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ARTICLES

The Case for Less Secrecy in Lawyer Discipline

LESLIE C. LEVIN*

Each year state disciplinary agencies receive more than 125,000 lawyer discipline complaints against the 1.3 million lawyers in the United States.¹ More than 5,600 sanctions are imposed annually on lawyers.² Yet remarkably little is known about the effectiveness of lawyer discipline or the fairness of the discipline systems. Of course, questions of effectiveness and fairness are difficult to evaluate under the best of circumstances. But the difficulty of evaluation is compounded by the fact that in many jurisdictions, discipline complaints, discipline files, and even many discipline sanctions are private. Even states with relatively “public” disciplinary processes shield much information from the public.

Critiques of the private nature of lawyer discipline go back to at least 1970, when the American Bar Association’s Special Committee on Evaluation of Disciplinary Enforcement, headed by former U.S. Supreme Court Justice Tom C. Clark (“the Clark Commission”), studied lawyer discipline systems and declared the situation “scandalous.”³ The Commission found that even discipline proceedings against lawyers who had been convicted of crimes were maintained as

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1. The 2004 Survey on Lawyer Discipline Systems indicates that 126,748 complaints were received in 2004. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS 2004, Chart I (2005) [hereinafter SOLD 2004]. The number of complaints is clearly higher since some states provided only partial data. More importantly, many lawyer disciplinary agencies screen complaints and many potential complainants are discouraged from filing complaints or are directed to other venues before a complaint is filed. *See infra* notes 111-16 and accompanying text.

2. SOLD 2004, *supra* note 1, at Chart II. This estimate is low, because some jurisdictions provided partial data. It does not include the number of matters that are the subject of diversion agreements, in which lawyers who engaged in “minor” misconduct agree to certain terms in order to avoid formal discipline sanctions. *See infra* notes 15-17, 117 and accompanying text.

3. *See* ABA SPECIAL COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT].

confidential.⁴ While the Clark Commission prompted many states to make some changes in their lawyer discipline systems, little changed in the secrecy that surrounded the disciplinary process. More than twenty years later, when the ABA's McKay Commission again looked at lawyer discipline systems, it concluded that "[t]he Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems."⁵ Yet even today, much of the lawyer discipline process in many states remains secret.

Proponents of continued secrecy offer several reasons for why secrecy may contribute to more fair and effective lawyer discipline. Chief among those reasons are concerns about protecting the integrity of investigations, concerns about administrative efficiency, and concerns that lawyers may be seriously harmed by the disclosure of frivolous complaints. These arguments for secrecy are not without merit, especially early in the process. The more carefully one looks at the issue, however, the more it appears that in some cases, these concerns are exaggerated, and in other cases, these concerns are outweighed by competing considerations.

Moreover, the secrecy surrounding most lawyer discipline in this country makes the fairness and effectiveness of the discipline process virtually impossible to ascertain. It seems clear that the unavailability of discipline information not only hurts consumers of legal services—who may be victimized by lawyers who have been secretly sanctioned in the past—but also affects the legal profession and the public at large. Four examples make this point.

(1) *The Extent of Recidivism.* It is no secret that some lawyers who have been sanctioned continue to engage in misconduct,⁶ but no one—not even bar disciplinary counsel—knows how much recidivism actually occurs.⁷ In many cases, lawyers receive numerous private sanctions before they ever receive a public sanction.⁸ They may then receive a few public sanctions before they are either suspended from practice for a substantial length of time or disbarred.⁹

4. *Id.* at 140-41.

5. ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* 33 (1992) [hereinafter *LAWYER REGULATION FOR A NEW CENTURY*].

6. This is not a new problem. More than fifty years ago the problem of recidivism among some lawyers who received discipline was noted. ORIE L. PHILLIPS & PHILBRICK MCCOY, *CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT* 124-25 (1952).

7. An e-mail inquiry sent to disciplinary counsel on the National Organization of Bar Counsel listserv asking whether they kept information about recidivism produced no affirmative responses and disciplinary counsel from several states, including Maryland, Nevada, and Texas, responded that they did not compile such information. Some noted that it would be a good idea to do so.

8. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Standards*, 48 AM. U. L. REV. 1, 48 n.218 (1998) [hereinafter *Levin, Emperor's Clothes*].

9. For example, one lawyer in Connecticut received forty-four complaints and three reprimands over an eleven year period before he was ultimately disbarred. See Thomas D. Williams, *Disciplining Bad Lawyers a*

Although there has been very little study of recidivism, the limited data suggest that the rate of recidivism among lawyers who receive public sanctions is fairly high.¹⁰ Indeed, in apparent recognition of this problem, some jurisdictions have instituted a “three strikes” rule, which provides that if a lawyer receives three reprimands within five years, he will be presented to the court for more serious discipline.¹¹

While the rate of recidivism for lawyers who receive public sanctions is hard to determine, the rate of recidivism among lawyers who receive private sanctions is altogether unknown. In some jurisdictions, it is unknowable. Some state discipline systems do not maintain all of their discipline records after a period of time,¹² making it difficult to determine—even for those “inside” the discipline system—how much recidivism actually occurs. It seems reasonable to assume that private discipline, which by its nature is not typically made known to other lawyers, has little general deterrent effect on the legal community.¹³ But it appears that private discipline may not even serve as a specific deterrent for many lawyers who receive a sanction. If private discipline—which is the most common form of discipline in many jurisdictions¹⁴—is ineffective, the question must be asked whether it should be used at all.

(2) *Do Diversion Programs Work?* A closely related question to the one about recidivism among those who receive lawyer sanctions is whether diversion programs work. In an increasing number of jurisdictions, complaints of “minor” misconduct are referred by state discipline agencies to “diversion” programs,

Long, Slow Process and While State Panel Deliberates, Questionable Attorneys Continue to Practice, HARTFORD COURANT, Mar. 7, 2004, at A1.

10. A study of Louisiana discipline cases from 1975-2000 revealed that 85% of the disbarred lawyers who applied for reinstatement succeeded and 44% of those lawyers were subsequently disciplined. See Terry Carter, *Bounced from the Bar: Lawyers Who Lose Their Licenses for Fraud or Other Misconduct Can Win Reinstatement, If They Practice in the Right State*, A.B.A. J., Oct. 2003, at 56. It appears that in Michigan, where it is possible to track the public sanctions going back to 1978, more than one-third of the lawyers who receive public sanctions are recidivists who have received public discipline on more than one occasion. See Attorney Discipline Board, State of Michigan, Disciplined Lawyers, <http://www.adbmich.org/checker.htm> (last visited Dec. 8, 2006).

11. See, e.g., WASH. RULES FOR ENFORCEMENT OF LAWYER CONDUCT R. 13.6 (2005) [hereinafter WASH. RULES]; Lisa Siegel, *Lawyer Reprimand Not a Wrist Slap Anymore: Bristol Attorney First to Discover the Force of “Four Strikes” Rule*, CONN. L. TRIB., Feb. 13, 2006, at 1. I use the term “he” here, and throughout much of this article, because most of the discipline imposed on lawyers is imposed on men.

12. See, e.g., DISCIPLINARY CODE FOR THE WYO. STATE BAR § 5(d) (2003) (records of documents relating to disciplinary proceedings retained for six years).

13. A private sanction is usually communicated only to the offending lawyer and his counsel. In some states, a general description of the matter is published in the legal press, or occasionally, on judicial websites. See, e.g., Government of Massachusetts, Mass.gov, 2004 Admonitions, <http://www.mass.gov/obcbbbo/admon2004.htm> (last visited Nov. 30, 2006). Even in jurisdictions that publish this information, however, the explanation of the misconduct usually appears in highly abbreviated form. See, e.g., State Bar of Texas, News & Publications, TBJ DISCIPLINARY ACTIONS, 67 TEX. B.J. 589 (2004).

14. See *infra* note 127 and accompanying text.

where records are typically confidential¹⁵ and where discipline sanctions are not imposed.¹⁶ It is often not possible to determine how often or in what circumstances diversion actually occurs,¹⁷ and in some jurisdictions, those records are not maintained by the discipline agency after a period of years.¹⁸

At present, more than twenty jurisdictions have adopted diversion programs that handle “minor” disciplinary matters outside the discipline system.¹⁹ Diversion requires the consent of the attorney and is only offered to lawyers who have not recently been the subject of discipline.²⁰ Diversion may include law office management assistance, lawyer assistance programs,²¹ counseling, monitoring, and legal education.²² In certain respects, diversion operates like a private sanction with conditions, with the added advantage for the lawyer that most

15. See, e.g., ALA. RULES OF DISCIPLINARY PROCEDURE R. 8.1(i) (2005) [hereinafter ALA. RULES]; RULES GOVERNING THE MO. BAR AND THE JUDICIARY R. 5.105(j); 5.31 (2005) [hereinafter MO. RULES].

16. In 1992, the McKay Commission recommended procedures in lieu of discipline for “minor misconduct, minor incompetence or minor neglect.” LAWYER REGULATION FOR A NEW CENTURY, *supra* note 5, at 48. The Commission found that summary dismissal of cases involving minor neglect or minor incompetence was one of the chief sources of public dissatisfaction with the discipline system. *Id.* at 47. It also noted that in many minor disciplinary matters, fairness could be achieved by simpler and quicker procedures, thereby expediting their resolution and making it possible to devote scarce discipline resources to more substantial cases of misconduct. *Id.* at 50-52.

17. For example, Florida publishes no information about the number of diversions or the circumstances in which diversion occurs. *But see* Supreme Court of New Jersey, 2004 State of the Attorney Discipline System Report, at 31, available at <http://www.judiciary.state.nj.us/pressrel/2004OAEAnnualReport.pdf> [hereinafter 2004 N.J. Discipline System Report] (describing the number of diversion agreements and most common offenses giving rise to diversion). In only a few jurisdictions are the circumstances giving rise to diversion actually described. See, e.g., *From the Courts: Matters Resulting in Diversion and Private Admonition*, COLO. LAW., Jan. 2003, at 111.

18. See, e.g., Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1236 (2003) (noting that diversion records are expunged three years after completion of diversion so records of lawyers who received diversion are no longer in disciplinary agency’s database); Melvin Hirshman, *Remedy: Managing Conditional Diversion in Maryland*, 52 EMORY L.J. 1271, 1275 (2003) (noting that after a Maryland attorney successfully completes the conditional diversion agreement, the file is destroyed and there will be no record of the complaint against the attorney).

19. Alabama, Arizona, California, Colorado, the District of Columbia, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Dakota, New Hampshire, Oklahoma, Oregon, Tennessee, Washington, Wisconsin, and Wyoming have formal diversion programs. Illinois permits its Inquiry Board to defer consideration of a matter while the attorney meets conditions imposed by the Board. See ILL. RULES OF THE ATT’Y REGISTRATION AND DISCIPLINARY COMMISSION R. 108(a) (2005).

20. See, e.g., RULES REGULATING THE FLA. BAR R. 3-5.3(c) (2005) [hereinafter FLA. RULES] (“A respondent who has been the subject of a prior diversion within 7 years shall not be eligible for diversion.”); OKLA. RULES GOVERNING LAWYER DISCIPLINARY PROCEEDINGS R. 5.1(c)(4) (2004) (“lesser misconduct” subject to diversion does not include misconduct of same nature for which lawyer was disciplined within last five years). “Minor misconduct” usually means conduct that would not result in suspension from law practice and that does not involve misappropriation of funds or fraud or deceit. *E.g.*, ALA. RULES R. 8.1(c); MO. RULES R. 5.105(c).

21. Lawyer Assistance Programs are designed to provide confidential assistance to lawyers with alcohol abuse, drug dependency, or mental health problems. See, e.g., Illinois Lawyers’ Assistance Program, <http://www.illinoislap.org> (last visited Nov. 28, 2006); North Carolina Lawyer Assistance Program, <http://www.nclap.org> (last visited Nov. 28, 2006).

22. See, e.g., COLO. R. CIV. P. 251.13 (2006); WASH. RULES R. 6.1.

traces of it disappear once the terms of the diversion are satisfied.²³

It appears that as many as 20%-35% of the cases that might otherwise result in discipline are being sent to diversion programs.²⁴ The secrecy surrounding the process makes it impossible to determine whether diversion decisions are being made appropriately, or whether diversion is being used to shield lawyers who engage in misconduct from disciplinary sanctions. Nor is it known whether diversion “works.” The only published study concludes that lawyers who successfully completed a diversion program subsequently received fewer and less severe charges than lawyers who either did not participate in diversion or did not complete the program,²⁵ but the study has some serious limitations.²⁶ Aside from this study, remarkably little is known about how well diversion programs work generally or how well individual diversion options work.²⁷ Little is also

23. The most significant difference between diversion and a private admonition is that the latter is a “sanction” and the former is not. Both are private, however, and are only available when “minor” misconduct occurs. In some jurisdictions, both may be considered if the lawyer is later subject to another discipline proceeding. In contrast to private sanctions, diversion programs have an educational and rehabilitative goal, but when private sanctions are accompanied by conditions such as attending an ethics school or obtaining psychological counseling, they function in virtually the same manner.

24. It is difficult to get a clear sense of the extent to which such programs are being utilized nationwide, but some individual state discipline reports from 2004 shed light on this question. For example, in New Jersey, diversion was granted to 68 lawyers, while 177 lawyers received formal discipline. 2004 N.J. Discipline System Report, *supra* note 17, at 13, 24. In Washington, 32 lawyers were diverted from discipline, while 76 disciplinary sanctions were imposed. Wash. State Bar Ass’n, Lawyer Discipline in Wash., Annual Report 2004, at 1-2, available at <http://www.wsba.org/public/complaints/odc2004annualreportpdf.pdf> [hereinafter Wash. State Bar 2004 Annual Report]. In Louisiana, 626 matters were diverted to the bar-sponsored diversion program, but it is not clear how many other complaints proceeded to the investigative stage. Supreme Court of Louisiana, Annual Report 2004, at 11, available at http://www.lasc.org/press_room/annual_reports/reports/2004_ar.pdf.

25. Using archival data that were not publicly available, Diane Ellis, the then-Director of the Arizona State Bar’s Law Office Management Assistance Program (LOMAP), attempted to assess the efficacy of Arizona’s ten-year-old diversion program for lawyers whose diversion involved services provided by LOMAP. See Diane M. Ellis, *Is Diversion a Viable Alternative to Traditional Discipline?: An Analysis of the First Ten Years in Arizona*, 14 PROF. LAW. 1, 8, 13 (2002) [hereinafter Ellis, *Is Diversion a Viable Alternative?*]; Ellis, *supra* note 18, at 1235-36.

26. Most notably, recidivism among some lawyers could not be fully tracked because diversion records were expunged if lawyers received no charges for a three-year period after completing diversion. Ellis, *supra* note 18, at 1232, 1236. In addition, the “control group” against which recidivism rates were compared included lawyers who did not qualify for diversion because their offenses were too serious. *Id.* at 1237; Ellis, *Is Diversion a Viable Alternative?*, *supra* note 25, at 9. While the statistics show that lawyers who completed diversion subsequently received fewer and less severe charges than those lawyers who did not complete diversion, the study did not account for how the absence or presence of a record of recent discipline (which would not exist for lawyers who participated in diversion and had had their records expunged) might have affected the disciplinary agency’s evaluation of subsequent complaints about the lawyer and charging decisions.

27. For instance, while there is anecdotal evidence that lawyers who attend ethics schools experience fewer discipline problems thereafter, e.g., John T. Berry e-mail, there has been no systematic effort to test this belief. Similarly, some states have estimated that as much as 60% to 80% of all lawyer discipline matters are due, in part, to substance abuse. See, e.g., Am. Bar Ass’n, Young Lawyers’ Division, Commission on Impaired Attorneys, Report to the House of Delegates, ¶ 1, available at <http://www.abanet.org/legal services/downloads/colap/clesubstanceabusepolicy.pdf>. However, little is known about whether diversion to lawyer assistance programs is helpful in reducing subsequent discipline complaints.

known about whether only truly “minor” misconduct is being diverted into diversion programs or whether, as Colorado has reported, some agencies are diverting because of the pressure to relieve backlog in the traditional discipline system.²⁸ The fact that diversion is typically maintained as confidential and that records of diversion may not be maintained for long after diversion is complete, make it very difficult to evaluate the efficacy of diversion programs.²⁹

(3) *Fairness Based on Firm Size.* It is no secret that solo and small firm practitioners receive the vast majority of disciplinary complaints and that large firm lawyers are subjected to relatively little public lawyer discipline.³⁰ The concern that discipline decisionmakers are biased against solo and small firm practitioners is prevalent.³¹ For example, more than 47% of Oregon lawyers felt there was bias in the discipline system, and the most common reason for the bias was the size of the respondent’s law firm.³² In California, the State Bar commissioned an outside consultant in response to concerns that there was institutional bias against solo and small firm lawyers. It concluded that there was no institutional bias, largely because the number of complaints received against solo and small firm lawyers was not disproportionate to the percentage of disciplinary cases prosecuted and completed against solo and small firm lawyers.³³ Unfortunately, it did not consider that what becomes a “complaint” is determined by the State Bar staff and that fully three-quarters of the inquiries

28. See *Highlights of New Grievance Process*, WHOOPS! NEWSLETTER, Mar. 2000, (Colo. B. Ass’n, Denver, CO), <http://www.cobar.org/group/display.cfm?GenID=574> (last visited Nov. 22, 2006). The pressure felt by those within the discipline system is no doubt substantial as many states now publish annual reports showing the speed with which matters are resolved, in apparent response to pressure to dispose of discipline matters more quickly. See, e.g., Va. State Bar, 67th Annual Report for the period July 1, 2004 – June 30, 2005, at 11, available at <http://www.vsb.org/anreport/04-05/67thAnnReport.pdf>.

29. There are a few exceptions. For example, the Kansas rules state that “[a]n attempt should be made to monitor the recidivism rate for attorneys who successfully complete the [diversion] program.” KAN. SUP. CT. R. 203(d)(3)(i) (2005).

30. For example, in California, 78.37% of disciplinary cases prosecuted and completed in 2000-2001 were against solo practitioners, even though they represented only 23% of the lawyers practicing in that state. See Report by the State Bar of California, *Investigation and Prosecution of Disciplinary Complaints Against Attorneys in Solo Practice, Small Size Law Firms and Large Size Law Firms*, at 7-8, available at http://calbar.ca.gov/calbar/pdfs/reports/2001_SB143-Report.pdf [hereinafter Report by the State Bar of California]. Similarly, 34% of Texas lawyers are solo practitioners yet they receive 67% of all public sanctions. Frank William McIntyre, *Whose Interests Does Texas’ Disciplinary Process Protect?*, TEX. LAW., Aug. 5, 2002, at 27. When Texas lawyers who practice in firms of two to five lawyers are added with solo practitioners, they comprise 59% of all practicing lawyers yet they receive 98.5% of all public discipline. *Id.*; see also MICHAEL D. PRATT, AN ANALYSIS OF THE CONSISTENCY OF DECISION-MAKING WITHIN THE VIRGINIA STATE BAR DISCIPLINARY SYSTEM iii, 21 (2000) (noting that the greater the number of attorneys in practice, the lower the odds of receiving public or private sanctions in Virginia).

31. See, e.g., Report by the State Bar of California, *supra* note 30, at 1; Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 314, 381-83 (2004) [hereinafter Levin, *Ethical World*].

32. Oregon State Bar, Oregon State Bar Disciplinary System Task Force Report, July 15, 2002, <http://www.osbar.org/barnews/monthly/disciplinary.html> (last visited Nov. 22, 2006).

33. Report by the State Bar of California, *supra* note 30, at 8-9.

were dismissed, informally resolved, or diverted out of the discipline system.³⁴ Bias may arise in the types of complaints that disciplinary agencies choose to pursue³⁵ and in the severity of the sanctions imposed.

