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ACKNOWLEDGEMENTS

The Miller Becker Center for Professional Responsibility (MBC) is a nationally recognized academic center of the University of Akron School of Law. First known as the Joseph G. Miller Institute for Professional Responsibility, the Miller Institute was established in 1993 through the Joseph and Sally Miller Endowed Fund with the goal of enhancing public trust and confidence in the legal profession and the judicial system.

Mr. Miller, an Akron philanthropist and lawyer for 44 years, tapped his good friend and colleague William C. Becker to serve as the first Director of the Miller Institute. At that time, Mr. Becker was a Professor and Associate Dean at the University of Akron School of Law. Before that, Mr. Becker had a long career as corporate counsel with BF Goodrich, culminating in his service as general counsel and vice president. He was active for many years on the Ohio State Bar Association's Ethics Committee. He also served as bar counsel for the Akron Bar Association. Mr. Becker passed away in 2003.

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MILLER-BECKER SEMINAR AGENDA
Friday, October 25, 2024
University of Akron Law School

Time	Session
8:55 a.m.– 9:00 a.m.	**Welcome and Announcements**
9:00 a.m.–10:15 a.m.	**Alternatives to Discipline** ➢ Prof. Susan S. Fortney
10:15 a.m.–10:30 a.m.	**Break**
10:30 a.m.–11:45 a.m.	**Ohio's Alternatives to Discipline—Panel Discussion** ➢ Martha S. Asseff ➢ Elisabeth C, Duesler ➢ Prof. Susan S. Fortney ➢ George D. Jonson ➢ Laura Valentino ➢ Michelle A. Hall (Moderator)
11:45 a.m.–12:30 p.m.	**Lunch**
12:30 p.m.—1:15 p.m.	**Attacks on the Judiciary** ➢ Teri R. Daniel ➢ Alvin E. Mathews, Jr. ➢ Heather M. Zirke ➢ Kelly E. Heile (Moderator)
1:15 p.m.–1:45 p.m.	**Disciplinary Case Update** ➢ Richard A. Dove
1:45 p.m.—2:00 p.m.	**Break**
2:00 p.m.–3:30 p.m.	**Ethics and Artificial Intelligence** ➢ D. Allan Asbury ➢ Mark Lanterman ➢ Hon. David Hejmanowski
3:30 p.m.–4:30 p.m.	**Disciplinary Process Overview (Optional)** ➢ Joseph M. Caligiuri ➢ Richard A. Dove
4:30 p.m.	**Conclusion**

CLE Credit—5.25 for the main program; 6.25 for those attending the optional process overview.

ALTERNATIVES TO DISCIPLINE

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6-2023

"They Don't Know What They Don't Know": A Study of Diversion in Lieu of Lawyer Discipline

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“They Don’t Know What They Don’t Know”: A Study of Diversion in Lieu of Lawyer Discipline

LESLIE C. LEVIN* AND SUSAN SAAB FORTNEY**

ABSTRACT

Lawyer misconduct can have devastating consequences for clients. But what is the appropriate regulatory response when lawyers make less serious mistakes? For almost thirty years, jurisdictions have offered some lawyers diversion in lieu of discipline. Diversion is intended to help educate lawyers or treat those with impairments so that they do not reoffend. Yet remarkably little is known about how diversion operates, whether it is used appropriately, and how well it seems to work. This Article addresses these questions. It draws on the limited published data and on interviews with disciplinary regulators in twenty-nine jurisdictions about their use of diversion. The Article reveals wide variations in the extent to which diversion is utilized and the circumstances under which it is used. It also describes significant differences among the jurisdictions in resource allocation and decision-making, which may affect how effectively diversion assists respondent lawyers. The Article makes recommendations for increasing the consistency of decisions to use diversion and improving the efficacy of diversion interventions. In addition, it discusses how diversion could be handled better to provide some satisfaction to complainants. Finally, and importantly, the Article stresses the need for regulators to collect and analyze data to ensure that diversion is adequately protecting the public.

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INTRODUCTION

Anna, a third-year real estate associate, lost her job during an economic downturn. After two former clients ask Anna to handle their commercial real estate closings, Anna decides to launch her own law practice. She asks her brother to help her with the bookkeeping. Six months later, the state bar regulator notifies Anna of a grievance arising out of a bank notice relating to insufficient funds in her trust account. Neither she nor her brother understood how to properly handle trust account funds. Now Anna faces possible discipline. Professional discipline, even a reprimand, could tarnish Anna's reputation and increase her malpractice insurance premiums. Yet attorneys must handle trust accounts with scrupulous care, and bar regulators' primary goal is to protect the public. What is the best regulatory response?

State disciplinary authorities receive close to 125,000 complaints against lawyers annually.[1] Some of these complaints allege serious misconduct, some involve minor mistakes, and some are baseless or are not matters that the discipline system will address.[2] Where minor misconduct has occurred, some complaints may be referred for "diversion" in lieu of discipline. Diversion referrals enable lawyers to comply with certain conditions on a confidential basis and avoid discipline sanctions. Diversion also provides an opportunity to educate and rehabilitate the lawyer, thereby helping the lawyer and protecting the public.[3] Lawyers may find themselves in diversion because they "don't know what they don't know."[4] Although diversion has been used for almost thirty years, little is known about how it works in practice. The extent of recidivism among lawyers who receive diversion remains largely unknown.

Most lawyer discipline complaints are brought by individuals against solo and very small firm lawyers.[5] These lawyers often represent individuals and small businesses, typically in personal plight matters (e.g., bankruptcy, criminal, family, personal injury). Unlike large corporate clients, which can demand that their large law firms immediately remedy a problem or can credibly threaten to sue or take their business elsewhere, individuals who are not repeat consumers of legal services may not have the leverage or understanding of how to get their lawyers to address their

1. This is a very rough estimate. According to the ABA's Survey on Lawyer Discipline Systems, in 2019 there were over 69,500 complaints against lawyers reported by state disciplinary authorities and an additional 33,500 handled by consumer assistance programs. *See* AM. BAR ASS'N, 2019 SURVEY ON LAWYER DISCIPLINE SYSTEMS 3 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2019-sold-final.pdf [https://perma.cc/9XV6-NVVT] [hereinafter SOLD 2019]. These figures did not include California, which opened more than 16,200 cases, or New York's First Department, which processed over 2,800 complaints. *See* STATE BAR OF CAL., 2019 ANNUAL DISCIPLINE REPORT 2 (2020), https://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf [https://perma.cc/86FH-G9M6]; N.Y. ATT'Y GRIEVANCE COMM., SUP. CT., APP. DIV., FIRST JUDICIAL DEPT., 2019 ANNUAL REPORT 1 (2020), https://nycourts.gov/courts/AD1/Committees&Programs/DDC/2019%20ANNUAL%20REPORT.pdf [https://perma.cc/HNW3-REA3]. It also did not include complaints in Massachusetts, New Jersey, New York's Third Department, South Carolina, South Dakota, Vermont, West Virginia, or complaints filed with federal agencies. SOLD 2019, *supra*, at 1–3.

2. State lawyer disciplinary authorities dismiss the vast majority of these complaints without an investigation or hearing. *See, e.g.*, SOLD 2019, *supra* note 1, at 5–7; ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT 22 (2020), http://iardc.org/Files/AnnualReports/AnnualReport2019.pdf [https://perma.cc/J75T-KA63] [hereinafter ARDC ANNUAL REPORT]; ATT'Y GRIEVANCE COMM'N OF MD., 44TH ANNUAL REPORT 22 (2019), https://www.courts.state.md.us/sites/default/files/import/attygrievance/docs/annualreport19.pdf [https://perma.cc/EW9B-2V8A].

3. *See, e.g.*, N.D. RULES FOR LAW. DISCIPLINE R. 6.6(B) (stating that the purpose of diversion "is to protect the public by improving the professional competence of and providing educational, remedial, and rehabilitative programs" to lawyers); *see also infra* notes 105–07, 113 and accompanying text.

4. *See* Telephone Interview with Regulator 17 (July 6, 2022) (all citations to telephone interviews are to authors' interview transcripts, on file with authors). The regulator made this observation during an interview conducted for this Article. *See infra* notes 99–100 and accompanying text.

5. *See* Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312–13 (2004).

improper conduct.[6] Because it is so difficult to prevail on a legal malpractice claim, individuals often have no recourse except to file a discipline complaint.[7]

Unfortunately, the lawyer discipline system offers limited assistance to individual complainants. Lawyer discipline systems are designed to protect the public and the administration of justice.[8] For serious misconduct, regulators may seek to impose incapacitating sanctions (suspension and disbarment) to remove lawyers from practice for a period of time. Signaling and shaming sanctions (public reprimands or private sanctions) can alert the lawyer, the legal community, and sometimes the public that the lawyer has engaged in unacceptable conduct. Discipline systems are not, however, designed to provide complainants with damages or other remedies. While a few jurisdictions order fee restitution for neglect of client matters, restitution is not the norm.[9] Complainants rarely even receive an apology from lawyers who caused them harm.[10]

Fifty years ago, the American Bar Association's ("ABA") Special Committee on Evaluation of Lawyer Disciplinary Enforcement declared the state of lawyer discipline to be "scandalous."[11] That committee noted a host of deficiencies with underfinanced bar-controlled disciplinary systems that investigated few complaints and protected the bar's elite.[12] It also observed that there were "no informal admonitory procedures to dispose of matters involving minor misconduct" and that prosecution of minor misconduct "is unduly harsh [and] wastes the agency's limited manpower and financial resources on relatively insignificant matters."[13] Yet dismissal of numerous complaints against an attorney may "immunize the attorney guilty of repetitive acts of minor misconduct from substantial discipline."[14] In 1992, when the ABA's Special Commission on Evaluation of Disciplinary Enforcement ("the McKay Commission") reported on the state of

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6. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 815–17, 824–26, 828–29 (1992).

7. Legal malpractice is notoriously difficult to prove, and even demonstrable neglect (e.g., a missed statute of limitations) will not result in a plaintiff's verdict unless the client can also demonstrate that she would have prevailed at trial in the underlying matter. HERBERT KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 54 (2018); *see* RONALD E. MALLEN, LEGAL MALPRACTICE § 33:7 (West 2022 ed.). In addition, clients of solo and small firm lawyers can typically only afford to sue for malpractice on a contingent fee basis, and legal malpractice lawyers will usually only take on high-value cases. KRITZER & VIDMAR, *supra*, at 147–48.

8. *See, e.g.*, STANDARDS FOR IMPOSING LAWYER SANCTIONS, Purpose of Lawyer Discipline Proceedings, Standard 1.1 (AM. BAR ASS'N 1992).

9. *See* Susan S. Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2055 (2017) (noting that disciplinary authorities in the United States may order restitution in limited circumstances).

10. For an examination of the use of apologies in lawyer disciplinary matters, see Leslie C. Levin & Jennifer Robbennolt, *To Err is Human, To Apologize is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513 (2021).

11. *See* AM. BAR ASS'N, SPECIAL COMM'N ON EVALUATION OF DISCIPLINARY ENF'T, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970).

12. *Id.* at 1–2, 24–25, 175–78.

13. *Id.* at 92–93.

14. *Id.* at 94.

lawyer discipline, it found continuing deficiencies in lawyer discipline, including the failure to "address complaints of incompetence or negligence except where the conduct was egregious or repeated" and "complaints that the lawyer promised services that were not performed."[15] It further noted that "the disciplinary process also does nothing to improve the inadequate legal or office management skills that cause many of these complaints."[16] The McKay Commission recommended that "minor misconduct" be handled administratively outside the discipline system[17] in a process now known as diversion.

Today, in thirty-five U.S. jurisdictions, lawyer discipline complaints may result in diversion agreements that enable the respondent lawyer to avoid discipline sanctions even where some misconduct occurred.[18] As conceived by the McKay Commission, this process was for matters constituting "minor misconduct, minor incompetence or minor neglect."[19] In such cases, a lawyer may enter into a confidential diversion agreement with discipline authorities, which could include conditions such as attending an ethics course, fee arbitration, lawyer practice management assistance, mentoring, substance abuse recovery programs, or psychological counseling.[20] If the lawyer satisfactorily completes the terms in the agreement, the disciplinary complaint is dismissed.[21]

It is not easy to study states' use of diversion in lieu of lawyer discipline. Diversion decisions do not appear in written opinions, and diversion agreements are confidential. Although many jurisdictions annually report to the ABA the number of complaints that are referred to diversion programs, the reporting is incomplete and uneven.[22] Disciplinary authorities typically do not publish demographic information about the lawyers who receive diversion. Nor do they usually publish information about which diversion conditions they utilized during the year, how often they used them, or the reasons why diversion is imposed.

