing law during the period of incapacitation. Disbarment terminates the lawyer's status as a lawyer.<sup>91</sup> Suspension removes a lawyer from practice for some period of time.<sup>92</sup> The primary differences between disbarment and suspension are usually the length of incapacitation, the requirements for resuming practice,<sup>93</sup> and the degree of the stigma attached to the sanction.<sup>94</sup>

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87. In this section, I describe the most commonly used disciplinary sanctions and the reasons why they are employed. Some sanctions described below can be placed into more than one category, but they have been grouped for ease of discussion with an eye toward their most common use or most salient characteristic.

88. The sanctions of disbarment and suspension have been imposed on lawyers since the medieval period. See Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 123-30 (1998). These sanctions have been used in this country since colonial times. See GERARD W. GEWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840* 8, 48, 61 (1979); see also Gallagher, *supra* note 5, at 509 (describing colonial regulation of lawyers in Virginia).

89. See PACKER, *supra* note 82, at 48-50.

90. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1899 (1991).

91. As a practical matter, disbarments typically incapacitate for a minimum period of five to seven years before a petition for reinstatement will be considered. See COLD, *supra* note 9, at Q 56C; see also ABA STANDARDS, *supra* note 7, at Standard 2.2 Commentary. Eight states and the District of Columbia can impose permanent disbarment without the possibility of reinstatement. See COLD, *supra* note 9, at Q 56D.

92. The maximum length of suspension is usually no more than five years, although some suspensions are "indefinite." See COLD, *supra* note 9, at Q 57D.

93. In cases of disbarment, indefinite suspensions or, in most jurisdictions, suspensions of more than a year, lawyers must apply for reinstatement and bear the burden of proof in such a hearing. The burden typically includes a showing by clear and convincing evidence of rehabilitation from the conditions or attitudes that caused the problem, compliance with disciplinary orders, and competence to practice law. See ABA STANDARDS, *supra* note 7, at Standard 2.3 Commentary, Standard 2.10 Commentary; see also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 132-33 (2d ed. 1986).

94. Although a lengthy suspension and disbarment may have the same impact on an attorney's livelihood, the condemnation associated with the sanction of disbarment is greater. See ABA STANDARDS, *supra* note 7, at Standard 2.2 Commentary; WOLFRAM, *supra* note 93, at 128.

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These sanctions are designed to protect the public and the administration of justice by removing the bad actors from the practice of law.<sup>95</sup> Although the sanctions work through incapacitation, they are believed to serve significant deterrent<sup>96</sup> and expressive functions<sup>97</sup> as well. Incapacitating sanctions are typically reserved for the “worst” types of misconduct: thefts of funds from clients, fraud on the courts, crimes that seriously place in question the lawyer’s integrity, and repeated wrongdoing even after discipline has been imposed.<sup>98</sup>

## 2. *Expressive sanctions*

The imposition of any sanction expresses a message to the errant lawyer, other attorneys, and the general public about the level of blame and social condemnation attached to the misconduct.<sup>99</sup>

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95. See Committee on Legal Ethics v. Mitchell, 418 S.E.2d 733, 737 (W. Va. 1992) (noting that disbarment “removes a bad lawyer from preying on an unsuspecting world”); Steele & Nimmer, *supra* note 4, at 925; see also ABA STANDARDS, *supra* note 7, Standard 2.2 Commentary.

96. See PACKER, *supra* note 82, at 39. Deterrence theory focuses on the “inhibiting effect that punishment . . . will have on the actions of those who are otherwise disposed to commit crime.” Deterrence theory posits that punishment is inflicted to deter future wrongdoing by the person being punished (specific deterrence) and by others who might commit wrongs (general deterrence). See *id.* According to deterrence theory, punishment is so unpleasant that neither the individual who is being sanctioned nor those who observe the punishment would engage in similar misconduct in the future because of fear of similar sanction. In recent years, deterrence has been cited frequently as a justification for the sanctions of disbarment and suspension. See, e.g., *In re Retter*, 885 P.2d 1080, 1083 (Ariz. 1994) (stating that suspension is necessary to achieve goals of deterring respondent and other attorneys from engaging in unethical behavior); *In re Serstock*, 432 N.W.2d 179, 188 (Minn. 1988) (explaining that indefinite suspension will “serve as a warning” that future misconduct impinging on integrity of legal system will not be tolerated). See generally Florida State Bar v. Pellegrini, 714 So. 2d 448, 453 (Fla. 1998) (explaining that bar discipline must be severe enough to deter others from similar misconduct); Louisiana State Bar Ass’n v. Boutall, 597 So. 2d 444, 445 (La. 1992) (stating that attorney discipline protects the public by deterring attorney misconduct); *In re Concemi*, 662 N.E.2d 1030, 1033 (Mass. 1996) (noting that the court must consider “what measure of discipline is necessary to deter other attorneys from the same behavior”).

97. Punishment is a way in which society expresses its view that the wrongdoer did something blameworthy. Through this expression, society reinforces its values. See SALTZBURG ET AL., *supra* note 82, at 110. The forms and conventions of punishment are important because the conventions underlying different sanctions signify different levels of condemnation. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 599-600 (1996). For example, in the case of criminal punishment, incarceration expresses more condemnation than fines or community service. See *id.* at 592-93. In the case of lawyer discipline, disbarment expresses more condemnation than a public reprimand.

98. See ABA STANDARDS, *supra* note 7, at Standards 4.11, 4.21, 4.31, 4.41; see also Steele & Nimmer, *supra* note 4, at 996-97.

99. See *supra* note 97. See generally David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, in 11 STUDIES IN LAW, POLITICS AND SOCIETY 191, 193-203 (Austin Sarat et al. eds., 1991); Kahan, *supra* note 97, at 593 (noting that punishment “is a special social convention that signifies moral condemnation”).

Generally, the choice of sanctions reflects the relative seriousness of the wrongdoing. The degree and form of affliction on the wrongdoer signals society’s view of the act. See *id.* at 598.

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Although all sanctions are, in this sense, expressive, the term “expressive sanction” is used here to describe sanctions that are designed to achieve the goals of lawyer discipline primarily through the message of disapproval they convey rather than through any additional burden they may place on the lawyer. The two sanctions most commonly imposed on lawyers—public reprimand and private admonition<sup>100</sup>—are examples of expressive sanctions.

Public reprimands and private admonitions emerged early in this century and are widely utilized today as a means of conveying disapproval of lawyer conduct that did not seem to warrant incapacitating sanctions.<sup>101</sup> Indeed, these expressive sanctions have become the sanction of choice in most discipline cases.<sup>102</sup> Public reprimands typically involve publication of the lawyer’s name, the details of the misconduct and the fact that the reprimand has been issued.<sup>103</sup> The sanction derives its power from the value that lawyers place on their reputations and the resulting humiliation in having the misconduct publicized.<sup>104</sup> Private admonitions, in contrast, are used to convey disapproval concerning attorney misconduct that may not be viewed as serious, but that nonetheless violates ethical standards. Such admonitions usually are delivered in writing or during a personal appearance before a court or disciplinary authority.<sup>105</sup> Private admonitions have little or no deterrent effect on

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100. While the term “private admonition” is used here to describe any form of private discipline, it is called an “admonition” in the ABA Standards, *see* ABA STANDARDS, *supra* note 7, at Standard 2.6, and is also known as a “warning” or a “private censure” in other jurisdictions, *see, e.g.*, ARK. PROCEDURES REGULATING PROF’L CONDUCT OF ATTORNEYS § 7(D) (5); COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.7(4).

101. Public and private reprovals were apparently used in California by the 1920s. *See* ABEL, *supra* note 18, at 146 (noting that the California Bar issued 84 public and 77 private reprovals in its early years). Nevertheless, it appears that many jurisdictions lacked private admonitions as late as 1970. *See* PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 92. At that time the Clark Commission noted the need to vest the power to admonish in all disciplinary agencies in order to provide some method of dealing with “minor” misconduct. *See id.* The reasons for the recommendation included concern about dismissing obviously meritorious claims that did not warrant the expenditure of resources in formal disciplinary proceedings. *See id.* at 92-93. These dismissals angered the public and failed to inform lawyers that the conduct engaged in was unacceptable. *See id.* at 93-94.

102. *See* SOLD 1996, *supra* note 14, at 5-9 fig. II. In 1996, 2635 private sanctions and 814 public reprimands were imposed on lawyers in the reporting jurisdictions, for a total of 3449 expressive sanctions. In contrast, 2962 other sanctions were imposed. *See id.*

103. Public reprimands are delivered to the lawyer in writing or in person. *See* COLD, *supra* note 9, at Q 59F. At a minimum, information about the reprimand appears in disciplinary opinions that are available to the public. The reprimands often appear in legal publications as well. *See id.* at Q 59J. For a further discussion of the publication of reprimands, *see infra* notes 330-33 and accompanying text.

104. *See* WOLFRAM, *supra* note 93, at 127.

105. *See, e.g.*, COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.7; WASH. R. LAWYER DISCIPLINE 5.5(b).

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other lawyers because they usually are not publicized.<sup>106</sup> They are thought to promote specific deterrence and to provide a means of maintaining a record of attorney misconduct.<sup>107</sup>

### 3. *Rehabilitative sanctions*

Increased recognition of the pressures under which lawyers practice today and the relationship of those pressures to lawyer misconduct have heightened interest in the possibility of rehabilitation and expanded the range of sanctions imposed on lawyers. Rehabilitation theory is premised on the belief that human behavior is mutable and that punishment should be used to influence a wrongdoer's behavior, primarily by providing opportunities for reflection that actually change the wrongdoer's attitudes and actions.<sup>108</sup> Although policy makers and the public now seriously question whether such criminal behavior can be reformed, and rehabilitation as a justification for criminal punishment has lost some of its luster,<sup>109</sup> the possibility of rehabilitation continues to influence thinking about lawyer discipline. This may be due, in part, to a belief that lawyers are more "reformable" than most persons who commit crimes, and to the belief that lawyer misconduct can often be attributed to short-term psychological problems or substance abuse, and is therefore "treatable."

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106. See COLD, *supra* note 9, at Q 60D. Some jurisdictions simply list the number of private admonitions imposed, accompanied by two or three word explanations of the types of misconduct that occurred. See, e.g., *Discipline Reports*, 45 LA. B.J. 114 (1997). In a few jurisdictions, some of the facts giving rise to the misconduct are published without the names of the attorneys. The details about the misconduct are typically very sketchy. See, e.g., *Disciplinary Case Summaries*, COLO. LAW., Jan. 1996, at 75-76; *Discipline Corner*, UTAH B.J., Nov. 1997, at 24.

107. See PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 94.

108. See, e.g., FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 2, 12-13 (1981); PACKER, *supra* note 82, at 53-55.

Shortly after the American Revolution, society began to focus on rehabilitation as one of the goals of criminal punishment. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 77-78 (1993). The rehabilitation justification for criminal punishment originally relied upon incapacitation. Penitentiaries were built to provide a way for criminals to be removed from the evil forces in society and to reflect on the errors of their ways. See *id.* at 77-82. By the second half of the nineteenth century, the belief in rehabilitation brought with it the concept of probation. See LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 518-19 (2d ed. 1985). Other reforms during the 1800s that were based on rehabilitation theory included suspended sentences and indeterminate sentences. See *id.* at 519.

109. The decline of rehabilitation as a justification for criminal punishment has been well documented elsewhere. See ALLEN, *supra* note 108; Steiker, *supra* note 81, at 788-91. At the same time, the continued interest in certain types of alternative sanctions indicates that rehabilitation theory unquestionably continues to influence the imposition of criminal sanctions. See Kahan, *supra* note 97, at 630-52 (discussing shaming sanctions as an alternative penalty); *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1894-1949 (1998) [hereinafter *Developments in the Law*] (detailing alternative sanctions for drug offenders, female offenders, and non-violent offenders).

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Two commonly used rehabilitative sanctions are probation and mandatory education in professional responsibility.<sup>110</sup> Probation is imposed when it is determined that a lawyer's right to practice law needs to be monitored or limited rather than revoked<sup>111</sup> and when it appears that the conduct at issue can be corrected. Terms of probation may include supervision by another member of the bar,<sup>112</sup> limitations on practice, audits of trust accounts, and periodic physical or mental examinations.<sup>113</sup> Requirements that lawyers take a professional responsibility course or pass a professional responsibility examination<sup>114</sup> are also justified on the theory that a lawyer's attitudes and behaviors can be changed if the lawyer receives appropriate instruction.

The influence of rehabilitation theory on lawyer discipline can also be seen in the recent willingness to consider recovery from mental disability, alcoholism and chemical dependency as a mitigating factor when imposing discipline.<sup>115</sup> Although personal problems have long

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110. The use of "suspended" or "deferred" suspensions also reflects the impact of rehabilitation theory on lawyer sanctions. *See, e.g., In re Baxter*, 940 P.2d 37, 42 (Kan. 1997); *In re King*, 679 So. 2d 902, 903 (La. 1996); *In re Riviera*, 813 P.2d 1015, 1016 (N.M. 1991); *Office of Disciplinary Counsel v. Utacht*, 689 N.E.2d 543, 545 (Ohio 1998); *In re Fitting*, 742 P.2d 609, 611 (Or. 1987).

111. *See* ABA STANDARDS, *supra* note 7, at Standard 2.7 Commentary. In 1996, 350 sanctions of probation were imposed in the reporting jurisdictions. *See* FIVE-YEAR REPORT, *supra* note 24, at 15-16.

112. The level of supervision required can vary considerably. For example, in *In re Hunter*, 656 A.2d 203, 209 (Vt. 1994), the court ordered that during Hunter's probation a member of the bar acceptable to bar counsel was to perform a monthly review of Hunter's caseload. The court further required Hunter to file reports verifying this review and probation counsel was required to make written recommendations regarding Hunter's practice. *See id.* In contrast, the court in *In re Billewicz*, 641 A.2d 368, 369 (Vt. 1994), merely required respondent to consult with experienced members of the bar when doubts arose about ethical matters during the period of probation. *See id.*

113. *See* ABA STANDARDS, *supra* note 7, at Standard 2.7 Commentary (stating that conditions of probation may include periodic physical or mental examinations); *see also In re Rivkind*, 791 P.2d 1037, 1044 (Ariz. 1990) (requiring random drug testing and a "sobriety monitor" responsible for ensuring that the lawyer attend AA and NA meetings); *Florida Bar v. Rocha*, 453 So. 2d 823, 824 (Fla. 1984) (ordering psychological testing and continued counseling as recommended by a psychologist); *In re Baxter*, 940 P.2d at 42 (requiring mandatory examination by psychiatrist on a quarterly basis); *Cincinnati Bar Ass'n v. Baas*, 681 N.E.2d 421, 423 (Ohio 1997) (imposing random alcohol testing and examination by physician prior to termination of probation).

114. *See, e.g., In re Redondo*, 861 P.2d 619, 624 (Ariz. 1993) (ordering as a condition of probation that the lawyer take and complete a course on rules of professional conduct and pass an examination on the subject given by the state bar); *In re Bailey*, 478 S.E.2d 131, 132 (Ga. 1996) (ordering indefinite suspension until attorney complies with conditions including successful completion of the Georgia State Bar's Ethics School); ABA STANDARDS, *supra* note 7, at Standard 2.8(e) (listing the bar exam and professional responsibility exam as sanctions which may be imposed).

115. *See, e.g., In re Kersey*, 520 A.2d 321, 324, 326-27 (D.C. 1987) (treating rehabilitation from alcoholism as a mitigating factor); *Allen County Bar Ass'n v. Chamberlain*, 685 N.E.2d 1231, 1233 (Ohio 1997) (ordering that attorney receive only a public reprimand after considering his efforts at rehabilitation); *State v. Prather*, 925 P.2d 28, 30 (Okla. 1996) (taking

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been considered mitigating factors, the attitude toward drug and alcohol addiction and mental disabilities historically was less sympathetic.<sup>116</sup> As mental illness has become better understood and drug and alcohol abuse have come to be viewed as diseases rather than intentional conduct, sanctions for serious misconduct have been substantially reduced based on evidence that treatment has been successful or will continue.<sup>117</sup>

#### 4. *Consumer-oriented responses*

Consumer-oriented responses to lawyer misconduct evolved from the recognition that the practice of law is, in large part, a commercial enterprise, and that consumers of legal services should be entitled to the same types of protections afforded consumers of goods and services. Beginning in the 1960s, and with increasing momentum during the 1970s,<sup>118</sup> a consumer-oriented approach to attorney

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into account a lawyer's attempts to treat his attention deficit disorder in the imposition of discipline); ABA STANDARDS, *supra* note 7, at Standard 9.32(i)(3) (listing recovery from mental disability or chemical dependence as mitigating factors).

116. This attitude continues to prevail in some jurisdictions, at least where serious misconduct occurs. *See, e.g., In re Roth*, 658 A.2d 1264, 1274 (N.J. 1995) (declining to consider depression as a mitigating factor in a misappropriation case); *In re Turner*, 577 A.2d 511, 519 (N.J. 1990) (declining to treat drug rehabilitation efforts as a mitigating factor); *In re Floyd*, 468 S.E.2d 302, 304 (S.C. 1995) (refusing to permit evidence of depression to mitigate a sanction of disbarment). *See generally* Grievance Panel v. Millstein, No. CV-940538618S, 1997 WL 345356, at \*4-5 (Conn. Super. Ct. June 10, 1997) (disbarring the attorney notwithstanding evidence of rehabilitation from alcoholism); *In re Hahm*, 577 A.2d 503, 506 (N.J. 1990) (same).

117. *See, e.g., In re Rivkind*, 791 P.2d at 1043-45 (imposing a lesser sanction due in part to evidence of rehabilitation); *People v. Barbieri*, 935 P.2d 12, 13 (Colo. 1997) (imposing a lesser sanction based in part on the understanding that the lawyer would continue in therapy until discharged); *see also* ABA STANDARDS, *supra* note 7, at Standard 9.32(i)(3) (providing for mitigation when recovery is demonstrated by a sustained period of rehabilitation). In some states, lawyer assistance programs designed to help lawyers with alcohol and substance abuse problems are directly incorporated into the disciplinary scheme. *See* FLA. STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 10.1 (1998) (providing that attorneys accused of personal use of controlled substances will be advised of the existence of Florida Lawyers' Assistance, Inc., and that good faith, ongoing rehabilitation with F.L.A., Inc. will be viewed as mitigation).

118. In the early 1970s, the Watergate affair, which involved several lawyers, raised serious questions about lawyers' ethics and their commitment to the public interest. *See* JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 263-308 (1976); *see also* Garbus & Seligman, *supra* note 28, at 47. During this time, the emerging consumer-rights movement and legal services movement began to work together to challenge some time-honored bar practices, revealing that the bar's "ethical rules" often served to preserve lawyers' economic self-interests. *See* ABEL, *supra* note 18, at 229; POWELL, *supra* note 5, at 156-60; *see also* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 706-16, 721-28, 731-32 (1977) (arguing that the Code of Professional Responsibility protects lawyers' economic interests to the detriment of consumers). For example, court challenges to lawyer advertising rules rocked some of the basic assumptions about the law as a "profession" as opposed to a business. *See* *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (striking down ethics rules restricting advertising of legal services as violative of the First Amendment); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (finding the ethical practice of using minimum fee schedules violative of the Sherman Act).

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regulation evolved both inside and outside the bar.<sup>119</sup> The consumer movement and bar self-studies broadened the conception of the dangers to which consumers of legal services are exposed beyond obvious ethical lapses, such as theft from clients and fraud on the court.<sup>120</sup> The new consumer orientation highlighted the need to redress the most ignored but most common client complaints about lawyers: neglect of client matters, failure to communicate and lack of basic competence.<sup>121</sup> Consumer advocates also criticized the stated

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119. See Chalfie, *supra* note 84, at 4; Gallagher, *supra* note 5, at 535 & n.306. One sign of public dissatisfaction was the formation in 1978 of Help Abolish Legal Tyranny ("HALT"), an organization of Americans for Legal Reform. HALT has been a vocal critic of lawyer self-regulation and of lawyer discipline, in particular. See Michael L. Prigoff & Howard Stern, *The New Jersey State Bar Association's Task Force on the Disciplinary System*, N.J. LAW., Oct. 4, 1993, at S1; Kay Ostberg, Deputy Director of HALT, *The Conflict of Interest in Self Regulation*, Statement Before the Comm'n on the Evaluation of Disciplinary Enforcement of the ABA (Aug. 4, 1990) (on file with author).

120. Historically, discipline systems ignored or trivialized complaints about neglect and overcharging unless the violations were repeated or egregious. See Chalfie, *supra* note 84, at 5 (noting that "[t]o rise to the occasion of a disciplinary violation the neglect must be repeated or intentional, the overcharge must be unconscionable"); see also JETHRO K. LIEBERMAN, *CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 200-02* (1978) (discussing instances where grievance committees dismissed complaints regarding neglect and overcharging); Martyn, *supra* note 18, at 716-17 (reporting that "only repeated acts of misconduct constitute incompetence of sufficient severity to justify official action"); Steele & Nimmer, *supra* note 4, at 923, 967-69, 996-99 (noting lack of attention paid to these complaints). This may be due, in part, to the fact that disciplinary committees failed to consider neglect and incompetence as ethical violations until recently, and therefore complaints based upon those problems were not viewed as falling within the committee's jurisdiction. See generally *LAWYER REGULATION*, *supra* note 12, at 11, 13.

In 1970, the Clark Commission noted the problem that disciplinary agencies lacked procedures to dispose of "minor" misconduct such as failures to keep clients advised of the status of their cases and isolated instances of neglect. See *PROBLEMS IN DISCIPLINARY ENFORCEMENT*, *supra* note 1, at 92. By 1992, the ABA's McKay Commission, which was charged with reexamining the state of lawyer discipline, viewed this problem as even more critical. The McKay Commission stressed the need to address consumer complaints that lawyers' services were overpriced or unreasonably slow and complaints that lawyers were incompetent or negligent. See *LAWYER REGULATION*, *supra* note 12, at xv.

121. See Martyn, *supra* note 18, at 723-43 (suggesting ways to address the bar's failure to respond to complaints based on lawyer incompetence); Steele & Nimmer, *supra* note 4, at 923-24 (suggesting that an alternative definition of disciplinary agency's function may be needed to address complaints concerning the quality of legal services rendered); Kay Ostberg, Deputy Director of HALT, *Alternative Models of Lawyer Regulation*, Statement Before the Comm'n on Evaluation of Disciplinary Enforcement of the ABA (May 4, 1990) (on file with author) (suggesting alternative regulatory structure to address quality of service issues); see also *LAWYER REGULATION*, *supra* note 12, at xv-xvi, 13 (noting the need for additional avenues to redress the most common client complaints). For example, complaints involving neglect of clients, unreturned calls and missed filing deadlines accounted for nearly half of all complaints in Arizona. See Project Information Form, ABA E. Smythe Gambrell Fund for Professionalism Application 1991-92 (on file with author); see also SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, *SYMPOSIUM PROCEEDINGS: TEACHING AND LEARNING PROFESSIONALISM 95* (1997) (noting that most complaints filed in New York City describe neglect, poor service, and poor communication); Arnold R. Rosenfeld, *The Bar Disciplinary Process in Massachusetts*, 79 MASS. L. REV. 180, 184 (1994) (noting that the largest number of complaints received in Massachusetts allege neglect); Mark Chesire, *More Lawyers Facing Discipline Outgoing Member of Grievance Commission Questions Figures*, DAILY REC. (Balt.), Nov. 20, 1997, at 1 (reporting that "neglect, a lack of diligence or communication" is the most

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objective of most disciplinary systems of maintaining minimum ethical standards rather than protecting legal consumers.<sup>122</sup>

The recognition of the need to address consumer complaints brought with it the realization that different disciplinary responses may be required. Indeed, restitution and conciliation, rather than punishment are the main goals of the consumer movement.<sup>123</sup> Thus, while consumer advocates continue to support the use, in certain cases, of incapacitating sanctions to protect the public, the conception of public protection has been broadened to address complaints about the quality of legal services provided, and to develop more efficient and cost-effective methods of dispute resolution for clients.

Client complaints about lawyer services and fees are now being addressed in two ways. First, lawyer discipline systems are addressing these complaints with traditional disciplinary responses such as expressive sanctions, probation and restitution.<sup>124</sup> Completion of lawyer skills and law office management courses are frequently a part of the discipline imposed.<sup>125</sup> Expedited procedures for handling complaints of “minor misconduct” are used to resolve cases quickly and with fewer resources than are devoted to other types of complaints.<sup>126</sup>

Second, state courts and state bars are also increasingly establishing programs outside of lawyer discipline systems to deal with “minor

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frequent reason for disciplinary action in Maryland); *Disciplinary Comm'n Annual Report, 1994-95*, RES GESTAE, Mar. 1996, at 14, 20 (noting that misconduct most often giving rise to grievances in Indiana was “poor communication or non-diligence”).

122. See, e.g., Chalfie, *supra* note 84, at 5.

123. See *id.* at 6; Ostberg, *supra* note 121, at 7-9, 24-26.

124. Incapacitating sanctions are typically imposed only when there is complete abandonment of client matters, a pattern of neglect, or a history of repeated neglect. See, e.g., ABA STANDARDS, *supra* note 7, at Standards 4.41, 4.42.