(4) *Fairness to Minorities*. Secrecy also makes it hard to determine whether minorities are treated fairly by disciplinary agencies. There is a perception—at least among minority lawyers—that minorities are treated differently than others in the discipline process. For instance, there was an outcry when the New Jersey Office of Attorney Ethics targeted solo attorneys for random audits because a disproportionate number of minority lawyers practice in that setting.³⁶ Findings from an Illinois perception survey indicate that a substantial minority of responding African-American lawyers strongly agreed or somewhat agreed with the statement that the Attorney Registration and Disciplinary Commission's ("ARDC") decision whether to act on a case was influenced by the race of the complaining witness.³⁷ A majority of African-American lawyers—but very few white lawyers—felt that race played a part in the investigation and discipline of Illinois lawyers.³⁸

Three states have tried to determine whether minorities are in fact treated differently, but their reports raise as many questions as they answer. Both the Illinois ARDC and the New Mexico State Bar found, respectively, that African-American and Hispanic lawyers received a disproportionate number of discipline sanctions, but noted that these minority lawyers disproportionately

34. *Id.* at 9-10. The availability of diversion often rests on the ability to pay for it. *See, e.g.,* COLO. R. CIV. P. 251(d) (2005); MO. RULES R. 5.105(e)(4). This may make it likely that large firm lawyers with larger incomes can avail themselves of diversion. The ability to make restitution and thereby resolve conflicts with clients may also advantage large firm lawyers in the discipline process. *See, e.g., In re Edelman*, No. SB-02-0095-D, 2002 Ariz. Lexis 131, at *16 (Ariz. Aug. 7, 2002); *In re Fischer*, 89 P.3d 817, 821 (Colo. 2004); *In re Arabia*, 19 P.3d 113, 118 (Kan. 2001) (treating restitution as a mitigating factor when imposing discipline).

35. The few mechanisms that have been instituted by disciplinary agencies to detect lawyer misconduct are more likely to reveal problems with solo and small firm lawyers than with large firm lawyers. For example, random audits and requirements that banks report overdrafts in client trust accounts are more likely to reveal problems with solo and small firm lawyers, who may not have a bookkeeper to properly maintain the account or who may not be able to keep "extra" funds in a trust account. *See* Levin, *Ethical World*, *supra* note 31, at 357-59, n.158. Discipline agencies have established no similar mechanism for auditing bill padding, which is reportedly pervasive in many large firm practices. *See* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 277-79 (2000); Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 889 (2006).

36. Allyson Lee Moore, *Study Urges Changes in OAE Audits*, N.J. L.J., Nov. 21, 1991, at 1. There has also been occasional litigation charging racial bias in the lawyer discipline system. *See, e.g., Mosby v. Ligon*, 418 F.3d 927, 930-32 (8th Cir. 2005).

37. Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, 2002 Annual Report of the Attorney Registration and Disciplinary Commission, available at http://www.iardc.org/AnnualReport02/2002annual_report.html (31.4% of black lawyers agreed with this statement). The survey involved 1,306 telephone interviews of Illinois lawyers. *Id.*

38. *Id.* Only 28% of African American lawyers, as compared to 39.8% of white lawyers, felt that the disciplinary process was "very fair." *Id.*

practice in solo settings.³⁹ The Virginia State Bar study examined the consistency of decision-making within the lawyer discipline system⁴⁰ and concluded that differences in race were not statistically significant in explaining a case's resolution at a 95% confidence level.⁴¹ Although the studies represent a good-faith effort to study the question of bias, they do not answer many important questions. For example, while the Illinois and New Mexico data reveal that minorities practice disproportionately in a solo setting, the reports do not reveal whether minorities in solo practice receive the percentage of sanctions that their numbers would suggest.⁴² Nor is there close analysis in any of the studies of whether white and minority attorneys received similarly severe sanctions for similar conduct.⁴³ In addition, there has been no effort to examine whether there is bias in the initial handling of complaints about minority lawyers, including in the decisions about diversion. These questions raise serious concerns about the

39. The Illinois ARDC examined the race of lawyers sanctioned from 1998-2002. Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, 2003 Annual Report of the Attorney Registration and Disciplinary Commission, *available at* http://www.iardc.org/AnnualReport03/2003main_annreport.html [hereinafter 2003 ARDC Report]. It found that African-American lawyers comprised 11% of the lawyers sanctioned, but did not identify the percentage of Illinois lawyers who are African-American. *Id.* Most available statistics indicate that the percentage is not much higher than 4%. See ELIZABETH CHAMBLISS, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* 5 (2004).

The New Mexico Bar Commissioners looked at serious disciplinary sanctions imposed from 1988-1998. See The State Bar of New Mexico Task Force on Minorities in the Legal Profession II, Report, The Status of Minority Attorneys in New Mexico—An Update, 1990-1999, at 43-46, *available at* http://www.nmbar.org/Content/NavigationMenu/Publications_Media/Reports_Surveys/Minority_Attorneys_in_New_Mexico/minoritytaskforcereport.pdf. During the relevant period, Hispanic attorneys represented only between 14%-17% of all active attorneys, but they received 26% of all serious sanctions. *Id.* at 45. Thirty-eight percent of all active Hispanic attorneys are solo practitioners. *Id.* at 46.

40. Consistency was examined by looking at lawyer characteristics in closed discipline cases during 1997-1999. PRATT, *supra* note 30, at i. Lawyers who were the subject of complaints were sent brief surveys asking them to supply some practice information and gender and race information. Although the response rate was 76% for the closed cases, a disproportionate number of lawyers who resigned while under investigation did not respond to the survey. *Id.* at ii, 7.

41. *Id.* at 18. The study appears to be methodologically problematic in a few respects. First, although it had a relatively high response rate, there is some bias because those who were being investigated for the most serious offenses disproportionately did not respond. *Id.* at 7-8. Moreover, the question of whether a sanction was imposed was treated as a yes/no variable, while the severity of the sanctions imposed on one ethnic group may have been significantly greater than the sanction imposed on another. Similarly, not all dismissals are equal. For example, it appears that African-American lawyers received disproportionately more "dismissals on terms" (for example, with conditions) than white lawyers, but there was no indication whether the difference was statistically significant. See *id.* at 39. Finally, it is not clear from the report whether the in-house staff or members of the district committees were aware that this study was being conducted during 1997-1999, which could have altered the behavior of the decisionmakers.

42. For instance, if minorities comprise 20% of all solo attorneys in a state, they should theoretically be receiving approximately 20% of all discipline imposed on solo lawyers. However, those figures are not available anywhere.

43. The Illinois study does reflect that African-American attorneys receive the same percentage of disbarments as white attorneys (30%) and that white attorneys receive somewhat more private sanctions than African-American attorneys. 2003 ARDC Report, *supra* note 39. It is not clear, however, whether the differences in private discipline are statistically significant.

fairness of the discipline system, and most of them cannot be answered because the required information is confidential in most jurisdictions.

The secrecy surrounding the discipline process makes it impossible to answer the questions posed above. Yet these questions go to the heart of the efficacy and fairness of the discipline system. The absence of answers to these questions and the shroud of secrecy surrounding the process have significant real world consequences. First and most obviously, if private sanctions and diversion do not work, they should not be used, because they do not protect the public. Second, if a significant segment of the lawyer population does not view the lawyer discipline process as fair, these lawyers may have less respect for the discipline system and the rules of professional conduct that the system attempts to enforce. Third, the secrecy surrounding lawyer discipline may fundamentally affect how complainants view the fairness of the discipline process.⁴⁴ Finally, secrecy affects the general public's perception of the fairness and legitimacy of the lawyer discipline system and how well that system actually protects the public.⁴⁵

This article examines the secrecy that continues to surround lawyer discipline in many jurisdictions and lays out the case for further opening up the discipline process. Part I provides a brief history of lawyer discipline and notes that the process was open to the public until the beginning of the twentieth century. Part II provides an overview of the current lawyer discipline process in this country and the sanctions imposed on lawyers. Part III looks at the rationales for private lawyer discipline and the countervailing interests in open access to the discipline process. It notes that while there may be a credible argument for keeping lawyer discipline complaints private until after an initial review of a docketed complaint, the arguments for a private process thereafter and for private discipline do not withstand scrutiny. Part IV examines the First Amendment and common law

44. The only systematic study of discipline complainants reveals that they are generally dissatisfied with the state of lawyer discipline. When the Florida Bar announced an initiative to look at how it disciplines lawyers, it reportedly "had no idea the genie it had unleashed," and it was "deluged with e-mails and letters—from attorneys, disgruntled clients and citizens at large." John Pacenti, *Florida Bar Scrutinizes Discipline for Lawyers*, PALM BEACH POST, Mar. 5, 2004, at 1A. More than three-quarters of the 907 complainants who responded to the Florida 2004 Disciplinary Survey believed that the proceedings were not fair to all concerned, and one common reason for the feeling of unfairness was that the proceedings seemed biased in favor of attorneys. Florida Bar, Results of the 2004 Disciplinary Review Survey at ii, 3 (2004).

45. HALT—An Organization of Americans for Legal Reform, is a public interest group that claims to have more than 50,000 members. HALT has advocated that lawyer discipline should be public for more than 25 years. See About HALT, http://www.halt.org/about_halt (last visited Nov. 28, 2006); HALT, 2006 Lawyer Discipline Report Card, http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006 [hereinafter Lawyer Discipline Report Card] (last visited Nov. 28, 2006). HALT contends that some of the problems with state discipline systems are the inadequacy of the discipline actually imposed, the failure to investigate many grievances, the fact that the hearing process is often closed, the difficulty of obtaining information about lawyer discipline history, and the perceived secrecy and unfairness of the discipline procedures. See HALT, Report Card: What's New Since 2002, http://halt.org/reform_projects/lawyer_accountability/report_card_2006/whats_new_since_2002.php (last visited Nov. 22, 2006).

cases relating to access to lawyer disciplinary and judicial information, and it suggests possible legal arguments for opening up more discipline information to the public. This analysis reveals, however, that the case law does not provide a right of access to all of the lawyer discipline information that is needed to protect the public. The article concludes by suggesting that we need rules that provide more access to lawyer discipline information in order to protect the public, to answer some of the important empirical questions identified in this article, and to restore confidence in the fairness of lawyer discipline.

I. A BRIEF HISTORY OF LAWYER DISCIPLINE

Prior to the last century, lawyer discipline was conducted in public in the United States and in England. The earliest provision regulating the conduct of lawyers was the First Statute of Westminster, Chapter 29 (1275), which provided that “if any Serjeant, Pleader or other, do any manner of Deceit or Collusion in any King’s Court . . . he shall be imprisoned for a year and a day and from thenceforth shall not be heard to plead in [that] Court for any Man.”⁴⁶ The statutes and ordinances regulating lawyers, which began to appear during the thirteenth century, made no provision for private complaints, private proceedings, or private discipline. Lawyer discipline was imposed after fact-finding by judges or juries composed of lawyers.⁴⁷ The discipline imposed on lawyers during the medieval period included disbarment, temporary suspensions, fines, and imprisonment.⁴⁸

In 1605, Parliament enacted “An Act to Reform the Multitudes & Misdemeanors of Attorneys & Solicitors at Law, and to Avoid Unnecessary Suits and Charges at Law,” known as 3 James 1, which provided for disbarment and treble damages for lawyers who delayed their clients’ cases for private gain.⁴⁹ In 1654, both the King’s Bench and the Common Pleas provided for summoning special juries every three years to put an end to unethical practices by attorneys.⁵⁰ The purpose of these juries was to inquire into falsities, contempts, and other offenses, and to establish a system for inquiry into the conduct of attorneys for the purpose

46. HENRY S. DRINKER, *LEGAL ETHICS* 14-15 (1953). The term “deceit” was interpreted broadly by the courts and included candor to the court and duties to the client. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1395 (2004). The statute was applied not only to serjeants—who were the pleaders who represented the King—but also to attorneys. See generally Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 61 app. III (1998).

47. Rose, *supra* note 46, at 60-61.

48. *Id.* at 61.

49. An Act to reform the Multitudes and Misdemeanors of Attornies and Solicitors at Law, and to avoid unnecessary Suits and Charges in Law, 3 JAMES 1, ch. 7, STATUTES AT LARGE; see also Andrews, *supra* note 46, at 1406.

50. Charles S. Potts, *Disbarment Procedure*, 24 TEX. L. REV. 161 (1945).

of aiding the courts in the discipline and removal of attorneys.⁵¹

During the American colonial period, the laws governing lawyer discipline and the methods of imposing discipline were often borrowed directly from England.⁵² For example, in colonial North Carolina, lawyer regulation was controlled, in part, by the First Statute of Westminster (1275) and 3 James 1 (1605).⁵³ In Rhode Island, the Act of 1647 specifically referred to two English statutes dealing with attorneys and provided that if any "Attorney shall use any manner of deceit . . . he shall forfeit his place, and never more be admitted to plead in any Court of the Colonie."⁵⁴ In Pennsylvania in 1722, "An Act for Establishing Courts of Judicature in the Provinces" provided that admitted attorneys who misbehaved in court "shall suffer such penalties and suspensions as attorneys at law in Great Britain are liable to in such cases"⁵⁵

In the American colonies, both the courts and the Crown's governors claimed the power to disbar.⁵⁶ Disbarment proceedings handled by the courts were commonly conducted as an equity suit or a contempt proceeding.⁵⁷ The proceeding occasionally involved the appointment of a committee of lawyers or a referee who would conduct an investigation and submit a report. For example, in New York in the 1720s, a standing "Committee to Hear Grievances in the Practice of Law" reportedly was formed, and in order to insure that problems came to light, "all Publick Countenance and Encouragement" was given to "all Persons to come and complain."⁵⁸

Following the American Revolution and until the twentieth century, the lawyer

51. *Karlin v. Culkin*, 162 N.E. 487, 491 (N.Y. 1928); Andrews, *supra* note 46, at 1406. Starting in the seventeenth century, barristers reportedly also could be disbarred by the Benchers of his Inn. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 99-100 (1953). However, it is not clear whether the Benchers exercised this prerogative when a barrister engaged in misconduct.

52. There was also considerable anti-lawyer legislation that attempted to limit lawyers' activities altogether. See POUND, *supra* note 51, at 136. This legislation sought to bar lawyers from appearing in court, limited the number of lawyers admitted to practice and the number of courts in which the lawyers could practice, and tried to deprive lawyers of compensation for their services. See *id.* at 136-38, 141; see also CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 41-42, 53, 69, 131, 142 (1966).

53. 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE COLONIAL EXPERIENCE* 316 (1965).

54. 1 RHODE ISLAND COLONIAL RECORDS 200-201, CODE OF 1647, at 58 (1847).

55. 3 STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, at 308 (1896). Virtually identical language appears in Delaware in 1721, in the Act for Establishing the Courts of Law and Equity Within This Government, 1 LAWS OF THE STATE OF DELAWARE, 1700-1797, at 133 (1797).

56. See, e.g., CHROUST, *supra* note 53, at 157, 274, 314-17; John E. Douglass, *Between Pettifoggers and Professionals: Pleaders and Practitioners and the Beginnings of the Legal Profession in Colonial Maryland 1634-1731*, 39 AM. J. LEGAL HIST. 359, 367-68, 372-78 (1995).

57. Charles W. Wolfram, *Towards a History of the Legalization of American Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 474-75 (2001). A few jurisdictions provided for jury trials in discipline proceedings. *Id.* at 475 n. 32. In Georgia, New York, and North Carolina, the governor also retained the right to revoke a lawyer's license to practice. See CHROUST, *supra* note 53, at 157, 274.

58. See CHROUST, *supra* note 53, at 173-74.

discipline process and the imposition of sanctions were largely public.⁵⁹ Disbarment proceedings typically began by service of an order to show cause on a lawyer, requiring a lawyer to show cause why he should not be disciplined.⁶⁰ Lawyers were required to present evidence like an ordinary civil litigant.⁶¹ Courts rarely initiated discipline proceedings, but when they did so, it was by way of a summary proceeding to disbar in contempt.⁶² During the nineteenth and early twentieth centuries, courts received evidence in disbarment proceedings in open court.⁶³ Indeed, the New York Court of Appeals described applications to disbar an attorney as a proceeding "of a public nature and *quasi* criminal."⁶⁴ Jury trials were available in disbarment proceedings in eleven jurisdictions.⁶⁵ Courts routinely reported the names of lawyers who had been charged with misconduct but were not ultimately subjected to discipline.⁶⁶

Judging from newspaper reports, there was great public interest in lawyer discipline proceedings.⁶⁷ It was not uncommon for newspapers to report the filing

59. One rare exception appears in *Cowley v. Pulsifer*, 137 Mass. 392 (1894). In that libel case, the contents of a petition for removal of an attorney was presented to a court clerk who marked it "filed," but then handed it back to the petitioner and never entered it on the docket or presented it to the court. The court noted that it was a contempt of court to publish a pleading of one party in a newspaper "before the matter has come on to be heard." *Id.* at 396. The court further stated, with respect to papers filed with the court clerk, that "we are of the opinion that such papers are not open to public inspection." *Id.* It is not clear, however, whether in fact the court documents were open to inspection at that time. Closer analysis of Massachusetts law suggests that they were as a matter of law. See *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 91-92 (D. Mass. 1993).

60. Wolfram, *supra* note 57, at 474.

61. *Id.* at 475.

62. DAVID PAPKE, *THE LEGAL PROFESSION AND ITS ETHICAL RESPONSIBILITIES: A HISTORY IN ETHICS AND THE LEGAL PROFESSION* 34 (Michael Davis & Frederick Elliston eds., 1986); POUND, *supra* note 51, at 184-85.

63. See, e.g., *People ex rel. Pagel v. Pendleton*, 17 Colo. 544, 545 (1892); *In re Mains*, 80 N.W. 714, 715 (Mich. 1899); *In re Simpson*, 83 N.W. 541, 542 (N.D. 1900); *In re Raisch*, 90 A. 12 (N.J. Ch. 1914); *Hunt v. State*, 1904 Ohio Misc. LEXIS 283; *In re Hilton*, 158 P. 691, 697 (Utah 1916); *May Disbar Attorneys: Annapolis Court Tries Lawyers Charged With Fabricating Evidence*, WASH. POST, Feb. 1, 1911, at 3.

64. *In re Kelly*, 59 N.Y. 595 (1875); see also *In re Spencer*, 122 N.Y.S. 190 (App. Div. 1910).

65. The U.S. Constitution does not require a jury trial in lawyer discipline proceedings. See *Ex Parte Burr*, 4 Fed. Cas. No. 2186 (1823). Nevertheless, some state statutes required a jury trial in certain lawyer disciplinary proceedings. See, e.g., *Ex Parte Fischer*, 33 Va. 619, 626 (1835) (declaring that prior to suspending a lawyer for malpractice, he must be found guilty by a jury). At various times, Alabama, Arkansas, Georgia, Indiana, Louisiana, Missouri, North Carolina, Texas, Virginia, West Virginia, and Wyoming have afforded jury trials in disbarment cases. Potts, *supra* note 50, at 170; EDWARD P. WEEKS, *ATTORNEYS AND COUNSELLORS AT LAW* 217 (Charles Boone ed., 2d ed. 1892). As late as 1935, lawyer respondents in disciplinary proceedings were still entitled to a jury trial in six jurisdictions. PHILLIPS & MCCOY, *supra* note 6, at 91 n.13.