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15. AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY: REPORT ON THE COMMISSION OF EVALUATION OF DISCIPLINARY ENFORCEMENT xv (1992), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ [https://perma.cc/5KGB-3MFW] [hereinafter MCKAY COMM'N REPORT].

16. *Id.*

17. *See id.* at Recommendations 8–10.

18. The most recent ABA Survey on Lawyer Discipline Systems indicates that there are thirty-two jurisdictions with diversion programs, but it includes Arkansas, Indiana, and Nebraska, which do not offer diversion. *See* SOLD 2019, *supra* note 1, at 9–12. It also does not reflect that California and the District of Columbia offer diversion programs. *Id.* at 9; *see* CAL. BUS. & PROF. CODE § 6231 (West 2022); D.C. BAR RULES R. XI, § 8.1 (1972). Nor does SOLD list the diversion programs in Massachusetts, New Jersey, South Carolina, and Vermont. *See* SOLD 2019, *supra* note 1, at 9–12.

19. MCKAY COMM'N REPORT, *supra* note 15, at Recommendation 9.

20. Bryan D. Burgoon, *Diversion to Disbarment, The Florida Lawyer Discipline System*, FLA. BAR NEWS (Dec. 1, 2013), https://www.floridabar.org/the-florida-bar-news/diversion-to-disbarment-the-florida-lawyer-discipline-system/ [https://perma.cc/QJ86-MUF5]; *see also* ILL. RULES OF THE ATT'Y REGIS. & DISCIPLINARY COMM'N R. 56(b).

21. *See, e.g.*, COLO. R. CIV. P. R. 242.17(e). *But see* 27 N.C. ADMIN CODE 01B .0112(i)–(k) (stating that dismissal is not automatic but is considered as mitigating evidence).

22. *See infra* notes 56–58 and accompanying text.

Little is known about which lawyers receive diversion, what standards are actually being applied, or whether lawyers who receive diversion later engage in other misconduct. One 2002 study of diversion in Arizona concluded that diversion "is working."[23] The study provides some demographic information (gender, years of practice) about the lawyers who received diversion and indicates that those who accepted diversion received fewer subsequent charges than those who did not.[24] Unfortunately, that study has some significant limitations.[25] Other data from Florida indicate that 10% of the lawyers who satisfied their diversion conditions were subsequently disciplined one or more times, but the study only tracked some of the lawyers who participated in diversion for a relatively short time period.[26] A more recent Wisconsin study found that the incidence of recidivism over a longer period was substantially higher in that state.[27]

This Article seeks to shed light on the use of diversion in lieu of lawyer discipline and to begin to assess how well it is working for respondent lawyers, regulators, complainants, and the public. Part I provides a brief overview of the lawyer discipline process and identifies where diversion fits into discipline proceedings. It also describes the ways in which the ABA *Model Rules for Lawyer Disciplinary Enforcement* ("*MRLDE*") suggest that diversion should be structured. Part II discusses state statistics revealing the frequency with which diversion is used and additional data from three jurisdictions to provide a fuller picture of the use—and reuse—of diversion. Part III discusses key findings from interviews with discipline regulators in twenty-nine jurisdictions about their diversion programs. Those interviews reveal that the regulators generally appear to be happy to have diversion as part of their regulatory toolkit. Nevertheless, their procedures, the diversion conditions available to them, and the resources for diversion vary significantly from state-to-state. The interviews also revealed shortcomings in some of the programs. Part IV discusses some problems identified in the interviews and offers recommendations to improve the effectiveness of diversion programs. These suggestions include efforts to promote consistency in the treatment of respondent lawyers to avoid bias in the use of diversion. Regulators can also take steps to promote durable learning, provide greater transparency, and increase complainants' satisfaction with the process. Regulators should also collect and evaluate data to determine whether they are using

23. Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1221 (2003).

24. *Id.* at 1251–52.

25. *See infra* notes 72–73 and accompanying text.

26. *See* HAWKINS COMM'N ON REV. OF DISCIPLINE SYS. REP. & RECOMMENDATIONS, A REPORT AND ANALYSIS OF TARGETED ASPECTS OF THE ATTORNEY DISCIPLINE SYSTEM 14, App. D (2011) [hereinafter HAWKINS COMM'N REPORT]; *infra* note 78 and accompanying text.

27. *See* LESLIE C. LEVIN & SUSAN SAAB FORTNEY, REPORT TO THE WISCONSIN OFFICE OF LAWYER REGULATION: ANALYSIS OF GRIEVANCES FILED IN CRIMINAL AND FAMILY MATTERS FROM 2013–2016, at 6 (Aug. 1, 2020); *see also* Michael F. Thompson, Lawyer Prior Violation Study 2–3 (Sept. 13, 2021) (unpublished report) (on file with authors); *infra* note 96 and accompanying text.

diversion effectively and appropriately. The Conclusion describes some final thoughts for judges, regulators, scholars, and other parties interested in designing the optimal lawyer regulatory system.

I. SITUATING DIVERSION IN THE LAWYER DISCIPLINE PROCESS

To provide context and background on the role that diversion plays in lawyer discipline systems, this Part describes when and how regulators use diversion as an alternative to discipline.[28] Typically, a disciplinary matter starts when a potential complainant (often a client or opposing party) reviews the disciplinary authority's website or contacts the regulatory authority concerning a problem involving a lawyer. About a dozen jurisdictions have Attorney Consumer Assistance Programs ("ACAPs") that attempt to resolve low-level concerns involving issues such as failure to communicate.[29] Some jurisdictions with ACAPs attempt to resolve minor problems before a complaint is even filed.[30] Disciplinary authorities in other states often review the complaints they receive to determine whether they are appropriate for informal resolution.[31]

If a complaint is not referred elsewhere for resolution, disciplinary authorities will review and dismiss it if the matter is not within their jurisdiction or the alleged misconduct does not constitute a violation of the professional conduct rules.[32] If an investigation appears warranted, disciplinary counsel will conduct

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28. Because the process can vary considerably from state to state, the description that follows does not reflect the variations in the procedures in all jurisdictions.

29. The Mississippi Bar launched the first consumer assistance program in 1994. *See* Stephanie Francis Ward, *Voices of Reason*, ABA. J., 1, 2 (Mar. 21, 2006). One of the reasons for starting ACAPs was that the majority of complaints did not raise issues that the disciplinary authorities would address, leading to public disillusionment with the lawyer discipline process. *See* Roy M. Sobelson, *Legal Ethics*, 48 MERCER L. REV. 387, 387 (1996).

30. *See, e.g.*, *Attorney Discipline*, FLA. BAR (2023), https://www.floridabar.org/public/acap/ [https://perma.cc/7Y4T-79SL]; *Client Assistance Program of the Office of the General Counsel (CAP)*, STATE BAR OF GA. (2022), https://www.gabar.org/committeesprogramssections/programs/consumerassistanceprogram/index.cfm [https://perma.cc/DWG5-TM2V]; *Filing a Complaint Against an Attorney*, MASS. BD. OF BAR OVERSEERS [https://perma.cc/7DER-26RA] (last visited Nov. 23, 2022); *Client-Attorney Assistance Program (CAAP)*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/CAAP/default.htm [https://perma.cc/S5C2-S4G4] (last visited Nov. 23, 2022).

31. *See, e.g.*, VT. PRO. RESP. BD., PROFESSIONAL RESPONSIBILITY PROGRAM, FY 21 ANNUAL REPORT 5, 6 (2021); WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2020–2021, at 4 (2021); *see also Attorney Matters*, N.Y. SUP. CT., APP. DIV., SECOND JUD. DEP'T, https://www.nycourts.gov/courts/ad2/attorneymatters_ComplaintAboutaLawyer.shtml [https://perma.cc/A79E-EXK7] (last visited Dec. 27, 2022) (noting that after a staff attorney reviews a complaint, it "may be transferred to the grievance, mediation, or fee dispute committee of a local bar association").

32. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T R. 11(A)(1) (AM. BAR ASS'N 2002) [hereinafter MRLDE]; W. VA. RULES OF LAW. DISCIPLINARY PROC. R. 2.4(a) (2013). Some complaints do not fall within the jurisdiction of the disciplinary agency because the alleged misconduct occurred outside the statute of limitations or for other reasons. In some jurisdictions, disciplinary authorities will not consider certain claims such as ineffective assistance of counsel, even though these claims may implicate duties of diligence and competence which are governed by the rules of professional conduct. *See, e.g.*, *Important Information and Instructions*, STATE BAR OF GA. (2017), https://www.gabar.org/forthepublic/upload/Grievance-Form_English.pdf [https://perma.cc/JFG4-RLZJ] (stating that state bar cannot discipline lawyers for ineffective assistance of counsel).

one.[33] Before filing formal charges, disciplinary counsel may propose that the lawyer consent to diversion conditions in lieu of discipline if the alleged misconduct was minor in nature and disciplinary counsel believes diversion is appropriate.[34] The lawyer may then enter into a negotiated agreement to comply with certain conditions.[35] If diversion does not occur, disciplinary counsel may file formal charges.[36] A hearing will be held, and if a referee or hearing panel finds lawyer misconduct, the decision-maker will recommend a sanction to a disciplinary board or state court for approval.[37]

The ABA *Model Rules for Lawyer Disciplinary Enforcement*, which were first adopted in 1992, outline procedures for diversion,[38] although jurisdictions do not uniformly follow the *MRLDE*'s approach.[39] Typically, disciplinary counsel or someone else within the disciplinary authority's office will offer a lawyer diversion for actions involving minor misconduct.[40] Disciplinary counsel and the respondent lawyer negotiate an agreement, "the terms of which shall be tailored to the individual circumstances."[41] The conditions may include "fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education, ethics school, or any other program authorized by the court."[42] If the lawyer accepts diversion, the lawyer is required to sign the agreement and complete it within a specified time period. The lawyer is also required to pay all costs incurred in connection with the diversion contract.[43] If the lawyer does not complete the conditions within the specified time, the lawyer may then be subject to discipline.[44]

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33. *See, e.g.*, *File a Complaint*, ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., https://www.iardc.org/Home/FileComplaint [https://perma.cc/DVV9-7DZN] (last visited Nov. 23, 2022).

34. *See* MRLDE R. 11(G)(1); RULES GOVERNING THE MO. BAR & THE JUDICIARY R. 5.105. Nevertheless, in some jurisdictions, diversion is available at any stage of the disciplinary process. *See, e.g.*, ARIZ. ATT'Y DIVERSION GUIDELINES § IV (2011), https://www.azbar.org/media/m4zh1syl/diversion-guidelines.pdf [https://perma.cc/7K5B-NH3D].

35. *See, e.g.*, IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14(3)(b)–(c) .

36. *See* MRLDE R. 11(D); LA. RULES FOR LAW. DISCIPLINARY ENF'T § 4(B)(3). In some jurisdictions, diversion may be offered at the hearing stage. *See, e.g.*, RULES REGULATING THE FLA. BAR R. 3-5.1(b)(2).

37. *See, e.g.*, MRLDE R. 11(E), 11(F); CONN. PRAC. BOOK §§ 2–40 (h), 2–47A (2023).

38. *See* MRLDE R. 11(G).

39. Florida and Texas are two large states that do not closely follow the *MRLDE*. *See* RULES REGULATING THE FLA. BAR R. 3-5.3; TEX. RULES OF DISCIPLINARY PROC. R. 16.

40. *See, e.g.*, COLO. R. CIV. P. R. 242.17(c)(2); LA. RULES FOR LAW. DISCIPLINARY ENF'T § 11(A) (providing for disciplinary counsel to refer lawyers for diversion). *But see* IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14 (stating that disciplinary board decides on diversion with the agreement of director for attorney discipline).

41. MRLDE R. 11(G)(4).

42. MRLDE R. 11(G)(1).

43. MRLDE R. 11(G)(4).

44. MRLDE R. 11(G)(7)(b). The failure to complete diversion can be used against respondents in a few jurisdictions. *E.g.*, WASH. STATE CT. RULES FOR ENF'T OF LAW. CONDUCT R. 6.6 (indicating that a material breach of a diversion agreement can be considered in subsequent discipline matters).