125. See *Drociak v. State Bar*, 804 P.2d 711, 715 (Cal. 1991) (ordering completion of a law office management course and submission of a law office management plan as a condition of probation); *Florida Bar v. Birdsong*, 661 So. 2d 1199, 1202 (Fla. 1995) (requiring lawyer to complete law office management course); *In re Lyles*, 469 S.E.2d 670, 672 (Ga. 1996) (requiring disciplined attorney to obtain a certificate from the Law Practice Management Program of Georgia Bar within 90 days after reinstatement). Requirements that lawyers complete additional Continuing Legal Education (“CLE”) requirements or pass a bar examination are also among the sanctions imposed on lawyers. See *In re Nomura*, SB-96-0005-D, 1996 Ariz. LEXIS 8, at \*4 (Jan. 26, 1996) (requiring the lawyer to take additional six hours of CLE in ethics during each of two years of probation); *Drociak*, 804 P.2d at 715 (requiring the lawyer to take a professional responsibility examination); *In re Elmore*, 934 P.2d 273, 276 (N.M. 1997) (requiring the lawyer to complete 40 hours of CLE in bankruptcy law and to pass the MPRE to be eligible for reinstatement).

126. See LAWYER REGULATION, *supra* note 12, at 49-52 (discussing expedited procedures for “minor misconduct”).

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misconduct.”<sup>127</sup> In some states, diversion programs provide the public with a way to pursue certain types of complaints through mediation or other non-disciplinary avenues.<sup>128</sup> These programs typically prescribe “remedies” but do not impose stigmatizing sanctions.<sup>129</sup> Not surprisingly, consumer groups contend that these programs should not be administered by the bar.<sup>130</sup>

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127. In 1992, the ABA adopted the recommendations of the McKay Commission that courts establish a system of regulation consisting of component agencies including, but not limited to, a lawyer discipline system, mandatory arbitration of fee disputes, and voluntary arbitration of malpractice claims. *See* LAWYER REGULATION, *supra* note 12, at 14-16. The Commission also recommended the adoption of procedures in lieu of discipline to deal with “minor misconduct,” including “minor incompetence” and “minor neglect.” *See id.* at 48-49.

128. For example, the Arizona State Bar has created a diversion program for complaints involving office management issues which permits the transfer of such complaints to a “probation-type program, freeing up the formal discipline system for more serious offenses and providing education and rehabilitation for individual lawyers.” SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS’N, REPORT OF THE PROFESSIONAL COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM, 117 (1996); *see also* ARIZ. SUP. CT. R. 52(a)(11). Tennessee has established “practice and professionalism enhancement programs” to which eligible disciplinary cases may be diverted. *See* TENN. SUP. CT. R. 9, §§ 30.1, 30.2. The Missouri Bar has a Complaint Resolution Program for mediation of “minor” complaints that are referred by the chief disciplinary counsel. *See* MO. SUP. CT. R. 5.10. California, the District of Columbia, Florida, New Jersey, New York and North Carolina also provide for diversion of minor disciplinary complaints. *See* CAL. BUS. & PROF. CODE § 6086.14 (West 1997); D.C. B.R. XI, § 8.1; FLA. B.R. 3-5.3; N.J. CT. R. 1:20-3(i)(2)(B)(i); N.Y. SUP. CT. R., 1ST DEP’T § 605.20(d)(2); N.C. B.R., ch.1, subch. B, § .0112(i); *see also* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 11(G) (1996) (discussing the Alternatives to Discipline Program which can include arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education programs and ethics school).

129. For example, in some states, probation imposed in diversion programs is not considered a sanction. *See* ARIZ. SUP. CT. R. 52(a), notes to 1995 Amendments; *see also* TENN. SUP. CT. R. 9, § 30.9.

130. *See* Chalfie, *supra* note 84, at 7 (noting that programs controlled by lawyers result in an intimidating system partial to lawyers); Ostberg, *supra* note 121, at 9 (same).

In fact, while some of these initiatives may prove to be a useful way to resolve good faith misunderstandings between lawyers and clients, diversion programs should be closely monitored to ensure that they adequately protect the public. One potential problem with the diversion of complaints about lawyers outside the discipline system is that serious misconduct may be diverted before the facts are fully known. In such cases, restitution or other non-stigmatizing remedies may satisfy the individual client, but the public may have no means to learn of the lawyer’s misconduct and the lawyer may be undeterred from future wrongdoing. These prospects are particularly troubling because lawyers may participate in a diversion program on more than one occasion. *See, e.g.*, TENN. SUP. CT. R. 9, § 30.3 (indicating that lawyers who have not been the subject of a diversion within the past five years may benefit from a second diversion). In order to protect the public, clear rules are needed to guarantee that only truly minor complaints are diverted from the discipline system and that stringent guidelines are used to ensure that lawyers cannot repeatedly avoid the discipline system because their misconduct is “minor.” Since diversion would typically occur before a finding of wrongdoing, standards for diverting cases should be included in the state’s procedures for disciplinary enforcement rather than in any standards for imposing sanctions on lawyers. *See, e.g.*, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 11(G) (1996) (providing some factors to be considered in determining whether to refer a lawyer to the Alternatives to Discipline Program).

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### C. *The Purpose of Standards*

The array of sanctions that are imposed on lawyers and their divergent purposes suggest the sanctioning process can quickly become unpredictable if not unprincipled. Standards are needed to help ensure that the sanctions selected in any case advance the basic goals of lawyer discipline. Moreover, without standards, bias can occur in the sanctioning process, different discipline may be imposed in similar cases,<sup>131</sup> sanctions may be imposed that are disproportionate to the conduct at issue,<sup>132</sup> and attorneys may not receive meaningful notice about the likely consequences of engaging in particular conduct.<sup>133</sup> Thus, the need for considered decision-making, predictability, consistency, and fairness in lawyer discipline make well-drafted sanctioning standards essential.

But while it is easy in theory to support the idea of standards for imposing disciplinary sanctions, the devil is in the details and agreement about specifics can be much harder to attain.<sup>134</sup> For example, consistency is considered one of the hallmarks of any fair sanctioning system,<sup>135</sup> yet “consistency” is an elusive concept that is

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131. See ABA STANDARDS, *supra* note 7, at 1 (noting inconsistent sanctions imposed for convictions for failure to file federal tax returns); Kelly, *supra* note 8, at 470-76 (discussing inconsistency in the imposition of lawyer discipline sanctions); see also *supra* note 61 and accompanying text; *infra* notes 165-66 and accompanying text.

132. See *In re Arrick*, 775 P.2d 1080, 1086 (Ariz. 1989) (noting that in deciding sanctions the goal is to prescribe discipline “consistent and proportional to that previously imposed in similar situations”).

133. See *In re Martin*, 506 N.W.2d 101, 107 (S.D. 1993) (explaining that consistency in discipline is needed so the practicing bar is aware of the consequences of a violation of professional standards); see also Armour, *supra* note 19, at 510 (noting that “conduct of lawyers . . . is less likely to be influenced by a rule that is unpredictable in its application”).

134. An example of this disagreement can be seen in the evolution of Rule 11 of the Federal Rules of Civil Procedure. See Armour, *supra* note 19, at 502-07. An even more heated example of disagreement over the specifics of standards can be seen in the controversy over the Federal Sentencing Guidelines and in the disagreement over the specifics of state sentencing guidelines. Compare Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) [hereinafter Alschuler, *The Failure of Sentencing Guidelines*] (discussing problems with the Federal Sentencing Guidelines), and Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992), and David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 882 (1996), with Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679 (1996) (arguing that the Federal Sentencing Guidelines are an improvement over the system they replaced), and Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1578 (1997) (arguing that the Federal Sentencing Guidelines are not “too severe,” “too complex,” or “too rigid”). Compare also Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723 (1993) (criticizing aspects of state sentencing guidelines), with Kay A. Knapp, *A Reply to Professor Alschuler*, 64 U. COLO. L. REV. 737 (1993) (defending aspects of state sentencing reform).

135. See, e.g., *In re Chandler*, 641 N.E.2d 473, 479 (Ill. 1994) (“[P]redictability and fairness require consistency in the sanctions imposed for similar acts of misconduct.”); *In re Curran*, 801

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sometimes difficult to measure<sup>136</sup> and is impossible to attain fully.<sup>137</sup> How much inconsistency should be tolerated or even encouraged when imposing sanctions on lawyers is a subject that can be seriously debated.<sup>138</sup>

Moreover, consistency alone will not yield fair or effective sanctions. A “consistent” sanction for particular misconduct can mask other inequality and may give rise to disproportionately heavy sanctions in individual cases.<sup>139</sup> For example, a rule requiring disbarment of all lawyers who convert client funds would encompass the lawyer who took \$50,000 or \$50; the senior lawyer who master-minded the conversion and the young lawyer who was directed to effect it; and the lawyer who is a recovering alcoholic and the one who is merely greedy. Although consistent, the sanction of disbarment may be disproportionately heavy for some of these

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P.2d 962, 973 (Wash. 1990) (noting that inconsistent application of sanctions casts doubt on basic fairness and efficiency of disciplinary system); Kelly, *supra* note 8, at 470 (noting that courts generally agree upon the need for consistency in the imposition of discipline); Sarah A. Hirsch, Comment, *The Illusive Consistency: A Case for Adopting the ABA Standards for Imposing Lawyer Sanctions in In re Martin*, 40 S.D. L. REV. 300, 323 (1995) (noting that consistency within a jurisdiction promotes fairness and reliability).

A lack of consistency also obscures the message conveyed by lawyer sanctions: If certain misconduct results in different sanctions in different cases, the sanction communicates nothing about the level of social censure involved. *See generally* Garland, *supra* note 99, at 199.

136. Part of the difficulty is definitional. For example, “consistency” may refer to similar treatment of lawyers who engage in similar misconduct or it may refer to similar treatment of lawyers who manifest similar characteristics (*e.g.*, depression or lack of remorse) or it may refer to similar treatment of lawyers who cause similar types of harm. Other differences in individual circumstances from case to case also make efforts to measure consistency in the imposition of sanctions difficult.

137. Scholars have concluded that some inconsistency is inevitable in judicial decision-making. *See, e.g.*, Armour, *supra* note 19, at 537-38 n.185 (noting that the legal system tolerates inconsistencies in decisions). Judicial inconsistency can be classified as follows: “(1) inevitable inconsistency; (2) deliberate inconsistency; (3) bias inconsistency; (4) careless inconsistency; and (5) defective information inconsistency.” Robert S. Thompson, *Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer’s Wobble, or the Death of Error*, 59 S. CAL. L. REV. 424, 427 (1986). In many cases, rules create either inevitable inconsistency or there are institutional reasons for creating rules that permit deliberate inconsistency. *See id.* at 427-28. The other three types of inconsistency are considered unacceptable and should be avoided. *See id.* at 427, 429-31.

Empirical research also indicates that consistency is very difficult to attain. For example, even the carefully calibrated Federal Sentencing Guidelines have not completely eliminated unwarranted inconsistency in sentencing. *See* Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-92*, 31 L. & SOC’Y REV. 789, 804-18 (1997) (reporting that characteristics such as race, ethnicity, gender and education continue to result in disparate federal sentencing).

138. As Professor Wolfram has noted, consistency can “freeze a disciplinary system into a level of sanctions that is too lenient or too severe.” WOLFRAM, *supra* note 93, at 125. Arguments for consistency also assume—possibly incorrectly—“that ways can be found of isolating and quantifying all relevant factors that influence discretion.” *Id.*

139. This point has been well-developed in the criminal sentencing context. *See* RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 11-34 (1979); Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U.L. REV. 1336, 1337-39 (1997).

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offenders.

Nevertheless, consistency is important to the credibility, effectiveness and fairness of any discipline system, and efforts to achieve some measure of consistency are essential even if they do not succeed in all respects. At the same time, however, fairness when imposing sanctions requires some flexibility to account for the inevitable differences among the individuals being sanctioned. Consideration of the circumstances of the individual offender may also help ensure that the sanctions selected will best serve the goals of discipline. Yet, broad discretion to consider individual circumstances can become an invitation to treat differently those with whom the decision-makers identify. The challenge when creating standards for imposing lawyer sanctions is to strike the best possible balance between consistency and flexibility, keeping in mind the goals of discipline and the possible biases of the decision-makers.

### III. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

#### A. *The Background*

Until the ABA Standards for Imposing Lawyer Sanctions were adopted in the mid-1980s, there were no developed standards for imposing sanctions on lawyers.<sup>140</sup> The ABA Standards were drafted to fill the need for “clearly developed standards” and to address the perceived problem of inconsistent sanctions imposed on lawyers from jurisdiction to jurisdiction and inconsistencies within jurisdictions.<sup>141</sup> Before drafting the Standards, the ABA Joint Committee on Professional Sanctions (“Sanctions Committee”) extensively reviewed all recently reported disciplinary opinions and it relied heavily on

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140. Prior to 1986, the ABA Standards for Lawyer Discipline and Disability Proceedings did not suggest specific sanctions for particular offenses. Standard 7.1 simply provided that the sanctions should “depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline and may take into account aggravating or mitigating circumstances.” See ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS, *supra* note 6. At most, states had rules for dealing with convicted felons or common law rules concerning conversion of client funds. See, e.g., Attorney Grievance Comm’n v. Pattison, 441 A.2d 328, 333 (Md. 1982) (stating that absent extenuating circumstances, disbarment is the sanction that should be imposed for converting a client’s funds); *In re Wilson* 409 A.2d 1153, 1157-58 (N.J. 1979) (concluding that public confidence in the court and the bar require disbarment for misappropriation); *supra* notes 50-51.

141. See ABA STANDARDS, *supra* note 7, at 1; Martha Middleton, *Discipline Chaos: ABA to Try to End Disparity*, A.B.A. J., Dec. 1983, at 1810. For example, the Preface to the ABA Standards notes that a lawyer convicted of tax evasion in one state might be reprimanded while a lawyer elsewhere might be suspended for a year. See ABA STANDARDS, *supra* note 7, at 1. The Preface also contains numerous references to the problem of inconsistent sanctions and to the interest in achieving consistency in the imposition of sanctions. See *id.* at 1-2; see also *id.* at Standard 1.3.

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these court decisions when prescribing sanction levels for various types of misconduct.<sup>142</sup> The Sanctions Committee ultimately drafted voluntary standards that were designed to achieve consistency in the imposition of lawyer discipline while providing flexibility to consider the lawyer's individual circumstances.<sup>143</sup>

The framework of the ABA Standards requires courts<sup>144</sup> to consider the nature and effect of a lawyer's misconduct and to make an initial determination of the appropriate sanction for the misconduct before considering "aggravating" or "mitigating" factors.<sup>145</sup> To reach an initial determination, the Standards require that the court consider the ethical duty violated,<sup>146</sup> the lawyer's mental state and the injury caused by the lawyer's misconduct.<sup>147</sup> The ABA Standards then preliminarily prescribe the sanction that is "generally" appropriate for the misconduct.<sup>148</sup>

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142. The Sanctions Committee examined all reported discipline cases from 1980 through June 1984 and looked in depth at all reported decisions in eight jurisdictions from January 1974 through June 1984. *See id.* at 2. In each case, the Committee collected data concerning the offense, the level of sanction imposed, the policy considerations identified and the aggravating and mitigating factors noted by the courts. *See id.* at 3; *see also* Kelly, *supra* note 8, at 476-77 (describing the ABA sanctions project).

143. *See* ABA STANDARDS, *supra* note 7, at 1-2. The Sanctions Committee designed the Standards to promote:

- (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

*Id.* at Standard 1.3. The Sanctions Committee sought to create standards that were not analogous to criminal determinate sentences, but were instead guidelines giving courts flexibility in each case. *See id.* at 6.

144. The ABA Standards refer to the factors the "court" should consider, but the Standards are often used by disciplinary bodies as well as courts. *See infra* note 157 and accompanying text. Because this section examines judicial use and interpretation of the Standards, it refers to the conduct of "courts," although most of the observations apply to any decision-maker with the authority to impose sanctions in a lawyer discipline system.

145. The ABA Standards recommend either disbarment, suspension, reprimand, or a private admonition for each type of misconduct it describes. *See infra* note 148. Although not expressly prescribed for any particular misconduct, interim suspension and probation may also be imposed. *See* ABA STANDARDS, *supra* note 7, at Standards 2.4, 2.7.

The Standards also list other sanctions and remedies that may be imposed, such as restitution, bar examination, and educational requirements, although they provide little guidance as to when imposition of those sanctions would be appropriate. *See id.* at Standard 2.8. The Commentary suggests that courts "should be creative and flexible in approaching those cases where there is some misconduct but where a severe sanction is not required." *See id.* at Standard 2.8 Commentary.

146. Those duties are broadly categorized as duties to clients, the public, the legal system, and the profession. *See id.* at 5. Within each of these categories the Standards identify the types of duties that may be breached. For example, under Duty to Clients, the ABA Standards separately address Failure to Preserve the Client's Property (Standard 4.1), Failure to Preserve the Client's Confidences (Standard 4.2), Failure to Avoid Conflicts of Interest (Standard 4.3), Lack of Diligence (Standard 4.4), Lack of Competence (Standard 4.5) and Lack of Candor (Standard 4.6).

147. *See* ABA STANDARDS, *supra* note 7, at 3, 5-6.

148. For example, ABA Standard 4.1 provides:

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Once the court makes an initial determination of what the appropriate sanction should be, it then may consider aggravating and mitigating factors.<sup>149</sup> Aggravating factors include, *inter alia*, the existence of prior disciplinary offenses, a dishonest or selfish motive, a pattern of misconduct, vulnerability of the victim, and substantial experience in the practice of law.<sup>150</sup> Mitigating factors include the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, personal or emotional problems, inexperience in law practice, character or reputation, and, under certain circumstances, mental disability or chemical dependency.<sup>151</sup> The Standards suggest but do not require that courts consider these factors<sup>152</sup> and do not indicate how much weight these factors should be accorded.

### *B. Use of Standards by the Courts*

The ABA Standards are the most frequently used standards for imposing lawyer sanctions. A dozen of the highest state courts rely heavily on the ABA Standards when imposing discipline.<sup>153</sup> Four

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Absent aggravating or mitigating circumstances . . . the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

ABA STANDARDS, *supra* note 7, at Standard 4.1.

149. *See id.* at 3.

150. *See id.* at Standard 9.22. Other factors that may be considered aggravating are multiple offenses, bad faith obstruction of the disciplinary process, submission of false evidence, false statements or other deceptive practices during the disciplinary process, refusal to acknowledge wrongful nature of conduct, indifference to making restitution, and illegal conduct. *See id.*

151. *See id.* at Standard 9.32. Other factors that may be considered mitigating include timely good faith effort to make restitution or to rectify consequences of the misconduct, cooperative attitude toward disciplinary proceedings, physical disability, delay in disciplinary proceedings, the imposition of other penalties or sanctions, remorse, and remoteness of prior offenses. *See id.*

152. "In imposing a sanction . . . a court should consider . . . the existence of aggravating or mitigating factors." *Id.* at Standard 3.0(d). The factors described as aggravating or mitigating "may be considered" in aggravation or mitigation. *See id.* at Standards 9.22, 9.32.

153. Colorado, Georgia, and Washington courts routinely follow the ABA Standards when imposing sanctions. *See, e.g.,* *People v. Fager*, 938 P.2d 138, 141 (Colo. 1997) (using the ABA Standards to determine a sanction against an attorney); *In re Swindall*, 468 S.E. 2d 372, 373 (Ga. 1996) ("In determining the appropriate sanction to impose, we look to the [ABA Standards] for guidance."); *In re Curran*, 801 P.2d 962, 973 (Wash. 1990) (noting that the ABA Standards govern all disciplinary cases in that jurisdiction). The Supreme Courts of Alaska, Arizona, Delaware, Indiana, Louisiana, Maryland, Mississippi, Oregon, and Vermont often rely on the

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other states have adopted their own standards based on the ABA's Standards.<sup>154</sup> Several other state courts occasionally refer to the ABA Standards as useful in determining an appropriate sanction<sup>155</sup> or cite to the Standards as persuasive authority.<sup>156</sup> In addition, several state disciplinary boards rely on the ABA Standards.<sup>157</sup>

ABA Standards. *See, e.g., In re Beconovich*, 884 P.2d 1080, 1084 (Alaska 1994) (noting that the court was guided by the ABA Standards and its methodology); *In re Riddle*, 857 P.2d 1233, 1235 (Ariz. 1993) (noting that the ABA Standards are used by the court in determining the appropriate sanction); *In re Lassen*, 672 A.2d 988, 997 n.12 (Del. 1996) (stating that the court "often relies" on the ABA Standards when imposing sanctions); *In re Atanga*, 636 N.E.2d 1253, 1260 (Ind. 1994) ("In analyzing the appropriate sanction for lawyer misconduct, this court relies heavily upon the [ABA Standards]."); *In re Quaid*, 646 So. 2d 343, 350 (La. 1994) (noting that the court looks to the ABA Standards in determining appropriate sanctions); *Mississippi Bar v. Land*, 653 So. 2d 899, 910 (Miss. 1994) (noting that the court is guided by the ABA Standards in determining an appropriate sanction); *In re Hassenstab*, 934 P.2d 1110, 1117 (Or. 1997) (noting that the court is guided by the ABA Standards and its own case law); *In re Hunter*, 656 A.2d 203, 207 (Vt. 1994) (noting that "in deciding upon the appropriate sanction, we rely upon ABA Standards").

154. *See Preface* to ALA. STANDARDS FOR IMPOSING LAWYER SANCTIONS (1996) (stating that the Alabama Standards are "based in large measure" on ABA Standards); *Preface* to FLA. STANDARDS FOR IMPOSING LAWYER SANCTIONS (1998) (adopting an "amended version" of the ABA Standards); N.D. STANDARDS FOR IMPOSING LAWYER SANCTIONS, Note (1996-97) (stating that the North Dakota Standards are based on the ABA Standards); UTAH STANDARDS FOR IMPOSING LAWYER SANCTIONS, Summary (1997) (stating that the Utah Standards are based on black-letter rules contained in the ABA Standards).

155. States that occasionally refer to the ABA Standards to determine lawyer sanctions include Connecticut, Hawaii, Kansas, Minnesota, Missouri, New Mexico, and Wyoming. *See Statewide Grievance Comm. v. Duffy*, No. CV 93532399, 1994 Conn. Super. LEXIS 472, at \*3 (Feb. 25, 1994) (declaring that the ABA Standards are "[u]seful in the consideration of a proper remedy"); *Office of Disciplinary Counsel v. Lau*, 900 P.2d 777, 782 (Haw. 1995) (describing the ABA Standards as a "useful reference" to determine sanctions); *In re Anderson*, 795 P.2d 64, 67 (Kan. 1990) (noting the court's previous reliance on the ABA Standards to determine appropriate sanction); *see also In re Shoemaker*, 518 N.W.2d 552, 555 (Minn. 1994) (considering the ABA Standards' recommendation in a decision to disbar an attorney); *In re Howard*, 912 S.W.2d 61, 63 (Mo. 1995) (turning to the ABA Standards when "issue of discipline remains [to be resolved]"); *In re Gabell*, 858 P.2d 404, 405 (N.M. 1993) (referring to ABA Standards for recommendation on disbarment).

156. Arkansas, the District of Columbia, Massachusetts, New Hampshire and South Dakota courts have, on occasion, cited to the ABA Standards as persuasive authority. *See Wilson v. Neal*, 964 S.W.2d 199, 207 (Ark. 1998) (describing the ABA Standards' list of aggravating and mitigating factors as "useful" in determining appropriate sanctions); *In re Dulaney*, 606 A.2d 189, 191 n.5 (D.C. 1992) (citing the ABA Standards as persuasive in a disbarment decision); *In re Luongo*, 621 N.E.2d 681, 683 (Mass. 1993); *Tocci's Case*, 663 A.2d 88, 90 (N.H. 1995); *In re Claggett*, 544 N.W.2d 878, 881 (S.D. 1996) (choosing not to adopt the ABA Standards, but referring to them for guidance).

157. State disciplinary boards typically rely on the ABA Standards if the courts of the state rely on them. *See, e.g., In re Merrill*, 875 P.2d 128, 130 (Ariz. 1994) (recognizing that because the state court considers the ABA Standards, the Disciplinary Commission will as well); *In re Curran*, 801 P.2d 962, 967 (Wash. 1990). Even in states where the courts do not routinely rely on the ABA Standards, some disciplinary boards closely follow the ABA Standards. For example, the Wisconsin Disciplinary Board "always" looks at the Standards. Although Wisconsin case law carries more weight, the Board considers the ABA Standards "very persuasive." *See Telephone Interview* by Paul Croce with Gerald Sternberg, Administrator of the Wisconsin Disciplinary Board (Sept. 4, 1997); *see also In re Baxter*, 940 P.2d 37, 40 (Kan. 1997) (referring to the state court disciplinary panel's examination of the ABA Standards in determining the sanction); *Dockery v. Board of Prof'l Responsibility*, 937 S.W.2d 863, 866 n.6 (Tenn. 1996) (recognizing adoption of the ABA Standards by the Board); Board of Prof'l

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The state courts that do not regularly rely on the ABA Standards take varying approaches to the imposition of sanctions. Some of those states have rules concerning the discipline to be imposed on lawyers convicted of certain felonies,<sup>158</sup> and common law presumptive sanctions for conversion of client funds,<sup>159</sup> but do not have well-developed rules or standards regarding the discipline for non-felonious misconduct.<sup>160</sup> A few states have adopted rules listing some aggravating and mitigating factors that may be considered when imposing sanctions,<sup>161</sup> or have identified some general factors to be considered when imposing discipline, but they do not attempt to prescribe a framework for making the sanctioning decision or suggest particular sanctions that should be imposed for particular misconduct.<sup>162</sup> A number of state courts resist articulating any

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Responsibility. v. Vidakovich, 816 P.2d 885, 889 (Wyo. 1991) (reflecting that the Board of Professional Responsibility relied on the ABA Standards in making a sanction recommendation). See generally *In re Kane*, 13 MASS. ATT'Y DISCIPLINE REP. 321, 327-28 (1997) (announcing new guidelines for imposing sanctions in neglect cases similar to the ABA Standards).