66. See, e.g., *In re Ashley*, 80 P. 1030 (Cal. 1905); *In re Haymond*, 53 P. 899 (Cal. 1898); *In re Hudson*, 36 P. 812 (Cal. 1894); *In re Luce*, 23 P. 350 (Cal. 1890); *People ex rel. The Colorado Bar Ass'n v. Robinson*, 32 Colo. 241 (1904); *People v. Benson*, 24 Colo. 358 (1897); *Zachary v. State*, 43 So. 925, 926 (Fla. 1907); *People ex rel. Healy v. Thornton*, 228 Ill. 42 (1907); *People v. Matthews*, 217 Ill. 94 (1905); *In re Elliott*, 84 P. 750 (Kan. 1906); *In re Harding*, 125 N.Y.S. 264 (App. Div. 1910); *In re Dunn*, 50 N.Y.S. 163 (App. Div. 1898). But see MASS. MONTHLY L. REP., Dec. 1856 (declining to provide name of respondent who was stricken from rolls of Superior Court).

67. See, e.g., *Campbell's Case*, CHI. DAILY TRIB., July 17, 1884, at 2 (noting that when the proceedings to disbar an attorney were called "[t]he court-room was crowded with attorneys, and the keenest interest manifested"); *Domestic Intelligence*, COHEN'S LOTTERY GAZETTE & REG., May 23, 1822, at 66 (noting that

of charges against lawyers in disbarment proceedings, including charges by clients or other lawyers.⁶⁸ Disciplinary proceedings were colorfully reported,⁶⁹ and newspapers routinely included the names of lawyers when sanctions were not imposed.⁷⁰ Numerous public reports of pending disbarment proceedings in several jurisdictions can be found in metropolitan newspapers during the period from the 1870s through the early 1900s.⁷¹

Beginning in the 1870s, as major bar associations started to emerge, the associations became involved in the state lawyer discipline process.⁷² For example, the Chicago Bar Association first brought a disbarment proceeding in

Philadelphia Court of Common Pleas "was filled by persons anxious to ascertain what measures would be adopted by the Court against [two lawyers]"); *The Disbarment Case: The Defense Injects a Demurrer that Puts it Off*, L.A. TIMES, Oct. 14, 1888, at 1 (reporting that "[a] large crowd hung around the Supreme Court yesterday in the expectation of seeing a good legal fight . . .").

68. See, e.g., *A Charge Against An Attorney*, N.Y. TIMES, Oct. 2, 1877, at 2; *Attempt to Disbar a Cincinnati Attorney—The Textile Fabrics Exposition*, CHI. TRIB., July 29, 1869, at 1; *Charge Against Lawyer: J. J. Halligan Accused of Exacting an Exorbitant Fee*, N.Y. TIMES, Mar. 10, 1899, at 12; *Fellow-attorney Asks that John Patterson be Disbarred*, WASH. POST, Mar. 31, 1906, at 12; *Motion to Disbar Attorneys*, N.Y. TIMES, Oct. 21, 1874, at 3; *Negro Lawyer in Trouble: The Disbarment Case: The Defense Injects a Demurrer that Puts it Off*, L.A. TIMES, Oct. 14, 1888, at 1; *To Disbar G. R. Brewster: Newberg Lawyer Accused of Using Funds Left in His Care*, N.Y. TIMES, Jan. 25, 1914, at 9.

69. See, e.g., *An Attorneys' Fight: Horace Bell and Dunnigan & Dunnigan in Court*, L.A. TIMES, Dec. 13, 1898, at 11; *Attorney Attacked, Attempt to Disbar Earl Rogers*, L.A. TIMES, May 27, 1900, at III 8; *Charge Against Lawyer: J. J. Halligan Accused of Exacting an Exorbitant Fee*, N.Y. TIMES, Mar. 10, 1899, at 12; *Club Feud, Now Suit to Disbar*, CHI. TRIB., May 20, 1904, at 4; *The Disbarment Case: The Defense Injects a Demurrer that Puts it Off*, L.A. TIMES, Oct. 14, 1888, at 1; *Threatens to Kill Accuser if Attorneys Disbar Him*, CHI. TRIB., Feb. 11, 1908, at 3.

70. See, e.g., *A Charge Against an Attorney*, *supra* note 68, at 2; *Charges Against Two Lawyers: Proceedings to Disbar the Firm of Hall & Webster*, N.Y. TIMES, Oct. 5, 1875, at 3; *Court Clears an Attorney: Appellate Division Finds No Ground to Disbar O'Neill*, N.Y. TIMES, July 12, 1918; *Earl Rogers Vindicated*, L.A. TIMES, Sept. 21, 1900, at II 2; *Motion to Disbar Attorneys*, N.Y. TIMES, Oct. 21, 1874, at 3; *Proceedings to Disbar Attorneys Dismissed*, N.Y. TIMES, May 30, 1874, at p. 2.

71. See, e.g., *Attorney Attacked. Attempt to Disbar Earl Rogers*, L.A. TIMES, May 27, 1900, at III 8; *Campbell's Case*, CHI. DAILY TRIB., July 17, 1884, at 2; *Judge Would Disbar Gray: Prosecutor Had Charged Him with Unfairness in Murder Trial*, WASH. POST, Dec. 1, 1907, at 2; *Lawyer T.C. Campbell: Alleged Efforts to Prevent a Prosecution in His Case*, N.Y. TIMES, July 13, 1884, at 2; *Motion to Disbar*, N.Y. TIMES, Apr. 18, 1889, at 1; *Move to Disbar J. S. Stevens: Charges Are Filed Against Leading Lawyer of Peoria*, CHI. DAILY TRIB., June 24, 1910, at 5; *Moving to Disbar Bliss and Ker*, N.Y. TIMES, May 4, 1884, at 2; *Negro Lawyer in Trouble: Fellow-attorney Asks that John Patterson Be Disbarred*, WASH. POST, Mar. 31, 1906, at 12; *Seeking to Disbar a Lawyer, William R. Martin's Connection with the Platt Estate*, N.Y. TIMES, Oct. 31, 1883, at 8; *Seeks to Stop a Prize Fight*, CHI. TRIB., Dec. 12, 1900, at 3; *The Disbarment Case: The Defense Injects a Demurrer that Puts it Off*, L.A. TIMES, Oct. 14, 1888, at 1; *Threatens to Kill Accuser If Attorneys Disbar Him*, CHI. TRIB., Feb. 11, 1908, at 3; *To Disbar Attorney: He Pleads Loss of Memory*, L.A. TIMES, Dec. 27, 1906, at 13; *To Disbar Divorce Lawyers*, CHI. TRIB., Aug. 26, 1894, at 1; *To Disbar O'Brien: Master in Chancery Cummings is Preparing a Complaint*, CHI. TRIB., Aug. 17, 1894, at 3.

72. Some bar associations emerged in colonial times. See TERRENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 60-61 (1987). However, the major bar associations that are known today were not formed until 1870 or thereafter. See MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* xiv-xv (1989).

court against a lawyer in 1875.⁷³ The Association of the Bar of the City of New York ("ABCNY") first investigated and pressed charges against a lawyer in 1877.⁷⁴ Bar associations initially played the role of investigators and brought complaints to the attention of the state courts for the imposition of discipline.⁷⁵ Over time, their role in the lawyer discipline process became more formalized, so that they not only routinely investigated complaints against lawyers and held hearings, but also made recommendations to the court about the imposition of discipline.⁷⁶ By the early 1930s, the courts or legislatures in many states had conferred on bar associations express authority to investigate complaints,⁷⁷ subpoena power to conduct investigations,⁷⁸ and the authority to impose certain types of discipline sanctions.⁷⁹

When bar associations became involved in lawyer discipline, the discipline process and the sanctions imposed became considerably more private. For example, when the ABCNY began to investigate complaints against lawyers in the late nineteenth century, its investigations reportedly were private.⁸⁰ The

73. See *People v. Leary*, 84 Ill. 190 (1876); HERMAN KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 1874-1974*, at 42 (1974).

74. GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970*, at 355 (1970).

75. See *id.* at 361; Albert P. Blaustein, *The Association of the Bar of the City of New York: 1870-1951*, 6 *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 261, 265-66 (1951). The Alabama State Bar Association had authority to institute and prosecute proceedings against attorneys in court by 1892. Weeks, *supra* note 65, at 217. But not until 1909 did the Illinois Supreme Court adopt a rule that authorized any information to be brought against an attorney by a regularly organized bar association. PHILLIPS & MCCOY, *supra* note 6, at 105.

76. See MARTIN, *supra* note 74, at 361-63. The timing of bar association involvement in the discipline process varied considerably from state to state. For example, as late as 1912, the Chairman of the Ohio State Bar Association Committee on Grievances stated that the "[c]ommittee has never found it necessary to even have a meeting. If any of the members of the Ohio State Bar Association have any grievances against each other, they have not made it known to this Committee." OHIO ST. B. ASS'N, *PROCEEDINGS OF THE THIRTY-THIRD ANNUAL SESSION* 23 (1912).

77. As early as 1921, the California Legislature recognized the role of the organized bar in investigating complaints against lawyers and bringing them to the courts. See PHILLIPS & MCCOY, *supra* note 6, at 96-97; see also *In re Morganstern*, 215 P. 721 (Cal. Ct. App. 1923). This role was formalized somewhat later in other jurisdictions.

78. By 1935, grievance committees in 28 states had the power to subpoena witnesses. PHILLIPS & MCCOY, *supra* note 6, at 90-91.

79. See, e.g., 1 NEV. COMPILED LAWS § 565 (1929) (describing powers of the board of governors of the state bar to disbar or suspend members or to discipline them by reproof); PHILLIPS & MCCOY, *supra* note 6, at 100 (describing authority of California Bar Board of Governors to impose public or private reprimand, subject to review of court); *Regulation of the Practice of Law*, 10 IND. L.J. 15, 16 (1934-35) (describing procedures promulgated by Missouri Supreme Court); *Rules of Procedure Regulating Disciplinary Proceedings*, OKLA. ST. B.J. 94, 95 (July 1932). But see AM. B. ASS'N, *DISCIPLINARY PROCEEDINGS: A SURVEY OF METHODS USED TO DISCIPLINE UNETHICAL LAWYERS* 42-58 (1935) [hereinafter ABA DISCIPLINARY PROCEEDINGS SURVEY] (describing in 1935 several jurisdictions in which bar associations were not functioning in the disciplinary arena under either statutory authority or court rule).

80. According to an official history, all grievance investigations by the bar were private. See MARTIN, *supra* note 74, at 369; see also EDWARD SHELTON, *ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK HISTORICAL SKETCH, PREPARED FOR THE SEMI-CENTENARY CELEBRATION* 35, 76-77 (1920). However, a review of press

ACBNY adopted procedures to keep the proceedings secret until the appointment of a referee by the court, which came after a determination that the case warranted prosecution.⁸¹ It reportedly fought to maintain the confidential status of its records of an investigation as early as 1877.⁸² It was not until 1928, however, that Justice Benjamin Cardozo of the New York Court of Appeals ruled that a preliminary investigation into lawyer misconduct may be private.⁸³ Five years later, the Illinois Supreme Court also adopted a rule providing that the bar association's hearings concerning lawyer misconduct "shall be private."⁸⁴ In 1935, an ABA report stated that "[i]t is desirable that there should be no publicity in regard to any phase of the [discipline] proceedings until it is determined by the court that a hearing should be had when such a determination is necessary."⁸⁵

Although it is difficult to determine the timing precisely, it appears that private sanctions began to be imposed by state bar organizations in the 1920s.⁸⁶ Courts began imposing private discipline by the early 1930s.⁸⁷ Courts and state legislatures also started to make certain documents relating to discipline proceedings confidential in the 1930s.⁸⁸

For the next forty years, lawyer disciplinary complaints were typically handled first by bar organizations,⁸⁹ although the courts often retained the exclusive

reports raises some question about the accuracy of this assertion. See, e.g., *Charge Against Lawyer*, N.Y. TIMES, Mar. 10, 1899, at 12.

81. See *Remarks of John Proctor Clarke*, ADDRESSES DELIVERED FEBRUARY 17, 1920, AND HISTORICAL SKETCH TO COMMEMORATE THE SEMI-CENTENARY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 23-24 (1920).

82. See MARTIN, *supra* note 74, at 353-54.

83. *Karlin v. Culkin*, 162 N.E. 487, 492 (N.Y. 1928). Although Justice Cardozo noted the practice of "distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous," *id.* at 492-93, in fact that was the exception rather than the rule up to that time.

84. PHILLIPS & MCCOY, *supra* note 6, at 106; see also ABA DISCIPLINARY PROCEEDINGS SURVEY, *supra* note 79, at 37 (noting that disciplinary hearings before the Pennsylvania State Bar were usually private).

85. ABA DISCIPLINARY PROCEEDINGS SURVEY, *supra* note 79, at 5.

86. See, e.g., ALA. CODE § 6225 (1923) (providing board of commissioners with power to "take such disciplinary action by public or private reprimand"); 1 NEV. COMPILED LAWS § 565 (1929) (providing State Bar with power to discipline members by "reproval, public or private"); PHILLIPS & MCCOY, *supra* note 6, at 97-98 (noting that in California from 1927 to 1939, 77 private reprovals were administered by the Board of Governors of the State Bar); see also *In re Edwards*, 266 P. 665, 669 (Idaho 1928) (finding unconstitutional state statute giving commissioners of Idaho State Bar power to impose public or private discipline). The Chicago Bar Association reportedly asked the Illinois Supreme Court to allow the CBA to impose private admonitions even before 1920, but it is not clear when the CBA actually obtained authority to impose private sanctions. See HALLIDAY, *supra* note 72, at 77.

87. See, e.g., *People ex rel. Colorado Bar Ass'n v. —, Attorney at Law*, 9 P.2d 611, 612 (1932); PHILLIPS & MCCOY, *supra* note 6, at 101 (indicating that California court imposed private discipline in 1931). It is difficult to pinpoint the timing of this development precisely because it occurred without fanfare.

88. See, e.g., *In re Integration of the Neb. State Bar Ass'n*, 275 N.W. 265, 273 (Neb. 1937); *Colo. Bar Ass'n v. —, Attorney at Law*, 9 P.2d 611 (Colo. 1932) (affirming bar's imposition of private reprimand and ordering that the committee's report remain confidential). Some jurisdictions did not do so until the 1940s. See, e.g., N.Y. JUD. LAW § 90, Sess. Laws of 1945, ch. 675.

89. PAPKE, *supra* note 62, at 29, 39. For example, in New York City, the grievance committee of the ABCNY had considerable discretion to determine which complaints to pursue and which to dismiss. POWELL, *supra* note

power to suspend or disbar.⁹⁰ Most bar associations relied on volunteers, possessed few investigative resources, and ultimately disciplined only a very small number of lawyers about whom complaints were received.⁹¹ Recordkeeping was abysmal. For example, the responses to an ABA survey on disciplinary procedures and practices in 1948 were so incomplete that the ensuing report noted that "we can only accept the complete absence of disciplinary records in those states as indicating an extraordinary disinterest on the part of the Bar and the courts in the character and professional conduct of the practicing lawyer."⁹²

Beginning in the 1960s, the organized bar came under attack, as did many social institutions.⁹³ The ABA took a number of defensive steps, including a far-ranging study of bar discipline systems. In 1970, the ABA's Clark Commission concluded, after studying "all aspects of professional discipline," that bar discipline was too self-interested, inefficient, and under-inclusive.⁹⁴ It recommended that the courts resume more supervisory responsibility for overseeing lawyer discipline.⁹⁵ It also recommended the use of informal private admonitions to insure that lawyers who were the source of complaints about minor misconduct would receive some discipline indicating that the conduct was not condoned.⁹⁶

In 1979 the ABA Standards for Lawyer Discipline and Disability Proceedings recommended making disciplinary charges public after a finding of probable cause.⁹⁷ States were not quick to adopt the ABA Standards, however, and when the ABA's McKay Commission studied lawyer discipline systems in the early 1990s, it criticized the continued secrecy in discipline proceedings in its 1992 report. It found that no harm would come to lawyers from the public disclosure of most discipline records and originally recommended that "all records of the lawyer disciplinary agency, except the work product of disciplinary counsel,

72, at 20. By the 1960s, 98% of all complaints against New York City lawyers reportedly were referred initially to the ABCNY's Grievance Committee. JEROME CARLIN, *LEGAL ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 150 (1966).

90. For instance, in California, the state bar could recommend suspension or disbarment, but only the Supreme Court had the power to impose those sanctions. PHILLIPS & MCCOY, *supra* note 6, at 100.

91. POWELL, *supra* note 72, at 21; Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 31 AM. B. FOUND. RES. J. 31, 37-38 (1985).

92. PHILLIPS & MCCOY, *supra* note 6, at 94-95. According to the report, 18 states provided no response to the questions about disciplinary action. Some other states provided incomplete responses. *Id.* at 94 n. 16-17.

93. See JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 263-288 (1976); PAPKE, *supra* note 62, at 40-41.

94. See PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, *supra* note 3, at xiii, 1-3.

95. *Id.* at 24-29.

96. *Id.* at 92-93. The Clark Commission recommended the use of private admonitions because it was concerned that in cases of minor misconduct, the "disciplinary agency that has no alternative but to dismiss a complaint or prosecute a formal disciplinary proceeding will often decide to dismiss." *Id.* It further noted that prosecution of a formal proceeding in an instance of minor misconduct "is unduly harsh, wastes the agency's limited manpower and financial resources on relatively insignificant matters and . . . overburdens the court." *Id.* at 93.

97. See ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS STD. 8.24 commentary (1979).

should be available to the public from the time of the complainant's initial communication with the agency" and that all proceedings except adjudicative deliberations should be public.⁹⁸ The McKay Commission later accepted a "friendly amendment" that the information be made public after a determination has been made that "probable cause exists to believe that misconduct occurred."⁹⁹ This approach was incorporated into the *ABA Model Rules for Lawyer Disciplinary Enforcement* ("MRLDE").¹⁰⁰ According to the MRLDE, prior to the filing and service of formal charges, the matter is confidential within the agency.¹⁰¹ The Commentary notes that the "confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the respondent, and protects against publicity predicated upon unfounded accusations."¹⁰²

Although the MRLDE recommend that disciplinary charges be made public after a finding of probable cause, they create an exception for "minor misconduct."¹⁰³ In such cases, private discipline—in the form of an "admonition"—may be imposed on a lawyer with the consent of the respondent and the approval of the chair of a hearing committee. The admonition may not be imposed after formal charges have been issued.¹⁰⁴ According to the Commentary to the MRLDE, a private sanction informs the lawyer that conduct is unethical but "does not unnecessarily stigmatize a lawyer from whom the public needs no protection."¹⁰⁵ The MRLDE continue to reflect this approach to this day.¹⁰⁶

II. LAWYER DISCIPLINE TODAY

Lawyer discipline complaints typically are submitted to a disciplinary agency that either operates within the judicial branch or is part of an integrated state bar.¹⁰⁷ Most complaints¹⁰⁸ come from clients, from other lawyers, from third

98. See *LAWYER REGULATION FOR A NEW CENTURY*, *supra* note 5, at 34-38.

99. *Id.* at 33.

100. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(A) (1993).

101. *Id.* at R. 16(B).

102. *Id.* at R. 16 commentary.

103. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(5) (2001).

104. *Id.*

105. *Id.* at R. 10 commentary.

106. *Id.* at R. 6(A).

107. Levin, *Emperor's Clothes*, *supra* note 8, at 3-4. When the disciplinary function is handled by an integrated state bar, the bar's authority has typically been delegated by the court. See, e.g., IDAHO CODE ANN. § 3-402 (2006).