The *MRLDE* state that diversion is appropriate for "lesser misconduct."[45] A matter is not lesser misconduct if it involves misappropriation, the misconduct results in or is likely to result in substantial prejudice to the client or another person, or the respondent has been publicly disciplined within the past three years.[46] In addition, it is not lesser misconduct if it is of the same nature as misconduct for which the lawyer was disciplined in the past five years, involves dishonesty or deceit, constitutes a serious crime, or is part of a pattern of similar misconduct.[47] Other factors that disciplinary counsel consider when deciding whether to refer a lawyer to a diversion program include whether the presumptive sanction is likely to be no more severe than a reprimand, whether participation in the program is likely to benefit the respondent and accomplish the program's goals, whether aggravating or mitigating factors exist, and whether diversion was already tried.[48]

Some jurisdictions have more stringent limits on when diversion can be offered. For example, a few provide that diversion may be offered to a lawyer only once, absent extraordinary circumstances.[49] In California, Michigan, and New York, the rules limit diversion to lawyers suffering from mental health problems or an impairment such as substance abuse.[50]

Diversion is treated as confidential in most jurisdictions.[51] The *MRLDE* provide that complainants are to be told of the decision to refer the respondent to a diversion program and shall be provided a reasonable opportunity to submit a statement offering any new information.[52] In a few states, when diversion has been successfully completed, the records are destroyed three years after the charge is dismissed.[53]

The states also differ in the impact of the diversion agreements. In some states, lawyers are required to admit the wrongdoing while in others they are not.[54] In a few jurisdictions, diversion may be considered in any future disciplinary matters involving the respondent,[55] but in most, completed diversion is not considered in subsequent discipline matters.

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45. MRLDE R. 11(G)(1).

46. MRLDE R. 9(B).

47. MRLDE R. 9(B).

48. MRLDE R. 11(G)(3).

49. *E.g.*, D.C. BAR RULES R. XI, § 8.1(b)(2); *see also* TEX. RULES OF DISCIPLINARY PROC. R. 16.03(F) (noting that "[g]enerally, a Respondent is eligible to participate in the program one time").

50. *See, e.g.*, CA. BUS. & PROF. CODE §§ 6230–6231 (2011); MICH. CT. RULES R. 9.114(C)(1)(a); N.Y. RULES FOR ATT'Y DISCIPLINARY MATTERS § 1240.11.

51. *See, e.g.*, ARIZ. SUP. CT. RULES R. 70 (b)(4); COLO R. CIV. P. R. 242.17(g).

52. MRLDE R. 11(G)(2).

53. *See* ARIZ. SUP. CT. RULES R. 71(b); COLO. R. CIV. P. R. 251.13(f).

54. In New Jersey, the lawyer must acknowledge the misconduct. N.J. CT. RULES R.1:20–3(i)(2)(B). In Delaware, acceptance of conditional diversion means the lawyer does not contest the finding that there was probable cause that the respondent engaged in misconduct. DEL. LAWS.' RULES OF DISCIPLINARY PROC. R. 9(b)(4)(D).

55. *See* IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14(5); KAN. RULES RELATING TO DISCIPLINE OF ATT'YS R. 212(h)(2); LA. RULES FOR LAW. DISCIPLINARY ENF'T § 11(H).

II. THE DATA ON LAWYER DIVERSION

A. GENERAL JURISDICTIONAL INFORMATION

It is not clear how much lawyer diversion occurs in the United States. The best resource is the ABA's Survey on Lawyer Discipline Systems ("SOLD"), which annually reports the number of complaints jurisdictions referred to diversion and the number of respondents who completed or did not complete diversion.[56] Unfortunately, seven jurisdictions did not report their 2019 diversion statistics to the ABA, and two reported that they did not maintain data on diversion referrals.[57] SOLD also contains some information that differs from information in states' annual disciplinary reports.[58]

According to SOLD, some jurisdictions utilize diversion much more frequently than others. Several states with smaller populations refer ten or fewer complaints to diversion annually.[59] But some other states refer a more substantial number of complaints to diversion. In 2019, Florida referred 140 complaints to diversion while Kentucky referred seventy-three complaints.[60] To put this in perspective, this was 3.9% of all complaints received in Florida but almost 6.9% of all discipline complaints received in Kentucky.[61] In contrast, in Illinois, where disciplinary authorities received 27% more complaints than in Florida, only seven lawyers were referred to diversion, and fifty-seven lawyers were referred to the Lawyer Assistance Program ("LAP").[62] The numbers of diversion referrals can also vary considerably in a single jurisdiction from year to year.[63]

Annual reports published by state discipline authorities also provide, at best, limited information on diversion. Most annual reports from state disciplinary authorities only report the number of diversions,[64] and some do not even provide

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56. *See* SOLD 2019, *supra* note 1, at 9–12.

57. We are using 2019 diversion statistics in this discussion because of the possibility that diversion was utilized less frequently during the COVID-19 pandemic. Massachusetts, Michigan, New Jersey, most of New York, South Carolina, Vermont, and West Virginia did not report their 2019 data. Ohio and Virginia advised the ABA that they do not maintain data on diversion referrals. *Id.* at 13.

58. *Compare, e.g.*, *id.* at 9 (reporting Arizona had 112 diversions in 2019), *with* ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., ANNUAL REPORT OF THE ATTORNEY REGULATION ADVISORY COMMITTEE TO THE ARIZONA SUPREME COURT 7 (Apr. 30, 2020), https://www.azcourts.gov/Portals/108/ARC%20Report%202019.pdf?ver=2021-04-14-181725-203 [https://perma.cc/U2YT-U23K] (reporting 127 diversions).

59. According to SOLD, there are thirteen jurisdictions that fall into that category. SOLD 2019, *supra* note 1, at 9–12.

60. *Id.* at 9–10.

61. *Id.* at 3 (reporting that Kentucky received 1,057 complaints).

62. *See* ARDC ANNUAL REPORT, *supra* note 2, at 30.

63. *Compare, e.g.*, AM. BAR ASS'N, 2018 SURVEY ON LAWYER DISCIPLINE SYSTEMS 14 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf [https://perma.cc/8FK3-P2LE], *with* SOLD 2019, *supra* note 1, at 9–10 (reflecting that Arizona referred 77 complaints to diversion in 2018 as compared to 112 in 2019).

64. *See, e.g.*, ARDC ANNUAL REPORT, *supra* note 2, at 32; ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., *supra* note 58, at 7.

that information.[65] New Jersey is one of the very few jurisdictions that reported the most common offense leading to diversion (money recordkeeping) and that the most common condition was completion of the New Jersey State Bar Association's Ethics Diversionary Education Course.[66]

As previously noted, there have been only two systematic studies of lawyer diversion. The first study examined all disciplinary charges against Arizona lawyers from April 1992 through April 2002 that resulted in referral to the State Bar's Law Office Management and Assistance Program ("LOMAP").[67] Most of the 448 lawyers who were referred were solo practitioners.[68] Women lawyers were underrepresented in this group.[69] The study found that lawyers who completed diversion were "significantly more likely to receive fewer and/or less serious subsequent disciplinary charges than lawyers who ha[d] not completed such a program."[70] It also appears that lawyers who completed diversion may have received less discipline,[71] but the author did not report whether the difference was statistically significant. Unfortunately, the control group against which recidivism rates were compared included lawyers who did not qualify for diversion because their offenses were too serious.[72] Moreover, the study only analyzed recidivism within three years after the lawyer completed diversion because disciplinary records were expunged if the lawyer in question had no discipline imposed during that time period.[73]

Florida has also attempted to assess the effects of lawyer diversion. In 2011, the Florida Bar appointed a commission (the "Hawkins Commission") to review aspects of its lawyer discipline system, including diversion. At that time, lawyers who received diversion were only eligible to receive it once every seven years.[74] The Hawkins Commission subsequently reported that a study of diversions from June 2004 through June 2011 "determined that 90% of those in [diversion] programs

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65. *See, e.g.*, N.Y. ATT'Y GRIEVANCE COMM., *supra* note 1.

66. SUP. CT. OF N. J., OFF. OF ATT'Y ETHICS, 2021 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 31 (2022), https://www.njcourts.gov/sites/default/files/attorneys/office-attorney-ethics/2021oaeannualrpt.pdf [https://perma.cc/JJ3N-6GRF]; *see also* OKLA. BAR. ASS'N, 2020 ANNUAL REPORT OF THE PROFESSIONAL RESPONSIBILITY COMMISSION 8 (2021), https://www.okbar.org/wp-content/uploads/2021/02/2020-PRC-Annual-Report.pdf [https://perma.cc/P5MY-8VV2] (indicating diversion conditions imposed on Oklahoma lawyers).

67. Ellis, *supra* note 23, at 1221–22. The median years in practice of the lawyers referred for diversion was sixteen years. *Id.* at 1238.

68. *Id.* at 1251.

69. While 34% of active lawyers were female, only 14.2% of all lawyers referred to diversion were women. *Id.* at 1244. This is consistent with findings in other studies that women are less likely to be the subject of lawyer discipline then men. *See, e.g.*, Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. L. REV. 785, 799–800 (2004).

70. Ellis, *supra* note 23, at 1253. The length of participation in diversion did not have much of an impact on desirable outcomes. *Id.* at 1265.

71. *Id.* at 1253.

72. *Id.* at 1237; Diane M. Ellis, *Is Diversion a Viable Alternative to Traditional Discipline?: An Analysis of the First Ten Years in Arizona*, PRO. LAW., Fall 2002, at 4, 9.

73. Ellis, *supra* note 23, at 1236, 1253.

74. HAWKINS COMM'N REPORT, *supra* note 26, at 14.

ha[d] no subsequent history of discipline."[75] Moreover, when recidivism occurred, the misconduct was not necessarily in the same subject areas.[76] The study itself was not published, although the Commission supplied a table that shows the diversion completion dates and the discipline imposed for attorneys who later engaged in misconduct.[77] In some of those cases, the attorneys received multiple subsequent sanctions. The table does not reveal how many of the 939 lawyers who participated in diversion did so toward the end of the study period (e.g., 2009–2011), which means that their subsequent conduct was only tracked for a very short period. The table does not state—but suggests through the conditions identified—some reasons for diversion, which seemingly included trust account issues, advertising violations, lack of competence, law office management issues, and anger management problems.[78]

B. THE WISCONSIN DATA

A study we conducted of lawyer grievances in Wisconsin yielded some useful information related to diversion. In 2016, the Wisconsin Office of Lawyer Regulation ("OLR") sought to learn more about the lawyers who received grievances in family and criminal law matters and asked us to analyze their discipline data and prepare a report.[79] In our study, we looked exclusively at lawyers who received grievances for issues arising from family law or criminal law matters from 2013–2016.[80]

During this period, there were 4,898 grievances in criminal law and family law matters involving 2,123 different lawyers.[81] Complainants filed substantially more grievances against men (68.4%) than women (31.6%), although this would be expected, given the demographics of the legal profession in Wisconsin.[82] Of the 4,898 grievances reviewed, 64% involved criminal law matters, and 36% involved family law matters. The median age of lawyers who received grievances in these matters from 2013–2016 was forty-seven years old.[83] Almost 20% of the

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75. *See id.* at 14, App. D; *see also* Julie Kay, *Lawyers Should Report Misbehavior, Problems; Group to Discuss Study Friday*, MIA. DAILY BUS. REV., May 16, 2012, at A1.

76. HAWKINS COMM'N REPORT, *supra* note 26, at 14.

77. *Id.* at App. D.

78. *See id.*

79. LEVIN & FORTNEY, *supra* note 27, at 1, 1 n.1. The OLR had noted that in recent years, over 30% of lawyer grievances in Wisconsin involved criminal or traffic matters and almost 20% related to family and juvenile matters. *Id.* (citing WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2015-2016, at 46) (reporting that 38.1% of all disciplinary grievances were filed in criminal law matters and 19.76% were filed in family law matters).

80. LEVIN & FORTNEY, *supra* note 27, at 1. Individuals hired and supervised by the OLR coded and anonymized data related to the grievances. For each of these grievances, they coded demographic information and information about the nature of the grievance, the type of matter, its disposition, and the lawyer's prior diversion and discipline history.

81. *Id.* at 2.

82. During this time period, approximately two-thirds of all Wisconsin lawyers were male while one-third were female. *Id.* at 2–3. The Wisconsin OLR and State Bar of Wisconsin do not maintain records reflecting the total number or gender of Wisconsin lawyers who practice in the areas of criminal or family law.