158. See, e.g., D.C. CODE ANN. § 11-2503(a) (1997) (requiring disbarment of an attorney convicted of a crime of moral turpitude); TEX. R. DISCIPLINARY P. 8.05 (stating that an attorney convicted of an "intentional" crime shall be disbarred); VA. SUP. CT. R., pt. 6, § IV, ¶ 13(E)(2) (requiring disbarment or suspension of an attorney convicted of certain crimes); *supra* note 50 and accompanying text (describing New York's automatic disbarment rule for lawyers convicted of certain felonies).

159. See, e.g., *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (reaffirming that in virtually all cases of misappropriation, disbarment is the only appropriate sanction); Louisiana State Bar Ass'n v. Hinrichs, 486 So. 2d 116, 122-23 (La. 1986) (discussing presumptive sanctions for misuse of client funds); Attorney Grievance Comm'n v. Pattison, 441 A.2d 328, 333 (Md. 1982) (noting that absent extenuating circumstances, disbarment is the sanction which should be imposed for conversion); *In re Schoepfer*, 687 N.E.2d 391, 394 (Mass. 1997) (reaffirming that suspension or disbarment are the appropriate sanctions for commingling of funds); *In re Olson*, 577 N.W.2d 218, 220-21 (Minn. 1998) (stating that misappropriation of client funds usually merits disbarment unless conversion was unintentional); *In re Wilson*, 409 A.2d 1153, 1157-58 (N.J. 1979) (noting that mitigating factors will rarely override requirement of disbarment in cases of misappropriation of funds); *In re Pitts*, 617 N.Y.S.2d 473, 475 (App. Div. 1994) (noting court's consistent penalty of disbarment for fund conversion); Office of Disciplinary Counsel v. Connaughton, 665 N.E.2d 675, 676 (Ohio 1996) (same).

160. Only California has adopted detailed guidelines for imposing sanctions on lawyers that differ from the ABA Standards. See generally CAL. ST. B.P., TITLE IV, STANDARDS FOR ATTORNEY SANCTIONS FOR PROF'L MISCONDUCT (1998). In some cases, those standards remove all discretion from the decision-maker by mandating specific sanctions for certain misconduct regardless of mitigating circumstances. See, e.g., *id.* at Standard 2.5 (stating that disbarment is the penalty for violations of certain sections of the Business and Professions Code, regardless of mitigating circumstances). While Georgia has rules that describe sanctions that "may" be imposed for particular misconduct, see GA. B.R. & REGS. 4-102, the Georgia Supreme Court typically relies on the ABA Standards when imposing sanctions. See, e.g., *In re Quist*, 483 S.E.2d 569, 570 (Ga. 1997).

161. In some states the list of aggravating and mitigating factors mirrors the factors set forth in the ABA Standards, although the states have not otherwise adopted the ABA Standards. See, e.g., N.C. B.R., ch.1, subch. B, § .0114(w)(1)-(2).

162. For example, Texas has adopted a court rule listing factors that shall be considered when imposing discipline, which include some of the basic goals of discipline as well as

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standards for imposing sanctions for particular misconduct, expressly preferring a “case-by-case” approach.<sup>163</sup>

The case-by-case approach to lawyer sanctions typically assumes one of two forms. In the first, a court attempts to achieve some consistency in discipline cases by considering its treatment of lawyers in “similar” cases.<sup>164</sup> Such attempts are often unsuccessful because the courts disregard seemingly similar cases,<sup>165</sup> or cannot agree upon the factors that should be considered when assessing similarity,<sup>166</sup> or do not consider the same factors important from case to case. As a result, the quest for “similarity” is chimerical because it is often possible to find both similarities to and distinctions from earlier

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aggravating and mitigating factors. See TEX. R. DISCIPLINARY P. 3.10. Ohio rules provide that prior disciplinary offenses may justify an increased sanction. See OHIO B.R. V § 6(C). Other state courts have, through court or common law rules, identified some general factors to consider when imposing discipline. See, e.g., ARK. PROCEDURES REGULATING PROF'L CONDUCT OF ATTORNEYS § 8(F); *In re Grzybek*, 552 N.W.2d 215, 216 (Minn. 1996); *People v. Farrant*, 867 P.2d 1279, 1286 (Okla. 1994). None of these states has articulated detailed standards to guide the sanctioning decision.

163. See, e.g., *Office of Disciplinary Counsel v. Chung*, 695 A.2d 405, 407 (Pa. 1997) (declining to set *per se* rule and stating that each case must “be decided on the totality of facts present”); *Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478, 482 (W. Va. 1992) (declining to set “a uniform standard,” preferring instead to consider facts in each case). See also, e.g., *In re Timpone*, 623 N.E.2d 300, 309 (Ill. 1993) (noting that “each case is unique and must be resolved with respect to its particular facts and circumstances”); *In re Montpetit*, 528 N.W.2d 243, 246 (Minn. 1995) (noting that inquiries into a suitable measure of discipline are subjective and each case is different).

164. See, e.g., *In re Chandler*, 641 N.E.2d 473, 480-82 (Ill. 1994) (comparing discipline in other cases to determine the proper sanction in the case before the court); *In re Hartke*, 529 N.W.2d 678, 683 (Minn. 1995) (looking to other cases for guidance as to the appropriate sanction); *In re Ruegger*, 621 N.Y.S.2d 308, 309 (App. Div. 1995) (same); *Oklahoma State Bar Ass'n v. Meek*, 895 P.2d 692, 700-01 (Okla. 1995) (considering facts and circumstances in other cases when determining appropriate disciplinary sanctions). See generally *In re Concemi*, 662 N.E.2d 1030, 1032 (Mass. 1996) (stating that the standard is “whether [the] sanction imposed is markedly disparate from the sanctions imposed in similar cases”).

165. Although Colorado does not usually use a case-by-case approach, examples of this approach can be seen in its decisions. For example, in *People v. McIntyre*, 942 P.2d 499 (Colo. 1997), the court imposed a six-month suspension on a lawyer who failed to file federal income tax returns for three years and failed to pay federal withholding tax. The court in *McIntyre* cited to *People v. Holt*, 832 P.2d 948 (Colo. 1992), in which a one-year suspension was imposed on a lawyer who failed to file state and federal income tax returns for eight years, failed to pay federal and state withholding taxes for one year, and used illegal drugs for a number of years. The court never mentioned its decisions in *People v. Borchard*, 825 P.2d 999 (Colo. 1992) (imposing public censure for failure to file a federal income tax return for one year and late filing of taxes for eight years), or *People v. Tauger*, 893 P.2d 121 (Colo. 1995) (ordering public censure for failure to file federal income tax returns for three years).

166. For example, in *In re Chandler*, 641 N.E.2d at 479-81, the Illinois Supreme Court imposed a three-year suspension on a lawyer, who was a single mother, for submitting false documents to obtain a home loan. The majority analogized her situation to another case in which a lawyer received a three-year suspension for participating in a scheme to kick back one-half of an annual retainer to an officer of a client company, reasoning that both cases involved elaborate fraudulent schemes. See *id.* The dissent argued that the cases were dissimilar, because the former did not involve the lawyer's use of her profession to advance an illegal scheme and pointed to another Illinois case in which two lawyers received a five-month suspension for making false statements to obtain a loan. See *id.* at 488-89 (McMorrow, J., dissenting).

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decisions, giving courts significant latitude to show that any case is “similar to” or “different from” previous cases.<sup>167</sup> Nevertheless, this approach probably produces more consistency than the second “case-by-case” approach, in which courts decide each case on its own facts, without much regard for precedent.<sup>168</sup>

Thus, almost thirty years after the Clark Commission noted serious problems with the lack of uniformity in lawyer discipline,<sup>169</sup> attorneys continue to be sanctioned inconsistently. Moreover, even courts that attempt to follow the ABA Standards reach inconsistent results in seemingly similar cases.<sup>170</sup> This occurs for a number of reasons mainly attributable to problems with the Standards themselves.<sup>171</sup>

For example, under the ABA Standards, suspension is appropriate when a lawyer engages in a pattern of neglect when representing a client and causes injury or potential injury.<sup>172</sup> Nevertheless, it is not unusual for courts to impose a public reprimand or private discipline on lawyers who engage in a pattern of neglect of client matters.<sup>173</sup> A

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167. Of course, this problem pervades the common law system and cannot be eradicated even with the most carefully drafted standards. Nevertheless, well-designed standards can reduce unwarranted inconsistency from case to case.

168. See *Gay v. Virginia State Bar*, 389 S.E.2d 470, 474 (Va. 1990) (stating that precedents are of little aid in deciding the punishment to be imposed and that each case must be largely governed by its particular facts). See generally *In re Randall*, 562 N.W.2d 679, 683 (Minn. 1997) (stating that the facts of each case independently dictate the appropriate discipline); *Office of Disciplinary Counsel v. Chung*, 695 A.2d 405, 407 (Pa. 1997) (noting that each case is to be decided on the totality of facts presented); Kelly, *supra* note 8, at 472-76 (describing courts’ use of a “case-by-case-consider-all-the-circumstances” approach). According to a former chair of a statewide grievance commission, this second “case-by-case” approach sometimes occurs at the disciplinary hearing level because poor indexing systems make it difficult to determine what discipline has been imposed by other hearing panels in similar cases.

169. See PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 175 (noting that “[i]t is often virtually impossible to predict the extent of discipline that may be imposed by a court through an analysis of prior cases concerning similar misconduct, because the cases often have resulted in widely dissimilar sanctions”).

170. See, e.g., *infra* notes 174, 186, 240 and accompanying text.

171. See *infra* Part III.C. Wholly apart from problems with the language and the advisory nature of the ABA Standards, inconsistency occurs because the courts at times analyze the misconduct before them under a category that requires a lesser penalty rather than the category that clearly should be considered. For example, a lawyer who knowingly submitted a false statement on an application for admission to the bar was suspended under ABA Standard 6.12, which addresses situations in which a lawyer knows false documents are being submitted to the court, rather than disbarred under Standard 6.11, which addresses situations in which a lawyer personally submits false documents with intent to deceive, or ABA Standard 7.1, which addresses instances in which a lawyer knowingly engages in conduct that violates a duty owed to the profession. See *In re Warren*, 888 S.W.2d 334, 337 (Mo. 1994) (holding that such behavior warranted a six-month suspension). *But see* *Attorney Grievance Comm’n v. Joehl*, 642 A.2d 194 (Md. 1994) (imposing disbarment).

172. See ABA STANDARDS, *supra* note 7, at Standard 4.42(b).

173. See, e.g., *In re Gawlowski*, 868 P.2d 324, 326 (Ariz. 1994) (imposing public censure for a pattern of neglect involving four cases); *In re Hunter*, 656 A.2d 203, 209 (Vt. 1994) (ordering a public reprimand and probation for neglect of three client matters); *Discipline Corner*, UTAH B.J., Dec. 1997, at 31, 31 (imposing an admonition for failure to handle diligently four separate

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pattern of neglect can result in a wide range of sanctions even within the same state, even when the same number of client matters are neglected, and even when the sanctioned attorneys previously have been disciplined for similar misconduct.<sup>174</sup>

Obviously, comparing any two cases is difficult because the underlying facts are never identical and differences in sanctions for seemingly similar misconduct may be due to relevant, even important differences in the facts of each case.<sup>175</sup> The effectiveness of the ABA Standards in promoting consistency and consideration of relevant individual factors cannot be evaluated by a cursory comparison of case results. Nor do such comparisons indicate how well the Standards promote the goals of discipline. A closer analysis of the framework and the specifics of the Standards as well as their application by the courts is necessary to assess their usefulness.

### C. Critique of the ABA Standards

The ABA Standards resemble the emperor's new clothes: While warmly greeted,<sup>176</sup> it is readily apparent that something important is missing. In fact, while the two-step framework of the Standards—which separates the initial determination of the sanction from the consideration of aggravating and mitigating factors—is useful, the Standards are in other respects conceptually flawed, confusing and

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client matters); *Discipline Corner*, UTAH B.J., Nov. 1997, at 24, 24 (imposing an admonition for failure to handle diligently two separate client matters).

174. See, e.g., *People v. DeBaca*, 948 P.2d 1, 4 (Colo. 1997) (imposing a two-year suspension for a pattern of neglect involving two clients); *People v. Johnson*, 944 P.2d 76, 77-78 (Colo. 1997) (ordering a one-year suspension for neglect and incompetent representation involving two clients); *People v. Archuleta*, 898 P.2d 1064, 1066 (Colo. 1995) (imposing a six-month suspension for neglect of client matters); *People v. Harding*, 937 P.2d 393, 395-96 (Colo. 1997) (ordering a 30-day suspension for neglect); *People v. Eagan*, 902 P.2d 841, 841-42 (Colo. 1995) (imposing a public censure for neglect of two client matters).

175. For example, the failure to file income tax returns typically results in public reprimands or suspensions. See, e.g., *People v. Borchard*, 825 P.2d 999, 1000 (Colo. 1992) (holding that the failure to file a federal tax return in violation of 26 U.S.C. § 7203 warranted public censure); *In re Sandbach*, 546 A.2d 345, 347 (Del. 1988) (stating that failure to file state personal income tax returns warranted a three-year suspension); *In re Thompson*, 463 S.E.2d 118, 119 (Ga. 1995) (ruling that conviction of willful failure to file a tax return under 26 U.S.C. § 7203 warranted a 120-day suspension); *In re Mitchell*, 681 So. 2d 339, 339-40 (La. 1996) (ordering that failure to file tax return under 26 U.S.C. § 7203 warranted a two-year probation). Nevertheless, flouting the tax laws for extended periods has occasionally resulted in disbarment. See *In re Shorter*, 570 A.2d 760, 771 (D.C. 1990) (disbarring attorney who had failed to pay federal income taxes for eleven years).

176. Some courts were quick to embrace the ABA Standards shortly after they appeared. See *In re Buckalew*, 731 P.2d 48, 51-52 (Alaska 1986); *In re Petrie*, 742 P.2d 796, 803 (Ariz. 1987); *Louisiana State Bar Ass'n v. Krasnoff*, 515 So. 2d 780, 782 n.1 (La. 1987); *In re Bristow*, 721 P.2d 437, 444 n.31 (Or. 1986); *In re Rentel*, 729 P.2d 615, 618 (Wash. 1986). But see Nancy Blodgett, *Mixed Reviews: ABA Discipline Standards Get Bouquets, Brickbats*, 11 B. LEADER 25 (1986) (noting that the National Organization of Bar Counsel and some state bars expressed reservations about implementing the ABA Standards).

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unworkably vague. As a result, these voluntary standards provide virtually limitless flexibility, but they do not promote the considered decision-making or provide the consistency sought by the ABA Sanctions Committee.<sup>177</sup> Moreover, the ABA Standards prescribe some sanctions that do not adequately protect the public, and fail to provide guidance for the use of other sanctions that may better serve the goals of discipline.

*1. Problems with the initial sanction determination*

The framework of the ABA Standards requires the court to first reach an initial determination of the sanction in order to insure that the court gives appropriate weight to the misconduct that occurred, the lawyer's state of mind and the injury the lawyer caused.<sup>178</sup> In theory, since the initial determination is based only on these factors, the ABA Standards should yield similar initial determinations in similar cases. In practice, this often does not occur because of the difficulty of categorizing some misconduct, the Standards' failure to define adequately the meaning of "injury," and the failure to specify the appropriate length of suspensions for serious misconduct. In addition, the initial determination often yields a private admonition, which fails to promote the goals of lawyer discipline.

*a. Categorizing the misconduct*

One reason why the ABA Standards do not effectively promote consistent treatment of similar misconduct is that not all lawyer misconduct fits neatly into one of the categories set forth in the Standards. The ABA Standards rely on very general descriptions of misconduct<sup>179</sup> and attempt to elaborate on those descriptions in the accompanying Commentary. At times, a lawyer's misconduct can seemingly fall within two different black-letter standards and the accompanying Commentary confounds efforts to fit actual misconduct into one of the black-letter standards.<sup>180</sup> Categorization

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177. See *supra* notes 141, 143 and accompanying text. The problems with the ABA Standards are exacerbated by their advisory tone. The ABA sought to walk a fine line in suggesting standards to the courts while not wanting to be seen as dictating rules to the judiciary. Nevertheless, by stressing that the Standards promote flexibility, and by describing the sanctions as only "generally appropriate" for violations of specific conduct, the ABA decreased the likelihood that the Standards would be carefully followed.

178. See Kelly, *supra* note 8, at 512-13; *supra* text accompanying notes 144-48.

179. See, e.g., *supra* note 148.

180. The Commentary that follows each black-letter standard identifies the sanctions that have been imposed for similar misconduct in reported cases, the policy reasons articulated by the courts to support the sanctions, and a recommendation of the level of sanction for the misconduct absent aggravating or mitigating factors. See ABA STANDARDS, *supra* note 7, at 3.

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can also be difficult because some misconduct does not fit neatly within *any* category.

The problem of selecting between two black-letter standards arises frequently in cases involving improper dealings with client funds. For such an offense, the ABA Standards provide in pertinent part:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.<sup>181</sup>

Standard 4.11 does not explain what conduct by lawyers constitutes conversion, but the Commentary to Standard 4.11 states that most courts reserve disbarment for cases in which the lawyer “uses the client’s funds for the lawyer’s own benefit.”<sup>182</sup> The Commentary to Standard 4.12 notes that “[s]uspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion” and that suspension is commonly used for lawyers who “merely” commingle client funds with their own or “fail to remit client funds promptly.”<sup>183</sup> While these statements, read together, provide some guidance as to when the sanction of suspension rather than disbarment is appropriate, the Commentary to Standard 4.12 muddles the analysis by citing to a case in which the sanction of suspension was imposed for misconduct which seemingly constituted conversion or “use” of the client’s funds for the lawyer’s benefit.<sup>184</sup>

As a result, in the case of a lawyer who knowingly places client funds into a general office account, uses the money for the lawyer’s own purposes and does not return the funds until after disciplinary proceedings commence, it is not clear how the conduct should be categorized under the ABA Standards. Courts sometimes construe this ambiguity in favor of lawyers by treating such conduct as “mere

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The conflict between the Commentary and the black-letter standards occurs because the Commentary is mostly descriptive of what courts have done rather than prescriptive about the meaning of the black-letter standards.

181. *Id.* at Standards 4.11, 4.12.

182. *Id.* at Standard 4.11 Commentary.

183. *Id.* at Standard 4.12 Commentary.

184. The Commentary cites *In re Salvesen*, 614 P.2d 1264, 1266 (Wash. 1980), for the proposition that most courts do not impose disbarment on lawyers who “merely” commingle funds. Yet in *Salvesen*, the attorney “made a regular practice” of transferring client trust account funds into his personal checking account for his personal use, leaving insufficient funds in the trust account to disburse in accordance with his clients’ instructions. *Id.* at 1269 (Stafford, J., dissenting). In one instance, the lawyer did not use client funds entrusted to him to pay off a real estate contract until after a complaint was made to the bar association about the defalcation. *See id.* at 1268.

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commingling” or failure to remit client funds promptly although the funds may also have been “used” for office expenses or personal purposes.<sup>185</sup> Courts also differ over whether conversion occurs when lawyers accept retainers from clients, do little or no work, and do not return the fees.<sup>186</sup> Since conversion is considered one of the most serious breaches of a lawyer’s duties—and carries one of the most unforgiving sanctions<sup>187</sup>—clarity about the conduct that constitutes “conversion” is essential, and it is missing from the ABA Standards.

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185. *See* *People v. Schaefer*, 938 P.2d 147, 150 (Colo. 1997) (suspending rather than disbarring a lawyer who commingled \$9,400 in client funds in an operating account, used funds for other purposes, and ignored client requests to return any money until six months after the client requested an investigation of the lawyer). *See generally In re Redondo*, 861 P.2d 619, 623-24 (Ariz. 1993) (suspending a lawyer who used a client trust account for the payment of personal and business accounts); *Louisiana State Bar Ass’n v. Young*, 545 So. 2d 1018, 1022 (La. 1989) (suspending an attorney for endorsing a client’s name on a check and using the funds). These courts seem willing to call the conduct something other than “conversion” so long as the money is ultimately returned. *But see People v. O’Leary*, 783 P.2d 843 (Colo. 1989) (disbarring a lawyer who converted by commingling client funds in an operating account, used funds for other purposes and failed to repay); *In re Allen*, 493 S.E.2d 706 (Ga. 1997) (allowing voluntary surrender of a license to practice in exchange for an admission of conversion by a lawyer who failed to repay).

The courts’ willingness to treat the use of client funds as something other than “conversion” may be due, in part, to the excessive aggregation of different types of misconduct under the ABA Standards. *See generally* Alschuler, *The Failure of Sentencing Guidelines*, *supra* note 134, at 904-08, 915-18 (describing the problems with aggregation of misconduct in federal sentencing). For example, under ABA Standard 4.11, the knowing conversion of client funds can encompass behavior ranging from the theft of client funds by forging a client’s signature on a \$50,000 settlement check to the transfer of \$500 of client funds to a law firm operating account to cover payroll expenses. Courts may view the sanction of disbarment as disproportionately heavy in the latter case, which may explain why some courts struggle to categorize the misconduct as something other than “conversion.” *See generally* *State ex rel. Oklahoma Bar Ass’n v. Meek*, 895 P.2d 692, 698-99 (Okla. 1994) (distinguishing between “simple” conversion and “theft by conversion”).

186. *Compare* *People v. Holmes*, 951 P.2d 477, 480 (Colo. 1998) (concluding that failure to perform legal services after receiving payment is tantamount to misappropriation and warrants disbarment), *and* *People v. Townshend*, 933 P.2d 1327, 1328 (Colo. 1997) (characterizing the acceptance of retainers and subsequent failure to perform duties as conversion and ordering disbarment), *and* *People v. Wallace*, 936 P.2d 1282, 1284 (Colo. 1997) (concluding that a lawyer who accepted retainers, failed to deposit them into a trust account, neglected client matters and failed to return funds should be disbarred for conversion of client funds), *with* *People v. Fager*, 925 P.2d 280, 282-83 (Colo. 1996) (finding that a lawyer who accepted a client retainer, failed to maintain it in a separate account, neglected the client matter and failed to return client funds should receive a one-year suspension for dealing improperly with client property). *See generally* *People v. Rishel*, 956 P.2d 542 (Colo. 1998) (finding that a lawyer who accepted client retainers, neglected client matters, left the state and failed to refund fees should be suspended for one year). In many cases, courts do not even consider whether lawyers who fail to refund unearned fees have converted client funds. *See, e.g.,* *People v. Singer*, 897 P.2d 798 (Colo. 1995); *People v. Barr*, 818 P.2d 761 (Colo. 1991); *In re Lyles*, 469 S.E.2d 670 (Ga. 1996); *Louisiana State Bar Ass’n v. Jones*, 570 So. 2d 1161 (La. 1990).

187. The Commentary to ABA Standard 4.11 notes that some courts have held that disbarment is “always” the appropriate discipline when a lawyer knowingly converts client funds. It also states that when a lawyer converts client funds for the lawyer’s own use, “only the most compelling mitigating circumstances should justify a lesser sanction than disbarment.” ABA STANDARDS, *supra* note 7, at Standard 4.11 Commentary.

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Unlike improper handling of client funds, which can fit within two black-letter standards, a different problem arises when a lawyer's misconduct does not fit within any misconduct described in the black-letter standards. This problem usually occurs because the black-letter standards prescribe sanctions on the assumption that as the lawyer's mental state becomes less deliberate, actual or potential injury also decreases.<sup>188</sup> When this correlation between lawyer culpability and client injury does not occur, courts are left to choose between two black-letter standards which prescribe different sanctions and do not describe the situation that actually occurred. For example, a lawyer may knowingly fail to perform services for a client,<sup>189</sup> yet cause little actual injury. ABA Standards 4.41 and 4.42 address a knowing failure to perform services and recommend disbarment or suspension where there is injury or potential injury. Standard 4.44 addresses negligent failure to act with diligence and prescribes an admonition where there is "little or no actual or potential injury." Where a lawyer knowingly fails to perform services for a client but causes little actual or potential injury, there is a gap in the Standards, providing courts with substantial leeway to impose very different sanctions.<sup>190</sup>

*b. The definition of "injury"*

The ABA Standards also provide inadequate guidance for making the initial sanction determination because they do not define the "injury" component with any precision. Under the Standards, a finding of "injury," "serious injury" or "potential injury" directly affects the level of the initial sanction determination and results in the recommendation of some form of public discipline.<sup>191</sup> A finding

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188. See, e.g., *supra* note 148.

189. "Knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." See ABA STANDARDS, *supra* note 7, at 7.