108. It is important to note that jurisdictions do not use the term "complaint" in a uniform manner. Some jurisdictions use the term "complaint" to refer to any allegations it receives about a lawyer. See, e.g., KAN. SUP. CT. R. 209 (2005); LA. SUP. CT. R. XIX, § 11(A) (2005). Others refer to a "complaint" as being allegations that have been docketed by the disciplinary agency after screening. See, e.g., FLA. RULES R. 3-7.3(b). Still others refer to a "complaint" as a document that is filed only after a finding by the agency of probable cause. See, e.g., GA. BAR R. 4-204.4(a) (2005); IND. RULES FOR ADMISSION TO THE BAR § 11 (2005). I am using "complaint" in this section in the first sense described.

parties, and occasionally from judges.¹⁰⁹ Although there are important differences from state to state, the complaining party usually starts the process with a telephone call which may be followed by a written description of the alleged misconduct.¹¹⁰ Disciplinary agencies often use screening processes to try to resolve misunderstandings informally and to help keep the number of docketed complaints that require staff time low.¹¹¹ In addition, many disciplinary agencies will not docket charges of incompetence against criminal defense attorneys,¹¹² legal malpractice, complaints arising out of ongoing litigation,¹¹³ or many allegations of incivility.¹¹⁴ Certain types of complaints will immediately be referred to another agency or forum, such as bar association programs designed to deal with fee disputes¹¹⁵ or advertising complaints.¹¹⁶

In the remaining cases, a file will be opened and an investigation undertaken.

109. See, e.g., 2005 Annual Report of the Oregon State Bar Client Assistance Office 5 (2006), available at http://www.osbar.org/_docs/resources/CAO-05.pdf [hereinafter Oregon State Bar Report]; Wash. State Bar 2004 Annual Report, *supra* note 24, at 14 (reporting that less than 1% of grievances were filed by judges); State Bar of Ariz., Office of Lawyer Regulation: 2004 Annual Report, at 13, available at <http://azbar.org/Discipline/Reports/2004LawyerRegReport.pdf>. In addition to responding to complaints about lawyer misconduct, disciplinary agencies also impose discipline when they learn that a lawyer has been convicted of a serious crime or has been disciplined in another jurisdiction.

110. For example, in Indiana, a complainant must file a completed form which can only be obtained by calling the Indiana Supreme Court Disciplinary Commission. See Indiana Supreme Court Disciplinary Commission, *Complaining About Lawyer Misconduct*, <http://www.in.gov/judiciary/discipline/complaining.html> (last visited Nov. 28, 2006). In Massachusetts, complaint forms can only be obtained by calling the Attorney and Consumer Assistance Program. See Massachusetts Government, *How to File a Complaint*, <http://www.mass.gov/obcbbbo/complaint.htm#how> (last visited Nov. 28, 2006).

111. For example, the Florida Attorney and Consumer Assistance Program is designed to assist a consumer in resolving problems before a complaint is filed. See FlaBar Online, *Consumer Pamphlet: Attorney Consumer Assistance Program*, <http://www.flabar.org/tfb/TFBConsum.nsf/840090c16eedaf0085256b61000928dc/90dad2cf7a8f877b85256b2f006c61bd?OpenDocument>.

112. The rationale appears to be that in some cases, complaints may be used coercively for improper purposes. See, e.g., Massachusetts Bar Association, Report of the MBA Task Force on Lawyer Discipline, Protecting the Public: Reforming the Disciplinary Process (2005), at 11-13 available at http://www.massbar.org/publications/lawyersjournal/article.php?c_id=7932&vt=2. An exception may be made when the court has already found that the lawyer provided ineffective assistance of counsel. Mary Robinson, *Avoiding ARDC Anxiety: A Disciplinary Primer*, 84 ILL. B.J. 452, 453 (1996).

113. The Florida Bar, Public Information, Consumer Information, Attorney Consumer Assistance Program, <http://www.flabar.org/tfb/TFBConsum.nsf/840090c16eedaf0085256b61000928dc/90dad2cf7a8f877b85256b2f006c61bd?OpenDocument> (last visited Nov. 28, 2006) [hereinafter Florida Bar Consumer Assistance Program] (matters arising from ongoing litigation are outside the jurisdiction of Florida disciplinary agency).

114. Robinson, *supra* note 112, at 454; see also Supreme Court of New Jersey, 2002 State of the Attorney Discipline System Report, at 101, available at http://www.judiciary.state.nj.us/pressrel/annual_report02.pdf (indicating that cases involving inappropriate language are not docketed).

115. In Virginia, for example, fee disputes are routinely dismissed by disciplinary authorities. Although the billing of excessive fees is an ethical violation, Virginia clients have no recourse except to submit to binding arbitration through a Fee Dispute Resolution Program sponsored by the Virginia State Bar; attorneys are not required to submit to arbitration. Virginia State Bar, Fee Dispute Resolution Program, www.vsb.org/feedisputes.html (last visited Nov. 28, 2006). Similarly, in New Jersey, grievances concerning fee disputes are typically referred to the district fee arbitration committee. See N.J. R. 1:20-3(e)(2)(D) (2005).

116. For example, in New Jersey, a grievance concerning advertising will be referred to the Committee on Attorney Advertising. N.J. R. 1:20-3(e)(2)(B) (2005).

At that point, some cases will be sent to diversion programs¹¹⁷ or a private sanction will be imposed.¹¹⁸ The cases not resolved in this fashion will either be dismissed, or, if probable cause is found, the matter will be presented to a hearing panel for fact finding and consideration as to whether discipline should be imposed.¹¹⁹ The panel's findings and recommendations are referred to a disciplinary board, which reviews the panel's determinations and may administer sanctions.¹²⁰ In many jurisdictions, the disciplinary board will then make written recommendations which it files with the court.¹²¹ The state court typically relies on the findings of the hearing panel when deciding whether to accept the recommendation of the board or to impose a different sanction.

The extent to which the disciplinary process is private varies from state to state. Only Florida, New Hampshire, Oregon, and West Virginia treat all or most complaints about lawyers as a matter of public record.¹²² In most other states, the complaint becomes a public record once there has been a finding of probable cause.¹²³ In a minority of the jurisdictions, the public cannot attend disciplinary

117. In several jurisdictions, after some preliminary investigation, the lawyer may be offered the opportunity to enter a diversion program if the misconduct is viewed as "minor" and there has not been a previous recent instance of diversion. *See supra* note 20 and accompanying text. If the lawyer consents to diversion, he is usually asked to enter into a "diversion" agreement. *See, e.g.*, MO. RULES R. 5.105(d); WASH. RULES R. 6.1. If the lawyer successfully fulfills the requirements of the agreement, the discipline matter is terminated. *See, e.g.*, MARYLAND RULES OF PROCEDURE R. 16-736(g) (2006); MO. RULES R. 5.105(g). Diversion is not considered a discipline sanction and is typically treated as confidential. *See, e.g.*, ALA. RULES R. 8.1(i), (k).

118. The *MRLDE* state that a private admonition may only be imposed before the filing of formal charges. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(5) (2001). As a practical matter, however, some states have adopted variations of the *MRLDE* that provide for the imposition of a private sanction after probable cause has been found. In those cases, the private sanction will usually be imposed by disciplinary counsel, the hearing panel or the disciplinary board.

119. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 3(D) (2001). The hearing panel is typically composed of three individuals, two of whom are lawyers. *Id.* at R. 3(A).

120. *See, e.g., id.* at R. 2(G)(4)-(5). The board is usually composed of nine members. *Id.* at R. 2(B). In most states, lawyers may be subject to private discipline, typically called an admonition or private reprimand, or public discipline, including a public reprimand, suspension or disbarment. Levin, *Emperor's Clothes*, *supra* note 8, at 20-23. In most jurisdictions the board can impose a public reprimand. Jurisdictions vary as to whether the board can impose suspension or disbarment or whether those sanctions can only be imposed by the state court.

121. *See, e.g.*, ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2(G)(4) (2001).

122. Oregon treats all inquiries as public records. *See* OREGON STATE BAR REPORT, *supra* note 109, at 2. Florida treats "complaints" as public, which means that the Florida Bar has concluded that it has jurisdiction over a matter. Florida Bar Consumer Assistance Program, *supra* note 113. If bar counsel does not pursue an inquiry or dismisses a disciplinary case, the matter becomes public, *see* FLA. RULES R. 3-7.3 (g), although this information is only retained for one year. E-mail from Anthony Boggs, Legal Division, Florida Lawyer Regulation, to Leslie C. Levin, (Aug. 23, 2005) (on file with author). In West Virginia, when probable cause is not found, the investigative panel issues a brief explanatory statement, and that statement, together with the complaint, "shall be made available to the public." W. VA. RULES OF LAWYER DISCIPLINARY PROCEDURE R. 2.9 (b) (2005) [hereinafter W. VA. RULES]. New Hampshire makes available to the public for two years all correspondence relating to a grievance filed against a lawyer but which was not docketed as a complaint. *See* N.H. SUP. CT. R. 37A (IV)(a)(2)(B) (2005).

123. However, in some states, the complaint and files may cease to be public if the lawyer is not ultimately disciplined. *See, e.g.*, 2006 CT. PRACTICE BOOK § 2-50 (2006); N.H. SUP. CT. R. 37A (V)(e) (2005); WASH.

hearings even after probable cause is found; information about complaints does not become publicly available until there has been a finding of wrongdoing and a public sanction is imposed.¹²⁴

All but a few jurisdictions impose private discipline,¹²⁵ and in many jurisdictions, it is the type of discipline most often imposed.¹²⁶ When private discipline is imposed, the affected lawyer and complainant learn about the discipline, but the sanction and the proceedings themselves are maintained as confidential and typically cannot be accessed by the public. In some jurisdictions, even the complainant is prohibited from publicizing the private discipline.¹²⁷

It is somewhat easier to learn about a lawyer's public discipline history. Notice of public discipline is typically published in legal newspapers and sometimes in general circulation newspapers.¹²⁸ But in some states, consumers can only learn about the past disciplinary history of lawyers by making a telephone call to the court or a disciplinary agency.¹²⁹ In other states, it is also possible to access electronically some of the public disciplinary history of lawyers through

RULES R. 3.6 (b). Moreover, it can be difficult for the average member of the public to gain access to these public records. In some cases, written requests for information must be made to the state discipline agency and hefty per page charges accompany efforts to obtain relevant documents.

124. According to HALT, Alabama, Delaware, Hawaii, Idaho, Iowa, Maryland, Nevada, Utah, and Wyoming prohibit the public from attending discipline hearings. Lawyer Discipline Report Card, *supra* note 45. In addition, it appears that the public usually cannot attend discipline hearings in Missouri, New York and Texas. *See* MO. RULES R. 5.31; TEX. RULES OF DISCIPLINARY PROCEDURE R. 2.16 (2005). The public can only attend a second round of disciplinary hearings in Arkansas if there is an appeal from the initial determination. ARK. RULES OF PROFESSIONAL CONDUCT R. 11 (2005).

125. Connecticut, Florida, New Hampshire, Oregon, and West Virginia impose only public discipline sanctions and also make lesser actions accessible to the public, at least for a period of time. *See, e.g.*, 2006 CT. PRACTICE BOOK § 2-50 (b)(5) (2006); FLA. RULES R. 3-7.1(a)(5); N.H. SUP. CT. R. 37(20)(b), 37A(III)(d)(3), 37A(IV)(a)(2)(B)-(C); OR. STATE BAR R. 1.7 (2005); W. VA. RULES R. 2.9. A few other jurisdictions have no private "sanctions," but use confidential "dismissals with warning," "diversion," "agreements in lieu of discipline," or "advisory letters" for "minor" unethical conduct. D.C. BAR RULE XI, Disciplinary Proceedings § 17 (2005); ME. BAR R. 7.1(d)(4)(B) (2005); N.J. R. 1:20-9(a), (c)(3) (2005); WASH. RULES R. 3.3 (diversion of grievances concerning minor misconduct is confidential); *see also* WASH. RULES R. 5.7 (providing that an advisory letter may be sent to caution an attorney concerning his or her conduct but does not constitute a finding of misconduct and is not public information).

126. For example, in 2004, Minnesota imposed private discipline in 115 cases as compared to 23 cases of public discipline. SOLD 2004, *supra* note 1, at Chart II. In New York's First Department, which includes Manhattan, 89 private sanctions were imposed as compared to 59 private sanctions. *Id.* In Missouri, private discipline was imposed in 73 cases as compared to 44 cases of public sanctions. *Id.*

127. *See, e.g.*, Lawyer Discipline Report Card, *supra* note 45.

128. The MRLDE expressly encourages this practice. ABA MODEL RULES OF LAWYER DISCIPLINARY ENFORCEMENT R. 17(B) (2001).

129. *See, e.g.*, Indiana Supreme Court Disciplinary Comm., *Getting Information About Lawyers*, www.in.gov/judiciary/discipline/information.html (last visited Nov. 28, 2006) (requiring toll call to clerk's office to obtain information); Oregon State Bar, Ethics Complaints and Lawyer Discipline, <http://www.osbar.org/public/legalinfo/1174.htm#ethics> (last visited Nov. 28, 2006) (requiring toll call in Oregon).

disciplinary agency or judicial websites.¹³⁰ Unfortunately, the disciplinary histories on websites often only go back to the mid-to-late-1990s. In addition, the websites do not always indicate the reason why discipline was imposed.¹³¹ In some jurisdictions, even “public” discipline will disappear from public view after a specified period of time.¹³²

In addition, many state lawyer discipline agencies publish “annual reports,” but they are often not a particularly rich source of information. They usually report how many discipline “complaints” were docketed, in how many cases discipline was imposed, the identities of members of the disciplinary agency, and how much funding the agency received.¹³³ The more informative reports also provide information about the types of misconduct alleged, the sources of the complaints, and the types of practice specialties or practice settings in which the attorneys worked.¹³⁴ However, these reports typically do not provide information about the actual number of complaints received by the agency, the types of cases that are resolved through private sanctions, the number or types of cases resolved through diversion, or the race or law office setting of the lawyers who are subject to discipline.¹³⁵

III. THE PUBLIC POLICY CASE FOR MORE TRANSPARENCY

As discussed above, in most jurisdictions, the discipline process is confidential from the time that an individual complainant contacts the discipline agency until and unless probable cause is found. Indeed, even after a probable cause determination, the public may be unable to determine that a lawyer is defending against serious charges of unethical conduct because discipline proceedings in some jurisdictions remain private unless and until a public sanction is imposed. Since most of these matters are handled informally, dismissed, or resolved through private sanctions or diversion, information about most of the 125,000-plus complaints against lawyers each year is entirely confidential. Not only does this mean that the public at large has few means available to observe and evaluate

130. See, e.g., State of Conn., Judicial Branch, Grievance Committee, Grievance Decisions, <http://www.jud.ct.gov/SGC/decisions/default.htm> (last visited Nov. 28, 2006); Wash. State Bar Ass’n Discipline Notice Search, <http://pro.wsba.org/PublicDisciplineSearch.asp> (last visited Nov. 22, 2006).

131. For example, the websites in Washington and Illinois list that discipline was imposed on a lawyer, but do not indicate the reasons for the discipline and it is not possible to access the relevant disciplinary decisions from the website.

132. See, e.g., MO. RULES R. 5.31(d) (letter of admonition available to public only for three years); WASH. RULES R. 3.6 (b) (records of admonitions, which are initially public, may be destroyed after five years).

133. Some provide considerably less information. For example, Connecticut publishes no annual report that is available to the public. Some jurisdictions, like Florida and South Carolina, publish a few statistics with no accompanying explanation.

134. See, e.g., 2003 ARDC Report, *supra* note 39; 2004 N.J. Discipline System Report, *supra* note 17.

135. There are a few exceptions. For example, California and Georgia make an effort to track the number of contacts with the agency. The Illinois ARDC has occasionally compiled information about minority lawyers. See *supra* note 39.

the process of lawyer discipline, but also that individual consumers have no way to determine whether their own lawyers have received private discipline sanctions or have entered into diversion agreements.

When considering whether more transparency in the handling of lawyer discipline complaints is desirable, it is important to weigh the arguments for a confidential discipline process and the private disposition of complaints¹³⁶ against the benefits of a more transparent discipline process. But because the relative weight of these interests shifts during the progress of a disciplinary matter,¹³⁷ it is useful to try to identify the particular point in the discipline process at which the interest in confidentiality—which is not inconsiderable—might give way to more transparency. As noted earlier, the McKay Commission originally fixed this point at the time when the initial complaint was received, proposing that “all records of the lawyer disciplinary agency should be public from the time of the complainant’s initial communication with the agency.”¹³⁸ The ABA rejected this approach, and its *MRLDE* suggest that the interest in transparency outweighs confidentiality only after probable cause is found and only in cases involving more than “minor” misconduct.¹³⁹

I suggest that more discipline information should be open to public scrutiny by fixing the point at which information is disclosed at an earlier point in the process. I would not fix this point where the McKay Commission did because many initial inquiries to disciplinary agencies are made by people who do not have cognizable complaints,¹⁴⁰ and thus a fully open process would not be fair to lawyers. I do, however, suggest that the public’s right to information should vest once a discipline complaint is docketed and that the information should become available once that complaint is dismissed, resolved informally (through minor sanction or diversion),¹⁴¹ or referred for further proceedings after a probable cause determination. Close analysis suggests that the interests in transparency at this point in the process outweigh the interests in confidentiality.

A. THE JUSTIFICATIONS FOR KEEPING DISCIPLINE PRIVATE

(1) *Fairness and Reputational Concerns.* A significant reason for keeping the

136. I am using the term “private disposition” here and throughout this article to mean both disposition through private sanctions and disposition through diversion, which is typically also maintained as confidential.

137. In other words, many of the arguments supporting confidentiality are strongest at the beginning of the discipline process and weaken as the proceeding progresses toward a final resolution against the attorney.

138. See *supra* note 98 and accompanying text. The McKay Commission later accepted a “friendly amendment” to its proposal after opposition from the ABA House of Delegates. See *LAWYER REGULATION FOR A NEW CENTURY*, *supra* note 5, at 35.

139. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 commentary (2001); see also ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(A) (1993).

140. See, e.g., Robinson, *supra* note 112 and accompanying text.

141. What this means, as a practical matter, is that there would be no private sanctions or confidential diversions.

discipline process private is fairness to the attorneys.¹⁴² Most complaints are ultimately dismissed and attorneys fear that the publication of baseless complaints would unfairly damage lawyers' reputations.¹⁴³ This argument has considerable force. Clients sometimes complain to disciplinary agencies simply because they do not like the results achieved or the final bill. Some clients have unrealistic expectations of what their lawyers can do for them and as a result, will attempt to file a complaint. Opposing lawyers will sometimes make disciplinary complaints to obtain an advantage in ongoing litigation.

Lawyers are very concerned about their reputations, and as the McKay Commission noted, "a lawyer's reputation is not only the basis for his or her livelihood, it is a cherished and integral part of the lawyer's life."¹⁴⁴ The *MRLDE* drafters recognized that there was some unfairness inherent in the publicity of unfounded charges and concluded that the discipline process should be secret until a finding of probable cause. Their decision reflected an effort to accommodate the public's interest in open proceedings, on the one hand, against fairness to the charged attorneys on the other. They reasoned that "[o]nce a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous."¹⁴⁵ As the *MRLDE* Commentary explains, "[t]he need to protect the integrity of the disciplinary process in the eyes of the public requires that at this point further proceedings be open to the public."¹⁴⁶

Fairness arguments in support of confidentiality admittedly become more compelling earlier in the discipline process, such as when a docketed complaint is dismissed. But if the information about the docketed complaint is coupled with a report that it was dismissed, this somewhat ameliorates fairness concerns. Proponents of an open disciplinary process have pointed to the fact that Oregon, West Virginia, and Florida have made discipline complaints available for several years with "no evidence" of any harm to lawyers.¹⁴⁷ Nevertheless, this claim appears too facile. In fact, there has been no systematic effort to study whether

142. See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16 commentary (2001) ("The confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the [attorney], and protects against publicity predicated upon unfounded accusations.").

143. Fairness and reputational concerns are not completely co-extensive. Obviously, they are closely linked when a lawyer suffers injury because he is wrongly charged with misconduct. While reputational concerns still exist when a lawyer has been found to have engaged in misconduct, there is considerably less of a "fairness" concern about publicizing the misconduct.