83. Where lawyers received more than one grievance during 2013–2016, we used the age at which they received their first grievance during that period. *Id.* at 3.

grievances filed in family and criminal law matters were filed against lawyers who had previously received discipline,[84] representing 284 individual lawyers.[85]

In Wisconsin, the OLR Director may determine that a matter should be diverted at intake, during an investigation, or at the conclusion of an investigation.[86] Diversion is available "when there is little likelihood that the attorney will harm the public during the period of participation, when the director can adequately supervise the conditions of the program, and when participation in the program is likely to benefit the attorney and accomplish the goals of the program."[87] Unless good cause is shown, the Wisconsin rule states that diversion is not available when the discipline likely to be imposed is greater than a private reprimand, the misconduct resulted in or is likely to result in actual injury to a client, the attorney has been publicly disciplined within the preceding five years, or the misconduct is the same as that for which the attorney previously has participated in diversion.[88]

From 2013–2016, 239 of the grievances (4.9%) resulted in diversion, involving a total of 232 lawyers.[89] A substantial number of those lawyers (103) had previously received diversion, a disciplinary sanction, or both. This included four lawyers who had been publicly disciplined in the preceding five years. More than 25% of those grievances leading to diversion were due to a failure to provide clients with a written fee agreement, a properly worded fee agreement, or fee arbitration information.[90] More than 12.5% of those grievances arose out of violation of the rules governing trust accounts.[91] Table 1 shows the number of years between the lawyer's graduation and the date when the grievance leading to diversion was filed.

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84. *Id.* at 4. Some of the lawyers may have received a sanction during 2013–2016 and then received a subsequent grievance during that period. In some of those cases, it is possible that the sanction was not imposed before a later grievance was filed.

85. *Id.* The OLR only maintains discipline records since 1978, so it is possible that the number of previously disciplined lawyers is somewhat higher. *Id.* at 4 n.10.

86. WIS. SUP. CT. RULES R. 22.10(1).

87. WIS. SUP. CT. RULES R. 22.10(3).

88. WIS. SUP. CT. RULES R. 22.10(3).

89. LEVIN & FORTNEY, *supra* note 27, at 15.

90. *Id.* at 18. Wisconsin requires lawyers to provide new clients with written fee agreements in most cases. WIS. SUP. CT. RULES R. 20:1.5(b). Starting in July 2016—toward the end of the study period—lawyers were also required to give clients notice of the availability of dispute resolution through arbitration if they chose to put advance fees in their business accounts. *See* WIS. SUP. CT. RULES R. 20:1.5(g).

91. LEVIN & FORTNEY, *supra* note 27, at 18.

TABLE 1
LAWYERS RECEIVING DIVERSION, 2013–2016: YEARS SINCE GRADUATING LAW SCHOOL[92]

Years From Graduation Until Grievance Leading to Diversion	Number of Lawyers	Percentage
0-5 Years	18	7.8%
5-10 Years	27	11.7%
10-20 Years	68	29.6%
20-30 Years	65	28.3%
30-40 Years	45	19.6%
Over 40 Years[93]	8	3.5%
Total	231[94]	100%

More than one condition was sometimes utilized in connection with diversion of a single lawyer. The diversion terms are shown below.

TABLE 2
DIVERSION CONDITIONS UTILIZED IN CONNECTION WITH GRIEVANCES, 2013–2016

Diversion Condition	Number
Affidavit of Compliance	5
CLE	120
Ethics School[95]	11
Fee Arbitration	91
Law Office Management Program	2
Monitoring	1
Other	7
Restitution	1
Trust Account Management Program	20
Trust Account Monitoring	1

92. The OLR provided the year of graduation. We assumed that May was the month of graduation.
93. None of the lawyers who received diversion had been in practice for more than forty-five years at the time that the grievance was received.
94. The year of graduation was not provided for one of the lawyers who received diversion.
95. Ethics School, which was run by the OLR, was discontinued during the study period. In subsequent years, some lawyers received conditions requiring them to complete ethics CLE.

The most common diversion condition was attending Continuing Legal Education ("CLE") classes, which included ethics CLE, practice area CLE, and wellness CLE. The next most common was fee arbitration, followed by participation in a Trust Account Management Program.

A grievance may simply reflect client unhappiness with an outcome rather than lawyer wrongdoing. Nevertheless, it seems noteworthy that 443 lawyers—or almost 20.9% of all lawyers who received grievances from 2013–16—had received diversion one or more times before 2013. The breakdown was as follows:

TABLE 3
NUMBER OF LAWYERS WHO RECEIVED GRIEVANCES DURING 2013–2016 AND HAD PREVIOUSLY RECEIVED DIVERSIONS (PRE-2013)

Number of Prior Diversions	Number of Lawyers
1	325
2	83
3	23
4	10
5	2

While family and criminal law are areas that attract a large number of grievances, these figures suggest that some lawyers are not learning the intended lessons from their experiences with diversion. This concern is reinforced by the fact that a number of lawyers received diversion on multiple occasions.

Subsequent analysis of the data provided by the Wisconsin OLR revealed that 254 lawyers were disciplined from 2013–2016 and that 40% of those lawyers had previously received diversion at least one or more times before.[96] These figures are substantially higher than those previously reported by other jurisdictions.[97] Since 2016, Wisconsin has reduced and reoriented its use of diversion.[98]

III. REGULATOR INTERVIEWS

A. METHODOLOGY

The findings from our Wisconsin study inspired us to conduct a national study on diversion. In order to learn more about how—and how well—diversion in lieu

96. Thompson, *supra* note 27, at 2–3.

97. *See supra* notes 59–63 and accompanying text.

98. During fiscal year 2019–2020, the Wisconsin OLR reported that thirty-one attorneys were diverted to alternative programs. WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2019-2020, at 6 (2020). More recently, the OLR reported diversions increased to fifty-four, with the most common term being completion of the State Bar's Law Firm Self-Assessment. *See* WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2021–2022, at 5.

of lawyer discipline is working in the United States, we interviewed disciplinary authorities in twenty-nine of the thirty-five jurisdictions that offer diversion.[99] We used email to contact the person who we believed was the head disciplinary authority in the jurisdiction, explained the focus of our study, and asked to speak with that person or someone else in that office about the jurisdiction's diversion program.[100] We separately conducted semi-structured telephone interviews, which lasted from thirty to sixty minutes. The interview topics included the jurisdiction's diversion procedures, the conditions available for diversion, and the regulators' views about diversion. We assured the regulators that their identities would be treated as confidential and that the information they provided would not be connected to their jurisdictions.

B. THE STUDY DATA

This Part examines findings from the national study, starting with the regulators' observations about the purpose and value of diversion. It then discusses how regulators make decisions to offer diversion, followed by a description of the conditions offered in diversion and communications that benefit complainants. We then outline regulators' approaches to confidentiality of diversion information and their consideration of diversion in subsequent discipline matters. This Part wraps up with an examination of the regulators' concerns related to diversion and their thoughts about improving diversion.

1. THE PURPOSE AND VALUE OF DIVERSION

As previously noted, in 1992, the ABA's McKay Commission recommended that "minor misconduct, minor incompetence or minor neglect" should be handled through non-disciplinary proceedings.[101] In 1993, the ABA amended its *Model Rules for Lawyer Disciplinary Enforcement* so that those rules provided that where "lesser misconduct" was involved, disciplinary counsel could enter into an agreement with the lawyer to comply with certain conditions in lieu of discipline.[102] The *MRLDE* commentary noted that the "overwhelming majority" of complaints against lawyers were for lesser misconduct and that summary dismissal of these complaints "is one of the chief reasons for public dissatisfaction with the system."[103] The commentary further observed that these cases "seldom justify the resources needed to conduct formal disciplinary proceedings" and that what

99. *See supra* note 18 and accompanying text.

100. In three of the interviews, two regulators from the same jurisdiction participated in the call. For two jurisdictions, there were separate interviews with a second person to learn additional details about their jurisdictions' diversion programs.

101. MCKAY COMM'N REPORT, *supra* note 15, at Recommendation 9.1.

102. MRLDE R. 21(F). Rule 9(b) defines "lesser misconduct" to mean "conduct that does not warrant a sanction restricting the respondent's license to practice law" and provides examples of conduct that is not considered lesser misconduct.

103. MRLDE R. 21 commentary.

most cases call for is "a remedy for the client and a way to improve the lawyer's skills."[104]

Many interviewees said that the primary purpose of diversion is to help the lawyer or improve the lawyer's practice.[105] "The primary purpose is to allow the lawyer to move on from a bad patch in their life . . . to get back on their feet and to keep their license. There is no point in shunting them off to the side."[106] The potential for rehabilitation to get lawyers back on track seemed to be foremost in many of their minds.[107] When describing the primary purpose as "[p]rofessional enhancement," one explained that it was "[t]aking a lawyer who is not a lost cause and enhancing what they do. Building them up to make them better . . . [like] the Bionic man."[108] This highlighted a striking aspect of the interviews: the extent to which the regulators appeared to want to help these lawyers.[109]

Some regulators stressed the importance of being able to address the underlying problem rather than simply impose a sanction.[110] When describing the primary purpose of diversion, one stated it was "[f]ixing the problem—[you] can't discipline the dumbness out of someone." Another noted that diversions are "less reactive and more proactive. It doesn't do any good to give a lawyer a private sanction or a public reprimand and not fix the problem so that the lawyers do not reoffend."[111] "Fixing the problem" seemed very important in some jurisdictions. Another regulator stated, "[w]e don't offer [diversion] unless we believe in good faith that the attorney could really benefit from it."[112]

A number of interviewees also recognized how assisting lawyers in "improving [their] skills, wellness, and practice" advances public protection.[113] Their focus on public protection reflects the mission of disciplinary regulators, which is, in large part, to protect the public.[114] Indeed, several regulators

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104. MRLDE R. 21 commentary.

105. *See, e.g.*, Telephone Interview with Regulator 14 (July 23, 2021) (noting that the primary purpose of diversion is "[t]o help the lawyer improve practice which then helps protect the public"); Telephone Interview with Regulator 15 (July 23, 2021) (stating that the purpose of diversion was "[t]o help the lawyer to be a better lawyer and make better choices").

106. Telephone Interview with Regulator E (July 6, 2021).

107. One regulator observed, "it's like going to prison for two years with no rehabilitation. . . . The idea is to provide rehabilitation." Telephone Interview with Regulator B (June 30, 2021).

108. Telephone Interview with Regulator J (July 14, 2021).

109. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021) (noting that diversion "gives guidance to attorneys who find themselves in the unfortunate position of being before disciplinary counsel and who would benefit from help due to inexperience, lack of knowledge or mental health issue[s]").

110. *E.g.*, Telephone Interview with Regulator 8 (July 8, 2021).

111. Telephone Interview with Regulator D (July 1, 2021).

112. Telephone Interview with Regulator C (July 1, 2021).

113. *See, e.g.*, Telephone Interview with Regulator 1 (June 30, 2021); *see also* Telephone Interview with Regulator 2 (June 28, 2021) (stating that diversion advances public protection by addressing the underlying conduct). In the words of one interviewee, diversion protects the "public from lawyer[s] who don't understand what they are doing." Telephone Interview with Regulator 16 (July 27, 2021).

114. *See, e.g.*, *Office of Disciplinary Counsel Purpose and Mission*, D.C. BAR (2022), https://www.dcbar.org/attorney-discipline/office-of-disciplinary-counsel/purpose-and-mission [https://perma.cc/VKH5-EHFR];

referred to "public protection" as the primary or an important purpose of diversion. When asked the primary purpose, one noted, "[w]earing my regulators' hat, it is intervention for public protection."[115] Another said, "[o]ur mission is public protection. The best protection is an attorney who has the best support. Lawyers who are stronger are going to be better lawyers and this meets our mission."[116] The purpose of diversion was "[t]o find a way to help the attorney when there is minor enough misconduct, and they think that they can help the lawyer so that they will be a better lawyer and not a risk to the public."[117] Likewise, diversion programs that address substance abuse "can prevent clients from being hurt because lawyers can better serve their clients."[118]

From the regulators' perspective, diversion also signals to respondent lawyers that their conduct was problematic. "It brings to the attorney's attention that in [the] view of [the regulator] the attorney is doing something that is 'off.'"[119] Diversion also "help[s] the attorney identify the problem behavior, accept that a problem exists, and impose[s] conditions that can correct without having to impose discipline."[120]

A few regulators described additional purposes for making diversion referrals. Echoing the concerns expressed in the McKay Report, one stated it "helps to reinforce [the] view that [the] legal profession maintains standards and is not just [a] cover-up. This helps communicate that the bar deserves the privilege of self-regulation."[121] That same regulator identified another purpose of diversion, which related to resources and docket control: "[d]isciplinary counsel is really a felony unit—they don't have time for traffic ticket[s], but prosecutors should focus on serious misconduct . . . In that sense, diversion frees prosecutors up to focus on those who pose a threat to the profession and the public."[122] Diversion had been adopted in another state to help with docket control, although the primary purpose of diversion was public protection.[123] A regulator there explained that "diversion expedites the disciplinary process."[124] Another interviewee said, "diversion can be used when there is a proof problem and deferral [may be] the best they can get.