190. While the Sanctions Committee was aware that there "may" be cases of lawyer misconduct that could not be easily categorized, it did not seem to contemplate the number of cases in which it could occur and it provided no guidance for determining the appropriate sanction in those cases. The Sanctions Committee instead noted that the ABA Standards are not designed to propose a sanction "for each of the myriad of fact patterns in cases of lawyer misconduct." ABA STANDARDS, *supra* note 7, at 6. In fact, the ABA Standards fail to provide even general guidance for how to resolve whole categories of cases where intentional conduct is present but injury is not, or vice versa. The Committee's statement that the Standards provide a "theoretical framework to guide the courts" and that the ultimate sanction will depend on the presence or absence of mitigating factors, *see id.*, gives the courts few clues as to how to decide these cases.

191. The Definitions section states that "injury can range from 'serious' injury to 'little or no' injury; a reference to 'injury' alone indicates any level of injury greater than 'little or no' injury." *Id.* at 7. In general, the ABA Standards prescribe the sanction of disbarment for serious or potentially serious injury and prescribe the sanctions of suspension or public censure

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of “injury” can be particularly important because some courts disregard “potential injury” altogether.<sup>192</sup> Unfortunately, the failure to define injury clearly has meant that different definitions are used by different courts, depending in part on the result the court wishes to achieve in any particular case.

For example, the ABA Standards define “injury” as “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct,” without indicating what types of “harm” to clients may be considered.<sup>193</sup> Courts agree that an actual monetary loss constitutes “injury” under the Standards, but it is less clear whether a lost monetary opportunity constitutes “injury.”<sup>194</sup> The courts differ even more significantly in their approach to non-monetary harm. Some courts find “injury” to clients in the inconvenience or psychic harm caused by unnecessary delay in resolving a matter or in the very real anxiety that can occur when clients are unable to obtain information about a matter from a lawyer.<sup>195</sup> Other courts do not appear to consider this to be “injury.”<sup>196</sup>

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for injury or potential injury. Admonitions are reserved for cases in which there is little or no actual or potential injury. *See, e.g., id.* at Standard 4.4.

192. “Potential injury” is defined as the harm that “is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.” *Id.* at 7.

The ABA Standards provide that “potential injury” can result in the imposition of serious incapacitating sanctions. *See id.* at Standards 4.11, 4.21. Nevertheless, at times, courts disregard potential injury, apparently so they can impose a lighter sanction. *See, e.g., In re Redondo*, 861 P.2d 619, 622 (Ariz. 1993); *In re Henley*, 478 S.E.2d 134, 137 (Ga. 1996); Attorney Grievance Comm’n v. Driscoll, BV No. 30, 1996 Md. LEXIS 133, at \*34 (Oct. 8, 1996). *See generally In re Nomura*, No. SB-96-0005-D, 1996 Ariz. LEXIS 8, at \*12-13 (Jan. 26, 1996) (declining to impose a suspension because the client suffered potential rather than actual injury); *In re Heald*, 664 A.2d 248, 250-51 (Vt. 1995) (noting the potential for “catastrophic” injury to the estate but imposing a reprimand because there was no “real” injury).

193. *See* ABA STANDARDS, *supra* note 7, at 7. There are occasional statements in the Commentary suggesting that non-monetary harm might constitute “injury” under the Standards, *see id.* at Standard 6.11 Commentary (implying that lost time appearing in court may constitute injury), but the Commentary makes no reference to emotional harm.

194. For example, the Vermont Supreme Court found “no real injury” where a lawyer failed to convey to the heirs of an estate a \$52,000 offer to purchase the sole asset of the estate when the property was ultimately sold to another purchaser for its appraised value of \$41,000. *See In re Heald*, 664 A.2d at 250. *But see In re Lyles*, 469 S.E.2d 670, 671 (Ga. 1996) (finding injury where lawyer’s neglect of a probate matter deprived the client of opportunities to sell estate property); *In re Hunter*, 656 A.2d 203, 208 (Vt. 1994) (finding injury where a lawyer’s failure to advise a client about the merits of his case resulted in a lost opportunity to accept a settlement offer).

195. *See, e.g., In re Schaffner*, 939 P.2d 39, 41 (Or. 1997) (finding actual injury to a client in the form of anxiety and frustration when a lawyer refused to return original documents); *In re Peterson*, 846 P.2d 1330, 1343 n.38 (Wash. 1993) (stating that injury is probable because people involved in lawsuit are often experiencing a period of emotional turmoil). *See generally In re Johnson*, 936 P.2d 258, 260 (Kan. 1997) (noting time, money, and emotional strain caused by a lawyer’s delay in adoption context).

196. *See, e.g., People v. Berkley*, 858 P.2d 699, 702 (Colo. 1993) (suggesting the actual harm

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The Standards' failure to indicate whether emotional distress constitutes "injury" gives rise to disparity in the initial sanction determination because so many complaints about lawyers arise from neglect of client matters and poor communication,<sup>197</sup> which can cause clients serious emotional distress. Moreover, the failure to treat emotional distress as "injury" often results in an initial determination under the Standards that the appropriate sanction is an admonition, which is a sanction that does not effectively promote the goals of lawyer discipline.<sup>198</sup>

*c. Indeterminacy in the length of suspensions*

The ABA Standards also invite disparate sanctions for serious misconduct because they fail to indicate how courts should determine the length of any suspension.<sup>199</sup> Under the Standards, a suspension may be imposed for a minimum of six months to a maximum of three years, but the Standards provide no guidance to assist in determining when longer or shorter time periods should be employed.<sup>200</sup> As a practical matter, a six month suspension for an attorney with law partners has a much different impact on a lawyer's practice than a suspension for two or three years.<sup>201</sup> Indeed, many

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to a client was "slight" where a lawyer's office failed to file or return original tax forms for ten months, notwithstanding the client's repeated efforts to resolve the matter); *In re Cushing*, 663 N.E.2d 776, 778 (Ind. 1996) (finding no "real harm" when a lawyer who was retained to pursue a personal injury action failed to return phone calls or respond to letters during a seven-month period, even though client suffered "needless anxiety"); *In re Bourcier*, 939 P.2d 604, 607 (Or. 1997) (finding no actual injury where a client was unable to communicate at all with his lawyer about a criminal appeal). See generally *In re Nomura*, 1996 Ariz. LEXIS 8, at \*12-13 (finding no actual injury to a client whose malpractice claim against a doctor was mistakenly dismissed with prejudice by a lawyer who did not return files for several months despite repeated requests); *In re Belsches*, 918 P.2d 559, 560 (Colo. 1996) (suggesting that harm must be "calculable"); *In re Hunter*, 656 A.2d at 208 (suggesting no harm to persons who experienced frustration and anguish due to lawyer's failure to communicate and return files).

197. See *supra* note 121 and accompanying text.

198. See *infra* notes 213-21 and accompanying text. In many cases in which lawyers breach a duty to clients, some emotional distress is likely to occur. The failure to recognize client emotional distress as "injury" under the ABA Standards sends the message that the treatment of the client is unimportant so long as the client suffers no monetary harm. The better approach would be to treat evidence of emotional distress as "injury," both to reduce inconsistency in the sanction determination and to afford appropriate weight to the importance of the client's feelings in the professional relationship.

199. Suspension from practice is typically prescribed when a lawyer knowingly engages in misconduct resulting in actual or potential injury. See, e.g., ABA STANDARDS, *supra* note 7, at Standards 4.22, 4.32, 4.52, 5.22.

200. See *id.* at Standard 2.3 & Commentary. The ABA Standards also do not indicate whether the length of the suspension should be calculated during the initial determination and adjusted after considering aggravating or mitigating factors. Because this approach would promote consistency in the initial determination of the sanction, the need to establish guidelines for determining the length of a suspension is addressed here.

201. In a law firm, a lawyer's partners can often perform the work that must be done for clients during a six-month suspension and can obtain extensions for non-essential work. See

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courts impose suspensions for the minimum amount of time in an apparent effort to reduce the impact of the suspension on lawyers' practices. For example, in Colorado, more than forty percent of all suspensions imposed in 1996 and 1997 were for no more than a six month period.<sup>202</sup>

The potential for disparity when imposing suspensions is even greater than it appears because many courts impose suspensions of less than six months.<sup>203</sup> Even in states that purport to follow the ABA Standards closely, a sizable percentage of suspensions are imposed for less than six months<sup>204</sup> and suspensions for as little as thirty days are not uncommon.<sup>205</sup> The absence of guidelines for determining the appropriate length of suspensions within a fairly broad range invites disparity and ultimately, ineffective discipline.

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*generally In re Roberts-Hohl*, 866 P.2d 1167, 1171 (N.M. 1994) (noting that a suspension of less than six months allows an attorney "to delay the performance of requested services"); *In re Schnitzler*, 412 N.W.2d 124, 125 (Wis. 1987) (noting that the impact of short suspensions falls mainly on clients). A six-month suspension can have a greater impact on solo practitioners, but some courts have attempted to mitigate that effect. *See In re Triem*, 929 P.2d 634, 648 (Alaska 1996) (taking into account the fact that a lawyer was a sole practitioner when imposing a 90-day suspension). *See generally In re Garnice*, 833 P.2d 700, 703 (Ariz. 1992) (imposing public censure rather than suspension on a sole practitioner because any suspension would likely be "devastating" for the lawyer's practice). *But see In re Neitlich*, 597 N.E.2d 425, 429-30 (Mass. 1992) (rejecting the argument that a lesser sanction should be imposed on a solo practitioner).

202. Short suspensions may be imposed even when there is significant misconduct. *See, e.g.*, *People v. Mason*, 938 P.2d 131, 137-38 (Colo. 1997) (imposing a six-month suspension for conflict of interest in litigation and submission of false statements to the court with the intent to mislead the court and others); *In re Evans*, 475 S.E.2d 645, 645 (Ga. 1996) (imposing a five-month suspension for failing to work on four client matters, resulting in the dismissal of a case, and lying to the client about the status); *Louisiana State Bar Ass'n v. Jones*, 570 So. 2d 1161, 1164 (La. 1990) (imposing a six-month suspension for a pattern of total neglect of seven client matters, failure to disburse client funds properly, and failure to refund client fees until shortly before a disciplinary hearing).

203. While the Standards state that any suspension should be for at least six months to insure a real interruption in practice, *see* ABA STANDARDS, *supra* note 7, at Standard 2.3 Commentary, many states that otherwise follow the ABA Standards place no minimum on the length of suspensions, *see, e.g.*, COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.7(2); GA. B.R. & REGS. 4-102(b)(2); LA. R. LAWYER DISCIPLINARY ENFORCEMENT 19, § 10(A)(2); WASH. R. LAWYER DISCIPLINE 5.1(b); *see also* COLD, *supra* note 9, at Q 57E (indicating that 20 out of 32 responding states had no minimum on length of suspension). Indeed, it does not appear that any state has adopted the ABA's recommendation that the minimum period of a suspension be for six months. *See id.*

204. For example, my review of Colorado cases revealed that 30% of all suspensions imposed in 1997 (10 out of 33) were for a period of less than six months.

205. For instance, Oregon has adopted a 30-day presumptive sanction for a single violation of conflict of interest rules. *See In re Morris*, 953 P.2d 387 (Or. 1998). Other state courts that follow the ABA Standards also occasionally impose 30-day suspensions. *See, e.g.*, *In re Plotkin*, Sup. Ct. No. SB-95-0065-D, 1995 Ariz. LEXIS 115 (Dec. 27, 1995); *In re Brooks*, 854 P.2d 776, 778 (Ariz. 1993); *People v. DeLoach*, 944 P.2d 522 (Colo. 1997); *People v. Nelson*, 941 P.2d 922 (Colo. 1997); *Florida Bar v. Birdsong*, 661 So. 2d 1199, 1201 (Fla. 1995); *Florida Bar v. Poplack*, 599 So. 2d 116, 119 (Fla. 1992); *In re Felling*, 679 N.E.2d 498 (Ind. 1998); *In re Roche*, 678 N.E.2d 797, 799 (Ind. 1997); *Louisiana State Bar Ass'n v. Keys*, 567 So. 2d 588 (La. 1990); *In re Felice*, 772 P.2d 505, 510 (Wash. 1989).

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*d. Overuse of admonitions*

The tendency to favor lawyers in the disciplinary process is best illustrated by the Standards' treatment, and the widespread use, of admonitions. Private sanctions make up more than forty percent of all discipline imposed on lawyers,<sup>206</sup> yet they provoke some of the loudest complaints by the public about lawyer sanctions. From the public's perspective, admonitions permit lawyers to be treated leniently behind closed doors and deprive the public of information about a lawyer's full disciplinary history.<sup>207</sup>

Under the ABA Standards, an admonition may be imposed in cases of "minor misconduct" when the lawyer is negligent and there is "little or no injury" to another.<sup>208</sup> The stated rationale for the use of admonitions is that a private sanction informs the lawyer that the conduct is unethical, but "does not unnecessarily stigmatize a lawyer from whom the public needs no protection."<sup>209</sup>

This rationale ignores the evidence that the public often *does* need protection from lawyers who engage in "minor" misconduct,<sup>210</sup> and effectively values the lawyer's reputation over the protection of the public.<sup>211</sup> Yet it is unclear why concerns about protecting the lawyer's

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206. See SOLD 1996, *supra* note 14, at 9 fig. II.

207. See KAY A. OSTBERG, HELP ABOLISH LEGAL TYRANNY, ATTORNEY DISCIPLINE NATIONAL SURVEY 11-14 (1990) [hereinafter HALT REPORT]; Chalfie, *supra* note 84, at 7.

208. See ABA STANDARDS, *supra* note 7, at Standard 1.2; see also *id.* at Standard 2.6 Commentary.

209. See *id.* at Standard 1.2 Commentary. Although not expressly stated in the Standards, another argument for the use of private sanctions is that they facilitate the speedy disposition of claims of minor misconduct which might otherwise be dismissed. See PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 92-93.

210. See *infra* notes 218-19 and accompanying text. It appears that in practice, admonitions are sometimes imposed on lawyers whose misconduct would not be considered "minor" by most members of the public. See, e.g., *Disciplinary Case Summaries*, COLO. LAW., Sept. 1996, at 123-24 (imposing private sanctions on a lawyer whose neglect of a case resulted in dismissal for failure to prosecute); *Discipline Corner*, UTAH B.J., June 1998, at 36, 38 (imposing an admonition on a lawyer who received a fee to file a criminal appeal but failed to file the appeal). Admonitions are also imposed when clients suffer real injury. See, e.g., *Discipline Reports*, 45 LA. B.J. 114, 114 (1997) (reporting admonitions imposed on lawyers who failed to refund any unearned portion of fees); *Discipline Corner*, UTAH B.J., Feb. 1997, at 26 (imposing an admonition on a lawyer whose failure to submit a timely answer in litigation caused the entry of a default judgment, loss of the client's truck, and additional attorneys' fees of \$1450 in an attempt to set aside the judgment).

211. See ABA STANDARDS, *supra* note 7, at Standard 2.6 Commentary (noting the interest in avoiding damage to a lawyer's reputation when future ethical violations seem unlikely).

Concern for the lawyer's reputation permeates all aspects of the ABA's approach to lawyer discipline. For example, concern about the lawyer's reputation led the Clark Commission to recommend making pending disciplinary proceedings a matter of public record only if the charges were based on a conviction or if the attorney requested a public hearing. See PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 138-42. The ABA Model Rules for Lawyer Disciplinary Enforcement go further, making disciplinary proceedings public after a finding of probable cause. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 16A (1996). Although the McKay Commission found that little or no significant harm would come to lawyers

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reputation should outweigh the interest in protecting the public. Admonitions are imposed only after lawyers have already received some level of due process and have consented to the discipline or been found to have engaged in wrongful conduct. In the absence of evidence that lawyers are harmed by fully public disciplinary systems,<sup>212</sup> it is difficult to find unfair the possible reputational impact of a low-level public sanction on those found to have engaged in misconduct.

Not only is the rationale for admonitions weak, but the ABA Standards fail to limit the use of admonitions in ways that adequately protect the public. Although the Standards state that the sanction of admonition should be imposed when there is “little or no likelihood of repetition,”<sup>213</sup> it is usually difficult or impossible to predict the likelihood of repetition of misconduct by a lawyer.<sup>214</sup> Some of the black-letter standards attempt to address this problem by prescribing an admonition only when there is an “isolated instance” of misconduct, but others do not contain this limitation.<sup>215</sup> Even if the “isolated instance” standard is applied, the underreporting of lawyer misconduct,<sup>216</sup> and the difficulty of learning about private discipline imposed elsewhere,<sup>217</sup> make it difficult to determine whether a

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from public disclosure of mere allegations and recommended fully public proceedings, the recommendation was rejected by the ABA House of Delegates. *See* LAWYER REGULATION, *supra* note 12, at 119-20; *see also* Burnele V. Powell, *Open Doors, Open Arms and Substantially Open Records: Consumerism Takes Hold in the Legal Profession*, 28 VAL. U. L. REV. 709, 733-34 (1994) (reporting on rejection of recommendation).

212. The McKay Commission found that the experience of Oregon, West Virginia and Florida with fully open disciplinary systems revealed no evidence of harm to lawyers from making complaints public. *See* LAWYER REGULATION, *supra* note 12, at 35. *But see* Powell, *supra* note 211, at 734-35 (suggesting that the Commission’s findings may rest on incomplete information).

213. *See* ABA STANDARDS, *supra* note 7, at Standard 2.6 Commentary.

214. I found no published empirical research addressing the characteristics of lawyer recidivists. There is, however, anecdotal evidence suggesting that a number of lawyers who receive admonitions will subsequently engage in similar misconduct. *See infra* note 218 and accompanying text.

215. *Compare, e.g.*, ABA STANDARDS, *supra* note 7, at Standards 4.34, 4.54, 4.64 (prescribing admonitions when there is an “isolated instance” of misconduct), *with* Standards 4.14, 4.24, 4.44 (making no reference to an isolated instance requirement).

216. *See supra* note 29. Indeed, the use of private discipline increases the likelihood that additional acts of misconduct will go unreported because other clients may not consider whether their lawyers have engaged in misconduct in their own cases or may be reluctant to make claims against lawyers whom they believe enjoy excellent reputations.

217. Disciplinary agencies may be mistaken about the apparent “isolated” nature of the misconduct because of poor reporting practices among jurisdictions. For example, private discipline is often not reported to the ABA National Discipline Data Bank, which was established primarily to facilitate the imposition of reciprocal public discipline. *See* Telephone Interview with Nancy H.C. Gronland, ABA Data Bank Manager (July 29, 1998). In some states, including New York, records of private discipline are placed in a lawyer’s disciplinary file, but are not communicated to other jurisdictions without a court order. *See* Daniel Wise, *Disciplinary*

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seemingly isolated instance of misconduct is truly a one-time occurrence.

It appears, moreover, that private sanctions are imposed in cases where the misconduct is not an “isolated” occurrence. In fact, private admonitions frequently are imposed on lawyers who are known to have been disciplined previously for misconduct. In Colorado, which follows the ABA Standards as closely as any state, it is not unusual for three, four or five private sanctions to be imposed on the same lawyer for misconduct.<sup>218</sup>

These cases also suggest that the specific deterrent effect of admonitions may be limited. Indeed, in two-thirds of all Colorado Supreme Court lawyer discipline cases decided in 1996 and 1997, the lawyer sanctioned had previously received at least one private sanction.<sup>219</sup> This figure is troubling but not surprising. Due to their private nature, admonitions have little sting and convey a weak message about the unacceptability of a lawyer’s conduct.

The failure of the ABA Standards to more carefully limit the use of admonitions is especially troubling because private sanctions deprive members of the public of the means to protect themselves.<sup>220</sup> Most

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*Panels Urged to Share Data*, N.Y. L.J., July 7, 1998, at 1.

218. See, e.g., *People v. DeBaca*, 948 P.2d 1, 3 (Colo. 1997) (reporting five prior admonitions for similar misconduct); *People v. Hohertz*, 926 P.2d 560, 565 (Colo. 1996) (noting five previous admonitions); *People v. Calvert*, 915 P.2d 1310 (Colo. 1996) (reporting five prior admonitions); *People v. Dolan*, 873 P.2d 766, 768 (Colo. 1994) (noting four prior admonitions for similar conduct); *People v. Barbieri*, 935 P.2d 12, 13 (Colo. 1997) (reporting four prior admonitions); *People v. Harding*, 937 P.2d 393, 395 (Colo. 1997) (noting three prior admonitions for similar misconduct).

Indeed, there are examples in many states of lawyers who have received more than one private sanction before being publicly disciplined. See, e.g., *In re Brown*, 910 P.2d 631, 632 (Ariz. 1990) (noting three prior private sanctions); *In re Melton*, SB-96-0002-D, 1996 Ariz. LEXIS 16, at \*9 (Feb. 27, 1996) (noting two prior sanctions for similar misconduct); *Louisiana State Bar Ass’n v. Noble*, 568 So. 2d 563, 565 (La. 1990) (noting two prior private sanctions); *Stegall v. Mississippi Bar*, 618 So. 2d 1291, 1295 (Miss. 1993) (noting four prior private sanctions); *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994) (citing three prior admonitions). See also WASH. R. LAWYER DISCIPLINE 5.5B(a) (allowing three admonitions in five years).

219. From 1996-1997, 82 lawyers out of 121 who were the subject of public discipline had received private sanctions before receiving more serious public sanctions. While these numbers suggest that some lawyers are not deterred by private sanctions, they must be interpreted cautiously. It is not known how many lawyers who receive private sanctions are never again disciplined, because the lawyers’ names are not published. This information has not been tracked by the Colorado Supreme Court Office of Disciplinary Counsel. See Telephone Interview by Alex Filotto with Michael Henry, Intake Attorney, Colorado Supreme Court Office of Disciplinary Counsel (Jan. 6, 1998). Moreover, the numbers do not indicate whether public expressive sanctions are more effective than private sanctions. In order to test this, one would need to look at all Colorado lawyers who received public reprimands and then track their future disciplinary experience. Unfortunately, the unavailability of private discipline records makes it impossible for outside observers to do this.

220. To be fair, the overuse of private sanctions is not due entirely to the language of the ABA Standards, which recommends against the use of admonitions if a lawyer has previously engaged in the same or similar misconduct. See ABA STANDARDS, *supra* note 7, at Standard 8.4. The problem is also due, in part, to the voluntary nature of the Standards and to the

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claims of misconduct against lawyers resulting in admonitions are claims arising from neglect of client matters, failure to communicate with clients, and claims of incompetence.<sup>221</sup> Imposing private sanctions in these cases deprives the public of useful information about whom to retain. In short, the ABA Standards too freely recommend the use of admonitions, even though private sanctions do little to protect the public or advance the other goals of lawyer discipline.

## 2. *Problems with the aggravating and mitigating factors*

The effort to achieve some consistency in the sanction determination effectively ends with the ABA Standards' treatment of aggravating and mitigating factors. The language of the ABA Standards—which states that the sanctions set forth in the black-letter standards are only “generally appropriate” absent aggravating or mitigating factors—invites courts to assume that the initial sanction determination will routinely be altered by these factors.<sup>222</sup> Yet the ABA Standards provide virtually no guidance with respect to how to treat these factors. Instead, they simply list the factors, mostly without explanation that might encourage a thoughtful or nuanced approach to their application.<sup>223</sup> As a consequence, these factors are reflexively—and inconsistently—invoked by the courts, even though some of the factors would appear to deserve little, if any, consideration. In addition, the ABA Standards provide no guidance for the difficult task of weighing these factors, leaving this determination entirely to the decision-maker.

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institutional tendencies to favor lawyers in the disciplinary process.

221. *See supra* note 121 and accompanying text.

222. Indeed, because at least one of these factors—the absence or presence of a prior disciplinary history—is present in every discipline case, some adjustment of the initial sanction determination is arguably justified in every case.

223. The Sanctions Committee determined which aggravating and mitigating factors might appropriately be considered after examining the factors considered by the courts in past cases. *See* ABA STANDARDS, *supra* note 7, at 2. The Commentary following the Standards' list of aggravating factors simply cites to cases in which the factors were considered. *See id.* at Standard 9.2 Commentary. The Commentary following the mitigating factors is somewhat more illuminating in that it briefly discusses the mitigating factors of restitution, personal and emotional problems, physical and mental disability, and chemical dependency. Unfortunately, it only cites to cases in which the other ten mitigating factors were considered. *See id.* at Standard 9.3 Commentary.

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a. *Some problems with specific factors*

i. *Experience in the practice of law*

The aggravating factor of “substantial experience in the practice of law” and the mitigating factor of “inexperience in the practice of law” merit reconsideration. These factors are not defined by the ABA Standards, and as interpreted by the courts, most lawyers can be placed into either or both categories.<sup>224</sup> As a result, these factors are frequently considered in disciplinary decisions, regardless of their relevance to the misconduct at issue. Moreover, courts will sometimes give great weight to these factors, and in other seemingly similar cases they will not, resulting in disparity in the imposition of sanctions.<sup>225</sup>

The justifications for treating substantial experience in the practice of law as an aggravating factor are weak in many cases. The bar admission standards in every state require applicants to demonstrate knowledge of professional responsibility rules and admitted lawyers are bound to abide by the rules regardless of their level of experience.<sup>226</sup> Although we might wish otherwise, there is little evidence that lawyers who have been admitted for substantial periods of time are more knowledgeable about these professional responsibility rules or more sensitized to desirable ethical norms than

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224. Compare *People v. Hensley-Martin*, 795 P.2d 262, 265 (Colo. 1992) (finding a lawyer with six to eight years of practice “inexperienced”), with *People v. Townshend*, 933 P.2d 1327, 1329 (Colo. 1997) (finding a lawyer admitted to the bar for six years had “substantial experience”). See also *In re Capps*, 942 P.2d 588, 589 (Kan. 1997) (finding a lawyer admitted less than seven years had “substantial experience”); *In re Jones*, 951 P.2d 149, 152 (Or. 1997) (finding a lawyer admitted less than eight years had substantial experience); *In re Hunter*, 656 A.2d 203, 208 (Vt. 1994) (noting that a lawyer admitted to the bar for less than eight years had “substantial experience”).