144. LAWYER REGULATION FOR A NEW CENTURY, *supra* note 5, at 38; see also *Karlin v. Culkin*, 162 N.E. 487, 492 (N.Y. 1928) ("Reputation . . . is a plant of tender growth, and its bloom, once lost, is not easily restored."); *In re Aretakis*, 791 N.Y.S.2d 687, 688 (App. Div. 2005).

145. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16 commentary (2001).

146. *Id.*

147. The McKay Commission noted, "There is no evidence from those states of any harm to lawyers from making disciplinary records public. The arguments against open disciplinary systems are based on conjecture and emotion." LAWYER REGULATION FOR A NEW CENTURY, *supra* note 5, at 35; see also Steven K. Berensen, *Is it Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 681 (2001).

the open discipline process has damaged the reputations of innocent lawyers.¹⁴⁸ The more compelling point is comparative. Claims that it is “unfair” to disclose dismissed complaints are difficult to sustain when the contents of civil complaints, police arrest blotters, and criminal preliminary hearings are open records and proceedings.¹⁴⁹

The fairness arguments in support of confidentiality have even less force when applied to private sanctions and confidential diversion programs. The *MRLDE* endorse the use of private sanctions in cases “of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer”¹⁵⁰ The justification explicitly relies on reputational considerations, as the *MRLDE* commentary notes that “[a] private sanction in those cases informs the lawyer that his or her conduct is unethical but does not unnecessarily stigmatize a lawyer”¹⁵¹ In other words, when private discipline is imposed, a lawyer has been found to have engaged in misconduct, but his reputation is protected on the theory that the lawyer is not someone from whom the public needs protection.¹⁵² There is no evidence, however, that disciplinary counsel or hearing boards—which typically impose private sanctions—are capable of determining whether the lawyer is likely to engage in similar misconduct in the future.¹⁵³ Moreover, in the case of private sanctions and diversion, the lawyer typically admits to misconduct and there is nothing inherently “unfair” about making this information public so long as the lawyer did not consent to the disposition believing it would be kept private.¹⁵⁴

(2) *Integrity of Investigative Process.* In most challenges to confidential lawyer discipline proceedings, courts consider bar arguments that confidentiality pro-

148. This would admittedly be difficult to prove. In the absence of evidence, some courts have assumed that lawyers' reputations are seriously harmed by baseless charges. *See, e.g., Chronicle Publ'g Co. v. Super. Ct.*, 354 P.2d 637, 648 (Cal. 1960) (“The fact that a charge has been made against an attorney, no matter how guiltless the attorney might be, if generally known, would do the attorney irreparable harm even though he be cleared by the State Bar.”).

149. *See, e.g., Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 15 (1986); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91-92 (2d Cir. 2004); *Caledonian Record Publ'g Co. v. Walton*, 573 A.2d 296 (Vt. 1990); *Newspapers, Inc. v. Metropolitan Police Dep't*, 546 A.2d 990 (D.C. 1988); *Newspapers Inc. v. Breier*, 279 N.W.2d 179 (Wis. 1979).

150. ABA MODEL RULES LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(5) (2001).

151. *Id.* at R. 10 commentary.

152. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS STD. 2.6 commentary (1991).

153. Indeed, even mental health professionals have great difficulty predicting future conduct. *See, e.g., P. Firestone, et al., Recidivism in Convicted Rapists*, 26 J. AM. ACAD. PSYCHIATRY L. 185 (1998); Rachel Lipson Glick, et al., *Emergency Psychiatry: How Should Emergency Psychiatrists Respond to School Violence?*, 55 PSYCHIATRY SERV. 223 (2004).

154. Where minor misconduct is involved, there would be reputational arguments for not widely publicizing this information, even if it is open for public inspection. The question of whether this information should be broadly disseminated—or simply available if requested—is a difficult one that merits serious consideration.

tests the integrity of the investigative process.¹⁵⁵ According to this argument, complainants and witnesses may not come forward if their complaints and testimony are going to be known publicly.¹⁵⁶ For instance, clients may be deterred by a more public discipline process from revealing information about lawyer misconduct,¹⁵⁷ presumably because they do not wish to reveal they have been duped by their own lawyer, they do not wish to reveal certain client confidences, or they fear that the lawyer will reveal confidential client information under the self-defense exception to client confidentiality rules. In some cases, bar counsel also argue that confidentiality is needed because investigations into alleged unethical activity will be impaired by premature publicity.

Most courts that have considered arguments concerning the integrity of the investigative process have noted that there does not seem to be empirical support for these claims.¹⁵⁸ It is, in fact, difficult to measure the deterrent effect, if any, that a more public discipline process may have on an individual's willingness to make a complaint or a witness's willingness to come forward. But it does not appear that the complaint statistics in West Virginia, which makes complaints publicly available after they are dismissed, are much different than the complaint statistics in Iowa or Maryland, which maintain confidentiality until a sanction is imposed.¹⁵⁹ This is unsurprising. Anyone who brings a complaint to a disciplinary agency presumably recognizes that if the complaint is found meritorious, there is some likelihood that at least some of the information will become public. The only questions are how much information will become public and at what point in the process this will occur. In addition, the investigative integrity argument is not especially strong with respect to witnesses, who can be

155. See, e.g., *Doe v. Doe*, 127 S.W.3d 728, 733 (Tenn. 2004); *Daily Gazette Co. v. Comm. on Legal Ethics*, 326 S.E.2d 705, 709 (W. Va. 1984).

156. See *Doe v. Sup. Ct.*, 734 F. Supp. 981, 985 (S.D. Fla. 1990); *In re Brooks*, 678 A.2d 140, 144 (N.H. 1996); *Doe v. Doe*, 127 S.W.3d at 735-36.

157. See, e.g., *In re Aretakis*, 291 N.Y.S.2d 687, 688 (App. Div. 2005) (holding that a policy of keeping records relating to disciplinary complaint confidential until finally determined "serves the purpose of safeguarding information that a potential complainant may regard as private or confidential and thereby removes a possible disincentive to the filing of complaints of professional misconduct"); *Sadler v. Or. State Bar*, 550 P.2d 1218, 1221 (Or. 1976) (noting the Bar's argument that "individuals might not feel so free to complain if they knew their complaints might be made public").

158. See, e.g., *Doe v. Sup. Ct.*, 734 F. Supp. at 985 (discussing the State Bar's argument that confidentiality encourages the filing of complaints and the cooperation of witnesses); *Sadler*, 550 P.2d at 1221 (discussing the State Bar's argument that "individuals might not feel so free to complain if they knew their complaints might be made public"). But see *Daily Gazette Co.*, 326 S.E.2d at 712 (noting that public disclosure of facts regarding a complaint prior to the filing of formal charges can impair the State Bar's investigatory function).

159. In fact, proportionally more complaints are received in West Virginia than in Iowa or Maryland. For example, during 2004, there were 5,583 lawyers with active licenses in West Virginia, and 663 disciplinary complaints were received. In Iowa there were 8,342 active lawyers and 641 complaints received. In Maryland there were 31,934 active lawyers and 2,095 complaints received. 2004 SOLD, *supra* note 1, Chart I. Admittedly the comparison is imperfect because "complaints" may be reported differently in these jurisdictions and there may be other factors at work. But in any event, the administrative argument about deterring complaints seems unsupported by the available data.

subpoenaed to give evidence in connection with investigations,¹⁶⁰ regardless of their preferences with respect to secrecy. Any concern about protecting the integrity of the investigation is much less compelling after a finding of probable cause, when the investigation is essentially complete.¹⁶¹ And of course, the concern that confidentiality is needed to protect the integrity of the process does not apply with any real force once the decision to impose a sanction is made.¹⁶²

(3) *Administrative Efficiency*. Another argument for keeping lawyer discipline confidential—at least where “minor” misconduct is involved—is administrative efficiency. In many jurisdictions private dispositions of misconduct do not require formal disciplinary charges and can be disposed of relatively easily without a finding of probable cause, a hearing, or the involvement of the court.¹⁶³ If the private handling of “minor” misconduct were eliminated, streamlined procedures that have been put in place for dealing with these matters might no longer be used, resulting in more demands on state discipline systems. According to this argument, lawyers may be less willing to forego a hearing and consent to an admonition or diversion if they know the matter will be public.¹⁶⁴

Of course, streamlined procedures can be and are used in some jurisdictions for the imposition of public admonitions on consent, reducing the strain on state systems.¹⁶⁵ It is also possible that lawyers will still settle on consent to resolve discipline complaints quickly and in order to get the lightest possible form of public discipline. The experiences in Florida and Oregon suggest that even in jurisdictions with exclusively public discipline sanctions and public diversion, lawyers will consent to these dispositions. It is less clear whether the administrative efficiency of discipline systems in the very largest jurisdictions will be adversely affected if many lawyers refuse to consent to discipline because the sanctions are not private.

(4) *Reluctance to Publicly Sanction Minor Misconduct*. Although not explicitly argued by the bar, another reason that arguably justifies the private treatment of “minor” misconduct is lawyers’ reluctance to publicly sanction such misconduct.

160. Doe v. Doe, 127 S.W.3d at 735. Of course, it can be argued that witnesses may be less likely to come forward if they cannot do so confidentially but there is, at the present time, no empirical support for this claim.

161. See *id.* at 736.

162. In the unusual case where an individual may not want to reveal personal information in order to protect his or her identity or privacy, the court can order that the individual’s identity not be revealed without requiring that a private sanction be imposed.

163. See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(C) (2001).

164. See generally *Kamasinski v. Judicial Rev. Council*, 44 F.3d 106, 111 (2d Cir. 1994) (considering similar argument in the judicial discipline context); *In re Brooks*, 678 A.2d 140, 145 (N.H. 1996) (noting that attorneys may be less willing to consent to discipline if the sanction is not private, but that this gain in efficiency did not outweigh the First Amendment concerns in that case); *In re Johnson*, 461 N.W.2d 767, 769 (S.D. 1990) (considering argument that disclosure of affidavit may prolong time-consuming disciplinary litigation and discourage disbarment by consent proceedings).

165. For example, in Oregon, if the Professional Responsibility Board determines that an admonition is appropriate and the lawyer consents, the admonition may be imposed without a finding of probable cause or the filing of a formal complaint. OR. STATE BAR R. 2.6; 3.6 (2005).

When the Clark Commission reviewed lawyer discipline systems, it recommended the vesting of private admonitory power in all disciplinary agencies because it found that “minor” misconduct was not being sanctioned.¹⁶⁶ The Commission noted that “[t]he disciplinary agency that has no alternative but to dismiss a complaint or prosecute a formal disciplinary proceeding will often decide to dismiss.”¹⁶⁷ While the cost of using the formal discipline apparatus for “minor” misconduct was part of the concern, so was the view that “[p]rosecution of a formal disciplinary proceeding predicated on an instance of minor misconduct is unduly harsh.”¹⁶⁸ Thus, the concern was that if private admonitions were not available, there might be a greater reluctance to sanction “minor” misconduct because it would be publicly reported.

It may be true that lawyers on disciplinary hearing panels find it difficult to impose a public sanction on a lawyer who has committed only “minor” misconduct. But this fact may simply reflect a problem with having lawyers sit on the hearing committees, rather than a problem with the use of public discipline per se.¹⁶⁹ If lawyers are squeamish about imposing minor public sanctions on other lawyers, the answer may be to have more laypersons involved in the discipline process.

(5) *Rehabilitation of Lawyers.* Another occasionally cited justification for confidential discipline proceedings—and for confidential sanctions—is that they promote the rehabilitation of lawyers.¹⁷⁰ This is a justification of relatively recent origin; when the Clark Commission proposed the use of private admonitions for minor misconduct in 1970, it made no reference to the rehabilitative function of private admonitions.¹⁷¹ While there are no studies supporting the view that confidentiality is needed to insure rehabilitation, there is some limited anecdotal support for the view that lawyers experience even minor disciplinary proceedings as emotionally debilitating and that such an experience may make lawyers more alienated and less likely to initiate preventative procedures in their practices.¹⁷² Research would be required to test whether there is in fact any connection between discipline and a failure to institute preventive procedures—and whether it matters that such discipline is public or private—before reaching any conclusions about the strength of rehabilitation as a rationale for the private

166. PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, *supra* note 3, at 92.

167. *Id.* at 92-93.

168. *Id.* at 93.

169. As previously noted, hearing panels are comprised primarily of lawyers. *See supra* note 119; *see also* Lawyer Discipline Report Card, *supra* note 45 (noting that six states have no non-lawyers on hearing panels and that Idaho is the only state in which non-lawyers comprise the majority on the hearing panels).

170. *See* McLaughlin v. Philadelphia Newspapers, Inc., 348 A.2d 376, 381 (Pa. 1974).

171. PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, *supra* note 3, at 92-96. Prior to that time, courts showed relatively little interest in the rehabilitative function of lawyer discipline. *See, e.g.,* Resner v. State Bar of Cal., 349 P.2d 67, 72 (Cal. 1960) (stating in proceeding to review recommendation of disbarment, “[w]e are not, in this proceeding, concerned with rehabilitation”).

172. Ellis, *supra* note 18, at 1230.

treatment of misconduct.

The more difficult question arises from the increasing interplay between Lawyer Assistance Programs, which are designed to help lawyers with psychological and substance abuse problems, and diversion. Lawyer Assistance Programs routinely offer lawyers confidentiality to encourage them to seek out and effectively use counseling services.¹⁷³ As an increasing number of lawyers are required to participate in Lawyer Assistance Programs as a condition of diversion, difficult questions arise as to how much information can or should be revealed to the public about these referrals. At the present time, lawyers frequently raise their psychological problems in lawyer discipline proceedings as a defense or in mitigation of misconduct.¹⁷⁴ This occurs even in jurisdictions where the proceedings are made public after a finding of probable cause. It seems probable that so long as disclosure of these problems helps lawyers avoid discipline sanctions, many lawyers will not be deterred from raising their psychological problems in disciplinary proceedings. It cannot be predicted with complete confidence, however, that self-disclosure of psychological problems will never be inhibited by a lack of secrecy earlier in the process, at the point where diversion agreements typically are discussed. This potential problem need not, however, be addressed by maintaining total secrecy concerning the lawyer's misconduct. Instead, the problem could be addressed by reporting the fact that the lawyer has entered into a diversion agreement, but not revealing that the diversion involved referral to a Lawyer Assistance Program for the purpose of addressing psychological or substance abuse problems.

(6) *The Reputation of the Bar.* A final reason that has been advanced for keeping the discipline process and discipline sanctions confidential is protection of the reputation of the Bar. The thrust of this argument is that confidentiality avoids the loss of confidence in the Bar caused by complaints against lawyers, frivolous or otherwise. Most courts have rejected this argument.¹⁷⁵ As will be seen below, they have concluded that a secret process and secret sanctions are more harmful than helpful to the Bar's reputation.

173. See, e.g., Oregon Attorney Assistance Program, Notice of Privacy Practices, <http://www.oaap.org/index.asp?page=privacy> (last visited Nov. 25, 2006).

174. See Levin, *Emperor's Clothes*, *supra* note 8, at 24-25; Alex Gronke, *The State: Assembly OKs Bar-Funded Rehab for Lawyers*, L.A. TIMES, June 22, 2001, at B8 ("30% to 40% of the [California] bar's discipline cases involve substance abuse in some way"). But see Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 835 (2004) (noting that in only 143 of the 3,493 cases in their database, the disciplined attorney offered, as a mitigating factor, alcoholism, drug abuse, depression, and other mental health issues).

175. As more than one court has noted, confidentiality is more likely to engender resentment and suspicion than to protect the reputation of the bar. *Doe v. Sup. Ct.*, 734 F. Supp. 981, 987 (S.D. Fla. 1990); *Doe v. Doe*, 127 S.W.3d 728, 734-35 (Tenn. 2004). But see *McLaughlin*, 348 A.2d at 381.

B. THE ARGUMENTS FOR A MORE OPEN DISCIPLINE PROCESS

(1) *Consumer Protection.* One of the two main arguments for opening up the lawyer discipline process and eliminating the private disposition of misconduct is protection of the public. Horror stories abound about clients who were defrauded by their lawyers while those same lawyers were under investigation by disciplinary counsel in other discipline cases.¹⁷⁶ If clients were able to access information about complaints docketed against their lawyers, clients might then more carefully scrutinize how the lawyers were representing them.

The likelihood that consumers would be better protected if all discipline sanctions and most diversion were made public is significant. While it is possible that attorneys who receive one private admonition will never find themselves before a disciplinary board again, that is often not the case. Indeed, many clients are victimized by lawyers who had previously received more than one private sanction.¹⁷⁷ In addition, it is highly unlikely that private admonitions or diversion work as a general deterrent—because most lawyers never learn of them—and there is little evidence that they work as a specific deterrent. Thus, if consumers could find out which lawyers have been found to have engaged in minor misconduct and the details of the misconduct, they would be in a position to better determine whether they need to take steps to protect themselves from certain lawyers.

(2) *Public Confidence.* The other main argument for a more transparent lawyer discipline process is to promote more confidence in the lawyer discipline system. As one court has observed, “if the legal profession’s practice of self-regulation is to remain viable, the public must be able to observe *for themselves* that the process is impartial and effective. We cannot simply expect the public to blindly accept that justice is being done.”¹⁷⁸ A lawyer discipline process in which only public discipline is imposed might also generate more public confidence in a system which is seen as secret and overly protective of lawyers.¹⁷⁹ Although most states include lay representatives on disciplinary hearing boards, the public members are typically in the minority.¹⁸⁰ The public and the media understandably suspect a process they often cannot observe and cannot review even after the process has been concluded.¹⁸¹ By opening the process and making sanctions public, the general public is more likely to view the disciplinary system as fair

176. See, e.g., Thomas D. Williams, *Disciplining Bad Lawyers A Long, Slow Process; and While State Panel Deliberates, Questionable Attorneys Continue to Practice*, HARTFORD COURANT, Mar. 7, 2004, at A1.

177. See *supra* notes 6, 8-9 and accompanying text.

178. *Daily Gazette Co. v. Comm. on Legal Ethics*, 326 S.E.2d 705, 711 (W. Va. 1984) (emphasis in original).

179. See *supra* note 45 and accompanying text.

180. See *supra* note 119.

181. See *Daily Gazette Co.*, 326 S.E.2d at 365-66; see also *Doe v. Sup. Ct.*, 734 F. Supp. 981, 988 (S.D. Fla. 1990) (noting that continuing confidentiality after a grievance is found meritorious “is far more likely to engender suspicion than foster confidence”); see also Lawyer Discipline Report Card, *supra* note 45; Kay A. Ostberg, *The Conflict of Interest in Lawyer Self-Regulation*, THE PROF. LAW., Summer 1989, at 8 (noting that

and legitimate.

(3) *Public Input.* If the disciplinary process were more transparent, the public could provide more input into how it is conducted. For example, when low-level public sanctions are imposed for certain misconduct, a negative public reaction might cause decisionmakers to more carefully consider the public's concerns about certain types of lawyer misconduct. Indeed, if all sanctions and dismissals were public, any difficulty that lawyer-members of disciplinary boards might have with imposing discipline for "minor" misconduct would undoubtedly be balanced against the fact that the public could be observing—and reacting to—the sanctions imposed. Moreover, if the public knew more about what was happening in terms of lawyer discipline, its response might encourage closer oversight of the disciplinary process by the legislature and the judiciary. It seems fair to assume that if the public could more closely observe the way in which complaints against lawyers are handled and resolved, the disciplinary system would become much more consumer-oriented than it currently is in most jurisdictions.¹⁸²

(4) *Complainant's Feelings.* A system of private discipline and private sanctions largely disregards the feelings of clients who believe they have been wronged by their lawyers. The vast majority of complaints about lawyer misconduct come from clients, but when the discipline process fails to address a complaint, or addresses it in a private fashion, this likely compounds the injury from the client's perspective.¹⁸³ Imagine, for example, a client whose lawyer was found to have engaged in serious neglect that prejudiced the client, but who received a private sanction. In many jurisdictions, that client is prevented by court rules from appealing the sanction and in some jurisdictions, from even communicating the existence of the private sanction to anyone else.¹⁸⁴ It is therefore not surprising that in some cases clients have contemplated risking contempt of court to publicize the lawyer's wrongdoing and the disciplinary

"self-policing has led to overprotecting of lawyers, manifested in a process that is secret, slow and overly lenient").