For the Public, DISCIPLINARY BD. OF THE SUP. CT. OF PA. (2023), https://www.padisciplinaryboard.org/for-the-public [https://perma.cc/C7MB-ENHW]. Public protection includes not only protection of clients but protection of third parties. For more on the purposes of lawyer discipline, see generally Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).

115. Telephone Interview with Regulator M (July 26, 2021).

116. Telephone Interview with Regulator B (June 30, 2021). Similarly, one regulator stated simply that the purpose of diversion was "[t]o help the lawyer improve the practice which then helps protect the public." Telephone Interview with Regulator 14 (July 23, 2021).

117. Telephone Interview with Regulator 11 (July 15, 2021).

118. Telephone Interview with Regulator 10 (July 16, 2021).

119. Telephone Interview with Regulator F (July 7, 2021).

120. Telephone Interview with Regulator G (July 7, 2021).

121. Telephone Interview with Regulator 16 (July 27, 2021).

122. *Id.*

123. Telephone Interview with Regulator M (July 26, 2021).

124. Telephone Interview with Regulator A (June 30, 2021).

The process may turn [the] attorney around. If not, they have admissions for future prosecutions."[125]

Although some regulators noted that diversion that improves lawyer performance could benefit clients generally,[126] few mentioned how diversion benefited individual complainants. Only one regulator stated that a purpose of diversion was "to make sure the complainant is made whole, if possible."[127] This lack of attention to the concerns of individual complainants is not altogether surprising given the discipline system's focus on public protection rather than providing a remedy or relief to individual complainants.

Interviewees valued having the diversion option, characterizing it as an important remedial tool to help "turn attorney[s] around."[128] A number of regulators enthusiastically commented on the importance of diversion as an alternative to discipline.[129] One reported that he was not a fan of diversion when he started as a disciplinary regulator decades earlier, but his thinking "has evolved 180 degrees and [he] now believes strongly in the effectiveness of diversion for both complainants and respondents."[130] Some appreciated the fact that diversion agreements can be designed to meet the individual needs of the respondent lawyer, rather than using a "one size fits all" approach.[131]

Pointing to the remedial assistance provided to attorneys, one regulator suggested that diversion programs can help transform relationships between the bar and the regulator.[132] As he noted, diversion "gives the office an alternative to saying, '[y]ou screwed up and we are going to whack you' . . . It has made [his] office ten times more reasonable because there are alternatives to discipline."[133]

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125. Telephone Interview with Regulator 9 (July 12, 2021) (also noting that diversion is "important in giving lawyers opportunities to tell their stories and to improve their practices"). Some jurisdictions require that the lawyer admit the misconduct as a condition of diversion. *See* KAN. RULES RELATING TO DISCIPLINE OF ATT'YS R. 212(e); N.J. CT. RULES R. 1:20 (glossary of attorney discipline terms).

126. *See, e.g.*, Telephone Interview with Regulator F (July 7, 2021) (stating that diversion is "a way to assist [lawyers]. It also benefits clients.").

127. Telephone Interview with Regulator K (July 19, 2021) (also noting that the "main duty is to protect the public").

128. Telephone Interview with Regulator 9 (July 12, 2021); *see also* Telephone Interview with Regulator 5 (June 30, 2021) (stating that diversion provides a second chance for attorneys who are "not bad people"); Telephone Interview with Regulator 7 (July 8, 2021) (referring to diversion as an "opportunity to right [the] ship before something serious happens").

129. *See, e.g.*, Telephone Interview with Regulator G (July 7, 2021) (stating that diversion is "tremendously beneficial to everyone involved").

130. Telephone Interview with Regulator 16 (July 27, 2021).

131. Telephone Interview with Regulator E (July 6, 2021).

132. Telephone Interview with Regulator H (July 8, 2021) (referring to diversion's "fundamental effect" on the regulator's "relationship with the bar").

133. *Id.*

2. DECISION-MAKING ABOUT DIVERSION

The individuals who decide whether to offer lawyers diversion vary from jurisdiction to jurisdiction. Factors such as the state's disciplinary procedure rules, the size of the jurisdiction, as well as available personnel and other resources affect who makes decisions related to whether a respondent is offered diversion and the terms of the diversion agreements. In most jurisdictions, lawyers in the regulator's office will suggest diversion following investigation or after a probable cause finding.[134] Diversion typically requires approval of the chief regulator (or a supervisor) and a hearing committee or disciplinary board.[135] In some jurisdictions, however, the decision to offer diversion and the accompanying conditions is made by a hearing panel later in the process, usually with some input from lawyers in the regulator's office.[136]

A few larger jurisdictions designate one person to oversee all diversions.[137] Such diversion directors or coordinators may participate in decisions on offering diversion alternatives and the proposed diversion conditions.[138] Regulators from smaller jurisdictions reported that lawyers in their offices informally consult one another on a regular basis about diversion decisions and the conditions to be negotiated or required and that the chief regulator is involved in all diversion decisions.[139] In a small number of jurisdictions, the conditions are determined by the state's lawyer assistance program or its law office management program.[140]

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134. *E.g.*, Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 4 (June 29, 2021).

135. *E.g.*, Telephone Interview with Regulator G (July 7, 2021) (reporting that the office director approves all diversion agreements in conversation with the chair of the ethics committee or the lawyers in his office proposing diversion); Telephone Interview with Regulator 4 (June 29, 2021) (indicating that the director of the office has the "sole discretion to make diversion referrals"); Telephone Interview with Regulator 10 (July 16, 2021) (stating the diversion recommendations must be accepted by the commission).

136. *See* Telephone Interview with Regulator 1 (June 28, 2021) (stating that in some cases, the Investigatory Panel may recommend the conditions); Telephone Interview with Regulator J (July 14, 2021) (reporting that if the referee believes diversion is appropriate, staff counsel will provide input). *But see* Telephone Interview with Regulator C (July 1, 2021) (noting that on some occasions the committee finalizes diversion agreements without consulting with disciplinary counsel's office).

137. *E.g.*, Telephone Interview with Regulator 1 (June 28, 2021); Telephone Interview with Regulator K (July 19, 2021).

138. *See, e.g.*, Telephone Interview with Regulator 3 (June 28, 2021) (describing collaborative process in which the designated person works with the respondent lawyer and disciplinary counsel in designing conditions); Telephone Interview with Regulator C (July 1, 2021) (referring to monitors who assist in finalizing diversion agreements and making "sure the terms are consistent in the agreement").

139. *See, e.g.*, Telephone Interview with Regulator D (July 1, 2021) (noting that attorneys in the very small office work in close proximity and talk to the chief regulator about conditions to be imposed); Telephone Interview with Regulator L (July 21, 2021) (explaining that they will "roundtable it within their group" if they think diversion is appropriate).

140. Telephone Interview with Regulator B (June 30, 2021); Telephone Interview with Regulator L (July 21, 2021). In one jurisdiction, diversion conditions are not decided by the disciplinary authority alone, but rather in conjunction with a program run by the state bar. Telephone Interview with Regulator 5 (June 30, 2021).

3. DIVERSION CONDITIONS

Some jurisdictions' rules provide for a wide range of conditions that may be included in diversion agreements,[141] but the regulators may not utilize all of them.[142] None of the jurisdictions reported having written internal guidelines for the conditions that should be negotiated or required in particular circumstances,[143] but some routinely required certain conditions for particular types of misconduct. For example, in one jurisdiction, in order to receive diversion for a Driving Under the Influence conviction, the lawyer must agree to undergo treatment.[144] Generally speaking, the regulators in most jurisdictions sought conditions that addressed the alleged misconduct, but their ability to tailor conditions depended largely on the jurisdiction's rules and resources.[145]

Several jurisdictions relied heavily on CLE courses to address lawyers' problems.[146] In some jurisdictions, CLE was mandatory for virtually everyone undergoing diversion.[147] These CLEs were sometimes the same ones that were offered broadly to the legal community. Although most regulators tried to tailor the CLE requirements, such as trust accounting CLEs for trust account problems,[148] few jurisdictions tailored the ethics instruction more specifically to address the particular ethics violation that led to diversion.

Some jurisdictions utilized special courses or workshops to help educate the lawyers.[149] One jurisdiction has "a full-day law practice management class taught by the director of the practice management program and a staff person."[150] However, only a few states' diversion programs appeared to utilize a robust Law

141. *See, e.g.*, OR. STATE BAR RULES OF PROC. R. 2.10(d).

142. One regulator noted that although they had about twenty conditions they could utilize, they very rarely used certain options such as counseling on law practice management. Telephone Interview with Regulator G (July 7, 2021).

143. Arizona's guidelines expressly provide that "[t]he Terms and Conditions of Diversion shall be tailored to address the problem(s) underlying the particular charge and misconduct and any circumstances specific to the Respondent or the misconduct." ARIZ. ATT'Y DIVERSION GUIDELINES § VI(A). They note that the need for flexibility is "paramount." *Id.*

144. Telephone Interview with Regulator 10 (July 16, 2021).

145. *See, e.g.*, Telephone Interview with Regulator 11 (July 15, 2021).

146. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021) (reporting that they commonly required one CLE for law office management, one for ethics, and one in a practice area). Another required one hour of CLE for every month during which the diversion agreement was in effect. Telephone Interview with Regulator 2 (June 28, 2021).

147. *See, e.g.*, Telephone Interview with Regulator 11 (July 15, 2021) (noting it is "almost automatic to require attendance [at] the one-day ethics school").

148. *See, e.g.*, Telephone Interview with Regulator F (July 7, 2021) (stating that her office may require "additional CLE for trust account management" where that was the problem); *see also* Telephone Interview with Regulator J (July 14, 2021) (stating that attendance at a CLE workshop on civil practice was an "appropriate" requirement in a case where "that had been the problem").

149. For example, one regulator reported that a Certified Public Accountant in her office "ha[d] developed an attorney trust account class, which [was] a one-time session with respondent[s] on [an] individual basis about the rules for handling trust accounts." Telephone Interview with Regulator N (July 29, 2021).

150. Telephone Interview with Regulator 15 (July 23, 2021). Likewise, at least one had an "Ethics School" program that was designed for the regulator's office. Telephone Interview with Regulator M (July 26, 2021).

Office Management Program ("LOMAP").[151] In some jurisdictions, all that was seemingly required of some lawyers to satisfy diversion was attending CLE courses, a workshop, or "school."[152]

A few regulators included financial audits and financial monitoring conditions to address trust account problems.[153] Occasionally, regulators required respondents to hire a Certified Public Accountant to demonstrate compliance with trust account requirements.[154] Another jurisdiction required some lawyers to consent to random audits of trust accounts as a condition of diversion.[155]

Several jurisdictions also attempted to provide individualized counseling to at least some of the lawyers.[156] The time and effort expended on the counseling varied significantly, due in part to resource constraints.[157] For example, a regulator may "require an in-office consultation to [assess the] entire practice including office technology."[158] Regulators took a variety of approaches when determining who would perform the counseling.[159] In a few jurisdictions, the LOMAP or another program provided individual counseling.[160] In a small number of

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151. *See infra* note 160 and accompanying text. Another regulator noted that the lawyers were sometimes required as a condition of diversion to consult with practice management experts, such as bar association personnel, who provide lawyers with law office management tools including software for billing and conflict checks. Telephone Interview with Regulator 10 (July 16, 2021). The resource was not, however, a LOMAP. *See id.*

152. *E.g.*, Telephone Interview with Regulator 3 (June 28, 2021). Some regulators refer to educational programs as "schools" when the training focuses on a particular subject area, such as trust accounts, or the training occurs over an extended time period. *See, e.g.*, *id.*

153. *E.g.*, Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 11 (July 15, 2021). A few jurisdictions tracked trust account compliance by requiring lawyers to submit financial information on a monthly or quarterly basis. *E.g.*, Telephone Interview with Regulator D (July 1, 2021); Telephone Interview with Regulator I (July 9, 2021).