225. Compare *People v. Sather*, 936 P.2d 576, 579 (Colo. 1997) (finding that respondent’s substantial experience in practice of law was a “significant aggravating factor” in a case involving excessive charging of fees), and *People v. Calvert*, 915 P.2d 1310, 1312 (Colo. 1996) (treating substantial experience as an aggravating factor in a case involving neglect of legal matters and excessive fees), with *People v. Hohertz*, 926 P.2d 560, 565 (Colo. 1996) (failing to address a lawyer’s substantial experience in a case involving neglect and charging of excessive fees), and *People v. Kardokus*, 881 P.2d 1202, 1204 (Colo. 1994) (declining to mention substantial experience as an aggravating factor in a case involving an experienced lawyer who neglected client matters and charged excessive fees). Compare also *People v. Murray*, 887 P.2d 1016, 1022 (Colo. 1994) (disbarring an inexperienced solo practitioner who took on more business than he could handle, resulting in a pattern of neglect of client matters), with *People v. Fried*, 898 P.2d 1066, 1068 (Colo. 1995) (ordering a thirty-day suspension for a pattern of neglect due, in part, to inexperience).

226. Forty-seven states and the District of Columbia require bar applicants to pass the Multistate Professional Responsibility Examination (“MPRE”) for admission to the bar. The remaining three states require applicants to pass a professional responsibility exam that tests specifically on the state’s professional responsibility rules. See 1998 BAR/BRI DIG. (1998); see also *Whelan’s Case*, 619 A.2d 571, 573 (N.H. 1992) (noting that attorneys are presumed to know the rules of professional conduct).

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their younger colleagues, and in fact, the reverse may be true.<sup>227</sup> Nor is there reason to believe that experience in the practice of law makes lawyers better able to avoid misconduct arising from depression<sup>228</sup> or from drug or alcohol abuse than less experienced lawyers.<sup>229</sup> Indeed, as lawyers gain experience they often assume greater responsibilities in law practice, which may make them more susceptible to substance abuse.<sup>230</sup> Thus, enhancing a sanction due to substantial experience is,

227. It is only in the last 20 years that serious efforts have been made to insure that lawyers become informed about professional responsibility rules through the MPRE requirement and that law school have required professional responsibility courses. See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39-41 (1992) (tracing the development of professional responsibility requirements in the legal field). Young lawyers believe that sensitivity to professional ethical concerns is learned mainly in law school. See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 479, 481, 483-86 (1993).

At the same time, there is evidence that the ethical climate in law offices can affect lawyers negatively and can give support for ethical violations. See CARLIN, LAWYERS' ETHICS, *supra* note 25, at 96. See generally FRANCIS K. ZEMANS & VICTOR G. ROSENBAUM, THE MAKING OF A PUBLIC PROFESSION 173 (1981) (stating that "[c]lose to 60% of the practicing bar rank lawyers in their own offices as among the two most important sources" that have affected the resolution of professional responsibility questions in the practice of law). The longer a lawyer has been a member of a law office, the more the behavior of the lawyer conforms to the ethical (or unethical) climate of the office. See CARLIN, LAWYERS' ETHICS, *supra* note 25, at 98. Requirements in some states that all lawyers attend CLE courses in ethics may counteract the effect of negative law office cultures, but the impact of such requirements is unclear.

228. A study of Washington lawyers revealed that 19% of them suffered from statistically significant elevated levels of depression, but the number of years that the lawyers practiced did not affect the percentage of lawyers who suffered from depression. See G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 240-41 (1990).

229. See generally *In re Smith*, SB-00074-D, 1996 Ariz. LEXIS 15, at \*7 (Feb. 28, 1996) (noting that experience in practice should not be considered an aggravating factor because there is no logical expectation that experience will reduce the likelihood of addiction). But see *State v. Stevens*, 866 P.2d 1378, 1379 (Colo. 1994) (justifying a lesser sanction for a relatively inexperienced lawyer who used cocaine in contrast to a more heavily sanctioned lawyer who had substantial experience in practice).

A study of Washington lawyers concluded that 18% of the lawyers who practiced from 2-20 years were problem drinkers and that 25% of the lawyers who practiced 20 or more years were problem drinkers. See Benjamin et al., *supra* note 228, at 241.

Estimates of the percentage of lawyers involved in disciplinary proceedings who have problems with alcohol or drug abuse range from 14% to 75%. See G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCHOL. REV. 113, 118 (1992); Cynthia L. Spanhel, *The Impact of Impaired Attorneys on the Texas Grievance Process*, TEX. B.J., Mar. 1989, at 312; Stephen Anderson, *New Data Link Mental Impairment with Discipline*, ILL. ST. B. ASS'N NEWS, Mar. 1, 1994, at 3. Unfortunately, most state disciplinary agencies do not systematically collect data reflecting the percentage of lawyer discipline cases in which alcohol or drug abuse was a factor, see Telephone Interview with Donna Spilis, ABA LAP Staff Director (July 29, 1998), but there is no question that alcoholism and substance abuse are contributing factors in many lawyer discipline cases.

230. It appears that the typical lawyer discipline case involves a lawyer who is more than 10 years out of law school. See James Evans, *Lawyers at Risk*, CAL. LAW., Oct. 1989, at 45, 46-47 (showing that 82% of disciplined lawyers have practiced for more than ten years). See generally Kelly, *supra* note 8, at 498 (indicating that most lawyers in the study who had converted client funds had been in practice more than 10 years). A study of California lawyers disciplined in the late 1980s revealed that 27% of the lawyers were in their early forties, which is a time when

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in many cases, essentially retributive.

There are, obviously, problems that more experienced lawyers may be better able to avoid than less experienced lawyers. For example, more experienced lawyers may be better equipped to avoid complaints based on claims of incompetent representation or poor law office management controls,<sup>231</sup> and may be more knowledgeable about state court rules governing practice than their younger colleagues.<sup>232</sup> However, even in cases involving law office management problems and incompetence, a lawyer's potentially greater knowledge and experience does not justify *routinely* enhancing the sanction. Case loads can become unmanageable for reasons that have nothing to do with experience. Claims of incompetent representation can also arise for reasons unrelated to the number of years a lawyer has practiced.<sup>233</sup> While there may be cases in which the lawyer's substantial experience should be considered relevant to the sanction imposed—such as where an experienced lawyer persuades a younger lawyer to engage in misconduct—these cases are relatively infrequent.<sup>234</sup> The ABA Standards' failure to define and carefully circumscribe the situations in which substantial experience in practice should be considered an aggravating factor, and to encourage thoughtful application of the factor in those limited categories of cases, invites unfair and inconsistent results.

Similarly, inexperience in the practice of law should not be a mitigating factor in many cases of lawyer misconduct. The goals of lawyer discipline are not advanced by reducing the sanctions imposed

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marital problems, financial strains and fading expectations can fuel mid-life crises. *See* Evans, *supra*, at 46, 48. This may help explain the finding that those who have practiced longer appear to be more susceptible to developing problem drinking than their younger colleagues. *See* Benjamin et al., *supra* note 228, at 242.

231. These complaints might include, *inter alia*, neglect of client matters, failures to communicate, and failures to maintain proper trust accounts.

232. State court rules concerning the limits on contingent fees, the terms of written retainer agreements, and the requirements for establishing and reporting on client trust accounts are not typically taught in law schools or tested on bar exams. Moreover, young lawyers who practice in large hierarchical law firms may not learn of these rules in their early years of practice. More experienced practitioners should come to know of these rules, particularly if they practice with other lawyers, but may be less likely to learn of them if they practice alone throughout their legal careers.

233. For example, case loads can become unmanageable due to the illness or the death of a partner. Mental disability can contribute to claims of neglect and incompetent representation. *See, e.g.*, Louisiana State Bar Ass'n v. Villa, 570 So. 2d 1165, 1166 (La. 1990) (discussing the effect of depression on a lawyer's ability to function in an intense personal injury practice).

234. More often, increased experience and responsibility may create the possibility of greater injury to clients. This possibility does not, in itself, justify treating substantial experience as an aggravating factor under the ABA Standards because the Standards already provide for the sanction to be enhanced if there is serious injury. *See* ABA STANDARDS, *supra* note 7, at Standard 4.3.

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on inexperienced lawyers who have willfully converted client funds, submitted false documents to a court, or knowingly engaged in other misconduct about which there can be no ethical confusion.<sup>235</sup> Although there may be instances where inexperience in practice can directly lead to disciplinary problems—such as neglect of client matters, lack of competence or technical trust fund violations—these situations typically only arise as a result of negligence, and the sanction prescribed by the ABA Standards is usually no greater than a reprimand. Further reduction of the sanction to a private admonition does not advance the goals of lawyer discipline.<sup>236</sup> At most, this mitigating factor should be considered in only limited circumstances where the misconduct is directly attributable to inexperience in order to avoid inconsistent and inappropriate application of this factor.

*ii. Absence of prior disciplinary record*

The absence of a prior disciplinary record should not be treated as a mitigating factor when imposing discipline on lawyers.<sup>237</sup> Mitigation due to lack of prior discipline sends the message to lawyers—who are supposed to maintain high ethical standards—that they have behaved in an exemplary fashion simply because they have not previously been subject to discipline. In addition, in view of the reluctance to report lawyer misconduct and the difficulty of otherwise detecting it,<sup>238</sup> the absence of a disciplinary record is not by itself proof of good

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235. See, e.g., *In re Leon*, 524 N.W.2d 723, 725 (Minn. 1994) (stating that inexperience in the practice of law does not excuse theft or mitigate serious misconduct); *In re Wilson*, 409 A.2d 1153, 1157 (N.J. 1979) (noting that offense of misappropriation “should be clear even to [the] youngest” practitioners); H. Furman, *Punishing Ethical Violations: Aggravating and Mitigating Factors*, 20 COLO. LAW. 243, 245 (1991) (arguing that an inexperienced lawyer “should be as fully informed as an experienced one”). But see *Florida Bar v. McNamara*, 634 So. 2d 166, 168 (Fla. 1994) (considering inexperience in practice as a mitigating factor where the lawyer converted client funds); *In re Muhammed*, 655 So. 2d 325, 327 (La. 1995) (considering inexperience in practice as a mitigating factor where the lawyer lied about receiving funds intended for a client and converted them to his own use).

236. See *supra* notes 213-21 and accompanying text. While there may be situations in which inexperience directly contributes to misconduct that draws a sanction greater than a reprimand under the ABA Standards, these cases are relatively infrequent. For example, a young solo practitioner may engage in a pattern of neglect of client matters, but be too inexperienced to know how to deal with it. Under the ABA Standards, the initial determination would require the sanction of suspension. See ABA STANDARDS, *supra* note 7, at Standard 4.42(b). In such cases, it may be appropriate to consider inexperience and to impose supervised probation rather than suspension.

237. It is, on the other hand, understandable why a prior history of disciplinary offenses would be treated as an aggravating factor. A prior disciplinary history suggests that the level of sanction previously imposed did not have the desired deterrent or rehabilitative effect and that an enhanced sanction may be needed.

238. See *supra* note 26 and accompanying text; *supra* note 29.

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conduct. Moreover, this mitigating factor is present in many disciplinary cases,<sup>239</sup> providing courts with significant latitude to apply the factor inconsistently.<sup>240</sup>

The opportunities for disparate treatment of similarly situated lawyers are compounded by the fact that under the ABA Standards, the absence of discipline over a long career should be offset by the countervailing aggravating factor of substantial experience in the practice of law, but courts will sometimes give great weight to one and virtually ignore the other.<sup>241</sup> To avoid unwarranted inconsistency, initial sanction levels should be determined based on the assumption that they are being applied to lawyers who have not been previously disciplined and the absence of prior discipline should not be treated as a mitigating factor.

### *iii. Character and reputation*

Character and reputation evidence is one of the most salient factors in determining lawyer sanctions,<sup>242</sup> yet the evidence frequently has little probative value. It is also the most misused of all the mitigating factors. Character and reputation evidence powerfully

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239. In one study of lawyers who were disciplined for converting client funds, 85% had not previously been disciplined. See Kelly, *supra* note 8, at 497, 499. My review of Oregon Supreme Court opinions decided in 1996-97 revealed that 13 of 19 lawyers had not previously been disciplined.

240. In some cases, courts give the absence of a disciplinary history great weight and in other cases the courts may give the factor little consideration. For example, in *In re Murphy*, 936 P.2d 1269 (Ariz. 1997), the court was "greatly influenced" by the fact that a lawyer who used confidential client information for his own benefit and violated rules against conflicts of interest had practiced for 26 years with no prior discipline complaints. See *id.* at 1274. It relied on this single "substantial" mitigating factor to outweigh several serious aggravating factors, and reduced an initial sanction determination from disbarment to a one-year suspension. See *id.* A year earlier, the same court gave no great weight to this mitigating factor when it suspended for two years a lawyer who had practiced for over 25 years without being disciplined. See *In re Schroeder*, SB-96-0004-D, 1996 Ariz. LEXIS 14, at \*13 (Feb. 26, 1996) (discussing a lawyer who failed to avoid conflicts of interest and charged excessive fees). In *Schroeder*, the initial sanction determination under the ABA Standards was no more than a suspension. The court's willingness to treat Murphy's clean discipline history as a substantial mitigating factor, but not Schroeder's, may have been due, in part, to the fact that Murphy was a member of a well-respected Phoenix law firm and Schroeder had left the law to work for a car rental company. See *Schroeder*, 1996 Ariz. LEXIS, at \*4.

241. The aggravating factor of substantial experience is often offset by the absence of a prior disciplinary record. See, e.g., *In re Frost*, 863 P.2d 843, 854-55 (Alaska 1993); *In re Auerbach*, SB-96-0019-D, 1996 Ariz. LEXIS 35, at \*7 (Apr. 1, 1996); *In re Grant*, 936 P.2d 1360, 1363 (Kan. 1997) (noting in each case a lawyer's substantial experience in practice as an aggravating factor and the absence of a prior disciplinary record as a mitigating factor). It is not unusual, however, for the courts to ignore one of these factors when they are both present in the same case. See, e.g., *In re Anderson*, 788 P.2d 95, 97 (Ariz. 1990) (considering no prior discipline as a mitigating factor but not considering experience in practice as an aggravating factor); Attorney Grievance Comm'n v. Driscoll, BV No. 30, 1996 Md. LEXIS 133, at \*24 (Oct. 8, 1996) (same); *In re Lancaster*, 690 A.2d 863, 864 (Vt. 1997) (same).

242. Character evidence is one of the variables predicting that a lawyer who converted client funds will not be disbarred. See Kelly, *supra* note 8, at 504, 507.

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affects the sanctioning decision because the witnesses who provide it are often well-regarded members of the bench and bar.<sup>243</sup> Courts often use such evidence to justify their decisions to treat well-connected lawyers leniently,<sup>244</sup> without regard for whether the evidence provided is relevant to the misconduct at issue or likely to predict a lawyer's future actions.

Character and reputation evidence should be afforded little if any weight in most discipline cases. The mere fact that a witness will testify to the lawyer's good reputation or to specific instances of good conduct<sup>245</sup> often does not merit mitigation of a sanction. While a spotless reputation, if deserved, might help predict future conduct, a good reputation can be due to the fact that lawyer misconduct is hard to detect and that "bad facts" have not become widely known.

Moreover, character and reputation evidence is often provided by people who have no knowledge of the specifics of a lawyer's practice or of the wrongdoing alleged.<sup>246</sup> While the witnesses may have

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243. For example, in *Florida Bar v. Diamond*, 548 So. 2d 1107, 1108 (Fla. 1989), a lawyer whose conduct merited disbarment under Florida's standards was instead suspended for three years based in part on the "abundant character testimony" including the testimony of the past president of the Florida Bar and a past mayor of Miami Beach. *See id.* *See also* *Florida Bar v. Clark*, 582 So. 2d 620, 621 (Fla. 1991) (suspending a lawyer rather than disbarring him based in part on the testimony of several character witnesses including a Florida circuit court judge who attested to the lawyer's legal ability and his reputation for honesty and integrity); *Louisiana State Bar Ass'n v. Garraway*, 520 So. 2d 400, 402 (La. 1988) (reducing a recommended sanction due in part to testimony of judges). *See generally supra* notes 67-70 and accompanying text.

244. Character and reputation evidence is often considered in lawyer discipline cases. For example, in 1996 and 1997, character evidence was considered as a mitigating factor in 40 out of 88 Colorado Supreme Court discipline cases. In many cases, character and reputation evidence appears to affect directly the court's decision to reduce a sanction. *See, e.g.*, *Florida Bar v. Hmielewski*, 702 So. 2d 218, 221 (Fla. 1997) (suspending a lawyer for three years rather than disbarring him due in part to "extremely strong character evidence"); *In re Berk*, 602 A.2d 946, 951 (Vt. 1991) (concluding that a lawyer who engaged in conduct that could have resulted in disbarment under the ABA Standards should be suspended for only six months due in part to character evidence); *In re Johnson*, 826 P.2d 186, 193 (Wash. 1992) (citing a lawyer's reputation for competence and integrity as one of two "important" factors which resulted in decision to impose a 60-day rather than a six-month suspension). *See generally* *People v. Galindo*, 884 P.2d 1109, 1112 (Colo. 1994) (using a lawyer's reputation for integrity to bolster a finding of no willful conversion of client funds and to reduce the recommended three-year suspension to a one-year suspension).

245. Generally, evidence of character or a trait of character is proved by testimony about an individual's reputation in the community or by testimony in the form of an opinion. *See* FED. R. EVID. 405(a). Under limited circumstances, character may be proved by specific instances of conduct. *See id.* at 405(b). While rules of evidence are only loosely applied in some disciplinary proceedings, they are more closely followed in others. *Compare* COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.14(d) (stating that hearings shall be conducted in conformity with Colorado Rules of Evidence), *with In re Quaid*, 646 So. 2d 343, 348 (La. 1994) (noting that it may be more appropriate in disciplinary proceedings to be guided but not confined by a strict application of the rules of evidence).

246. *See* WOLFRAM, *supra* note 93, at 121-22; *see also supra* notes 67-68 and accompanying text. In addition, these witnesses often provide testimony because of sympathy or friendship for the lawyer or for business reasons rather than out of concern for the disciplinary process. *See*

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observed the lawyer sporadically, they are often not in a position to know whether the misconduct was truly aberrational. Without this knowledge, character and reputation evidence is largely irrelevant, yet this evidence can have an enormous impact on the sanctioning decision.<sup>247</sup>

For example, in *In re Witteman*,<sup>248</sup> a lawyer was charged with several ethical violations including failure to handle diligently a client matter and then lying to the client about the legal status of the case after it was dismissed. This same lawyer previously had been convicted of failure to file a federal tax return and over the years had had four separate client matters in which “he got in trouble and lied in an effort to conceal what happened.”<sup>249</sup> He had been sanctioned on five previous occasions. Notwithstanding this record, the lawyer was able to assemble, and permitted to file, twenty-two affidavits from judges, lawyers and clients in his support.<sup>250</sup> The court wondered aloud “how a lawyer who is professionally well regarded by judges and lawyers . . . has repeatedly gotten himself into the same type of predicament.”<sup>251</sup> Nevertheless, the court suspended the lawyer for two years rather than disbarring him, as had been recommended by the disciplinary board and would have been appropriate under the ABA Standards.<sup>252</sup>

While lawyers are permitted to introduce this powerful—yet often meaningless—evidence, courts fail to consider that character and reputation evidence is, in the lawyer discipline context, often a one-way street that only benefits lawyers. The ABA Standards provide that a sanction may be mitigated if there is proof of good character, but do not provide for an increased sanction if there is proof of bad

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WOLFRAM, *supra* note 93.

247. *See supra* notes 242-43; *see also* Florida Bar v. Seldin, 526 So. 2d 41, 44 (Fla. 1988) (rejecting the Florida Bar’s recommendation of disbarment in view of the absence of a disciplinary record and favorable recommendations from civic leaders in his community); *In re Woodward*, 661 N.Y.S.2d 614, 617-18 (App. Div. 1997) (rejecting the hearing panel’s recommendation of disbarment due mainly to character evidence presented through four witnesses and 23 character letters); Office of Disciplinary Counsel v. Chung, 695 A.2d 405, 407-08 (Pa. 1997) (rejecting the recommendation of disbarment based in part on the testimony of eight character witnesses who testified that a lawyer convicted of lying to the FDIC on several occasions was “truthful”).

248. 737 P.2d 1268 (Wash. 1987).

249. *See id.* at 1270.

250. *See id.* at 1275.

251. *Id.* at 1270.

252. *See id.* at 1272; ABA STANDARDS, *supra* note 7, at Standards 4.41, 4.61. In *Witteman*, the court quoted extensively from judges’ affidavits describing the respondent and referred to the character evidence as one of the three “principal” mitigating factors. *See* 737 P.2d at 1271-72. The other two mitigating factors—the absence of dishonest motive (until the lawyer began cover up efforts) and the “availability” of restitution—were weak, and the majority ignored more substantial aggravating factors to reach its conclusion. *See id.*

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character.<sup>253</sup> Even if courts would consider this evidence, it is almost never readily available. Victims and other clients who have not filed complaints but who could provide information raising questions about a lawyer's character often do not learn about disciplinary proceedings until they are concluded (if then).<sup>254</sup> Moreover, underfunded state discipline systems lack the resources to seek out and investigate collateral "bad facts" that might affect the sanctioning decision.<sup>255</sup>

If courts are going to consider character evidence, the circumstances under which it is admitted should be carefully limited. For example, character and reputation evidence should only be admitted when a witness has substantial direct knowledge of the lawyer's day-to-day law practice, is aware of the misconduct alleged, and is able to provide testimony that sheds light on character traits placed in issue by the misconduct.<sup>256</sup> In view of the difficulties of

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253. In addition, courts usually sanction lawyers for the offense that is charged and proved rather than for the "real" offense, which contrasts with the approach of the Federal Sentencing Guidelines. Thus, when courts impose sanctions on lawyers the only "bad" facts they typically consider are facts relevant to the misconduct actually proved and any prior disciplinary history.

While prior disciplinary history can indirectly serve as evidence of "bad character," it is much more limited in scope than proof of good character. Moreover, in view of the underreporting of lawyer misconduct and the low number of complaints that result in sanctions, *see supra* notes 26, 29, 33 and accompanying text, the availability of "bad character" evidence is, at a minimum, very limited.

254. When a formal charge is filed against a lawyer it becomes a matter of public record, *see, e.g.*, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 16(A) (1996), but it is rarely publicized in a manner that is likely to come to the attention of the general public. Moreover, there is no requirement that the lawyer notify other clients or other possible victims. The notice requirements imposed on lawyers typically only arise after serious discipline has been imposed. *See, e.g., id.* at Rule 27(A) (requiring a lawyer to notify all clients being represented in pending matters that the lawyer has been disbarred, suspended or placed on disability inactive status). Thus, other clients and victims are unlikely to learn of the disciplinary proceedings against a lawyer unless and until public discipline is imposed.

255. *See, e.g.*, Dubin, *supra* note 12, at 677-78 (noting that current resources available to Michigan's Attorney Grievance Commission do not allow for more than superficial investigations and hastily prepared prosecutions).

256. In the lawyer discipline context, decision-makers are susceptible to influence by those providing evidence and may be beholden to witnesses in one way or another. Broad statements about reputation unsupported by first-hand knowledge of the lawyer's practice should not be permitted because they introduce too many opportunities for persons lacking detailed knowledge about the lawyer being disciplined to influence unfairly the discipline process. In addition, generalized claims that the lawyer enjoys a good reputation in the community contribute little to the sanctioning decision. Instead, character evidence should be admitted only if it sheds light on traits brought into question as a result of the misconduct.

A more difficult question is presented by evidence of a lawyer's good acts that contribute to society, including substantial pro bono work. *See, e.g., In re Rivkind*, 791 P.2d 1037, 1041 (Ariz. 1990) (characterizing respondent's public speaking engagements regarding illegal drug use as a mitigating factor); *People v. Davis*, 768 P.2d 1227, 1228-29 (Colo. 1989) (treating respondent's participation in a program that provided free legal services as a mitigating factor); *In re Merriwether*, 561 N.E.2d 662, 667 (Ill. 1990) (citing the respondent's active involvement in civic organizations and pro bono work as relevant mitigating factors); Office of Disciplinary Counsel

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excluding the testimony of politically influential—but irrelevant—witnesses, judges, elected officials and bar officers should not be permitted to offer character evidence in lawyer disciplinary proceedings unless the witnesses are current employers of the lawyers charged with misconduct and their testimony relates to unique facts that cannot be obtained from other witnesses.<sup>257</sup> Even with these limitations, character and reputation evidence should be afforded relatively little weight in the sanctioning decision.