182. Defenders of a more secret discipline process might argue that the public should not have any significant input because the public is not equipped to evaluate lawyer behavior or the disciplinary process. According to this argument, the issues are complex and the lawyers' ethical obligations demand a very careful weighing of conduct that occurs in a very pressured environment. This argument does not, however, address the fact that secret processes and secret discipline prevent the public from even expressing an educated view about how lawyer discipline is conducted and the sanctions imposed, wholly apart from the question of who actually makes the determination of what the appropriate sanction should be in any given case.

183. Indeed, disputants care a great deal about the perceived fairness of the dispute resolution process. Studies reveal that "perceptions of procedural justice influence disputants' perceptions of substantive justice, their compliance with the outcomes reached in dispute resolution processes and their perceptions of the legitimacy of the institution that provided or sponsored the dispute resolution process." Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 184-85 (2002).

184. See Lawyer Discipline Report Card, *supra* note 45.

system's response—or the inadequacy of the response.¹⁸⁵

(5) *Increased Information for Disciplinary Authorities.* If the disciplinary process were more open, it would probably increase the availability of useful information about lawyer misconduct. For example, former clients who learn of docketed complaints against their lawyers might step forward to complain of similar misconduct by the lawyers. This information could help notoriously under-financed disciplinary investigators develop evidence of a pattern of misconduct, which typically can provide a basis for increasing a lawyer's disciplinary sanctions.¹⁸⁶ It might also cause agencies to pursue matters against lawyers whom they otherwise viewed as one-time offenders and to better evaluate whether a low-level disposition is truly appropriate in particular cases.

(6) *The Use of Precedent.* Ironically, private discipline sanctions can hurt other lawyers who are charged with misconduct. If discipline sanctions are private, the facts of those cases are not available to be used by other lawyers as precedent in their own cases. This may particularly disadvantage solo and small law firm practitioners, who often represent themselves in disciplinary proceedings and may not have the resources to track down the facts of individual cases and find cases similar to their own.¹⁸⁷ Private discipline may also result in a lack of consistency in decisionmaking,¹⁸⁸ unless disciplinary counsel or hearing panels take it upon themselves to thoroughly research the sanctions imposed in similar cases.

(7) *Research.* Disciplinary agencies lack the resources and, in some cases, the will to maintain information in a systematic fashion that enables them to track the effectiveness of their work. In some states, information about the time required to resolve complaints is not maintained, apparently so that the disciplinary agency does not face criticism. Bar counsel do not maintain information relating to recidivism among lawyers who had been previously disciplined, although some counsel have admitted privately that it would be a good idea to do so.¹⁸⁹ The use of exclusively public sanctions and the opening of diversion records would permit the tracking of recidivism and reveal other important information. If discipline records were open, more research could be done to answer the questions raised in the Introduction of this article and many other important

185. See, e.g., *Doe v. Sup. Ct.*, 734 F. Supp. at 983.

186. See, e.g., ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS STD. 9.22 (c)-(d) (1991).

187. At least one court has taken the view that the bar was required to produce information about confidential disciplinary proceedings in similar cases. See *Brotsky v. State Bar of Cal.*, 368 P.2d 697, 706 (Cal. 1962). But other courts have taken a much more restrictive view of lawyers' rights to discovery in discipline cases. Moreover, the right to discovery only arises once probable cause is found, so that the lack of access to precedent will disadvantage lawyers who may be deciding whether to consent to a sanction before a finding of probable cause.

188. See generally *Cincinnati Post v. Ct. App.*, 604 N.E.2d 153, 156 (Ohio 1992) (noting that inconsistent results "can be analyzed and challenged only if decisions are made public").

189. See *supra* note 8.

questions relating to the efficacy and fairness of lawyer discipline.¹⁹⁰

IV. THE LEGAL ARGUMENTS FOR LESS SECRECY IN LAWYER DISCIPLINE

In most states, the courts adopt rules governing the procedures to be used in lawyer discipline proceedings, as well as the types of discipline that can be imposed. Either the courts or the legislatures determine which procedures and records will be confidential and which information will be open to the public.¹⁹¹ There have been relatively few legal challenges to these confidentiality requirements. In this section, I describe relevant case law and explore possible legal bases for arguing that the public has a right of access to lawyer discipline proceedings and to certain discipline records. In doing so, I do not mean to suggest that steady litigation is the best or quickest way to open the discipline system up to the public; rather, this section simply explores ways to make some headway towards greater transparency in the disciplinary process within the framework of current law.

A. THE LAWYER DISCIPLINE CASE LAW

Challenges to rules keeping lawyer discipline confidential have principally arisen in two types of cases. In the first type of case, courts have considered challenges to rules that prevent complainants from publicizing the fact that they have made a complaint about a lawyer to state discipline agencies. In the second, courts have considered right of access claims by which accused lawyers, the media, or other interested parties have sought to attend lawyer disciplinary hearings or to obtain confidential discipline records.

190. While disciplinary agencies arguably could maintain and report this information rather than make their records public, this would not be the ideal approach, nor is it likely to occur. The numbers and analysis will always be suspect if provided by people whose own systems are being evaluated. Moreover, the research performed or commissioned to date by those "within" the system has had some significant limitations. *See supra* notes 27, 40-43 and accompanying text. From a practical perspective, too, it is unlikely that this information could be compiled and reported by the agencies. Disciplinary agencies are notoriously underfunded and understaffed. *See, e.g.,* Neil Modie, *Stricter Policing of Lawyers Urged: Discipline by Court, Not Bar, Proposed*, SEATTLE POST INTELLIGENCER, Jan. 12, 1994, at B1 (reporting lack of money and personnel as the biggest problem in the state's disciplinary system); *see also California High Court Imposes Additional Fee on Lawyers*, NAT'L L.J., Dec. 21, 1998, at B28 (describing underfunding of discipline in California); *Rep./Bull.: Report of the Office of Chief Disciplinary Counsel*, J. Mo. B. Sept.-Oct. 2005, at 266, 269 (reporting that the disciplinary agency was too understaffed to pursue volume of unauthorized practice of law complaints it received). They lack the resources to track and compile important information like recidivism rates on a regular basis.

191. For example, in California and New York the confidentiality of discipline records is provided by statute. *See* CAL. BUS. & PROF. CODE § 6086.1 (Deering 2005); N.Y. JUD. LAW § 45 (McKinney 2005). In many other states, confidentiality is prescribed by court rule. *See, e.g.,* MO. RULES R. 12.21(a); PA. RULES OF DISCIPLINARY ENFORCEMENT R. 402 (2005).

1. CHALLENGES TO RULES THAT PREVENT COMPLAINANTS FROM DISCLOSING INFORMATION

The courts that have considered challenges to court rules preventing complainants from discussing their complaints about lawyers have struck down such rules on First Amendment grounds. For example, in *Doe v. Supreme Court of Florida*,¹⁹² a federal district court struck down as unconstitutional a Florida rule that required complainants to keep confidential information about lawyer complaints or face the prospect of being held in contempt of court. The complainant in *Doe* challenged the rule after his complaint against the lawyer had been found to be meritorious. The federal court found that the state bar was unable to come forward with a compelling interest to justify the content-based restriction. It noted that “imposing an enforced silence on all aspects of Bar disciplinary matters—including investigations, probable cause hearings, and final dispositions—is more likely, in our view, to engender resentment, suspicion, and contempt for Florida’s Bar and its legal institutions than to promote integrity, confidence, and respect.”¹⁹³ Relying on the United States Supreme Court decision in *Landmark Communications, Inc. v. Virginia*,¹⁹⁴ in which the Court struck down a Virginia statute that subjected persons to criminal sanctions for divulging information regarding confidential judicial misconduct proceedings,¹⁹⁵ the *Doe* court also found that insofar as the Florida confidentiality rule was designed to protect the reputation of the Florida Bar, there was no justification for it once the grievance was found to be meritorious.¹⁹⁶ Since then, the Supreme Courts of New Hampshire, New Jersey, and Tennessee have found unconstitutional similar state court rules requiring confidentiality in the lawyer discipline context.¹⁹⁷

2. CHALLENGES TO RULES THAT PREVENT ACCESS TO LAWYER DISCIPLINE HEARINGS OR RECORDS

Relatively few courts have considered legal attempts to open up the lawyer

192. 734 F. Supp. 981 (S.D. Fla. 1990).

193. *Id.* at 987.

194. 435 U.S. 829 (1978).

195. In *Landmark*, a newspaper was indicted for violating a Virginia criminal statute after it reported on a pending inquiry by the Virginia Judicial Inquiry and Review Commission concerning a state judge before a formal complaint was filed. The United States Supreme Court specifically noted that it was not considering the state’s power to keep the Commission’s proceedings confidential or whether there was any constitutionally compelled right to access for the press to those proceedings. *Id.* at 837-38. It found, however, that the interest in maintaining the reputation of judges or the institutional integrity of the courts was insufficient to justify the punishment of speech in that case, where First Amendment rights were at stake. *Id.* at 842-43.

196. *Doe v. Sup. Ct.*, 734 F. Supp. 981, 988 (S.D. Fla. 1990).

197. See *In re Brooks*, 678 A.2d 140 (N.H. 1996); *R.M. v. Sup. Ct.*, 883 A.2d 369 (N.J. 2005); *Doe v. Doe*, 127 S.W.3d 728, 735 (Tenn. 2004).

discipline process or discipline records.¹⁹⁸ Efforts to obtain lawyer discipline records based on state open records laws have had mixed results and have turned on the precise language and history of the particular state law.¹⁹⁹

There have been remarkably few state constitutional challenges to confidentiality rules in the lawyer discipline context. In *Daily Gazette Co. v. Committee on Legal Ethics*,²⁰⁰ the West Virginia Supreme Court used the state constitution to find a right of public access to attorney disciplinary complaints, even when there was no finding of probable cause, and a right of access to disciplinary hearings. The court held that "the right of public access to attorney disciplinary proceedings precludes utilization of private reprimand as a permissible sanction."²⁰¹ In that case, the West Virginia State Bar by-law provided that all proceedings involving allegations of misconduct "shall be kept confidential until and unless a recommendation for the imposition of public discipline is filed with the court."²⁰² Yet the state constitution provided that "[t]he courts of this state shall be open."²⁰³ The court found that attorney disciplinary proceedings conducted by the West Virginia State Bar Legal Ethics Committee are quasi-judicial proceedings not exempted from constitutional protections.²⁰⁴ Although other states with closed lawyer discipline procedures have similar state constitutional provisions calling for an "open court," the issue has not been litigated in those states.²⁰⁵ In the only other case in which a party attempted to gain access to lawyer discipline records based on state constitutional free speech and due process grounds, the Montana Supreme Court rejected the challenge, maintaining

198. The context in which these cases arise vary considerably. In some cases, accused lawyers seek information about their own discipline case—or other cases—for the purposes of defending themselves or attending certain proceedings. In other cases, the media seek access to discipline information for the purpose of publication or for the purpose of defending libel actions. In a few cases, individual litigants seek disciplinary information about a lawyer as part of the discovery process in civil cases. In virtually all of these cases, state discipline agencies oppose those efforts, maintaining the right to keep the discipline information confidential.

199. Compare *Sadler v. Or. State Bar*, 550 P.2d 1218 (Or. 1976) (finding that the state's Open Records law required disclosure of all communications received by the State Bar regarding the professional conduct of an attorney and all documents disposing of matters raised in those communications), with *Attorney Grievance Comm'n v. A.S. Abell Co.*, 452 A.2d 656 (Md. 1982) (finding that the state's Public Information Act did not require disclosure to the press of notifications to complainants regarding the disposition of filed complaints against attorneys, including private sanctions); see also *Chronicle Publ'g Co. v. Super. Ct.*, 354 P.2d 637, 650 (Cal. 1960) (state open records laws do not apply to State Bar discipline proceedings).

200. 326 S.E.2d 705, 711 (W. Va. 1984).

201. *Id.* at 714. The court found that the only way to reassure the public of the integrity of lawyers was to allow the public to observe for itself the hearing process and the decisions of the committee, including decisions to dismiss complaints for lack of probable cause. *Id.* at 711-14.

202. *Id.* at 709.

203. W.VA. CONST. art. III, § 17.

204. See *Daily Gazette Co.*, 326 S.E.2d at 708-09, 711-14.

205. For example, Alabama, Delaware, Idaho, Missouri, and Utah all have closed discipline hearings, see *supra* note 124 and accompanying text, yet they have "open court" state constitutional provisions similar to the one in West Virginia. See ALA. CONST. art I, § 13; DEL. CONST. ART. I, § 9; IDAHO CONST. art I, § 18; UTAH CONST. art. I, § 11. Nevertheless, there has been no litigation in those states asserting a right of access to lawyer discipline proceedings based on the state constitutional provisions.

as confidential information that was acquired by an ethics commission prior to the filing of a formal complaint in court.²⁰⁶

There also have been surprisingly few challenges to lawyer discipline confidentiality rules based on common law or federal constitutional “right of access” theories. Only one state supreme court has considered and upheld a common law right of access claim in connection with an affidavit filed in a lawyer discipline proceeding.²⁰⁷ The only state supreme court that has directly considered a federal constitutional right of access in the context of lawyer discipline proceedings has rejected that claim.²⁰⁸ More than thirty years ago, in *McLaughlin v. Philadelphia Newspapers*,²⁰⁹ the Pennsylvania Supreme Court rejected efforts by a newspaper publisher to obtain information about a discipline proceeding that involved an assistant district attorney prior to the time he assumed that position. According to long-standing court practice, the disciplinary proceedings were conducted privately and the record of the proceeding was maintained as confidential. In its decision, the court expressed great concern about maintaining the reputation of lawyers and the interest in preserving the rehabilitative function of private discipline for minor misconduct.²¹⁰ Because the disciplined lawyer was a private individual at the time of the discipline, and because the lawyer had had an expectation that his statements would remain private if private discipline were imposed, the court found that any right of access that may exist was overborne by the “paramount” interest of the state in protecting confidentiality under the circumstances presented.²¹¹ The *McLaughlin* case was decided, however, before some of the United States Supreme Court right of access decisions described below.

206. See *In re Goldstein*, 995 P.2d 923 (Mont. 2000). In that case, even the respondent could not obtain the information about his case. The discussion of the free speech claim under the state constitution was cursory. The majority stated that there was no “free speech” claim under the state constitution, noting only that *Doe v. Supreme Court of Fla.*, 734 F. Supp. 981 (S.D. Fla. 1990), was distinguishable. *Goldstein*, 995 P.2d at 930. The dissent in the 4-3 decision was based primarily on due process grounds. *Id.*

207. *In re Johnson*, 461 N.W.2d 767 (S.D. 1990). That affidavit was filed with the disciplinary board, which in turn filed the document with the Supreme Court. *Id.* at 768. Most jurisdictions recognize that the public enjoys a common law right of access to judicial documents filed with the court. See *infra* notes 272-76 and accompanying text.

208. *McLaughlin v. Philadelphia Newspapers, Inc.*, 348 A.2d 376, 378 (Pa. 1974). In addition, New York courts have indicated that there is no federal or state constitutional right and no common law right to attend professional disciplinary hearings. See *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046, 1046 (N.Y. 1990) (noting in dictum in a dentist discipline case that there is no state or federal constitutional right to attend professional disciplinary hearings). While the New York Court of Appeals has not squarely decided this issue with respect to lawyer discipline proceedings, its statements in other cases indicate strong support for the “general policy that disciplinary proceedings involving licensed professionals remain confidential until finally determined.” *Doe v. Office of Prof’l Medical Conduct*, 601 N.Y.S.2d 456, 457 (1993).

209. *McLaughlin*, 348 A.2d at 377.

210. *Id.* at 381.

211. *Id.* at 382-83.

B. CONSTITUTIONAL AND COMMON LAW ARGUMENTS SUPPORTING PUBLIC ACCESS TO DISCIPLINE INFORMATION

A legal basis for making more lawyer discipline proceedings and records available to the public may be found in cases involving federal constitutional rights of access to judicial proceedings and court records. The courts have also recognized a common law qualified right of access to judicial records which may provide an additional basis for obtaining access to discipline information in some jurisdictions. Neither approach is likely, however, to provide sufficient access to some of the most important discipline information, including information about the resolution of most complaints, private sanctions, and diversion.

1. FIRST AMENDMENT RIGHT OF ACCESS

a. The Constitutional Case Law

The constitutional right of access to judicial proceedings was first recognized by the United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia*.²¹² In that case, the Court recognized a qualified First Amendment right of public access to attend criminal trials.²¹³ The Court relied on the fact that throughout its evolution, and at the time this country's organic laws were adopted, the criminal trial had been presumptively open to the public.²¹⁴ The Court found that openness not only has therapeutic value for the public, but also promotes the perception of fairness, confidence in the administration of justice, and the integrity and quality of what takes place in the courtroom.²¹⁵ It noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."²¹⁶

The Supreme Court in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*")²¹⁷ later described the *Richmond Newspapers* right of access analysis as involving two "complementary considerations." First, "whether the place and process have historically been open to the press and general public" and second, "whether public access plays a significant positive role in the functioning of the particular process in question."²¹⁸ The *Press-Enterprise II* Court noted that the right of access can be overcome by "an overriding interest based on finding that closure is essential to preserve higher values and is

212. 448 U.S. 555, 577-78 (1980).

213. *Id.* at 580.

214. *Id.* at 564-75.

215. *Id.* at 570-71, 578.

216. *Id.* at 572.

217. 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

218. *Id.* at 8.

narrowly tailored to serve that interest.”²¹⁹ In that case, it found a right of public access to preliminary proceedings in criminal cases and the transcript of such proceedings.²²⁰ The Court noted the frequency with which guilty pleas followed a preliminary hearing, and observed that “the preliminary hearing in many cases provided the sole occasion for public observation of the criminal justice system.”²²¹ It further noted that “the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, ‘trial’ or otherwise, particularly where the preliminary hearing functions much like a full-scale trial.”²²²

The United States Supreme Court has not directly considered whether the public has a right of access to civil trials, but it noted in *Richmond Newspapers* that “historically both civil and criminal trials have been presumptively open.”²²³ Since then, many lower courts have recognized a First Amendment right of access to civil trials.²²⁴ Courts have also occasionally applied the *Richmond Newspapers* test to quasi-judicial and administrative proceedings.²²⁵ In some cases, the courts have found a First Amendment right of access to such proceedings.²²⁶

The lower courts have also found a First Amendment right of access to certain judicial documents. Some courts have applied the two-prong *Press-Enterprise II* inquiry to the question of whether there is a right of access to particular

219. *Id.* at 9-10 (quoting *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) [hereinafter *Press-Enterprise I*]).

220. *Press-Enterprise II*, 478 U.S. at 13.

221. *Id.* at 12. The preliminary hearing process at issue in *Press-Enterprise II* could be used by the prosecutor to obtain a finding of probable cause in lieu of a grand jury indictment. Even when the accused had been indicted by a grand jury, he had a right to a preliminary hearing before a magistrate. During that hearing, the accused had the right to appear, to be represented by counsel, to present evidence, to cross-examine witnesses, and to exclude illegally obtained evidence. *Id.*

222. *Id.* at 7.

223. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n. 17 (1980).