154. *E.g.*, Telephone Interview with Regulator J (July 14, 2021). In one jurisdiction, if the lawyer could not pay for a forensic accountant, the regulator might impose a sanction instead of diversion. Telephone Interview with Regulator N (July 29, 2021).

155. Telephone Interview with Regulator C (July 1, 2021).

156. *See, e.g.*, Telephone Interview with Regulator 5 (June 30, 2021) (estimating that 15% of lawyers in diversion received individual counseling on law practice management issues); Telephone Interview with Regulator 3 (June 28, 2021) (estimating psychological counseling in 20% of the diversion contracts); Telephone Interview with Regulator 1 (June 28, 2021) (stating that individual counseling occurred with every diversion participant, with the number of sessions depending upon the participant).

157. *See* Telephone Interview with Regulator 4 (June 29, 2021) (expressing the desire to "provide more individual counseling," but noting "it is a challenge with a small office"); Telephone Interview with Regulator L (July 21, 2021) (reporting that "they have a one-time counseling option for some lawyers as a condition of diversion," but "they realized [the need for] follow-up to ensure that the lawyer was doing what he was supposed to do").

158. *E.g.*, Telephone Interview with Regulator 15 (July 23, 2021).

159. For example, lawyers in one jurisdiction sometimes meet with a professional liability coverage provider, with many having a follow-up meeting with the provider six months later. Telephone Interview with Regulator 2 (June 28, 2021). In another jurisdiction, the counseling was a two-to-three-hour session with loss prevention counsel from an insurance company and someone from the law practice management program. Telephone Interview with Regulator 5 (June 30, 2021).

160. *E.g.*, Telephone Interview with Regulator 7 (July 8, 2021); Telephone Interview with Regulator 5 (June 30, 2021); Telephone Interview with Regulator J (July 14, 2021).

jurisdictions, disciplinary authorities themselves provided individual counseling to try to identify what went wrong and to help the lawyer fix it.[161]

A few regulators tried to get the lawyers to pay for a private consultant. This was on top of the administrative costs of diversion and the costs of CLE and other conditions.[162] As one regulator noted, however, most of the respondents are solo and small firm practitioners who cannot afford to pay for the "very expensive" consultants.[163]

A number of jurisdictions also require that some of the lawyers in diversion work with a "practice monitor," a "diversion supervisor," a "diversion monitor," or a "mentor."[164] These individuals, who typically provide the service on a volunteer basis, were often selected by the lawyer and approved by the regulator or, alternatively, were provided by a bar association.[165] Some regulators reported challenges associated with securing individuals to serve in these positions.[166] The level of training and supervision of practice monitors and mentors varied.[167] Some regulators required the mentors and monitors to provide regular reports to the regulators, sometimes on a monthly basis.[168]

Where substance abuse or other impairment was involved, the regulators often referred the lawyers to Lawyers' Assistance Programs or asked the lawyers to work with a LAP as one of the conditions of diversion.[169] This would typically be the sole response in jurisdictions that only permit diversion when lawyers are

161. One regulator gave as an example "a problem with a [lawyer's] personal injury fee agreement." In such a case, regulators will work with the lawyer to revise the fee agreement so that it complies with the state's requirements. "[A] condition of diversion would be for the lawyer to agree to use the [revised] agreement for one year and to provide the [regulator] with copies of every fee agreement entered into . . . on a quarterly basis." Telephone Interview with Regulator I (July 9, 2021).

162. Only a few regulators specified the administrative costs of diversion, which ran from $224 to $1,250. *E.g.*, Telephone Interview with Regulator 11 (July 15, 2021); Telephone Interview with Regulator J (July 14, 2021).

163. Telephone Interview with Regulator I (July 9, 2021).

164. Telephone Interview with Regulator A (June 30, 2021); Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator E (July 6, 2021); Telephone Interview with Regulator 14 (July 23, 2021).

165. *E.g.*, Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 14 (July 23, 2021).

166. *E.g.*, Telephone Interview with Regulator 12 (July 16, 2021) (noting interest in a pool of trained practice monitors). Occasionally it is necessary to pay the monitors. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021); *see also* Telephone Interview with Attorney F (July 7, 2021) (noting that individual counseling on law practice management used to be performed by a person who charged for the service, but often respondents could not afford it). At least one jurisdiction typically uses Certified Public Accountants as financial monitors. Telephone Interview with Regulator 12 (July 16, 2021). Presumably in such cases, they are paid.

167. For example, one regulator stated that practice monitors are advised in a letter how they should work with the lawyer. Telephone Interview with Regulator A (June 30, 2021). Another regulator explained that "law practice monitor[s do] not receive a manual with instructions, but [they receive] a lot of follow up from her office about what to do." Telephone Interview with Regulator N (July 29, 2021). In a third jurisdiction, mentoring was merely suggested by the regulator and mentoring was handled entirely by one of two bar organizations. Telephone Interview with Regulator B (June 30, 2021).

168. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021).

169. *E.g.*, Telephone Interview with Regulator I (July 9, 2021).

suffering from some impairment.[170] In some jurisdictions that refer lawyers to their LAPs, "whatever [a] LAP does with the lawyer" and any agreements a lawyer makes with a LAP are "kept confidential from [the regulator's] office."[171] In others, the conditions are developed more collaboratively.[172]

The interviews revealed that some regulators were using creative approaches to diversion. One jurisdiction provided lawyers with consultants on technology and practice profitability.[173] Another jurisdiction required that lawyers in diversion agree to "carry malpractice insurance and have a death/disability/disaster plan."[174]

Increasingly, regulators are including in diversion agreements conditions that require self-assessments by respondent lawyers. Self-assessment tools enable lawyers to systematically review their office procedures and systems, identify deficiencies, consult resources, and improve their practice controls. First used by lawyer regulators in Australia,[175] self-assessments are part of an approach to lawyer regulation known as Proactive Management-Based Regulation ("PMBR").[176] Following empirical studies on lawyer use of self-assessments, a number of regulators and groups in the U.S. and Canada began examining how self-assessment could be used to assist lawyers in improving their practice management.[177] These discussions led Illinois and Colorado to implement proactive programs that involve lawyer education and self-assessment.[178]

170. *See, e.g.*, Telephone Interview with Regulator B (June 30, 2021).

171. Telephone Interview with Regulator F (July 7, 2021). As a consequence, in at least one jurisdiction, outside consultants provide the mental health and substance abuse counseling that is paid for by respondents. Telephone Regulator N (July 29, 2021).

172. One regulator explained, "[i]f a substance abuse or mental health issue is involved . . . the diversion agreement [would be] a three-way agreement with her office, [the] LAP and the lawyer. But [the] LAP [would] monitor compliance and report to her office." Telephone Interview with Regulator I (July 9, 2021). The regulator noted these referrals were rare for diversion because usually if mental health or substance abuse was involved, "whatever the lawyer did was not 'a small boo boo.'" *Id.*

173. Telephone Interview with Regulator 3 (June 28, 2021).

174. Telephone Interview with Regulator C (July 1, 2021).

175. For background information on the use of self-assessments in Australia, see Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 ST. THOMAS L.J. 152 (2012).

176. Professor Theodore Schneyer first used the term "proactive, management-based regulation" to refer to a regulatory effort to encourage firms to develop their ethical infrastructure. Professor Schneyer suggested that PMBR has two essential features: (1) designation of a firm lawyer responsible for managing the firm's ethical infrastructure; and (2) proactive collaboration between firms and regulators. Theodore Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 584 (2011).

177. Susan Saab Fortney, *Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 900–09 (2020).

178. For an overview of the voluntary Colorado program, the mandatory Illinois program for uninsured lawyers, and other PMBR developments in the United States, see *id.* at 905–08.

The regulator interviews revealed different approaches to using self-assessments.[179] Close to half of the interviewees reported that they currently may require completion of a self-assessment related to office practice controls, such as docket management and conflict systems.[180] A few interviewees explained that the use of self-assessment depends on the respondent's circumstances and the alleged misconduct. One interviewee stated that if there appears to be a systemic problem with how a lawyer's office affairs are being handled, the regulator may require that the respondent complete a "law practice audit" (checklist) with another lawyer who makes recommendations.[181] In some cases, the self-assessment is used not only to educate respondent lawyers but also to help regulators as a diagnostic tool.[182] In other circumstances, the regulator may require respondent lawyers to complete the self-assessment form without review by anyone else.[183]

Various interview responses suggest that PMBR developments are affecting regulators' interest in including self-assessment conditions in diversion agreements. One interviewee reported that her jurisdiction now requires completion of a self-assessment form in all diversions.[184] The regulator explained that many respondents need someone to guide them on running a law office and that "the self-assessment is a success if 25% do something different to improve their practices."[185]

4. CONDITIONS AND COMMUNICATIONS THAT BENEFIT COMPLAINANTS

As noted, diversion in most jurisdictions focuses on public protection and lawyer rehabilitation rather than the complainant's concerns. Regulators seldom seek to include conditions that directly benefit complainants in diversion agreements. Nor do regulators in most jurisdictions provide complainants with much information when grievances result in diversion.

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179. Three regulators indicated that they were unfamiliar with self-assessments. Telephone Interview with Regulator I (July 9, 2021); Telephone Interview with Regulator J (July 14, 2021); Telephone Interview with Regulator 17 (July 6, 2022).

180. *E.g.*, Telephone Interview with Regulator 12 (July 16, 2021). In addition, a few regulators reported diversion conditions that required respondent lawyers to reflect on their office practices. For example, one regulator's office does not require completion of a specific form but requires respondents to affirm that they have management systems in place. Telephone Interview with Regulator 2 (June 28, 2021). Another reported that respondents are asked to describe their trust accounting processes when they complete their quarterly reports. Telephone Interview with Regulator C (July 1, 2021).

181. Telephone Interview with Regulator 11 (July 15, 2021).

182. A number of regulators also described how self-assessments may be used by someone in the jurisdiction's LOMAP or by other individuals designated to work with attorneys completing diversion agreements. *E.g.*, Telephone Interview with Regulator L (July 21, 2021).

183. *Id.* Although the respondents do not disclose the contents of the completed self-assessment, the respondents must self-report their completion of the form. Telephone Interview with Regulator 11 (July 15, 2021).

184. Telephone Interview with Regulator 9 (July 12, 2021).

185. *Id.*

The failure to consider complainants' interests can be seen in regulators' approach to restitution. In a discipline case, a regulator may be able to seek restitution when lawyers have wrongfully withheld or misused funds and property or when lawyers have not earned their fees.[186] Due to the fact that diversion is not available where misappropriation or serious misconduct occurred,[187] restitution in the diversion context would generally be limited to the return of fees.

Even though the *MRLDE*, when discussing alternatives to discipline, state that "[i]t may be appropriate to compensate the client for the lawyer's substandard performance by a fee adjustment or other arbitrated or mediated settlement,"[188] only two regulators reported that restitution must be included as a condition of diversion if the conduct resulted in an actual loss by a client or other person.[189] By contrast, most interviewees reported that restitution was not used as a condition in diversions or infrequently used.[190] Some of these regulators indicated that their state rules do not provide authority for including restitution as a condition of diversion or a discipline sanction.[191]

Regulators described different approaches to including restitution as a diversion condition where there were unearned or excessive fees. For example, one regulator indicated that restitution may occasionally be a condition of diversion where a lawyer charged excessive fees.[192] A few regulators suggested that they are reluctant to use restitution for fee disputes[193] but may include restitution as a diversion condition when a portion of the fee was "unearned" [194] or "no work was done and it's truly minor."[195] Another stated "[t]hey don't want to get in the business of determining how much work was done by the lawyer" and would "instead require fee arbitration as a condition of diversion."[196] Only a few other regulators

186. Fortney, *supra* note 177, at 892 n.129 (citing a survey on use of restitution in disciplinary proceedings).

187. *See supra* note 45 and accompanying text. One regulator stated that restitution would "never" be part of a diversion contract "when there has been a misappropriation." Telephone Interview with Regulator 15 (July 23, 2021). Another noted that diversion would be inappropriate in matters involving "theft." Telephone Interview with Regulator D (July 1, 2021).