*b. The lack of guidance in weighing factors*

The ABA Standards do not provide direction with respect to when to use, or how to weigh, the twenty-three mitigating and aggravating factors. The task of drafting standards that guide in the exercise of this discretion is admittedly difficult, but the Standards are virtually silent on this point.<sup>258</sup> For example, the ABA Standards provide almost no guidance as to how—or how heavily—any of these factors should be weighed against the initial determination of the sanction.<sup>259</sup> While the Reporter to the Sanctions Committee has stated that it was the Committee’s intention that all mitigating factors be afforded less weight than the lawyer’s mental state and the injury caused by the misconduct,<sup>260</sup> the Standards do not say this.

Indeed, in light of the purpose of the ABA Standards—to help achieve consistency in the imposition of sanctions—the absence of guidance with respect to these factors is striking. For example, the Standards state that mitigating and aggravating factors “could” make a sanction level other than the one arrived at during the initial

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v. Chung, 695 A.2d 405, 407 (Pa. 1997) (noting respondent’s significant history of service to the community and free legal aid to a non-profit organization as mitigating factors). While this type of evidence could be characterized as character evidence, and is reasonably related to the question of whether incapacitating sanctions or community service should be imposed, it should not be used as a backdoor method through which influential witnesses can affect the disciplinary decision. Instead, lawyers should be required to introduce this evidence through their own testimony or through the testimony of those who supervise the programs in which the lawyers have participated or through clients who have benefited from the pro bono work.

257. See generally *In re Beconovich*, 884 P.2d 1080, 1083-84 (Alaska 1994) (upholding a decision to exclude general good character testimony offered by a member of the disciplinary board).

258. Professor Cynthia Kelly, the Reporter to the Sanctions Committee, predicted the ABA Standards might be criticized for not providing greater guidance concerning the analysis of aggravating and mitigating factors that may be present, but explained that the Standards are simply a “general model” that would ensure consistency of analysis, while leaving room for flexibility in the imposition of sanctions in a particular case. See Kelly, *supra* note 8, at 512.

259. The only exception is where there are instances of prior discipline. See ABA STANDARDS, *supra* note 7, at Standard 9.22(a). ABA Standard 8.0 specifically provides for increased sanctions to be imposed where the attorney has previously received the prescribed sanction level for the same or similar prior misconduct. See *id.* at Standard 8.0.

260. See Kelly, *supra* note 8, at 512-13.

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determination appropriate,<sup>261</sup> but they do not suggest when a different sanction might be imposed. Thus, decision-makers are left with great latitude to determine whether it is the mere existence of a factor or its compelling nature that warrants a different sanction level.

The ABA Standards also provide no guidance as to whether all mitigating and aggravating factors should be afforded the same weight.<sup>262</sup> Although it may not be possible—and would not be desirable—to predetermine the precise weight to be afforded each factor, it would promote fair and considered decision-making to know whether certain factors should be afforded more weight than others.<sup>263</sup> The difficulty of knowing how to weigh individual aggravating or mitigating factors is exacerbated by the fact that there are often several mitigating and aggravating factors in a single case. Not surprisingly, courts applying the ABA Standards do little more than identify factors they consider relevant in a particular case and rarely attempt to articulate how they weigh these factors against one another.<sup>264</sup> In the end, the ABA Standards merely provide a consistent two-step process for approaching the discipline decision. The Standards' failure to provide courts with more guidance in their consideration of aggravating and mitigating factors seriously undermines efforts to achieve predictability and fairness when sanctioning lawyers.

#### IV. RECOMMENDATIONS

None of the above criticisms should obscure the fact that the ABA

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261. See ABA STANDARDS, *supra* note 7, at 6.

262. The only discussion of the weight to be afforded any of the aggravating or mitigating factors appears in the Commentary to Standard 9.32, which describes the weight to be given to evidence of physical or mental disability or chemical dependency. See ABA STANDARDS, *supra* note 7, at Standard 9.32 Commentary. That Commentary states that “if the offense is proven to be attributable solely to disability or chemical dependency, it should be given the greatest weight.” *Id.* If either is “principally responsible” for the offense, it should be given “great weight.” See *id.* Lesser weights are assigned as causation becomes less clear. It is unclear, however, whether the reference to weight refers to how this factor should be weighed against the initial determination or how to weigh this factor against other factors.

263. As previously noted, this failure to provide guidance permits courts to give great weight to a factor—such as the absence of prior discipline—in one case, while affording it no particular weight in another, seemingly similar case. See *supra* notes 225, 240.

264. For example, in *People v. Watson*, 833 P.2d 50 (Colo. 1992), the court noted that suspension was ordinarily the appropriate sanction for the misconduct at issue. The court also noted the existence of five mitigating factors and three aggravating factors. It concluded without explanation of the relative weight or impact of these factors that the appropriate sanction was an 18-month suspension, stating, “[a]fter a review of the respondent’s misconduct as contained in the stipulation and weighing the factors in aggravation and mitigation, we conclude that a reasonably long period of suspension is warranted.” *Id.* at 53.

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Standards are a useful step toward addressing some of the problems with the imposition of sanctions on lawyers. Indeed, the absence of standards in some jurisdictions gives rise to the greatest inconsistency and opportunities for bias. Nor are these criticisms meant to suggest that obvious and easy solutions are readily available. On the contrary, the problem of how to write standards that promote consistency yet permit flexibility has bedeviled judges, legislatures and scholars.<sup>265</sup>

The recommendations discussed below concerning the content of standards assume that for the near term, the standards will continue to be written on the state and not the federal level<sup>266</sup> and that state courts or judicial commissions will be responsible for this effort. This is not necessarily the best arrangement.<sup>267</sup> In light of the reluctance of state courts to adopt written standards and to abide by them when imposing discipline,<sup>268</sup> state legislatures or their appointed agencies arguably should draft the standards governing lawyer sanctions.<sup>269</sup> As

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265. Two recent experiences with this problem can be found in efforts to draft federal sentencing guidelines and in the evolution of Rule 11 of the Federal Rules of Civil Procedure. *See, e.g.*, Armour, *supra* note 19, at 500-04; Freed, *supra* note 134, at 1689-91, 1750-52; *infra* note 274.

266. In view of the calls for uniform federal rules of professional responsibility, *see* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345-72 (1994), efforts to draft Federal Rules Governing Attorney Conduct for the federal courts, and predictions about federal disciplinary commissions, *see* Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORD. L. REV. 125, 127 (1991), it would seem that federal standards for imposing discipline—written by a federal agency—might be more desirable. In fact, a careful legal process analysis of the relative competence of federal regulators and the state courts to draft standards may reveal that it *should* be preferable to allocate this task to federal regulators. *See generally* Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORD. L. REV. 33, 38-47 (1996) [hereinafter Schneyer, *Legal Process*] (describing the process of making these comparative assessments). I have not attempted to perform such an analysis. My assumption is based only on current political realities and on my belief that it is preferable for state courts to draft the standards—if they will do so—because state court standards would probably be more sensitive to the balance that needs to be struck than federally mandated sanctions, which may prove to be tougher and less flexible than necessary to achieve the goals of lawyer sanctions. Indeed, the experience with the Federal Sentencing Guidelines and the United States Sentencing Commission suggests that federal involvement is not likely to produce a nuanced approach to the development of standards. *See generally* Alschuler, *The Failure of Sentencing Guidelines*, *supra* note 134, at 918-23, 936-38 (describing the irrationality and inequality of outcomes under the Federal Sentencing Guidelines); Freed, *supra* note 134, at 1703-18, 1741-44 (explaining the problems with the Federal Sentencing Guidelines and the United States Sentencing Commission); Robinson, *supra* note 134, at 909-10 (describing how Congress' contradictory directives resulted in increased severity of federal sentences).

267. Nor is it inevitable. Admittedly, the ABA has consistently urged the courts to assert their exclusive power to regulate lawyers, *see, e.g.*, PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 10-18, and courts have attempted to do so, *see* Thomas M. Alpert, *The Inherent Powers Doctrine*, 32 BUFF. L. REV. 525, 530-31 (1983). The reality, however, is that since colonial times, legislatures also have been involved in the regulation of lawyers. *See* Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 AM. J. LEGAL HIST. 145, 146 (1973); *see also* JAMES HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 278-79 (1950); Alpert, *supra*, at 531-32.

268. *See, e.g.*, *supra* notes 160-63, 171 and accompanying text.

269. Legislators routinely set sanctions or ranges of sanctions in the criminal and civil context and already set disciplinary standards for other professional groups including

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a practical matter, however, it is doubtful state legislatures would devote the time, effort or funding needed to draft such standards well.<sup>270</sup> Moreover, legislative involvement in this process may yield overly rigid standards<sup>271</sup> and may open the door to legislation of rules governing the professional conduct of lawyers, which could compromise lawyer independence. Without attempting to resolve the important and difficult question of who should write these standards,<sup>272</sup> the recommendations that follow assume continued judicial involvement in the drafting of standards, although these recommendations could be implemented by legislatures or other rule-making bodies, as well.

#### A. *Adopt Clear and Complete Mandatory Standards*

A useful starting point for drafting standards for imposing lawyer sanctions can be found in criminal sentencing guidelines,<sup>273</sup> which

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physicians and accountants. See FRANK P. GRAD & NOELIA MARTI, PHYSICIANS' LICENSURE AND DISCIPLINE: THE LEGAL AND PROFESSIONAL REGULATION OF MEDICAL PRACTICE 8-9 (1979) (discussing regulation of the practice of medicine); Bene, *supra* note 18, at 918 (discussing licensing and discipline in accounting and medical professions).

Moreover, state legislatures and their sentencing commissions have had more success with devising criminal sentencing guidelines than the federal government. See Freed, *supra* note 134, at 1742 (discussing successes of the Minnesota Sentencing Guidelines); Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713, 717-20 (1993) (describing the successes of state sentencing commissions and state sentencing guidelines). Legislatures or their agencies may also be more likely to place the public interest before lawyers' interests when developing standards for imposing lawyer sanctions.

270. In most states, fewer than 200 lawyers are sanctioned each year by state discipline systems. See SOLD 1996, *supra* note 14, at 5-9 fig. II. Given the scarcity of financial resources and the other important issues confronting state legislatures, it is unlikely that legislatures would be willing to devote the time or resources needed to draft well-conceived standards.

271. See *infra* note 274. Legislatures may be less sensitive than other rulemakers to the competing demands on lawyers that can make lawyers' ethical choices so difficult. They may also be less sensitive than judges to the competing considerations faced by decision-makers when imposing sanctions, and therefore less well-equipped to draft well-conceived standards that guide the sanctioning decision.

272. I have mentioned only a few of the issues that should be considered when assessing the comparative strengths and weaknesses of some of the possible drafters. The question of who should write the standards is complex and necessarily raises the related questions of who should discipline and regulate lawyers. These are questions that have long been debated and have previously received serious scholarly attention. See, e.g., Martyn, *supra* note 18, at 734-43; Rhode, *supra* note 26, at 694-70, 704-06; Schneyer, *Legal Process*, *supra* note 266, at 33-58; Wilkins, *supra* note 18. These issues deserve and require separate treatment.

273. In some jurisdictions the term "sentencing guidelines" means rules that prescribe a particular sentence or sentence range from which judges may deviate only when the case presents unusual aggravating or mitigating factors. In others, it means broad sentencing ranges with broad discretion to consider aggravating and mitigating factors. In still others, it can mean "voluntary" guidelines that do not have the force of law. See Leonard Orland & Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 U. COLO. L. REV. 837, 839 (1993). The distinction between "standards" and "guidelines" is, in some cases, little more than semantic. See, e.g., Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards*, 78 JUDICATURE 189, 192 (Jan.-Feb. 1995) (discussing the ABA's decision to

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have produced considerable scholarship on how to promote consistency while providing the flexibility to consider relevant individual circumstances.<sup>274</sup> In certain respects, the problems that arise when imposing sanctions on lawyers mirror the difficulties with achieving fairness in criminal sentencing. For example, in both contexts there is the problem of bias,<sup>275</sup> the existence of an array of aggravating and mitigating factors, and the need to choose among a number of available sanctions that convey very different messages and may differ in their deterrent and rehabilitative effects.

Ironically, the ABA Standards for Criminal Justice Sentencing (“ABA Sentencing Standards”)<sup>276</sup> provide a more useful starting point for drafting standards for imposing lawyer discipline than do the ABA Standards relating to lawyer sanctions. Like the ABA Standards for

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use the word “standards” rather than “guidelines” because the latter would suggest similarity to the Federal Sentencing Guidelines).

274. The most well-known—and most criticized—guidelines are the Federal Sentencing Guidelines, which were mandated by the Sentencing Reform Act of 1984. *See* 28 U.S.C. § 994 (1994). Those guidelines have been criticized as too rigid, too complex, too harsh, and too susceptible to prosecutorial manipulation, *see, e.g.*, Freed, *supra* note 134, at 1690; Robinson, *supra* note 134, at 894-98, 909-10, but the critiques relate mostly to the structure and the specifics of the Guidelines rather than to the idea of guidelines themselves. *See* Tonry, *supra*, note 269, at 716. Many states have also adopted criminal sentencing guidelines, with somewhat more success. *See* Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 648 (1993); Tonry, *supra* note 269, at 717-20.

275. The problem of light sentences for white collar criminals with whom judges could identify as compared to the sentences imposed on other criminal defendants contributed to calls for federal sentencing guidelines. *See* FRANKEL, *supra* note 83, at 23-24. Judges are even more likely to identify with lawyers who are sanctioned than they are with the average criminal defendant because most judges were at one time practicing lawyers.

The opportunities for bias against lower echelon offenders are also present both when sanctioning criminal defendants and lawyers. Solo practitioners, who are on the bottom of the lawyer status ladder, are prosecuted at a greater rate by disciplinary authorities than partners in small firms. *See* Bruce L. Arnold & John Hagan, *Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers*, 57 AM. SOC. REV. 771, 772-73, 776-77 (1992). They are also disciplined more often than lawyers who work in other practice settings. *See, e.g.*, Evans, *supra* note 230, at 46-47 (reporting that approximately half of lawyers disciplined in California in 1988 were solo practitioners, although only 29% of California lawyers worked in solo practices). The reasons for this are complex. For example, lawyers in solo practices encounter economic pressures that may make them more likely to engage in misconduct. *See* CARLIN, LAWYERS’ ETHICS, *supra* note 25, at 73-74, 120-22. They are also more likely to have troubled clients who present ethical problems, *see id.*; Arnold & Hagen, *supra*, at 287; Levin, *supra* note 25, at text accompanying n.143, and their clients are more likely to file disciplinary complaints than more sophisticated clients, *see* Wilkins, *supra* note 18, at 829 (noting that individual clients are more likely than corporate clients to invoke the disciplinary system). In addition, solo practitioners may not have the staff and office controls that enable other lawyers to avoid the most common disciplinary complaints. They also have the fewest resources to fight prosecutions, *see* Evans, *supra* note 230, at 47, and their cases do not present the difficulties of proof that arise when prosecuting large firm lawyers, *see* Schneyer, *Professional Discipline*, *supra* note 18, at 8-11. Regardless of whether solo practitioners actually engage in wrongdoing at a greater rate than the rest of the lawyer population, the opportunities for less forgiving sanctions for these lawyers as compared to other lawyers is significant.

276. *See* ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING (3d ed. 1993) [hereinafter ABA SENTENCING STANDARDS].

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Imposing Lawyer Sanctions, the ABA Sentencing Standards seek to eliminate unwarranted disparity while permitting the courts to take into account differences among offenders that warrant disparate sentences.<sup>277</sup> The ABA Sentencing Standards promote more consistency in the initial determination of the sanction by recommending the use of mandatory—not voluntary—standards.<sup>278</sup> They also recommend that for each offense, standards should guide courts to a “presumptive sentence,” which is the level of severity of the sentence and the type of sanction to be imposed in the “ordinary case.”<sup>279</sup> Deviation from the presumptive sentence due to aggravating or mitigating factors is permitted only when there is “substantial reason” for doing so.<sup>280</sup> If aggravating or mitigating factors exist, the ABA Sentencing Standards recommend that guidance be provided to the courts in the use of their discretion to choose a level of severity or type of sanction different from the presumptive sanction.<sup>281</sup>

While the ABA Sentencing Standards provide a better model for standards for imposing lawyer discipline than the existing ABA Standards for Imposing Lawyer Sanctions, they are no more than a starting point for the drafting of standards. Indeed, the ABA Sentencing Standards are only meant to serve as a starting point for the drafting of criminal sentencing guidelines. The drafters of the ABA Sentencing Standards recommend that an independent, intermediate governmental agency—typically a sentencing commission—write detailed guidelines for use by the courts.<sup>282</sup>

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277. *See id.* at Standard 18-3.1 & Commentary.

278. The ABA Sentencing Standards note that presumptive sentences should not be merely advisory because voluntary provisions do little to promote the goals of determinacy. *See id.* at Standard 18-3.1 Commentary. The Commentary supports its recommendation by citing Michael Tonry’s findings that voluntary criminal sentencing guidelines typically had little or no demonstrable effect on the sentences imposed. *See id.* at 41 n.5.

279. “Ordinariness” is defined as factual scenarios that most frequently come before the courts, often in high volumes, of certain types of cases. *See id.* at 41.

280. *See, e.g.,* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-4.4(b)(iv).

281. *See id.* at Standards 18-3.2(b), 18-3.3(c).

The drafters of the ABA Sentencing Standards took pains to distinguish their approach from the Federal Sentencing Guidelines. *See id.* at xxv. For example, the ABA Sentencing Standards base the initial determination on the “ordinary case,” while the Federal Sentencing Guidelines use a “base offense” approach that requires a number of discrete factual determinations that increase or decrease the guideline sentence in a mechanical, restrictive manner. In contrast, the ABA Sentencing Standards permit more departure flexibility for aggravating and mitigating factors. In addition, the ABA Sentencing Standards allow for greater consideration of the personal characteristics of the offenders. *See id.* at xxv-xxvii.

282. *See id.* at Standard 18-1.3(a), (b). The ABA Sentencing Standards recommend a permanent commission that would write the guidelines, collect information regarding sentences imposed and adjust the guidelines as needed to control for unexpected disparity and disproportionality. *See id.* at xxvi; *id.* at Standard 18-4.1 & Commentary.

As a practical matter, a commission for drafting lawyer discipline standards is unlikely to be

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Although the ABA Sentencing Standards recommend that this agency be legislatively created, this intermediate function could also be performed by a judicially appointed body.<sup>283</sup> In either case, when drafting standards for imposing lawyer discipline, care must be taken to select a truly independent commission and to insulate it so that it will not draft standards that are unduly deferential to lawyers' sensibilities or to judges' discretion.<sup>284</sup>

Another reason why the ABA Sentencing Standards can only serve as a starting point for drafting standards for lawyer sanctions is because, obviously, they provide no guidance for categorizing lawyer misconduct. As previously noted, the ABA Standards for Imposing Lawyer Sanctions are overly general and, at the same time, their structure effectively excludes many fact patterns from fitting into the black-letter standards.<sup>285</sup> The ABA Sentencing Standards do not help address this problem because criminal sentencing guidelines typically define misconduct by reference to specific criminal statutes.<sup>286</sup> In contrast, no detailed method of categorizing lawyer misconduct now exists in most states.<sup>287</sup>

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funded by a legislature unless it is part of some larger reform. Far fewer people are subject to lawyer sanctions by state discipline systems than are subject to criminal sentencing. *Compare* SOLD 1996, *supra* note 14, at 9 fig. II (reporting approximately 6400 sanctions imposed by all reporting state discipline systems), *with* BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS 1994, at 4 tbl. 1.1 (1998) (reporting 872,217 felony convictions in state courts in 1994). Legislatures are likely to conclude that the imposition of lawyer discipline sanctions does not justify the type of resources devoted to the calibration of criminal sanctions by permanent sentencing commissions.

283. *See* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-4.6(a), (b) (allowing the legislature to delegate the authority to draft sentencing guidelines to the judiciary).

284. *Cf.* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-4.2 (recommending a commission composed of lay persons and persons with varying perspectives within the criminal justice system including judges, prosecutors, defense attorneys and members of probation departments and that members serve terms long enough to insure continuity but short enough to allow for the regular infusion of new perspectives). Any commission established to draft standards for imposing lawyer sanctions would unquestionably benefit from the continued efforts of the ABA to draft model standards, although the model standards would need to be scrutinized carefully to ensure that they do not favor lawyers' interests over the interests of the public. *See generally* Morgan, *supra* note 118, at 740 (noting that when there is conflict arising from difficult ethical questions, the ABA tends to resolve it in favor of lawyers).

285. *See supra* text accompanying notes 179-83, 188-90.

286. The use of criminal statutes to define misconduct helps categorize similar conduct but is not without its problems. The overlapping provisions of federal statutes permit the selection of a different charge for the same misconduct, which can affect the ultimate sanction. *See* Robinson, *supra* note 134, at 992-93.

287. In the majority of states, most lawyer misconduct is not governed by statute. *But see* CAL. BUS. & PROF. CODE §§ 6103, 6105, 6128, 6131 (West 1997). Instead, the rules regulating lawyers are court rules. While some of those rules are quite detailed, such as rules concerning contingent fee agreements, client trust accounts, and written retainer agreements, many track the ABA Model Rules of Professional Conduct and are broadly drafted in terms of what lawyers "shall," "shall not," and "may" do.

The generality and vagueness of the Model Rules make them unhelpful for categorizing misconduct for the purpose of creating standards for imposing lawyer discipline sanctions. The

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While no standards for imposing lawyer sanctions can anticipate every fact pattern that may arise, the standards should, at a minimum, clearly provide for the types of misconduct that frequently occur and prescribe a method for determining the appropriate presumptive sanction when there is no apparent fit. Commentary should provide clear examples of the types of misconduct that fall within a particular standard rather than describe what past courts have done. It may be possible to use a revised version of the ABA Standards for Imposing Lawyer Sanctions if the black-letter standards are rewritten and made more specific and less aggregated in their treatment of misconduct,<sup>288</sup> the definitions are expanded,<sup>289</sup> the Commentary is clarified, and rules are provided for how to handle the problem of “no fit.”<sup>290</sup> Alternatively, an example of a more detailed standard and commentary is provided in the Appendix.

These changes, and the use of “presumptive sanctions” in the manner prescribed by the ABA Sentencing Standards, should help promote proportionality and consistent treatment of similar misconduct in the “ordinary case.”<sup>291</sup> In order to reduce bias and unwarranted inconsistency in the ultimate sanction determination, however, much depends upon the identification and treatment of mitigating and aggravating factors. Departures from the presumptive sanction should be permitted only when there are “substantial

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vagueness and generality also make it difficult to determine precisely what type of conduct is expected or prohibited in certain settings. *See, e.g.*, Schneyer, *supra* note 29, at 650-64 (arguing that the Model Rules are too vague and general to provide guidance on issues arising for lawyers who represent the banking industry).

288. As previously noted, the aggregation of a range of conduct within a single standard can lead to disproportionate sanctions. For example, the ABA Standard regarding conversion can be read to apply to a variety of conduct that results in client funds being used by lawyers, ranging from forgery of settlement checks or other theft of funds to poor accounting practices to refusal to return an unearned fee. *See supra* notes 185-86 and accompanying text. By clarifying, and at times narrowing, the types of misconduct addressed in each standard, the sanctions imposed will be more proportional. Sanctioning should also be more consistent, because courts will have less incentive and less latitude to fit similar misconduct into differently-sanctioned categories.

289. For example, the definition of “injury” should be expanded to include emotional harm. *See supra* notes 195-98 and accompanying text. The definition of “serious injury” should be revised to clarify the types of injury that would be considered “serious” and to indicate from whose perspective the existence of “serious injury” should be assessed.

290. *See supra* notes 188-90 and accompanying text. In fact, the ABA is currently working to revise some of the black-letter standards and the Commentary. A draft of the proposed revisions may be completed in 1999. *See* Telephone Interview with Elyn S. Rosen, ABA Assistant Regulation Counsel (July 30, 1998).

291. In contrast, the “initial determination” in the ABA Standards for Imposing Lawyer Sanctions, which only provides the “generally appropriate” sanction, invites the courts routinely to adjust the sanction whenever faced with any of the 23 aggravating or mitigating factors. *See* ABA STANDARDS, *supra* note 7, at Standard 3.0 Commentary.

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reasons” for departure.<sup>292</sup> The commentary to the standards should reflect that it is the compelling nature and not merely the existence or number of aggravating and mitigating factors that should be considered.<sup>293</sup> Certain aggravating and mitigating factors listed in the ABA Standards for Imposing Lawyer Sanctions should be eliminated because they are typically present in the ordinary case and they encourage deviation from the presumptive sanction in a large number of cases.<sup>294</sup> Some of the remaining factors should be afforded relatively little weight or should only be considered under carefully prescribed circumstances.<sup>295</sup>

The reason for placing these limitations on discretion is not because deviations are, in themselves, undesirable. Deviations from the presumptive sanction are not undesirable if they are due to factors that should be relevant to the ultimate sanction determination.<sup>296</sup> The problem with permitting routine and unrestrained deviation whenever any one of a number of aggravating and mitigating factors is present is that it presents increased opportunities for bias and unwarranted inconsistency to creep into the decision-making process due to factors that should be *irrelevant* to the sanctioning decision.<sup>297</sup>

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292. Under the ABA Sentencing Standards, when presumptive sentences are expressed in ranges of severity, departure from the presumptive sentence is permitted when there is “substantial reason” for the departure. *See* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-4.4(b)(iv). This standard was chosen to distinguish the ABA Sentencing Standards from the more rigid Federal Sentencing Guidelines and to provide courts with “meaningful discretion” to consider individual circumstances. *See id.* at Standard 18-3.2 Commentary.