224. *See, e.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (2d Cir. 1984); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1983); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996); *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 980 P.2d 337, 361 (Cal. 1999); *State v. Cottman Transp. Sys., Inc.*, 542 A.2d 859, 862-64 (Md. Ct. Spec. App. 1988). *But see* *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t. of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (noting that neither D.C. Circuit nor U.S. Supreme Court has stated that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings).

225. *See, e.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (deportation proceeding); *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); *see also* *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (university student disciplinary records).

226. *See* *Detroit Free Press*, 303 F.3d at 700 (right of access to deportation proceedings); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1988) (right of access to town planning commission meetings). *But see* *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (holding that there is no right of access to deportation proceedings).

documents, looking to whether there is a history of openness and whether access plays a positive role in the functioning of the particular process.²²⁷ In other cases, the right of access to judicial documents has been viewed as “derived from or a necessary corollary of the capacity to attend the relevant proceedings.”²²⁸ The types of documents to which the public has been found to have a First Amendment right of access include criminal plea agreements, civil settlement agreements deposited in court, and civil docket sheets.²²⁹

b. The Constitutional Right of Access to Lawyer Discipline Information

i. Access to Discipline Proceedings

The argument for a First Amendment right of access to lawyer disciplinary proceedings is strongest in a dozen or so jurisdictions like New York where the disciplinary hearing is closed to the public.²³⁰ These hearings are usually the only time when evidence relating to the charge of lawyer misconduct is heard. This hearing is, in most jurisdictions, the closest that the lawyer comes to a “trial” concerning the alleged misconduct.²³¹

Reasonably strong arguments can be made for access to these hearings under the first prong of the *Press-Enterprise II* test.²³² The Supreme Court explained in *Press-Enterprise II* that “because a tradition of accessibility implies the favorable judgment of experience, we have considered whether the place and process have historically been open to the press and general public.”²³³ The Court in *Richmond Newspapers* indicated that it was appropriate to look at whether criminal trials

227. See, e.g., *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004); see also *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998) (noting that a number of circuits “have concluded that the logic of *Press-Enterprise II* extends to at least some categories of court documents and records”).

228. *Hartford Courant Co.*, 380 F.3d at 93; *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994).

229. See, e.g., *Hartford Courant Co.*, 380 F.3d at 93 (first amendment right of access to court docket sheets in civil and family court cases); *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002) (right of access to settlement agreement); *Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990) (qualified first amendment right of access to plea agreements).

230. See *supra* note 124. An argument might also be made that discipline proceedings should be open before a finding of probable cause, but it would be harder to sustain. In most jurisdictions the formal charge is made by disciplinary counsel following an investigation and there is no actual hearing. See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 (2001). At that point, the process resembles the exercise of prosecutorial discretion or the grand jury process, to which there is no right of access. See *Press-Enterprise II*, 478 U.S. 1, 8-9 (1986).

231. See, e.g., ABA MODEL RULES OF LAWYER DISCIPLINARY ENFORCEMENT R. 3 commentary (2001) (“Hearing committees conduct trials of formal charges . . .”).

232. Some courts and commentators have questioned whether there must be a tradition of accessibility in order to demonstrate a First Amendment right of access. See *Boston Herald, Inc. v. Connolly*, 321 F.3d 174, 182 (1st Cir. 2003); *United States v. Gonzales*, 150 F.3d 1246 (10th Cir. 1998); *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989); see also *United States v. Simone*, 14 F.3d 833, 839-42 (3d Cir. 1994) (relying primarily on “logic” prong of test in absence of evidence supporting a tradition of openness). Thus, even if this prong is not satisfied, a right of access might still be found.

233. *Press-Enterprise II*, 478 U.S. at 8.

were open “at the time when our organic laws were adopted,”²³⁴ but the Court in *Press-Enterprise II* also considered the tradition of accessibility to preliminary hearings starting somewhat later in this country’s history.²³⁵ Since then, some lower courts have looked to the openness of the proceeding as far back as the colonial period and to more recent history to determine whether there has been a tradition of accessibility.²³⁶ Where the procedure is of relatively recent origin, the courts have also looked to analogous proceedings and documents of the same “type or kind.”²³⁷

As previously noted, lawyer disciplinary proceedings were conducted in the open for centuries in England and were also open to the public in the United States at the time that the Bill of Rights was ratified.²³⁸ Over the next 125 years, lawyer discipline continued to be handled in open proceedings before the courts. Court opinions and news coverage of lawyer discipline charges and proceedings up until the early 1900s demonstrate that the disciplinary process remained open until it was taken over by the organized bar.²³⁹ Even then, in a few jurisdictions, public access to discipline proceedings was permitted as soon as a formal complaint was filed.²⁴⁰

The deep involvement of bar associations in lawyer discipline and their increasing use of secrecy did not produce favorable results.²⁴¹ By 1970, even the ABA’s Special Committee on Evaluation of Disciplinary Enforcement concluded that the state of lawyer discipline was “scandalous” and recommended that the courts take back responsibility for administering lawyer discipline.²⁴² The Clark Commission noted that many of the problems, including that “disciplinary agencies will not proceed against prominent lawyers and law firms,” occurred at least in part because so much discipline was handled in secrecy.²⁴³ Since 1979,

234. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

235. *Press-Enterprise II*, 478 U.S. at 10-11. Moreover, the Supreme Court has considered whether a proceeding has generally been open in many jurisdictions rather than focusing on the history of a particular jurisdiction. See *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150-51 (1993).

236. See, e.g., *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *NBC, Inc. v. Presser*, 828 F.2d 340, 344 (6th Cir. 1987).

237. *El Vocero*, 508 U.S. at 150-51; *Boston Herald*, 321 F.3d at 184.

238. See *supra* notes 50-59 and accompanying text.

239. See *supra* notes 63-71 and accompanying text.

240. PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, *supra* note 3, at 138. This typically occurred in states that provide for trial of the charges by judges rather than by a referee or bar disciplinary commission. *Id.*

241. I do not mean to suggest that bar association involvement in bar discipline was altogether a bad development. Bar association involvement in discipline in the early twentieth century had the positive effect of turning more attention to the subject of lawyer discipline and creating a mechanism for pursuing more lawyer misconduct that occurred outside the courtroom.

242. *Id.* at 1.

243. *Id.* at 1-2. The Clark Commission was admittedly somewhat ambivalent about the idea of opening up lawyer discipline to the public. Although the report cited as a problem “[i]nadequate provisions concerning public disclosure of pending disciplinary proceedings,” *id.* at 138, it recommended that many formal charges be withheld until the charges had been sustained by the trial authority. *Id.*

the ABA has recommended that discipline proceedings become public after a finding of probable cause and the majority of states have now adopted that procedure.²⁴⁴ Thus, the favorable judgment of experience shows that the historically open approach to lawyer discipline is the preferable approach in *all* jurisdictions.²⁴⁵

The second prong of the *Press-Enterprise II* test—that public access plays a significant positive role in the function of the discipline process—can easily be satisfied. Relying on language from United States Supreme Court cases, the lower courts have identified six structural interests to determine whether public access plays a significant positive role including “informing the public discussion of government affairs, assuring the public perception of fairness, promoting the community-therapeutic effect of criminal justice proceedings, providing a public check on corrupt practices, intimidating potential perjurers, and generally enhancing the performance of all involved in the process.”²⁴⁶

All of these interests would be satisfied by public access to disciplinary hearings. As is true for the preliminary criminal hearing, the lawyer disciplinary hearing is often the final and most important step in the entire proceeding. That hearing may be the sole occasion for public observation of the discipline system, as there typically is no trial before the court.²⁴⁷ Open disciplinary hearings would play a significant positive role in the functioning of the overall discipline process

244. See *supra* notes 97, 123 and accompanying text.

245. Only two cases—neither decided in the lawyer discipline context—argue against the conclusion that the “history” prong favors openness. In *First Amendment Coalition v. Jud. Inquiry & Rev. Board*, 784 F.2d 467, 468 (3d Cir. 1986) (en banc), the Third Circuit rejected arguments that there was a First Amendment right of access to judicial disciplinary proceedings prior to the imposition of discipline. The court considered a challenge to a Pennsylvania constitutional provision that provided for access to the records of the Judicial Inquiry and Review Board only if it recommended that the state Supreme Court impose public discipline on a judge. *Id.* In rejecting the application of *Richmond Newspapers’* analysis to judicial discipline, the Third Circuit referred to the judicial board’s proceedings as “administrative proceedings” and noted that they did not have “a long history of openness.” *Id.* at 473-74. The court dismissed the argument that judicial discipline had traditionally involved public impeachment, noting that “the Board’s functions are intended to supplement rather than replace the historical methods of judicial discipline: impeachment and removal for conviction of a crime.” *Id.* at 472-73. Some of the court’s reasoning, which relied on its analogy to the secrecy of pre-trial criminal proceedings, was undercut by the decision four months later in *Press-Enterprise II*. Moreover, the federal court was especially mindful of the fact that it was dealing with a challenge to a state constitutional provision, which carries a heavy presumption of validity. *Id.* at 475.

In the second case, *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046, 1047-49 (N.Y. 1990), the New York Court of Appeals stated that there was no First Amendment right of access to professional disciplinary hearings. But in that case, the court was considering a dental disciplinary hearing and appellants argued that the court need not consider the historical tradition prong of the *Press-Enterprise II* test. *Id.* at 1046-47. There was apparently no effort to present evidence of a historical tradition of openness. See *id.* at 1049 (“there is no suggestion that professional disciplinary hearings have any tradition of being open to the public . . .”).

246. *United States v. McVeigh*, 106 F.3d 325, 336 (10th Cir. 1997); see also *Boston Herald, Inc. v. Connolly*, 321 F.3d 174, 187 (1st Cir. 2003); *United States v. Gonzales*, 150 F.3d 1246, 1259 n. 18 (10th Cir. 1998); *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994).

247. See *Press-Enterprise II*, 478 U.S. 1, 12 (1986) (noting that the preliminary hearing should be open because it was often the only opportunity for the public to observe the criminal process).

because they would also make citizens more aware of the process—and more likely to resort to it—if they believe that their lawyers engage in wrongdoing. Open disciplinary hearings would also contribute to public discussion about the disciplinary process and the sanctions being imposed on officers of the court, who are often needed for access to justice. As with open trials, the openness of disciplinary proceedings would contribute to the appearance of fairness and increase public confidence in the system.²⁴⁸ Open hearings would also undoubtedly have therapeutic effects on the community and the complainant. Open hearings would also help discourage perjury behind closed doors and corrupt and biased practices.²⁴⁹ Furthermore, they would undoubtedly enhance the performance of disciplinary counsel and all others involved in the disciplinary process as their actions would be subject to public scrutiny.

The “quasi-criminal” nature of disciplinary proceedings²⁵⁰ strengthens the arguments for a constitutional right of access to disciplinary hearings under *Press-Enterprise II*. In contrast to civil proceedings, the primary purpose of lawyer discipline proceedings is protection of the public.²⁵¹ A close look at the function and effect of incapacitating sanctions such as disbarment and suspension reflect that they are, in fact, “punishment.”²⁵²

Any contention that disciplinary proceedings are not sufficiently “judicial” to warrant a First Amendment right of access is also likely to be unsuccessful.²⁵³ A hearing committee’s members are appointed by the courts, are supervised by the courts, perform fact-finding for the courts, and in many cases, impose discipline

248. See generally *Press-Enterprise I*, 464 U.S. 501, 508 (1984).

249. In *Press-Enterprise II*, the Court noted that the absence of a jury—which safeguards against overzealous prosecutors and biased or compliant judges—makes the importance of public access to a preliminary hearing “even more significant.” 478 U.S. at 13. This observation is also true in the context of lawyer discipline proceedings, where there is otherwise little public check on bias.

250. See, e.g., *In re Ruffalo*, 390 U.S. 544, 551 (1968); see also *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 438 (1982) (Brennan, J., concurring) (referring to disciplinary proceedings as “quasi-criminal” in nature).

251. See Levin, *Emperor’s Clothes*, *supra* note 8, at 17 n. 77.

252. *Id.* at 18–19. While some courts have claimed that disciplinary sanctions are not “punishment,” they do this to avoid having to provide lawyers with a full panoply of rights provided by the Constitution to criminal defendants. In virtually all jurisdictions, disciplinary counsel has prosecutorial-type powers, including the power to subpoena, investigate, and bring charges. *Id.*

253. The only case that might support the argument is *First Amendment Coalition v. Jud. Inquiry & Rev. Board*, 784 F.2d 467 (3d Cir. 1986) (en banc). In that case, the court rejected First Amendment arguments by media organizations in which they relied upon *Richmond Newspapers* in an effort to obtain access to the records of the Judicial Inquiry and Review Board. In its decision, the court referred to the Board’s functions as “administrative proceedings, unlike conventional criminal and civil trials.” *Id.* at 472. In order to support its conclusion that the Board’s hearing function was not judicial, the court noted that the Board could only make recommendations and could not impose sanctions on judges. *Id.* at 473. In contrast, lawyer discipline agencies often impose sanctions. Moreover, as previously noted, the vitality of the Third Circuit’s decision in this case is questionable in light of the subsequent decision in *Press-Enterprise II*. See *supra* notes 220–222 and accompanying text.

for the courts.²⁵⁴ In most cases, the hearing committee's hearing functions as a full-scale trial and is usually the only fact-finding that occurs. The United States Supreme Court has noted that the delegation of the disciplinary function to bar ethics committees makes those committees an "arm of the court in performing the function of receiving and investigating complaints and holding hearings."²⁵⁵ It has also observed that the local ethics committees "may be analogized to the function of a special master" and that disciplinary actions have an "essentially judicial nature."²⁵⁶

ii. Access to Discipline Records

Where there is a right to attend judicial proceedings, there is a concomitant First Amendment right to access documents submitted in connection with the proceedings.²⁵⁷ Thus, the formal charges, transcripts of discipline hearings, documents submitted to the hearing committee, and records concerning the disposition of disciplinary matters should also be accessible to the public under a First Amendment right of access theory. The more difficult question is whether additional documents might be obtained through a constitutional right of access claim, including access to the initial complaints²⁵⁸ or private sanctions.

One basis for obtaining additional discipline information may lie in the court decisions recognizing a First Amendment right of access to court docket sheets. The courts that have considered the issue have concluded that docket sheets

254. See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 commentary (2001) (noting that "the highest courts of the states cannot handle discipline and disability matters directly by themselves. The agency assists the court in the exercise of its inherent power to supervise the bar . . .").

255. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433-34 (1982); see also *Chronicle Publ'g Co. v. Super. Ct.*, 354 P.2d 637, 644 (Cal. 1960) (noting that the "State Bar acts 'as an arm of the court, for the purpose of taking evidence and making its recommendations'").

256. *Middlesex County Ethics Comm.*, 457 U.S. at 434 n.13; see also *Mosby v. Ligon*, 418 F.3d 927, 931-32 (8th Cir. 2005) (noting that disciplinary proceedings were judicial in nature and that because "the Committee [on Professional Conduct] is created and appointed by the Arkansas Supreme Court, operates pursuant to rules promulgated by that court, and is subject to review by that court, the Committee's decision to discipline [an attorney] is the functional equivalent of a state-court judgment").

257. See *supra* note 228 and accompanying text.

258. If the initial complaints are submitted as evidence in the discipline hearing, then they would presumably be accessible to the public as a corollary to their right to attend the proceeding. Otherwise, it would be necessary to apply the *Press-Enterprise II* logic and experience test to the documents, as some courts have done. There is a long history of discipline complaints being raised before judges in open court and little evidence that the complaints of the discipline matters were not open to the public until the bar became involved. Nevertheless, it would be somewhat more difficult to satisfy the second prong of the test with respect to the documents than it is to satisfy it with respect to the discipline hearing. So, for example, while it would be possible to show that access to all complaints would help inform the public discussion of government affairs, assure the public perception of fairness, provide a check on corrupt practices and enhance the performance of all involved, see text accompanying note 246, it is less clear that access would intimidate potential perjurers or promote the community-therapeutic effects of the proceedings.

relating to judicial proceedings enjoy a presumption of openness.²⁵⁹ Access to docket sheets provides an opportunity for the public to understand “the system in general and its workings in a particular case.”²⁶⁰ Important discipline information can be derived from docket sheets in some jurisdictions, including the identities of lawyers who have been charged and the sanctions imposed on lawyers. The availability of docket sheets can also be used to reveal potential biases.²⁶¹ At a minimum, in jurisdictions where courts can review the imposition of a private admonition,²⁶² it should be possible to make a right of access claim to obtain information about these sanctions from the courts’ docket sheets. It is also possible that a successful access claim could be mounted for the docket sheets of state court disciplinary agencies on the theory that since they are the bodies that impose private sanctions, they are judicial fora that are acting in the place of the state courts.²⁶³

iii. The Balancing

If there is a qualified First Amendment right of access to disciplinary proceedings and records, then the proceedings and records cannot be closed unless “specific, on the record findings are made demonstrating that ‘closure is necessary to preserve higher values and is narrowly tailored to serve that interest.’”²⁶⁴ It is very unlikely that this showing can be made. Preservation of the integrity of the investigative process is not a “higher value” that would justify limiting access to disciplinary hearings, documents submitted in those proceedings, transcripts, or court docket sheets because the investigation would be complete by the time of the hearing or before those documents were generated.²⁶⁵ Moreover, it seems doubtful that fairness to the lawyer or protection of a lawyer’s

259. *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028-29 (11th Cir. 2005); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993); *see also* *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 94-95 (D. Mass. 1993). This was true even in cases involving, *inter alia*, the docket sheets for paternity proceedings where the proceeding itself may have been private. *See Hartford Courant Co.*, 380 F.3d at 93.

260. *Hartford Courant Co.*, 380 F.3d at 95 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)).

261. *See id.* (“Precisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness.”).

262. *See, e.g.*, DEL. LAWYERS’ RULES OF DISCIPLINARY PROCEDURE R. 9(d)(5) (2004) [hereinafter DEL. RULES]; IOWA RULES OF COURT R. 35.11(1), (2) (2006) (permitting appeal to be taken from dismissal of complaint or imposition of private sanction).

263. The main obstacle that this argument would encounter is that there is no historical tradition of openness of the docket sheets maintained by disciplinary agencies. However, some courts have not required a showing of a tradition of openness for newer procedures if the second prong of the *Press-Enterprise II* test can be satisfied. *See supra* note 228.

264. *Press-Enterprise II*, 478 U.S. 1, 14 (1986) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

265. Even if access to the docket sheets of the disciplinary agency were sought, once a finding of probable cause was made or the complaint was dismissed without finding probable cause, the investigation would be largely complete and the integrity of the investigative process would not be affected. Moreover, most courts

reputation are higher values than the public's right to observe what is happening in the discipline process, especially after a finding of probable cause has been made.²⁶⁶ Although a closer question, the interest in fairness to the attorney and protection of reputational interests are probably not higher values, even when no probable cause is found.²⁶⁷ The argument for administrative efficiency typically has not been found to be the type of higher value that outweighs First Amendment rights.²⁶⁸ Likewise, the interest in rehabilitation has not been found to outweigh First Amendment interests.²⁶⁹ Finally, there is substantial evidence that the reputation of the bar is actually undercut by secrecy,²⁷⁰ so that argument would unlikely to be found to be a "higher value" that overrides the public's First Amendment right of access.

2. COMMON LAW RIGHT OF ACCESS CASES

Some lawyer discipline documents may also be obtained based on a common law right of access. The most cited discussion of the historical common law right appears in *Nixon v. Warner Communications, Inc.*²⁷¹ In that case, the United States Supreme Court considered whether audiotapes which had been admitted into evidence in the trials of President Richard Nixon's former advisors could be copied for broadcasting and sale to the public. The Court noted that "[i]t is clear that the courts in this country recognize a general right to inspect and copy public

have rejected investigative integrity as an argument that outweighs First Amendment interests. See *supra* notes 158, 160-61 and accompanying text.