188. MRLDE R. 11 commentary.

189. Telephone Interview with Regulator K (July 19, 2021); Telephone Interview with Regulator 9 (July 12, 2021).

190. *E.g.*, Telephone Interview with Regulator 7 (July 8, 2021); Telephone Interview with Regulator B (June 30, 2021).

191. *See, e.g.*, Telephone Interview with Regulator 13 (July 20, 2021); Telephone Interview with Regulator I (July 9, 2021). One regulator stated that while restitution would only "very rarely" be a condition of diversion, disciplinary counsel might say in advance that a respondent is more likely to be able to get diversion if the lawyer provides restitution. Telephone Interview with Regulator A (June 30, 2021).

192. Telephone Interview with Regulator 11 (July 15, 2021).

193. One regulator noted that "'the bar does not want to be a debt collector' and that the Supreme Court has said that 'fee disputes are not within [the regulator's] jurisdiction.'" Telephone Interview with Regulator J (July 14, 2021).

194. Telephone Interview with Regulator 1 (June 28, 2021).

195. Telephone Interview with Regulator L (July 21, 2021).

196. *Id.*; *see also* Telephone Interview with Regulator N (July 29, 2021) (noting that "[t]hey don't want to get involved in fees and collections" and are "more likely to send [a matter] to fee arbitration").

reported seeking fee arbitration as a diversion condition even though separate entities, such as a bar association committee, would handle the fee arbitration process.[197]

Like restitution, apologies to the complainant and others are not commonly a part of diversion.[198] In some jurisdictions, the diversion rules expressly provide for the use of apologies or permit regulators to propose conditions not otherwise enumerated.[199] Yet even where apologies are permitted under the governing rules, interviewees indicated that apologies are rarely used.[200]

One of these regulators believed apologies were "valuable" the few times that they were utilized.[201] Another said, "[i]t may just be a three sentence apology. It can mean a lot to the offended party."[202] A small number of regulators reported that their offices occasionally sought apologies for rude, offensive, or uncivil conduct by lawyers.[203]

Some other interviewees appeared to question the value of seeking an apology as a condition of diversion.[204] As one stated, "[a]ttorneys don't want to apologize."[205] Another noted "that a bad apology is . . . bad. Lawyers sometimes realize an apology would be a good idea on their own."[206] A small number of interviewees indicated that lawyer apologies or demonstrations of

197. *See, e.g.*, Telephone Interview with Regulator 12 (July 16, 2021) (stating that regulator's office would sometimes refer lawyers to fee arbitration); Telephone Interview with Regulator 10 (July 16, 2021) (same); Telephone Interview with Regulator H (July 8, 2021) (noting that in some diversion cases, fee arbitration may be the only condition).

198. *See* Interview with Regulator N (July 29, 2021) (stating that restitution and apologies are "not on [their] radar"). A number of regulators simply stated "no" when asked whether their offices seek an apology to the complainant or a client as a condition of diversion. *E.g.*, Telephone Interview with Regulator C (July 1, 2021); Telephone Interview with Regulator 13 (July 20, 2021).

199. *See, e.g.*, MD. RULES, ATT'YS § 19-716(c)(3)(iii) (2021) (permitting the use of a public apology); ILL. RULES OF THE ATT'Y REGIS. & DISCIPLINARY COMM'N R. 56(b)(7) (providing for "any other requirement agreeable to the Administrator and the respondent").

200. Telephone Interview with Regulator L (July 21, 2021); *see also* Telephone Interview with Regulator 7 (July 8, 2021) (stating that it would be "very rare to require, but at time[s] an apology may be strongly encouraged"); Telephone Interview with Regulator 3 (June 28, 2021) (recalling it had occurred "a couple times").

201. Telephone Interview with Regulator 3 (June 28, 2021).

202. Telephone Interview with Regulator I (July 9, 2021).

203. Telephone Interview with Regulator G (July 7, 2021); Telephone Interview with Regulator H (July 8, 2021); Telephone Interview with Regulator K (July 19, 2021). In one jurisdiction, apologies had been sought twice for "outbursts." Telephone Interview with Regulator I (July 9, 2021).

204. One regulator laughed at the prospect of including apologies in diversion agreements, stating that she "can't imagine doing that." Telephone Interview with Regulator F (July 7, 2021). However, the interviewee recognized that "[c]ertainly there are times when clients would want it and an apology would be appropriate." *Id.* Another explained that his office had "[g]one back and forth on this. There has been some concern because the apology may be used in a malpractice case as an admission." Telephone Interview with Regulator 16 (July 27, 2021).

205. Telephone Interview with Regulator 5 (June 30, 2021).

206. Telephone Interview with Regulator L (July 21, 2021). Another regulator explained that often, "when they are negotiating [diversion conditions] the respondent has acknowledged he made a mistake, and complainant knows through responses that are forwarded to [the] complainant that [the] lawyer acknowledged mistakes." Telephone Interview with Regulator N (July 29, 2021). A different regulator indicated that her office does not mandate apologies, but lawyers may offer them. Telephone Interview with Regulator 12 (July 16, 2021) (explaining that the regulators "don't want a forced, insincere apology").

remorse would been taken into account as mitigating factors in the diversion decisions.[207]

Another way in which complainants' interests are sometimes inadequately considered in diversion programs can be seen in the communication with complainants about diversion. Only a few interviewees described opportunities for complainants to provide input concerning diversion decisions.[208] One interviewee reported that before she enters diversion agreements, she communicates with complainants to get their input about conditions.[209] In one small jurisdiction, the regulator typically arranges a meeting between the complainant and the lawyer, with a three-person panel present, and asks both the lawyer and complainant to suggest conditions.[210] Another regulator sends complaining parties a letter advising them that they have ten days to object to a diversion referral under consideration.[211]

For the most part, however, procedures relating to the handling of diversion referrals create a tension between providing complainants information on the one hand and preserving confidentiality of the diversion referral on the other. The majority of regulators use a middle ground approach, informing the complainant that the matter will be handled under a diversion agreement in which the lawyer must complete conditions but not disclosing the actual conditions that the attorney must satisfy.[212] One regulator described the information provided to the complainant as "bare bones."[213] A few regulators indicated that they provide complaining parties with more information, such as general descriptions of the conditions,[214] while others do not, apparently due to concerns about the

207. Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 10 (July 16, 2021); Telephone Interview with Regulator B (June 30, 2021).

208. *See* Telephone Interview with Regulator 16 (July 27, 2021) (reporting that a letter is sent to complainants explaining that a diversion referral has been made and that a panel of volunteers considering the diversion hopes to hear from them).

209. Telephone Interview with Regulator E (July 6, 2021) (noting that complainants sometimes have "good ideas"). This regulator suggested that a complainant who was really incensed about the referral "might" affect the regulator's assessment of whether the lawyer was offered the diversion option. *Id.*

210. Telephone Interview with Regulator 16 (July 27, 2021).

211. Telephone Interview with Regulator G (July 7, 2021). The "agreement in lieu of discipline is conditional until the grievant has an opportunity to object and those objections are considered." *Id.*

212. *See, e.g.*, Telephone Interview with Regulator A (June 30, 2021) (explaining that the conditions are sometimes not disclosed, even if the complainant asks); Telephone Interview with Regulator H (July 8, 2021) (noting that the complainant is only told that the lawyer agreed to diversion and that the regulator will monitor compliance with the conditions); Telephone Interview with Regulator K (July 19, 2021) (stating that the regulator only informs the complainant "that the matter has been referred to diversion"); Telephone Interview with Regulator 7 (July 8, 2021) (indicating that the regulator only advises complainants that the office has entered into a diversion agreement with the lawyer, without providing copies of the diversion agreement).

213. Telephone Interview with Regulator 13 (July 20, 2021).

214. Telephone Interview with Regulator 11 (July 15, 2021) (noting, however, that special care is exercised not to disclose specific information when dealing with impairments); Telephone Interview with Regulator 12 (July 16, 2021) (explaining that the letter to the complainant may describe a specific diversion condition but may also state there may be additional terms in the agreement). Another regulator indicated that the amount of information disclosed will depend on the circumstances and his assessment of the complainant. Telephone Interview with Regulator 14 (July 23, 2021).

confidential nature of the diversion referral.[215] A number of regulators indicated that they also write to the complainants when diversion is complete.[216]

In jurisdictions where regulatory counsel simply tells the complaining party that the complaint was dismissed,[217] complainants are left in the dark.[218] They may see the diversion referral as a "cover-up" or "wrist slap."[219] But one regulator noted that when she explains to complainants that a regulator "will be watching [the] lawyer for a year to be sure the lawyer doesn't reoffend, that seems to quell some of the unhappiness."[220]

5. Access to and Use of Diversion Information

As noted, diversion is not considered to be discipline and issues arise as to whether diversion records can be accessed and considered in any subsequent disciplinary proceedings. Although the majority of jurisdictions treat diversion information as confidential,[221] most interviewees reported that information related to completed diversions remained available to disciplinary counsel.[222] In a small number of jurisdictions, however, the information is "expunged" after a few years. In some of those states, the information is not subsequently available at all, and regulators can only rely on their memories as to which lawyers previously participated in diversion.[223]

How should jurisdictions treat the fact that a lawyer has previously completed a diversion agreement? A few regulators noted that the completed diversions

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215. *See, e.g.*, Telephone Interview with Regulator 4 (June 29, 2021) (noting that the complainant is told nothing after receiving acknowledgement of the complaint).

216. *E.g.*, Telephone Interview with Regulator C (July 1, 2021). *But see* Telephone Interview with Regulator L (July 21, 2021) (noting that the regulator does not routinely tell complainants that diversion has been completed).

217. *See* Telephone Interview with Regulator M (July 26, 2021) (reporting that the complainant is told nothing other than that the complaint was dismissed).

218. As one regulator explained, "[t]hey are entitled to know the disposition of the matter. Otherwise, they are left in limbo." Telephone Interview with Regulator 15 (July 23, 2021).

219. *See* Telephone Interview with Regulator 2 (June 28, 2021) (describing a post in which a complainant blogged about a diversion referral as a "slap on the wrist"); Telephone Interview with Regulator I (July 9, 2021) (referring to complaining parties' views of diversion as a "'slap on the wrist'"); Telephone Interview with Regulator 16 (July 27, 2021) (stating that diversion "may be viewed as another way of lawyers covering up their problems").

220. Telephone Interview with Regulator I (July 9, 2021).

221. *See, e.g.*, RULES GOVERNING THE MO. BAR & THE JUDICIARY R. 5.105(j); WASH. STATE CT. RULES FOR ENF'T OF LAW. CONDUCT R. 6.6.

222. *E.g.*, Telephone Interview with Regulator 6 (July 7, 2021); Telephone Interview with Regulator E (July 6, 2021).

223. Telephone Interview with Regulator 14 (July 23, 2021) (explaining that "[t]he office and bar are small[,] so bar counsel knows who has [completed] diversion"); Telephone Interview with Regulator K (July 19, 2021) (stating that the regulator's office views the lack of records as "one of [the] incentives of diversion"). In another jurisdiction that expunges diversion files, the office still keeps some record of the fact that a lawyer has previously completed diversion. Telephone Interview with Regulator 11 (July 15, 2021).

would not be used against a lawyer in a subsequent discipline matter.[224] As one interviewee explained, "diversion would fail if lawyers see the diversion as a Scarlet A. Rather[,] it is important that it continue to be treated as 'not discipline.'"[225] In a small number of jurisdictions, however, diversion can be considered as an aggravating factor if there is subsequent discipline.[226] Another regulator explained that they "favor progressive action," and keeping records on every disposition allows them to pull the records and see conditions previously imposed.[227]

6. INTERVIEWEES' CONCERNS AND SUGGESTIONS RELATING TO DIVERSION PROGRAMS

Many interviewees stated that they had no concerns with the use of diversion.[228] Some qualified their answers by indicating that they had no concerns when diversion was used *appropriately*.[229] As one regulator stated: "[d]iversion, when properly applied, is a good tool. If the attorney is truly ignorant and has no malice, diversion is a great way to move forward and preserve reputation and help the attorney be more mindful of professional obligations."[230] Although a number of regulators were very positive, and even enthusiastic, in describing their opinions of diversion,[231] a few described reservations when we asked about concerns. A couple of interviewees commented on concerns related to complainant satisfaction with the process.[232] Another regulator explained that the diversion terms should "have an impact" on lawyers and that "diversion should [not] be reduced to making people jump through hoops."[233] A third indicated that he did not really have concerns but noted, "you can become cynical, wondering whether this guy really wants to work on the problem or just wants to get diversion."[234]

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224. *See, e.g.*, Telephone Interview with Regulator 7 (July 8, 2021) (noting that diversion agreement is not treated as disciplinary history or an aggravating circumstance); Telephone Interview with Regulator C (July 1, 2021) (explaining that disciplinary counsel "can't use [the information] as a strike against the lawyer").