293. Standards should also provide guidance as to how to choose a different level of severity or type of sanction if aggravating or mitigating factors are present. *Cf.* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-3.2(b) (stating that the agency should guide sentencing courts in the use of discretion to choose a level of severity or type of sanction that is different from the presumptive sanction).

294. *Cf.* MINN. SENTENCING GUIDELINES AND COMMENTARY ch. 244 cmt. II.D.201 (1996) (refusing to include as aggravating or mitigating factors those which could apply to a large number of cases). Some factors that are frequently present in lawyer discipline cases are discussed *supra* notes 224, 239 and accompanying text.

295. For example, inexperience in the practice of law should only be considered when ethical violations can be attributed directly to the inexperience. *See supra* note 236 and accompanying text. Character or reputation evidence should also be greatly limited and should be afforded less weight than other factors. *See supra* Part III.C.2.a.iii.

296. Of course, the question of which factors “should” be relevant depends upon the goals of lawyer discipline.

297. For example, a study of drug sentences under the Federal Sentencing Guidelines revealed that white defendants received more departures from the Guidelines and less severe sentences than black or Hispanics, even after controlling for other relevant factors. Moreover, Guideline departures increased the probability of not going to prison more for whites than for blacks or Hispanics. *See* Albonetti, *supra* note 137, at 804, 814-18. This does not mean, however, that guidelines do not work to reduce disparity. *See generally id.* at 793 (reporting research indicating that state guidelines produced sentencing outcomes that were more uniform and less dependent on an offender’s socioeconomic status). It does suggest that opportunities for departures from presumptive ranges present opportunities for bias to creep into the sanctioning process.

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Any new standards should also address the imposition of discipline on law firms<sup>298</sup> and should provide more guidance regarding some of the less traditional lawyer discipline sanctions such as rehabilitative programs, publication requirements, fines and community service.<sup>299</sup> As discussed below, some of these alternative sanctions may be more effective than traditional lawyer sanctions.<sup>300</sup> Once again, the ABA Sentencing Standards provide a useful starting point for drafting standards regarding these sanctions.<sup>301</sup> Any standards for imposing lawyer sanctions should address whether, for each type of

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298. New York and New Jersey courts now permit the imposition of discipline on law firms, *see* N.Y. SUP. CT. R., 1ST DEP'T §§ 603.2(b), 603.4(a)(1); *In re Ravich, Koster, Tobin*, 715 A.2d 216 (N.J. 1998), and it seems only a matter of time before this idea takes hold elsewhere. Expressive sanctions, probation, educational sanctions, fines and restitution are all appropriate sanctions in this context. *See* Schneyer, *Professional Discipline*, *supra* note 18, at 36-37. In certain cases, limitations on areas of practice that incapacitate for periods of time may also be appropriate. The opportunities for bias when imposing sanctions on the most elite law firms as opposed to smaller firms and those that practice in less prestigious areas of the law are obvious. Carefully drafted standards for the imposition of discipline on law firms are, therefore, needed just as much as standards for the imposition of sanctions on individual lawyers.

299. Community service currently is imposed as a sanction on lawyers with relatively little consideration of its effectiveness, its expressive message or its merit relative to other available sanctions. For example, some courts impose a number of hours of community service on lawyers, either of a legal or non-legal nature, *see, e.g.*, *Florida Bar v. Neckman*, 616 So. 2d 31, 32 (Fla. 1993) (holding that the sanctioned attorney must perform 10 hours of community service in the field of addictive diseases during probationary period); *In re Burchett*, 630 N.E.2d 205, 206 (Ind. 1994) (requiring the sanctioned attorney to perform 50 hours of community service); *In re Stier*, 530 A.2d 786, 789 (N.J. 1987) (requiring the sanctioned attorney to perform the equivalent of one day's worth of community service per week), even though community service as a sanction does not express strong condemnation of misconduct and its use as a sanction seemingly devalues the positive meaning of community service, *see generally* Kahan, *supra* note 97, at 626-29 (making this same point about community service in the criminal sentencing context). Moreover, little consideration seems to be given to the possibility that compelled community *legal* service by lawyers who have engaged in misconduct may raise issues of whether the service provided will be competent or zealous. *See generally* *West Virginia State Bar v. Mitchell*, 418 S.E.2d 733, 737 (W. Va. 1992) (stating in dictum that community service must involve representation of indigent persons in matters such as divorce, child abuse or juvenile proceedings). At the same time, community service is more socially productive than a brief period of suspension, and may have a greater deterrent impact than certain other sanctions. *See* Rhode, *supra* note 26, at 701. *See generally* Malcolm M. Feeley et al., *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and the Implications for U.S. Sentencing Guidelines*, 66 S. CAL. L. REV. 155, 191 (1992) (reporting that recidivism is no higher among incarcerated federal defendants than those who were sentenced to community service). At a minimum, standards should provide guidance to help courts determine when and how to impose this sanction in a manner that promotes the goals of lawyer discipline.

300. *See infra* text accompanying notes 335-45, 350-60.

301. The ABA Sentencing Standards provide that certain alternative sanctions, such as compliance programs, economic sanctions and acknowledgement sanctions, can be imposed alone or in conjunction with other sanctions. *See* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-3.12(d). Compliance programs include programs of education, rehabilitation or therapy. *See id.* at Standards 18-3.13(c), 18-3.14. Economic sanctions include restitution, reparation, fines and community service. *See id.* at Standards 18-3.15, 18-3.16, 18-3.17. Acknowledgement sanctions include court-ordered communications to the public of information about offenders' convictions and other facts about their offenses. *See id.* at Standard 18-2.2(iii).

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misconduct, the alternative sanctions may be used in lieu of traditional sanctions or only in conjunction with those sanctions and under what circumstances alternative sanctions are appropriate.

*B. Make Sanctions More Meaningful and Effective*

The sanctions most commonly imposed on lawyers—suspension, public reprimands and private admonitions—are often not utilized effectively in response to lawyer misconduct. To make these sanctions more effective, standards are needed to guide discretion with respect to suspension and to make expressive sanctions truly public. Standards should also explicitly address the use of fines, which may be more effective deterrents than some of the sanctions traditionally imposed on lawyers.

*1. Clear standards for incapacitating sanctions*

The sanction of suspension—the most commonly used incapacitating sanction<sup>302</sup>—is not being employed in a manner that promotes the basic goals of discipline. As previously discussed, the ABA Standards recommend a minimum six month period and a maximum three year period for suspensions, but provide no other guidance for determining the length of a suspension for specific misconduct.<sup>303</sup> As a result, the length of suspensions for similar misconduct can vary considerably, and is, as a practical matter, often less than six months.<sup>304</sup> Such an approach to the sanction of suspension undermines the basic goals of discipline and the credibility of the discipline system.

If incapacitation is necessary to protect the public from a lawyer, incapacitating sanctions should truly incapacitate for some significant period of time. Brief suspensions—meaning suspensions for less than a six month period—do not effectively incapacitate: At best, they simply delay performance of legal work<sup>305</sup> and it is more likely that they do not actually cause any interruption of practice.<sup>306</sup> Even

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302. In 1996, there were 1324 suspensions imposed as compared to 542 disbarments and 77 transfers to disability inactive status in the reporting jurisdictions. *See* SOLD 1996, *supra* note 14, at 9 fig. II.

303. *See supra* note 200 and accompanying text.

304. *See supra* notes 203-05 and accompanying text.

305. *See* ABA STANDARDS, *supra* note 7, at Standard 2.3 Commentary; *see also In re Roberts Hohl*, 866 P.2d 1167, 1171 (N.M. 1994). Moreover, in cases arising from lack of diligence or poor case management practices, brief suspensions may simply exacerbate the problems as work mounts in the lawyer's absence. *See In re Nomura*, SB-96-0005-D, 1996 Ariz. LEXIS 8, at \*12 (Jan. 26, 1996).

306. *See supra* note 201. In view of the number of lawyers who are "caught" practicing during longer periods of suspension, it is doubtful that most lawyers who are briefly suspended really cease to practice altogether during the period of suspension. *See, e.g., In re Brown*, 910

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with the best intentions, it may not be possible for lawyers to notify all clients of the suspension, make arrangements for cases to be handled competently by someone else, and remove themselves from the practice of law altogether during very brief suspensions.<sup>307</sup> Moreover, the general deterrent effect of brief suspensions is questionable.<sup>308</sup> Although brief suspensions serve an expressive function because they signify more disapproval than a reprimand, the additional disapproval conveyed by a brief suspension is difficult to gauge<sup>309</sup> and does not clearly outweigh the burden of the sanction on clients and on the public.<sup>310</sup>

Standards must be written to insure that the sanction of suspension is imposed consistently and in a manner that incapacitates for a meaningful period. For each type of misconduct warranting a

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P.2d 631, 634 (Ariz. 1996) (discussing a lawyer who was suspended for six months but neither withdrew from representation nor advised the client of the suspension order); *In re Baars*, 683 N.E.2d 555, 556 (Ind. 1997) (reporting that a lawyer who was suspended for one year failed to notify a client and continued to practice law); *In re Hankin*, 804 P.2d 30, 33 (Wash. 1991) (noting that a lawyer who was suspended indefinitely for failure to comply with CLE requirements continued to advise clients, appear in court, and accept fees). See generally *In re Thonert*, 693 N.E.2d 559, 564-65 (Ind. 1998) (explaining that a lawyer's 30-day suspension was extended because his office staff engaged in the unauthorized practice of law during the suspension in order to service clients); Deirdre Shergreen, *D.C. Bar Counsel Bringing Criminal Cases Against Sanctioned Attorneys*, LEGAL TIMES, Apr. 21, 1997, at 1 (describing enforcement actions taken against lawyers who flout suspension and disbarment orders). Indeed, some clients probably encourage their lawyers to find ways to continue to perform legal work to avoid the cost and delay of retaining new counsel.

307. See *In re Figliola*, 652 A.2d 1071, 1077 (Del. 1995) (concluding that brief suspensions are impractical insofar as they do not allow adequate time for a lawyer to make proper arrangements for the course of suspension). In Colorado, the court routinely imposes the suspension 30 days after its order but even with this delay, a lawyer may not be able to transfer completely the responsibility for all active matters before the period of suspension commences. In other jurisdictions, courts do not always delay imposition of suspension, even when the suspensions are brief. See *In re Brooks*, 854 P.2d 776, 781 (Ariz. 1993) (imposing an immediate 30-day suspension); *In re Page*, 955 P.2d 239, 243 (Or. 1998) (imposing a 30-day suspension effective on the date of the decision).

308. Empirical research is needed to determine how well incapacitating sanctions deter lawyers from misconduct. In theory, attorneys as a group may be more deterrable than the average criminal because: (1) attorneys often engage in economic wrongdoing rather than in "crimes of passion"; (2) lawyers as a group are more educated than the average criminal and more careful when weighing the potential gains and losses; (3) attorneys are more risk averse than the average criminal; and (4) attorneys have more to lose by committing wrongdoing. See Bene, *supra* note 18, at 924-25. While it would seem that longer suspensions should have a greater deterrent effect than very short suspensions because they place a significantly different burden on a lawyer, empirical research is needed to determine whether this is true.

309. For example, it is unclear whether a 30-day suspension carries much more of a message of disapproval than a public reprimand. Indeed, such a brief suspension may be so clearly symbolic that it has little more expressive force than a reprimand.

310. Brief suspensions inconvenience the disciplined lawyers' clients, see ABA STANDARDS, *supra* note 7, at Standard 2.3 Commentary, and can also delay litigation and the completion of other legal work in ways that inconvenience courts, other lawyers and their clients. While it is true that *any* suspension has this effect, longer suspensions usually require clients to retain other counsel to perform ongoing legal work and therefore serve a protective function.

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suspension, standards should prescribe a presumptive range for the length of suspension which is not so wide as to encourage markedly disparate sanctions in the ordinary case. The exact length of suspension within the range can then be determined based upon an assessment of the underlying facts and any aggravating or mitigating factors.<sup>311</sup> If these factors present substantial reason for departure from the presumptive range, or for a sanction other than suspension, the standards should identify the circumstances under which this may occur.<sup>312</sup>

Detailed standards should also be developed for the reinstatement of lawyers after suspension or disbarment.<sup>313</sup> Each year approximately two-hundred lawyers are reinstated to practice by state courts following reinstatement proceedings.<sup>314</sup> The problem of lawyers being reinstated too readily was identified almost thirty years ago by the Clark Commission.<sup>315</sup> Nevertheless, the ABA Standards do not provide detailed guidelines for reinstatement. They note only that the lawyer should demonstrate rehabilitation, compliance with applicable disciplinary or disability orders and rules, and fitness to practice law.<sup>316</sup> Although lawyers who have been disbarred or suspended for more than brief periods typically have engaged in the

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311. This approach is derived from the ABA Sentencing Standards, which provide that when presumptive sanctions are expressed in ranges of severity, sentencing courts should take into account the material facts regarding the offense and the offender to determine the appropriate sanction within the range. *See* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-4.4(b)(ii).

312. *See supra* note 293. For example, standards might prescribe that a presumptive sanction of suspension can only be reduced to a public reprimand if the mitigating factors present substantial reasons for departure and if there are no aggravating factors.

313. The ABA Standards state that lawyers who are suspended for more than six months should be required to apply for reinstatement, *see* ABA STANDARDS, *supra* note 7, at Standard 2.3 Commentary, but many states do not require reinstatement proceedings unless the suspension is for a period of more than one year. *See, e.g.*, COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.22(b); PA. R. DISCIPLINARY ENFORCEMENT 218(a). An application for reinstatement is always required to resume practice after disbarment. *See* ABA STANDARDS, *supra* note 7, at Standard 2.2.

314. *See* FIVE-YEAR REPORT, *supra* note 24, at 33-34. The ABA Data Bank Report does not reflect the number of reinstatement petitions that are denied on a nationwide basis, although it appears that in some jurisdictions more petitions are granted than denied. *See* ANNUAL REPORT ON LAWYER DISCIPLINE IN NEW YORK STATE, *supra* note 35, at 1.

315. *See* PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 150-55 (“[S]ome jurisdictions are more concerned with the personal predicament of the disbarred attorney than they are with protecting the public, and they lower their standards in passing on applications for reinstatement.”)

316. *See* ABA STANDARDS, *supra* note 7, at Standards 2.3, 2.10. Somewhat more detail is provided in the ABA Model Rules for Lawyer Disciplinary Enforcement, which suggest how to evaluate whether a lawyer who was suffering from a physical or mental disability, including drug or alcohol abuse, has been rehabilitated. These rules do not otherwise provide guidance for determining “rehabilitation,” except for noting that the lawyer must have the “requisite honesty and integrity to practice law.” *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 25(E) (1996).

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most egregious misconduct, the standards for determining rehabilitation and fitness to practice in many states are vague,<sup>317</sup> and the potential for bias is considerable.<sup>318</sup> Stories of lawyers who engaged in extremely serious misconduct yet easily gained readmission to the bar provide fodder for critics of lawyer discipline.<sup>319</sup> Reinstatement standards are in themselves a broad subject meriting separate treatment,<sup>320</sup> but they should be included within any standards for imposing lawyer sanctions.

## 2. *Increased use of truly public sanctions*

The heavy reliance on private lawyer sanctions and the failure to publicize effectively the “public” sanctions undermines the most important goal of lawyer discipline: protection of the public. In order for lawyer sanctions to protect the public, they must be known to the public.<sup>321</sup> Public discipline is also needed to promote public confidence in the lawyer discipline system. Consequently, any standards for imposing sanctions should make all discipline public.<sup>322</sup>

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317. See, e.g., DEL. R. PROF'L RESPONSIBILITY 23(f) (requiring clear and convincing evidence of “rehabilitation,” “fitness to practice” and “that the resumption of practice of law within Delaware will not be detrimental to the administration of justice”); NEV. SUP. CT. R. 116(3) (requiring a showing that the attorney has the “moral qualifications” for admission and that the resumption of practice will not be detrimental to the integrity of the bar, the administration of justice or the public interest); *In re Reutter*, 474 N.W.2d 343, 345 (Minn. 1991) (noting that “moral change” is the “decisive factor” in reinstatement proceedings).

318. See, e.g., *supra* notes 66-72 and accompanying text. The absence of well-developed standards means that reinstatement is often heavily dependent on the quality of character evidence presented by judges and other influential members of the legal community. See Miriam D. Gibson, Comment, *Proving Rehabilitation*, 20 J. LEGAL PROF. 239, 243 (1995-96) (“The type of evidence considered most frequently by the courts when determining whether an erring attorney has been sufficiently rehabilitated is testimony or letters written by neighbors, friends, associates and employers . . .”). While this evidence may be highly probative in some circumstances, it can be unduly influential in other cases because of the stature of the witness rather than because of the content of the testimony. See *supra* notes 243-47 and accompanying text.

319. See, e.g., Davis, *supra* note 40, at A1.

320. See Fred P. Parker, *Admissions and Reinstatement—A Comparison of Standards*, 66 B. EXAMINER 21 (1997); Anne Badgley, Note, *Attorney Reinstatement Standards: A Proposal for Reform in Washington State*, 62 WASH. L. REV. 723 (1987).

321. The publication of lawyer sanctions protects the public by serving incapacitating and deterrent functions. Incapacitation occurs because some consumers are likely to avoid lawyers who have a history of disciplinary misconduct. Deterrence is likely because of the perceived adverse impact that negative publicity has on a lawyer’s practice. See generally DeGraw & Burton, *supra* note 18, at 380 (arguing that disclosure advertising of a lawyer’s disciplinary history would have a deterrent effect).

322. The recommendation that all sanctions be public extends to all misconduct that remains within an adjudicative discipline system, but not necessarily to all determinations within diversion programs such as those described *supra* notes 127-29 and accompanying text. Although the interests of consumers would be furthered by publicizing the outcome of disputes resolved by mediation programs, the potential unfairness to lawyers because of the absence of findings of fact and the interest in encouraging settlements in cases involving minor

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Standards or other court rules should also require the publication of a lawyer's disciplinary history in a manner that is readily accessible to the general public.

While these suggestions are hardly novel,<sup>323</sup> it is sobering to note that the most frequently used lawyer sanction remains the private admonition.<sup>324</sup> Private sanctions breed public suspicion and have limited deterrent effect.<sup>325</sup> Their primary justification—protection of the lawyer's reputation—is an inappropriate goal of a lawyer discipline system. Even if reputational concerns were appropriate, public expressive sanctions could be calibrated so that some convey a relatively weak message of condemnation, only minimally affecting a lawyer's reputation.<sup>326</sup>

The argument that private admonitions are needed to dispose quickly of complaints concerning minor misconduct also fails to justify the widespread use of private sanctions.<sup>327</sup> It is true that many jurisdictions have adopted procedures that permit disciplinary boards or disciplinary counsel to impose non-appealable private sanctions if the attorney is willing to forego the filing of a formal charge.<sup>328</sup> Little

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misconduct outweigh the public's interest in learning about the resolution of these disputes.

323. See, e.g., HALT REPORT, *supra* note 207, at 11-12; Chalfie, *supra* note 84, at 7 (criticizing the use of "secret sentences" and advocating that more information be provided to consumers); Martyn, *supra* note 18, at 737-38 (highlighting the need for publicity of lawyer sanctions and the grievance system's operations); Rhode, *supra* note 26, at 700 (discussing the need for increased publicity of lawyer sanctions).

324. See *supra* note 35 and accompanying text.

325. See *supra* notes 106, 219 and accompanying text. At most, private sanctions may promote specific deterrence by warning the attorney who is sanctioned that the misconduct engaged in is unacceptable. For some attorneys, this brush with the disciplinary process may prove sufficiently unnerving that it deters future misconduct. For others, the private sanction may seem like a "slap on the wrist," and have no real deterrent effect.

The general deterrent effect of private discipline is negligible because other lawyers rarely learn of it. See, e.g., Green, *supra* note 44, at 88-89 (noting that private sanctions do not deter prosecutorial misconduct because other prosecutors do not learn how disciplinary bodies interpret ethical rules). Although the ABA Standards recommend that the facts giving rise to the admonition be published without the lawyer's name, see ABA STANDARDS, *supra* note 7, at Standard 2.6 Commentary, these descriptions are not published in most jurisdictions and even when they are provided, they are often very brief and extremely general, see *supra* note 106 and accompanying text. Moreover, human nature suggests that publication without the names of the attorneys involved lessens lawyers' interest in reading the description of the misconduct giving rise to admonitions. If the descriptions are not read, they cannot have a general deterrent effect.

326. For example, a lawyer whose conduct did not merit a public reprimand could receive a public "letter of caution." This is not dissimilar from the practice in some jurisdictions of having two tiers of private expressive sanctions. See COLO. R.P. REGARDING ATTORNEY DISCIPLINE 241.7(4)-(5); PA. R. DISCIPLINARY ENFORCEMENT 204.

327. The Clark Commission recommended that admonitory power be vested in all disciplinary agencies because of a concern that in cases of minor misconduct, prosecution of a formal disciplinary complaint "is unduly harsh, wastes the agency's limited manpower and financial resources on relatively insignificant matters and, particularly in large urban areas, overburdens the courts." PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 92-93.

328. See, e.g., PA. R. DISCIPLINARY ENFORCEMENT 208(a). An admonition can *only* be

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is known, however, about the extent to which *private* discipline is needed to expedite the resolution of cases. Lawyers may consent to discipline in order to receive the lowest level of public sanction and to resolve quickly a disciplinary matter. Moreover, it is difficult to justify the claim that private sanctions are essential to the effective functioning of disciplinary systems when six states operate without them.<sup>329</sup>

Changes are also needed to insure that public reprimands are truly “public.” Since public reprimands place no burden on the lawyer other than those that flow from publication of the sanction, they must be made known to the public to deliver a meaningful expressive message and to carry any deterrent force. Currently, most reprimands imposed on lawyers are publicized in court opinions or bar journals, where only other lawyers see them.<sup>330</sup> Even current clients are not routinely notified of public reprimands imposed on their own counsel.<sup>331</sup> While notices of the names of sanctioned lawyers and their misconduct appear in general circulation newspapers in some states, it is questionable whether most clients read these legal notices.<sup>332</sup> It is even more unlikely that members of the public who will seek legal services in the future will read or remember these notices.<sup>333</sup>

In order to insure that consumers of legal services learn of public

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imposed before the filing of a formal charge in about half of the states. *See* COLD, *supra* note 9, at Q 60A.

329. Connecticut, Florida, Illinois, New Jersey, Oregon, and West Virginia do not impose private discipline. *See* SOLD 1995, *supra* note 14, at 8-12; COLD, *supra* note 9, at Q 60D; *see also* FLA. STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 1.2 (1998); N.J. CT. R. 1:20-9(c) (3); W. VA. R. LAWYER DISCIPLINARY P. 2.9(c). Maine technically also does not impose private discipline, but a Maine Grievance Commission panel may dismiss minor misconduct with a “warning,” which is not “discipline,” but may be considered in subsequent disciplinary proceedings as evidence of prior misconduct. *See* ME. B.R. 7.1(d) (4).

330. *See* DeGraw & Burton, *supra* note 18, at 355 (describing how notices of lawyer discipline are typically published in specialized journals or bar reports). For example, notice of a public reprimand is published in bar journals in most states; only 15 states appear to publish notice of the discipline in other newspapers. *See* COLD, *supra* note 9, at Q 59. A few states do not publish notice of public reprimands in any manner. *See id.* at Q 59 I.

331. *See, e.g.*, ILL. SUP. CT. R. 764; LA. R. LAWYER DISCIPLINARY ENFORCEMENT 19, §§ 10, 26(A); MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 27(A) (1996).

332. Legal notices typically appear on inside pages and are written in legal jargon that is not appealing to the average reader. It is possible, however, that organizational clients may have in-house counsel who would read such notices. It is also possible that the notices might be read in smaller communities where people are more likely to know one another. It is unlikely, however, that many clients in urban areas would take the time to read a listing of lawyers who received public reprimands. *Cf.* Massaro, *supra* note 90, at 1931 (noting that a long list of shaming sanctions in a local newspaper would be ignored).

333. *See* DeGraw & Burton, *supra* note 18, at 359 (noting that the chance that a non-lawyer who is seeking counsel will stumble across pertinent information in a local newspaper “is, at most, a random possibility”).