266. See generally *In re Gitto Global Corp.*, 2005 U.S. Dist. Lexis 7918, at *39-40 (D. Mass. May 2, 2005), *aff'd*, 422 F.3d 1 (1st Cir. 2005) (interest in avoiding embarrassment and protecting privacy are insufficient to overcome First Amendment interest in permitting public access to bankruptcy report filed in court).

267. The fact that no probable cause was found can be made public, along with the reasons why this determination was made, so that interested parties who access the information can determine what weight, if any, to give the complaint. At a minimum, a blanket statute or rule making all such records private may be subject to attack as not sufficiently narrowly tailored. See *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509 (1st Cir. 1989) (striking down as unconstitutional a statute that sealed all criminal records in cases where there was an acquittal or no probable cause was found).

268. See, e.g., *R.M. v. Sup. Ct.*, 883 A.2d 369, 378 (N.J. 2005) (rejecting argument that administrative interest in encouraging diversion justifies requiring complainant to maintain confidentiality of complaint). But see generally *First Amendment Coalition v. Jud. Inquiry & Rev. Board*, 784 F.2d 467, 476 (3d Cir. 1986) (noting that state has substantial interest in confidentiality because it increases flexibility by allowing judges to resign rather than go through discipline process).

269. See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-106 (1979) (state's interest in rehabilitation of juvenile offenders does not outweigh First Amendment rights); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 98 (D. Mass. 1993) (noting that protection of state's interest in reintegration and rehabilitation of defendants can be effected through means other than burdening First Amendment right of access). Moreover, there would have to be a clear showing and specific findings that keeping all discipline information *private* is necessary for rehabilitation. See *Press-Enterprise II*, 478 U.S. 1, 13-15 (1986) ("The First Amendment right of access cannot be overcome by [a] conclusory assertion."). In the absence of empirical evidence supporting this claim, it would be difficult to make this showing.

270. See *supra* notes 44-45 and accompanying text.

271. 435 U.S. 589, 597-98 (1978).

records and documents, including judicial records and documents.”²⁷² Although the Court observed that the contours of the qualified right of access “had not been delineated with any precision,” it explained that “[t]he interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen’s desire to keep a watchful eye on the workings of public agencies.”²⁷³ While the *Nixon* Court considered materials that had been admitted at trial, the common law right also extends to judicial documents not introduced in open court²⁷⁴ and to other public records.²⁷⁵

Both lower federal courts and state courts recognize the common law right to inspect judicial documents.²⁷⁶ This right of access allows the citizenry to monitor the courts²⁷⁷ and serves as a check on arbitrary judicial behavior. It also promotes public confidence in the legal system.²⁷⁸ The common law right is broader than the First Amendment right because the common law right attaches to virtually all judicial records and documents without the need to show a historic tradition of openness.²⁷⁹ The common law right is typically asserted on a case-by-case basis and obviously cannot, like a constitutional challenge, invalidate statutes. Indeed, the common law right may be expanded or limited in some jurisdictions by statute.²⁸⁰

272. *Id.* The Court concluded, however, that the sole method by which the tapes could be accessed were specified in the Presidential Recordings Act. *Id.* at 603.

273. *Id.* at 597-98.

274. *See, e.g.,* Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.2d 1304, 1312-13 (11th Cir. 2001); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001).

275. *E.g.,* Wash. Legal Found. v. U.S. Sentencing Comm’n, 89 F.3d 897, 903 (D.C. Cir. 1996) (“[J]udicial records are but a subset of the universe of documents to which the common law right applies.”). Courts differ over the extent to which the common law right of access extends to public records in the executive and legislative branches. *Compare* Ctr. for Nat’l Sec. Studies v. U.S. Dep’t. of Justice, 331 F.3d 918, 936 (D.C. Cir. 2003) (common law right of access extends to all branches of government), *with* Boston Herald, Inc. v. Connolly, 321 F.3d 174, 180 (1st Cir. 2003) (common law right of access has applied only to judicial documents), *and* Uniontown Newspapers, Inc. v. Roberts, 839 A.2d 185, 189 (Pa. 2003) (no common law right of access to legislative records). Since disciplinary activities are typically supervised within the judicial branch, the analysis with respect to the other branches is not developed here.

276. *See, e.g.,* Holland v. Eads, 614 So. 2d 1012, 1014-15 (Ala. 1993); Ark. Best Corp. v. Gen. Elec. Capital Corp., 878 S.W.2d 708, 711 (Ark. 1994); *In re Johnson*, 598 N.E.2d 406 (Ill. App. 1992); Roman Catholic Diocese of Lexington v. Noble, 92 S.W.3d 724 (Ky. 2002); People v. Atkins, 514 N.W.2d 148, 149 (Mich. 1994); Republican Co. v. Appeals Court, 812 N.E. 2d 887, 891 (Mass. 2004); State v. Cribbs, 469 N.W.2d 108 (Neb. 1991); *see also* Daily News v. Teresi, 706 N.Y.S.2d 527 (App. Div. 2000) (noting that state recognizes common law right of access to court records but looks to federal courts for instruction).

277. FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987); *see also* Leucadia, Inc. v. Applied Extrusion Tech., 988 F.2d 157, 161 (3d Cir. 1993); *Roman Catholic Diocese of Lexington*, 92 S.W.3d at 732.

278. *Wash. Legal Found.*, 89 F.3d at 901.

279. *See, e.g.,* Va. Dept. of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004); United States v. Gotti, 322 F. Supp. 2d 230, 239-41 (E.D.N.Y. 2004).

280. *See In re Gitto Global Corp.*, 422 F.3d 1, 8 (1st Cir. 2005) (common law right of access supplanted by broader approach to access under Bankruptcy Code); *Ctr for Nat’l Sec. Studies*, 331 F.3d at 936 (common law right of access pre-empted by statutory disclosure scheme of FOIA); United States v. Gonzales, 150 F.3d 1246, 1263 (10th Cir. 1998) (common law right of access superseded by CJA statute and regulations); Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 691 (N.C. 1999) (statute supplants common law right to

Lower courts have applied different tests to determine whether a document is a “judicial document” subject to the common law right of access. Some courts have indicated that the document simply must be “physically filed” with the court.²⁸¹ Other courts have said that the filed document must also be “relevant to the performance of the judicial function and useful in the judicial process.”²⁸² “Judicial documents” subject to common law access claims have included sentencing letters sent directly to judges,²⁸³ settlement agreements in the courts’ files,²⁸⁴ and reports prepared for the court.²⁸⁵

The courts have also taken somewhat different approaches to determining the weight to be given to the common law presumption of access. Most courts have characterized the presumption as “strong”²⁸⁶ and have required a “compelling reason, accompanied by specific factual findings” to justify keeping the documents from the public.²⁸⁷ A few courts have stated that the presumption of access must be governed by the role of the material at issue in the exercise of judicial power and the resultant value of such information to monitoring the courts.²⁸⁸ So, for example, the presumption might be strong with respect to evidence introduced at trial, but far weaker with respect to discovery documents,

inspect medical review committee records); *KNSS Channels 7/39 v. Super. Ct.*, 74 Cal. Rptr. 2d 595, 597 (1998) (noting common law right of access to judicial proceedings where no contrary statute).

281. *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001); *see also Doe v. Blue Cross Blue Shield of Md.*, 103 F. Supp. 2d 856 (D. Md. 2000); *Johnson*, 598 N.E.2d at 410.

282. *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) [hereinafter *Amodeo I*]; *see also In re Policy Mgmt. Sys. Corp.*, Nos. 94-2254, 94-2341, 1995 U.S. App. LEXIS 25900 (4th Cir. Sept. 13, 1995) (document becomes a judicial document when court relies on it to determine substantive rights); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

283. *United States v. Gotti*, 322 F. Supp. 2d 230 (E.D.N.Y. 2004); *see also United States v. Kushner*, 349 F. Supp. 2d 892, 906 (D. N.J. 2005) (making available sentencing letters relied upon by judge in sentencing).

284. *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002).

285. *Amodeo I*, 44 F.3d at 146 (finding that report of court-appointed monitor investigating union corruption was a “judicial document” presumptively subject to public inspection); *Ashworth v. Bagley*, 351 F. Supp. 2d 786 (S.D. Ohio 2005) (allowing access to competency report prepared by court-appointed doctor); *United States v. Kushner*, 349 F. Supp. 2d 892 (D. N.J. 2005) (allowing access to sentencing memorandum prepared by probation department).

286. *E.g.*, *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988) (“strong presumption” in favor of accessibility).

287. *E.g.*, *In re Johnson*, 598 N.E.2d 406, 411 (Ill. App. 1992); *see also FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d at 410; *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983) (“Only the most compelling reasons can justify non-disclosure of judicial records.”).

288. This approach was articulated in *United States v. Amodeo*, 71 F.3d 1044, 1047-49 (2d Cir. 1995) [hereinafter *Amodeo II*], with respect to Article III judges, but it has been followed both by federal and state courts that have considered the weight to be afforded the common law right of access. *See, e.g.*, *United States v. Kushner*, 349 F. Supp. 2d 892, 904-05 (D. N.J. 2005); *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 732 (Ky. 2002).

which play little role in the exercise of judicial power.²⁸⁹

Obviously the easiest argument for access can be made with respect to discipline documents that are filed with the courts. For example, in *In re Johnson*,²⁹⁰ a lawyer filed an affidavit acknowledging the truth of accusations and consenting to discipline with the state bar Disciplinary Board; the affidavit was then automatically filed with the South Dakota Supreme Court. The Court concluded this was a “judicial record” subject to the common law judicial record privilege. The governing statute provided that the “order disbaring the attorney on consent shall be a matter of public record,” but the affidavit “shall not be publicly disclosed or made available for any use in any other proceeding except upon order of the Supreme Court.”²⁹¹ The court noted that “the public has a general right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”²⁹² Although the state argued that disclosure may discourage other attorneys from submitting such affidavits, thereby prolonging disciplinary litigation, the court did not find this reason compelling in the context of that particular case.²⁹³

In jurisdictions where disciplinary boards are required to submit their recommendations to the court,²⁹⁴ there would also appear to be a common law right of access to those recommendations. Such a challenge might be mounted in Delaware, for example, which treats as confidential the Disciplinary Board’s report and recommendations that are submitted to the Supreme Court in matters where it recommends dismissal or that private discipline be imposed.²⁹⁵ Likewise, any records of private discipline and diversion agreements that are filed with the court, and any private sanctions imposed by the court, should be subject to a common law right of access.²⁹⁶ The interests underlying the common

289. *Amodeo II*, 71 F.3d at 1050; *United States v. Kushner*, 349 F. Supp. 2d at 904. Even at its strongest, it appears that the common law presumption does not give rise to as high a burden as does the presumption of access under the First Amendment. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006).

290. 461 N.W.2d 767, 768 (S.D. 1990).

291. *Id.*

292. *Id.* at 769.

293. *Id.* at 769-70. One important reason why the argument was rejected in that case was because the public had already been permitted substantial access to the records.

294. It is not uncommon to require the Disciplinary Board to prepare a written report for the court indicating whether it recommends that dismissal should occur or a sanction should be imposed. *See, e.g.*, ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(E)(1) (2001). Some jurisdictions also require that diversion agreements be filed with the court. *See, e.g.*, KAN. SUP. CT. R. 205(c)(4) (2005).

295. DEL. RULES R. 9(e), 13. Under the Delaware Rule, the reports are “submitted” to the court and not filed with the court, but this distinction should not necessarily make a difference in the common law analysis. Presumably the reports are required to be submitted to the court so that the court can supervise the discipline process. Certainly the public has the same interests in access to the documents even if—or perhaps particularly if—the court does not actually review the reports that have been submitted to it.

296. One hurdle that would need to be overcome in some jurisdictions is the claim that a statute requiring confidentiality supercedes the common law. In some jurisdictions, courts have found that statutory confidentiality requirements can limit the common law right of access, *see supra* note 276 and accompanying text, but have not taken the same position with respect to court rules. *But see In re Werfel*, 260 N.Y.S.2d 791,

law right of access—including “the citizen’s desire to keep a watchful eye on the workings of public agencies”²⁹⁷—would be furthered by permitting access.

Of course, even if there is a common law presumption of access, this can be rebutted if countervailing interests outweigh the public interests in access. Some of the factors that the courts weigh in the common law balancing include whether the documents are sought for an improper purpose, the privacy interests of parties opposing disclosure, and law enforcement concerns.²⁹⁸ In the context of a lawsuit based on a claimed public right of access to discipline records, it is unlikely that there could be a showing of an “improper purpose.”²⁹⁹ Likewise, it would be hard to demonstrate that law enforcement concerns should overcome the right of access, especially if the information is not sought until after a determination has been made to dismiss a complaint, impose diversion or a private sanction, or proceed with a disciplinary hearing. It is similarly unlikely that disclosure of this information would seriously implicate the privacy interests of third parties, who presumably recognized the possibility that discipline would be public when they made their complaints.³⁰⁰ Courts have also rejected administrative efficiency³⁰¹ and reputational interests of a party as a reason for denying access to judicial records that are presumptively open.³⁰² At least with respect to private sanctions, diversion agreements, and dismissals, it would be difficult to show a “compelling

796 (App. Div. 1965) (stating in dictum that the “general policy” of the state is to allow public access to all records, “at least where secrecy is not enjoined by statute or rule”) (quoting *New York Post Corp. v. Leibowitz*, 143 N.E.2d 256, 260 (N.Y. 1957)). In most states, the rules governing the confidentiality of lawyer discipline proceedings are court rules and not legislative enactments, and they often leave latitude for the court’s discretion. *See, e.g.*, DEL. RULES R. 13(a) (providing for confidentiality of hearing panels’ submissions concerning dismissals and private discipline “unless and until ordered by the Court”).

297. *Nixon v. Warner Comm’n, Inc.*, 435 U.S. 589, 597-98 (1978).

298. *Va. Dept. of State Police v. Wash. Post.*, 386 F.3d 567, 575 (4th Cir. 2004) (noting one of factors to be weighed is “whether the records are sought for improper purposes”); *Amodeo II*, 71 F.3d 1044, 1050 (2d Cir. 1995) (noting that the privacy interests of those resisting disclosure are a competing consideration); *Haber v. Evans*, 268 F. Supp. 2d 507 (E.D. Pa. 2003) (discussing countervailing law enforcement concerns).

299. Presumably most efforts to obtain access to the documents would come from the media or public interest groups. The Second Circuit has recently reiterated that it will not explore the motives of the media for seeking documents under the common law privilege. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006).

300. *See generally Chronicle Publ’g Co. v. Super. Ct.*, 354 P.2d 637 (Cal. 1960) (“Persons giving the information must realize that, just as when public disciplinary action follows, their information is subject to release, so it is when private disciplinary action is taken.”). Moreover, if the privacy of a third party is ever a serious concern, the court retains the power to redact certain information before releasing documents.

301. *See, e.g., In re Johnson*, 461 N.W.2d 767, 770 (S.D. 1990) (concluding that affidavit consenting to discipline should be disclosed notwithstanding disciplinary board’s “strong interest” in expediting disciplinary hearings).

302. *E.g., Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1127 (Colo. Ct. App. 1996) (prospective injury to reputation of a party “is generally insufficient to overcome the strong presumption in favor of public access to court records”); *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 190 (Wis. 1979) (“Possible damage to arrested persons’ reputations does not outweigh the public interest in allowing inspection of the police records which show the charges upon which arrests were made.”). *But see generally Haber*, 268 F. Supp. 2d at 513 (allowing name of accused officer who was cleared of wrongdoing to be redacted from Bureau of Professional Responsibility records disclosed during litigation).

reason, accompanied by specific factual findings,” to justify keeping the material from the public.

CONCLUSION

The case for less secrecy in lawyer discipline is strong when the public is being victimized by lawyers who are awaiting private discipline hearings or who have been the repeated subject of private sanctions. The case is further bolstered by the unanswered questions that private discipline and diversion have produced. For example, if we do not know what percentage of lawyers who receive private dispositions later engage in additional misconduct, it becomes difficult to defend private sanctions or diversion programs. Likewise, if we do not know whether differences occur in the handling of complaints, in the decisions about diversion, or in the imposition of private sanctions when minorities and solo lawyers are the targets, then it is hard to convince anyone that the lawyer discipline process is fair.

Litigation raising First Amendment and common law right of access claims can make inroads into the confidentiality that continues to surround lawyer discipline proceedings in some jurisdictions even after probable cause is found. Case law can also be used to obtain additional access to some discipline documents and docket sheets that are currently kept confidential. Unfortunately, information about dismissed complaints, private sanctions, and diversion agreements that are never submitted to the courts may prove harder to obtain under First Amendment or common law right of access theories. In the end, access to this important information will depend upon the willingness of courts or legislatures to devise discipline rules or laws that give more weight to the public's interests.

At a minimum, these rules should provide that if a discipline complaint is docketed by the disciplinary agency, the public can learn what happened to the complaint shortly after it is docketed.³⁰³ In view of the potential injury to a lawyer's reputation that could be caused by a baseless complaint, I am not suggesting that the complaint become public immediately upon docketing. I am proposing, however, that if a complaint is docketed, the public should be able to learn shortly thereafter that a lawyer had a complaint against him summarily dismissed (as well as the reasons for dismissal), that he received a minor sanction, that he agreed to diversion, or that there was a probable cause

303. As previously noted, docketing is typically performed by the disciplinary counsel's staff and occurs after initial scrutiny of the complaint to determine that the complaint cannot be resolved through a phone call and that it falls within the jurisdiction of the disciplinary agency. See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 (2001); *supra* notes 111-16 and accompanying text. Even if the docketing decision becomes public in all instances, agency personnel responsible for making the docketing decision are immune from suit for any conduct arising from their official duties. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 12(A) (2001).

determination.³⁰⁴

How widely this information should be publicized, and whether there should be a time limit on access to the information, are admittedly not easy questions. These questions deserve careful consideration.³⁰⁵ At a minimum, information about *all* disciplinary sanctions should be easily accessible to the public for some period of time.³⁰⁶ While fairness and rehabilitation arguments can be made for why dismissed complaints and diversion agreements should not be accessible on public websites or should not be available indefinitely, they should, at a minimum, be accessible for research and should be maintained for the purpose of determining in a later disciplinary hearing whether there is a pattern of misconduct.

The time is past due for the lawyer discipline process to again be open to the public. The current lawyer disciplinary system does a good job of protecting lawyers' interests, but it is far less effective at protecting the public. Quite simply, the wrong balance has been struck. The primary purpose of lawyer discipline should be the protection of the public, but confidentiality rules and private dispositions make it virtually impossible to determine whether the lawyer disciplinary process achieves that goal. Moreover, the costs of secrecy are substantial. Secrecy makes it impossible to determine whether the system is fair, and there is evidence that even lawyers—the primary beneficiaries of confidentiality—believe it is not. We also know that many clients do not think the system is fair. Distrust of the process by clients and the public not only undermines their views of the lawyer discipline system; it makes them suspicious of lawyers, of the court system, and of the administration of justice. If these are the costs of protecting confidentiality in the lawyer discipline process, then the price of secrecy is too high.

304. Florida currently takes this approach. *See* FLA. RULES R. 3-7.1(a)(5).

305. The few states that have wrestled with this question have reached different conclusions. West Virginia permits access to all dismissed complaints and the reasons for their dismissal, but requires an inquiry to the disciplinary authority to obtain this information. *See* W. VA. RULES R. 2.9(b). Florida permits access to dismissed complaints, but only retains them for a year; *see also supra* note 122.

306. Difficult-to-obtain discipline information does not protect the public. In California, even information about "private" reprimands is published on the State Bar's website, on the theory that this is no different than answering telephone inquiries to the State Bar about a lawyer's disciplinary history. *See Mack v. State Bar*, 112 Cal. Rptr. 2d 341, 345 (2001).