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reprimands—and a lawyer’s entire disciplinary history—publication of this information should be required in places where current and future clients are likely to see it. For example, disciplinary agencies should publish bar discipline information in a manner that is readily accessible to the public, such as through a toll-free telephone number or an internet website that provides information about the disciplinary history of lawyers.<sup>334</sup> In addition, court rules concerning lawyer advertising should make clear that lawyers who engage in discretionary advertising<sup>335</sup> such as print or electronic advertisements or mailings, cannot list their bar admission dates in an open-ended fashion, suggesting that they have engaged without incident in the uninterrupted practice of law when they have in fact been suspended from practice or disbarred for misconduct. When publicizing their bar admission dates, lawyers like Cooper and Reich should be required to disclose that they have not engaged in the uninterrupted practice of law so as to avoid misleading advertising.<sup>336</sup>

The harder question is whether wider self-publication of lawyer misconduct should be imposed as a lawyer discipline sanction. Publication is not mentioned as a sanction in the ABA Standards, although dissemination of decisions imposing sanctions is among the tools courts may use in the Rule 11 context.<sup>337</sup> Professors Sandra DeGraw and Bruce Burton have suggested that lawyers should be required to self-advertise the sanctions imposed on them for serious wrongdoing and repeated misconduct, both to deter other lawyers from misconduct and to address the information imbalance caused

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334. For example, a website at <<http://www.law.uh.edu/ethics>> provides information about public discipline imposed on Texas lawyers since 1995. Consumers in California can access the State Bar of California’s website at <<http://www.calbar.org>> to determine whether a lawyer is currently disbarred, suspended or on inactive status. It is also possible to obtain a lawyer’s past bar discipline history by calling the California State Bar. For \$10, members of the public can also learn about a lawyer’s public disciplinary history from the ABA National Lawyer Regulatory Data Bank, although the reliability of the search depends upon whether each jurisdiction in which the lawyer is licensed reports to the Data Bank.

335. In their article proposing that lawyers be required to self-advertise the sanctions imposed on them for misconduct, Professors DeGraw and Burton distinguish between discretionary advertising, such as advertising in the yellow pages, and near-discretionary advertising, such as the appearance of a name on firm letterhead. See DeGraw & Burton, *supra* note 18, at 385-86. While some of the advertising they identify as near-discretionary is arguably discretionary (e.g., listings in *Martindale-Hubbell*), the conceptual division is a useful one when considering the scope of any requirement that lawyers self-advertise their sanctions.

336. See generally *supra* note 59 and accompanying text. Most states have adopted some version of the Model Rules of Professional Conduct, which prohibit false or misleading communications about the lawyer and state that a communication is false or misleading if it “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1(a) (1997). The publication of bar admission dates without reference to reinstatement dates would seem to fit this definition of “misleading.”

337. See DeGraw & Burton, *supra* note 18, at 373-74.

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by the unavailability of lawyers' disciplinary records and lawyers' positive self-promotional activities.<sup>338</sup> The self-advertising of sanctions they suggest would appear on discretionary advertising and near-discretionary advertising, such as letterhead and business cards, for a specified period of time.<sup>339</sup>

While required self-publicity of lawyer sanctions probably can withstand First Amendment scrutiny,<sup>340</sup> it is not clear that this type of sanction is desirable. Self-advertising of lawyer discipline could serve significant consumer protection and deterrent functions, but it also bears some resemblance to a shaming penalty.<sup>341</sup> Although the primary purpose of the self-advertising requirement would not be to shame a lawyer, such a requirement would almost certainly humiliate, because lawyers value their reputations in the larger community.<sup>342</sup>

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338. *See id.* at 383-85, 388-89.

339. *See id.* at 384-89. Their proposal does not extend to requiring lawyers to buy advertising for the purpose of disseminating news of their sanctions to the general public.

340. There is little question that if a lawyer engages in discretionary advertising, the lawyer can be required to include certain information in the advertisement to insure the advertisement is not deceptive. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (concluding that states may require disclosure of information in advertisements by lawyers as long as the regulation is reasonably related to the state's interest in preventing fraud). Even compelled self-publication of sanctions can be required of organizations as administrative remedies and as criminal sanctions. *See, e.g.*, ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-3.18 Commentary (providing for use of acknowledgement sanctions for organizational offenders in criminal cases); Andrew Cowan, Note, *The Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2395-98 (1992) (describing the use of adverse publicity in non-criminal cases). Thus, in all likelihood, the self-disclosure requirements suggested by Professors DeGraw and Burton would withstand First Amendment scrutiny.

341. Scholars have resurrected discussions about forms of punishment in the criminal context—such as shaming—which may provide a powerful expressive message and deterrent for wrongdoers. *See Kahan, supra* note 97, at 630-52; Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL., PUB. POL'Y & L. 645, 648, 689 n.223 (1997); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). Shaming sanctions take many different forms. For example, stigmatizing publicity is designed to magnify the humiliation inherent in a conviction by communicating the conviction to a wider audience by, for example, publishing the names of offenders in print or broadcast media. Literal stigmatization stamps an offender with a mark or sign that invites ridicule, such as signs at the residence of child molesters that warn others to steer clear. *See Kahan, supra* note 97, at 631-34. Some forms of publication that warn the public of lawyer misconduct, such as Internet websites and notices of discipline on letterheads and firm signs, are indistinguishable in form from shaming sanctions. The intent to inform the public—as opposed to the intent to inflict shame or to express condemnation—may be the only distinction between consumer-oriented self-publicity requirements and shaming sanctions.

Although shaming sanctions are unusual in the lawyer discipline context, courts have occasionally required apologies or sanctions akin to shaming penalties. *See WOLFRAM, supra* note 93, at 139; *see also In re Sandbach*, 546 A.2d 345, 346 (Del. 1988) (seeking relief from court's sanction of community service that would "publicize the lessons of this case" and would subject the lawyer to further embarrassment and humiliation).

342. While shaming sanctions are on the increase in the criminal context, *see Massaro, supra* note 341, at 648, 689 n.223; *Developments in the Law, supra* note 109, at 1869, 1949, the sanctions have been criticized on several grounds, including that they may be an ineffective deterrent, *see*

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Indeed, the impact of this sanction on a lawyer's self-esteem and ability to resume law practice may outweigh its benefits.<sup>343</sup> Self-publicity requirements might prove to be less troubling, however, if imposed on law firms, and could be highly effective in that context.<sup>344</sup>

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Massaro, *supra* note 90, at 1917-28, 1936-43; Massaro, *supra* note 341, at 692-94. *See generally* ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-3.18 Commentary; Whitman, *supra* note 341, at 1087-92 (raising other concerns about imposing acknowledgement sanctions on individuals). *But see* Kahan, *supra* note 97, at 646-49 (challenging the critiques of shaming); *Developments in the Law*, *supra* note 109, at 1964 (citing studies indicating that conditions on probation that are meant to shame offenders may serve as effective deterrents). Some of the reasons why shaming may be ineffective when imposed on criminal defendants are less applicable to lawyers. For example, lawyers, unlike some types of criminal defendants, usually value their reputations within the larger community and may be more likely to respond to shaming sanctions. *See* Massaro, *supra* note 90, at 1918 (noting that some criminal defendants may be impervious to shaming penalties and that shaming best deters those who most fear social disapproval). Lawyers also share norms including a well-defined ethical community and high expectations of social responsibility. *See generally* Massaro, *supra* note 341, at 682 (discussing the importance of these shared norms for effective shaming sanctions); Schneyer, *Professional Discipline*, *supra* note 18, at 35 (noting that the legal community is arguably a well-defined ethical community). Moreover, the legal community may be receptive to shaming sanctions because, *inter alia*, it respects the decision-maker and probably shares agreement regarding what punishments are embarrassing. *See generally* Massaro, *supra* note 90, at 1922-23 (noting that these cultural conditions of effective shaming are only weakly present in general U.S. population). Finally, the reinstatement process for lawyers may be the type of reintegrative ceremony that welcomes the offender back into the community and makes the shaming sanction a positive rehabilitative experience. *See generally id.*; *see also* Massaro, *supra* note 341, at 694 (explaining that reintegrative ceremonies are important for the effectiveness of shaming but no such ceremonies exist in the general population).

343. Shaming penalties raise concerns about proportionality and cruelty. *See* Massaro, *supra* note 90, at 1937-43. For example, when a shaming penalty is imposed, it is impossible to gauge or control the public's reaction to it. *See* Whitman, *supra* note 341, at 1088-92 ("Once the state stirs the up public opprobrium against an offender, it cannot really control the way the public treats that offender."). In addition, the stigma of shaming may be irreversible, particularly among lawyers, who value their reputations. *See generally* Massaro, *supra* note 90, at 1937-43 (raising concerns about proportionality because the stigma of shaming may be irreversible). Shaming penalties can also produce negative long-term emotional consequences for the people who are shamed. *See Developments in the Law*, *supra* note 109, at 1957-58 (noting that shaming sanctions can cause destructive anger and aggression in the affected individual).

Although critiques of shaming sanctions are troubling, they seem somewhat less compelling when one considers that any public sanction evokes some uncontrollable responses toward the offender. It is true, as Professor Tori Massaro argues, that there is something troubling about state-enforced punishment that authorizes officials to seek out and damage an offender's dignity and self-esteem. *See* Massaro, *supra* note 90, at 1943. This argument is somewhat less compelling, however, if shaming is not the primary goal of the self-publicity requirement, but rather one of its consequences.

344. Self-publication of disciplinary sanctions may be a very effective deterrent for law firms and would serve a significant public protection function. *See* Schneyer, *Professional Discipline*, *supra* note 18, at 33-36. *See generally* ABA SENTENCING STANDARDS, *supra* note 276, at 124-25 (noting the purposes self-publicity requirements can serve when imposed on an organization as a criminal sanction); Cowan, *supra* note 340, at 2398-2404 (describing the deterrent effect of adverse publicity on corporations). Although the imposition of self-publication requirements on law firms might raise fewer concerns about human dignity than would the imposition of publication requirements on individuals, such concerns cannot be entirely disregarded. Partners in small partnerships, and "name" partners in larger partnerships, may identify—and be identified—so closely with their firms that they feel the sanctions imposed on the firm are equivalent to sanctions imposed on themselves. Self-publication sanctions might humiliate those lawyers to the same degree as they would humiliate a lawyer who is personally disciplined.

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At a minimum, the question of whether to require self-publication of sanctions is one that deserves careful consideration. If mandatory self-advertising of discipline is utilized as a lawyer sanction, the circumstances under which self-disclosure should be required, the duration of the advertising and the forms it should take should be clearly set forth in any standards for imposing sanctions and the sanction should be systematically applied to maximize deterrent impact and consumer protection goals.<sup>345</sup>

### 3. *Use fines with other discipline*

Standards should also be drafted expressly to permit the imposition of fines as a lawyer discipline sanction and to provide guidelines for their use. The argument that fines should be used as a lawyer discipline sanction is not new and has been well-developed elsewhere.<sup>346</sup> Fines are a well-established sanction in criminal law and are an integral part of Rule 11 sanctions imposed on lawyers in the civil context.<sup>347</sup> Fines are also used by courts to discipline lawyers in contempt proceedings and are imposed as a lawyer discipline sanction in other countries.<sup>348</sup> Although the current ABA Standards do not list fines as one of the sanctions that may be imposed and at one time discouraged their use,<sup>349</sup> this approach is misguided.<sup>350</sup> The

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345. See DeGraw & Burton, *supra* note 18, at 384. Professors DeGraw and Burton offer some suggestions for the duration and content of the self-advertising of lawyer discipline history. While I do not endorse the full scope of disclosure they suggest, the authors provide a useful starting point for the crafting of standards concerning self-advertising of discipline.

346. See Bene, *supra* note 18 (arguing that fines are preferable to non-monetary sanctions for lawyer misconduct); see also Schneyer, *Professional Discipline*, *supra* note 18, at 31-33 (urging the use of fines to discipline law firms).

347. See 18 U.S.C. § 371 (Supp. III 1997) (providing that criminal conspirators may be fined); FED. R. CIV. P. 11(c)(2) (stating that a sanction may include an order to pay a penalty to the court).

348. Courts do not hesitate to impose fines on lawyers for misconduct in contempt proceedings. See, e.g., *In re Baars*, 683 N.E.2d 555, 556 (Ind. 1997); *In re Thurston*, 574 N.W.2d 374, 387 (Mich. Ct. App. 1997). In addition, fines have been used to discipline English lawyers since medieval times. See Rose, *supra* note 88, at 59 n.258; see also WOLFRAM, *supra* note 93, at 141 & n.6. They are also used as a lawyer discipline sanction in Canada and Norway. See Jon T. Johnsen, *The Professionalization of Legal Counseling in Norway*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 86 (Richard L. Abel et al. eds., 1989); Schneyer, *Professional Discipline*, *supra* note 18, at 32.

349. Fines were actively discouraged in the original ABA Standards, apparently on the grounds they were too much like criminal punishment. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 2.3 Commentary (1986); ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS Standard 6.14 & Commentary (1979). The current ABA Standards do not expressly list fines among the sanctions that may be imposed, but state that sanctions may include "other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions." See ABA STANDARDS, *supra* note 7, at Standard 2.8(g).

350. This approach does, however, reflect current practices. Fines are rarely used to sanction lawyers in discipline cases in this country. See WOLFRAM, *supra* note 93, at 141. Only a few states have court rules that explicitly permit the imposition of fines in lawyer discipline cases. See CAL.

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use of fines should be addressed in any standards for imposing lawyer discipline because fines, coupled with other sanctions, can be more effective than those other sanctions used alone.

For example, fines should be a more effective deterrent than restitution alone because restitution merely requires the wrongdoer to repay what was taken, so the cost of detection is no higher than what might be gained if the misconduct is not detected.<sup>351</sup> Fines may also provide more effective discipline in cases where enforcers may prefer expressive sanctions because incapacitating sanctions are viewed as too harsh, but where expressive sanctions alone may prove too mild and ineffective from a deterrence perspective.<sup>352</sup> In addition, fines may be used in conjunction with incapacitating sanctions to promote marginal deterrence.<sup>353</sup>

Indeed, fines may prove to be among the most effective deterrents for lawyers. There is anecdotal evidence that monetary penalties have a general deterrent effect on lawyers.<sup>354</sup> Lawyers by virtue of

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BUS. & PROF. CODE § 6086.13 (West 1997); NEV. SUP. CT. R. 102(5)-(6). In 1996, only eight fines were reported to the National Lawyer Regulatory Data Bank by state discipline systems. *See FIVE-YEAR REPORT*, *supra* note 24, at 13.

351. *See Bene*, *supra* note 18, at 922 & n.78 (explaining that fines make the cost of detection higher than the benefits of the misconduct in the event the misconduct is not detected); *see also* PROBLEMS IN DISCIPLINARY ENFORCEMENT, *supra* note 1, at 98 (noting that an attorney who converts funds is not effectively disciplined if merely required to repay funds because the attorney risks little by wrongful misappropriation).

352. Little is known about the effectiveness of public expressive sanctions, but there is some evidence that lawyers who receive reprimands are not deterred from engaging in future misconduct. *See Dubin*, *supra* note 12, at 695 (reporting on a Michigan study showing that 75% of respondents who received a reprimand went on to commit other acts of misconduct). Fines, coupled with expressive sanctions, may permit enforcers to impose seemingly less harsh penalties which have greater deterrent effect. *See generally Bene*, *supra* note 18, at 931-32 (discussing how fines provide enforcers with greater flexibility to impose more powerful sanctions without being "too harsh").

353. From a law and economics perspective, fines are generally preferable to incapacitating sanctions because they merely transfer wealth and cause no loss of productivity. *See Bene*, *supra* note 18, at 926. From this perspective, fines permit competent lawyers to continue to represent their clients while still providing a powerful deterrent. *See id.* at 930-31. While this may be true, given our rudimentary understanding of the deterrent force of fines and the fairness issues discussed *infra* notes 357-58 and accompanying text, I believe fines should not be used alone where it appears that incapacitation is needed to protect the public.

Fines may, however, be used in addition to incapacitating sanctions to promote marginal deterrence. Marginal deterrence is, in essence, the ability to deter an offender who has already engaged in wrongdoing from committing an even greater wrong. For example, fines can be used to provide marginal deterrence in the lawyer discipline context when lawyers are already subject to incapacitating sanctions. *See generally In re Baars*, 683 N.E.2d 555, 556 (Ind. 1997) (fining a lawyer who practiced law while suspended from practice).

354. One example of this effect can be seen in the bar's response to the settlements negotiated by the Office of Thrift Supervision with the law firms of Kaye, Scholer, Fierman, Hayes & Handler and Jones, Day and Reavis in connection with the Lincoln Savings Bank debacle. Those multi-million dollar settlements spawned efforts by lawyers to educate themselves about their disclosure obligations when representing clients before the Office of Thrift Supervision and to implement internal measures to avoid a similar fate. *See THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER* (PLI Corporate Law & Practice Course

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their training and experience should be better able to assess the risks and costs of misconduct than most other groups and therefore should be deterrable by appropriate monetary penalties.<sup>355</sup> In addition, because lawyers in larger law firms often make decisions only after thorough discussion and analysis, fines may prove to be an especially effective sanction for such firms.<sup>356</sup>

Most objections to the use of fines can be addressed by writing standards that require the use of fines in conjunction with other sanctions, not in lieu of those sanctions.<sup>357</sup> This approach should help insure that lawyers who are part of the bar elite will not be permitted to “buy their way out” of non-monetary sanctions when lower-echelon lawyers cannot.<sup>358</sup> Moreover, any objection to fines on the grounds that they are insufficiently condemnatory, while possibly true in the criminal context,<sup>359</sup> is less persuasive in the lawyer discipline context, where brief periods of suspension, public reprimands and admonitions make up the majority of sanctions imposed and already convey a weak message of condemnation. The imposition of fines in conjunction with incapacitating sanctions, expressive sanctions and probation should strengthen the condemnatory message conveyed by those sanctions and promote the

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Handbook Series No. 779, 1992); Bettina Lawton Alexander & Thomas W. MacIsaac, *Protecting Yourself and Your Firm in the Representation of Insured Depositor Institutions: Lessons to Be Learned from the Kaye, Scholer Case*, in INSIDER TRADING, FRAUD, AND FIDUCIARY DUTY UNDER THE FEDERAL SECURITIES LAW (ALI-ABA Course of Study No. C873, 1993). Although the payments by the law firms were settlements and not “fines,” the effect of having to pay from the pocket was clear.

355. See Bene, *supra* note 18, at 924-25 (noting that attorneys are more highly educated than the average criminal and that their work as counselors make them comfortable with cost-benefit evaluations).

356. Moreover, as Professor Schneyer notes, fines “speak” a corporation’s language. They also speak a law firm’s language. See Schneyer, *Professional Discipline*, *supra* note 18, at 32-33.

357. The objections to fines have not been well-articulated, but some of the objections are addressed in Bene, *supra* note 18, at 932-33. One objection is a fairness argument that lawyers should not be permitted to “buy their way out” of serious sanctions, because some lawyers are less well-equipped to pay than others. A second possible objection, borrowed from the criminal context, may be based on the view that the expressive message of fines is weak and insufficiently condemnatory, sending the wrong message to the public and to other lawyers about the seriousness of the misconduct. Cf. Kahan, *supra* note 97, at 620 (arguing that fines are politically unacceptable as criminal sanctions because they are insufficiently condemnatory).

358. In addition, standards should provide that fines be imposed with an eye toward the financial circumstances of the lawyer who is being disciplined. They should be set in an amount that a lawyer can pay. See generally ABA SENTENCING STANDARDS, *supra* note 276, at Standard 18-3.16(d); Section of Litigation, American Bar Ass’n, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 125 (1988).

359. As Professor Dan Kahan has observed, when fines are imposed as the exclusive sanction in the criminal context they are viewed not as a sanction that condemns, but as a “price,” which is a detriment that an actor is required to endure in order to do what is permitted. See Kahan, *supra* note 97, at 621. For this reason, fines are seen as trivializing the seriousness of wrongdoing and denigrating the worth of the crime victim.

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goals of discipline.<sup>360</sup>

#### CONCLUSION

This Article is a beginning attempt to identify and explore the problems with the current manner of imposing lawyer sanctions by state discipline systems. Too often, courts and disciplinary boards impose discipline without reference to any discernible standards. Even when standards are consulted, they are applied unevenly and yield inconsistent results. Too many lawyers are permitted to engage in repeated misconduct before they receive public sanctions. Too little is known about the effectiveness of the sanctions that are currently imposed.

It appears that the most frequently used lawyer sanction—the private admonition—has little deterrent or rehabilitative effect. Some of the other sanctions imposed on lawyers—including brief suspensions and community service—are imposed without careful consideration of the goals of discipline. Sanctions that have been disfavored, such as fines, deserve treatment in any new standards for imposing lawyer sanctions. Carefully drafted standards are also needed to insure that diversion programs serve consumer interest goals and do not become an ineffective form of private discipline.

Improvements in the standards for imposing sanctions are an important first step toward addressing some of these problems, but standards are of little value if they are not followed. Standards for imposing lawyer sanctions must be mandatory, not voluntary. They should be written to serve as a counterweight against any unconscious bias on the part of judges and lawyer-dominated disciplinary boards. They must be drafted to place protection of the public above protection of the lawyer's reputation or livelihood. Failure to place protection of the public above other considerations will not only doom any standards to failure. Such a failure will lead to a broad-based demand for sweeping structural changes in lawyer discipline systems.

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360. *Cf.* Kahan, *supra* note 97, at 650-51 (proposing in the criminal context to increase the power of the condemnation expressed through fines by combining fines with short periods of incarceration).

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## APPENDIX

A standard for the wrongful handling of client funds or property might use the definitions of “knowledge” and “negligence” contained in the ABA Standards for Imposing Lawyer Sanctions and provide:

### STANDARD 1. Wrongful handling of client funds or property

Absent substantial reasons for imposing a different sanction, the following sanctions shall be imposed in cases involving the wrongful handling of entrusted client funds or property:

(a) A lawyer who knowingly misappropriates or converts entrusted client funds or property shall be disbarred.

(b) A lawyer who knowingly engages in other unauthorized use of entrusted client funds or property for the lawyer’s benefit or for the benefit of a third party shall be suspended from the practice of law for a period of one to three years.

(c) A lawyer who negligently engages in unauthorized use of entrusted client funds or property for the lawyer’s benefit or for the benefit of a third party shall be suspended from the practice of law for a period of six months to one year, unless the value of the funds or property is less than \$1000, in which case a public reprimand may be imposed.

(d) A lawyer who improperly handles entrusted client funds or property, or who fails to return entrusted client funds or property promptly upon a lawful request for their return, or who fails to account promptly to a client for entrusted funds or property, shall be suspended from the practice of law for a period of six months to one year or shall receive a public reprimand.

(e) A lawyer who engages in unauthorized use of entrusted client funds or property not otherwise covered in this Standard shall be suspended from the practice of law for a minimum period of six months, unless the value of the funds or property is less than \$1000, in which case a public reprimand may be imposed.

### *COMMENTARY*

This Standard applies to client funds or property delivered to a lawyer to be held in trust or safekeeping or funds or property conveyed to a lawyer by a third party for a client’s benefit. It does not apply to funds paid to a lawyer as fees or as retainers for services to be rendered, or to any good faith fee disputes relating to the entrusted funds or property, which are governed by Standard 2. In all cases of

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unauthorized use or improper handling of client funds or property, restitution shall be ordered in addition to the sanctions described in this section.

(a) This section governs instances of conversion or misappropriation by the lawyer. Conversion or misappropriation occurs when the lawyer knowingly uses entrusted client funds or property without the client's consent and without the intention to return the funds or property. Absent compelling evidence to the contrary, if the client demands return of the entrusted funds or property, the failure to return the funds or property prior to the filing of a disciplinary complaint shall be construed as a use without intention to return the funds or property.

(b) This section governs other situations in which a lawyer knowingly uses client funds or property for the lawyer's benefit or for the benefit of a third party, without the client's consent. For example, a lawyer who loans client funds to a third party, without the client's consent but with the expectation that the funds will be repaid, is subject to discipline under this section. A lawyer who knowingly pays personal or office expenses with entrusted funds with the intention to later repay those funds to the client is also subject to discipline under this section. This section does not apply to use of client funds or property arising from negligent commingling of client funds or property with law office funds or property, which is governed by Standard 1(c).

(c) This section governs the negligent use of client funds or property. For example, a lawyer who negligently places client funds in a general office account rather than in a client trust account and draws on the general account below the dollar value of the client's funds in order to pay office expenses should be sanctioned under this section. Absent compelling evidence to the contrary, a lawyer who uses entrusted funds to pay personal expenses, or who transfers client funds from a client trust account in order to pay office or personal expenses, shall not be found to have acted negligently under this section and shall be sanctioned under Standard 1(a) or Standard 1(b).

(d) This section governs any improper handling of entrusted funds or property that does not constitute a "use" of client property. Improper handling includes actions not authorized by the client that place entrusted funds or property at risk of loss. For example, the placement of entrusted client funds in an account other than a properly maintained client trust account is governed by this section if the amount in the account does not drop below the value of the client funds. The failure to safeguard entrusted property from physical damage or theft is also governed by this section.

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The failure of a lawyer to return promptly entrusted client funds or property following the conclusion of a client matter or a demand by a client for their return shall also be sanctioned under this section. A prompt return means a return within 60 days after the client has made a demand for return or the lawyer should reasonably know that funds or property should be returned.

This section also governs the failure of a lawyer to account promptly to a client for funds or property delivered to the lawyer by a third party for a client's benefit or to account for entrusted funds or property following a demand by a client for an accounting. A prompt accounting means an accounting within sixty days after the lawyer should reasonably know that an accounting is due the client.

When determining whether to impose a period of suspension or a public reprimand under Standard 1(d), the court shall consider whether the lawyer acted knowingly or negligently and shall also consider the actual or potential injury, if any, to the client.

(e) This section governs any unauthorized use of entrusted client funds or property not otherwise addressed in this Standard. The length of the suspension shall be proportional to the sanctions imposed for the misconduct described in Standards 1(b) and 1(c) and shall be consistent with prior decisions in the jurisdiction.