225. Telephone Interview with Regulator 12 (July 16, 2021).

226. *See, e.g.*, KAN. RULES RELATING TO DISCIPLINE OF ATT'YS R. 212(h)(2) (diversion treated as an aggravating factor and facts admitted can be considered conclusive evidence of the facts in a later proceeding); *see also* IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14(5) (stating that the attorney's admission of misconduct may be considered in imposing sanctions in a subsequent disciplinary matter not arising out of the same conduct).

227. Telephone Interview with Regulator 10 (July 16, 2021).

228. *E.g.*, Telephone Interview with Regulator B (June 30, 2021); Telephone Interview with Regulator 5 (June 30, 2021).

229. *E.g.*, Telephone Interview with Regulator 7 (July 8, 2021); *see also* Telephone Interview with Regulator 2 (June 28, 2021) (noting that diversion "[s]hould not be used for serious misconduct").

230. Telephone Interview with Regulator 6 (July 7, 2021).

231. After describing diversion as "fantastic," one regulator stated that she would like to offer the option to more lawyers. Telephone Interview with Regulator 5 (June 30, 2021).

232. More generally, one regulator noted that the diversion alternative is "not satisfying to complainants." Telephone Interview with Regulator 12 (July 16, 2021).

233. Telephone Interview with Regulator 3 (June 28, 2021).

234. Telephone Interview with Regulator D (July 1, 2021). One regulator stated that he hoped that "they don't make a chump out of [the regulators]." Telephone Interview with Regulator 4 (June 29, 2021).

One regulator expressed frustration, noting "that the same misconduct may be reoccurring."[235] The regulator went on to explain that he does not have a "good sense on how effective are we being . . . in making attorneys better lawyers."[236] Most regulators reported that they did not have recidivism data or reports.[237] A number of regulators expressed interest in collecting data on recidivism following completed diversions,[238] including one who explained that if regulators "can have more information/data to capture, more people could study [the] structure, approach[es,] and effectiveness" of diversion.[239]

The most common suggestion for improving diversion related to the need for additional resources and support for initiatives, such as more practice management assistance,[240] trust account training,[241] and CLE programs.[242] In the words of one regulator, "[w]e are always trying to improve[,] but it is hard without more resources."[243]

Other suggestions for improving diversion related to the rules governing the timing and eligibility for diversion.[244] A couple of interviewees stated that diversion should be pursued earlier in the disciplinary process in their jurisdictions.[245] Some others suggested that diversion be used more often.[246] Yet another recommended broadening contractual diversion in that jurisdiction to be available to lawyers not suffering from impairments.[247]

A few suggestions for improving diversion related to how diversion programs are administered and conducted.[248] For example, one regulator wanted more

235. Telephone Interview with Regulator 11 (July 15, 2021).

236. *Id.*

237. *E.g.*, Telephone Interview with Regulator 4 (June 29, 2021); Telephone Interview with Regulator G (July 7, 2021). Two regulators reported that they were uncertain about their ability to run recidivism reports or unable to do so with their current case management systems. Telephone Interview with Regulator 13 (July 20, 2021); Telephone Interview with Regulator 15 (July 23, 2021).

238. *E.g.*, Telephone Interview with Regulator 1 (June 28, 2021); Telephone Interview with Regulator 7 (July 8, 2021).

239. Telephone Interview with Regulator 11 (July 15, 2021).

240. *See* Telephone Interview with Regulator L (July 21, 2021) (suggesting that they could use more resources to hire someone else to assist with a LOMAP). Another regulator noted, "[i]t would be awesome if we had someone to counsel on law practice management." Telephone Interview with Regulator C (July 1, 2021).

241. Telephone Interview with Regulator E (July 6, 2021) (indicating interest in a "trust account school option"). A second regulator would like to have a pool of trained auditors. *See* Telephone Interview with Regulator 12 (July 16, 2021).

242. Telephone Interview with Regulator 7 (July 8, 2021).

243. Telephone Interview with Regulator C (July 1, 2021).

244. *E.g.*, Telephone Interview with Regulator 5 (June 30, 2021).

245. Telephone Interview with Regulator I (July 9, 2021); *see also* Telephone Interview with Regulator 16 (July 27, 2021) ("Get matters to diversion quicker.").

246. *E.g.*, Telephone Interview with Regulator K (July 19, 2021). When suggesting that diversion be "utilized more by the lawyers on staff," this regulator noted that "diversion is more work" and that there is an "incentive to close cases" instead, "because those are reported." *Id.*

247. Telephone Interview with Regulator 8 (July 9, 2021).

248. *See, e.g.*, Telephone Interview with Regulator J (July 14, 2021) (identifying the use of online workshops as an improvement); Telephone Interview with Regulator 9 (July 12, 2021) (suggesting more coordination with the LAP).

autonomy to terminate lawyers from participating in the program.[249] Another regulator suggested that one improvement would be more consistency among the staff regarding the "cases appropriate for diversion."[250]

IV. PROBLEMS AND RECOMMENDATIONS

The interviewees uniformly described diversion as a useful opportunity to help lawyers remedy certain problems they encounter in practice and to better protect the public. Anecdotally, the regulators reported that diversion helps some lawyers improve their conduct.[251] Diversion programs can educate lawyers about the rules and identify impediments in their practices that may interfere with their ability to comply with those rules. This is vitally important: professionals must know the rules they are supposed to follow and be able to follow them.[252] Education and other measures that assist lawyers in addressing problems may protect the public more than discipline, especially because the effects of punishment are often unclear.[253] Questions remain, however, about the best ways in which to help these lawyers achieve durable changes in their conduct. Interviewees suggested various steps that could be taken to empower lawyers to achieve lasting change. Drawing on the interviews, as well as other research on professional discipline and rehabilitation, the following recommendations discuss how diversion alternatives can be improved to both assist lawyers and advance public protection.

A. ADDRESSING OVERUSE AND UNDERUSE

The regulator interviews revealed that diversion may be underutilized in some jurisdictions and possibly overused in others. Sixteen jurisdictions do not offer diversion as an alternative to discipline. A small number limit diversion to situations involving lawyer impairment.[254] Assuming, as the interviewees suggest, that diversion is a useful tool for addressing low-level lawyer misconduct, jurisdictions that do not offer diversion to deal with minor misconduct should consider revising their rules to allow for diversion, even when the lawyer is not impaired. While some jurisdictions that do not offer diversion can require CLE as a sanction,[255] it seems unlikely that approach will be effective without a more tailored program that can be offered through diversion. Moreover, diversion provides an additional incentive for the lawyer to work on the problem because successful

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249. Telephone Interview with Regulator 1 (June 28, 2021).

250. Telephone Interview with Regulator 2 (June 28, 2021).

251. *See, e.g.*, Telephone Interview with Regulator 17 (July 6, 2022) (referring to the "many lawyers [who] have benefitted" from diversion and thanked the regulator because diversion was a "career saver").

252. *See* BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE 137 (2021).

253. While punishment can sometimes have specific and general deterrent effects, it operates in enormously complicated ways with uncertain and unpredictable results. *See, e.g.*, *id.* at 20–24, 30–32.

254. *See supra* note 50 and accompanying text.

255. *E.g.*, CONN. PRAC. BOOK § 2-37(a)(5) (2023).

completion of the diversion agreement enables the lawyer to avoid an outcome that results in a disciplinary sanction.

At the same time, a few jurisdictions may overuse diversion. The large number of diversion cases in some jurisdictions raises questions about whether diversion is sometimes used as a means of quickly disposing of complaints that should be more appropriately subject to sanctions. This possibility of overuse is especially concerning in jurisdictions that do not provide individualized remedial approaches for the lawyers who participate in diversion.

There is also a potential for overuse when diversion is repeatedly offered to a respondent lawyer.[256] Diversion is occasionally afforded to lawyers on three or more occasions.[257] Jurisdictions should assess whether lawyers who receive diversion more than once avoid further misconduct or whether a different approach (e.g., sanctions plus educational requirements) would be more appropriate when recidivism occurs.[258] An individualized approach to diversion on the first occasion and other steps discussed below may limit the likelihood of repeated misconduct.

B. IMPROVING THE REGULATION AND ADMINISTRATION OF DIVERSION

As noted, regulators use different approaches to offering and handling diversion alternatives. In some jurisdictions, the procedural rules do not articulate clear standards for when diversion can be utilized.[259] Other states' rules expressly prohibit the use of diversion where certain types of misconduct occurred.[260] Even in jurisdictions where the rules limit eligibility, regulators have a good deal of latitude in offering diversion to respondents who qualify. Although this flexibility enables regulators to offer diversion programs to respondent lawyers who regulators believe are most likely to benefit from diversion, the flexibility presents a risk of inconsistent treatment of respondents.

Regulators should consider steps to promote consistent treatment of respondent lawyers. This is particularly important because of data suggesting racial disparities in the imposition of lawyer discipline sanctions.[261] In jurisdictions where

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256. The *MRLDE* permit the diversion option to be offered to a respondent lawyer on more than one occasion. *See supra* note 47 and accompanying text.

257. LEVIN & FORTNEY, *supra* note 27, at 19. This is probably not the case in most jurisdictions. *See, e.g.*, Telephone Interview with Regulator 3 (June 28, 2021) (reporting that regulator "has only had a couple of lawyers repeat diversion").

258. For some lawyers, repeated diversion may not yield positive results. In the medical field, researchers found that success with severely incompetent physicians is uncertain even with prolonged continuing medical education that incorporates modalities thought to be effective in changing physician behaviors. *See* Eileen Hanna, John Premi & John Turnbull, *Results of Remedial Continuing Medical Education in Dyscompetent Physicians*, 75 ACAD. MED. 174, 175 (2000).

259. *See, e.g*,, TENN. SUP. CT. RULES R. 9 § 13.2; VT. SUP. CT. ADMIN. ORD. NO. 9, R. 6(B).

260. *E.g.*, N.M. RULES GOVERNING DISCIPLINE R. 17-206(H)(3) (identifying circumstances under which participation in diversion is "prohibited").

261. *See* DAG MACLEOD, REPORT ON DISPARITIES IN THE DISCIPLINE SYSTEM (2019), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf [https://perma.cc/XGH4-9GT9] (revealing

eligibility for diversion is not well-defined, regulators should develop written internal guidelines for evaluating whether matters are appropriate for diversion. Regulators should also develop a review and consultation process to systematically evaluate whether diversion is being offered to lawyers on a consistent basis. While there are inevitably hard-to-quantify elements involved in the diversion decision—such as the respondent attorney's apparent willingness to learn from mistakes—there are other elements of the decision, including the nature of the misconduct, which should be treated comparably. Some of the interviewees described processes that could help with consistency, such as an office practice of circulating proposed diversions to all disciplinary counsel in writing and discussing the proposed diversion conditions in meetings attended by all regulatory counsel.[262] One regulator described using a spreadsheet to track information about the lawyers who received diversion, enabling the regulator to better discern whether a proposed diversion falls within the range of other diversions for particular rule violations.[263] Disciplinary panels and boards that offer diversion should also be advised of the importance of consulting closely with disciplinary counsel to ensure that diversion is being offered in a consistent fashion. At a minimum, a written record of all diversions should be maintained, and systems should be implemented to ensure that all individuals who play a role in offering diversions are doing so in a consistent manner.

Another way to promote consistency would be for regulators to make diversion more accessible to less affluent attorneys. Respondents who are able to hire lawyers to represent them in disciplinary matters may be more likely to secure diversion agreements rather than face discipline sanctions.[264] Less affluent lawyers often self-represent when they face a grievance[265] and may not know enough about the process to advocate for diversion in lieu of discipline. Regulators can help address this knowledge gap for unrepresented lawyers by providing clear information about diversion alternatives on the regulators' websites.[266] They should also devise payment plans or other financial solutions—as a few jurisdictions

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statistically significant disparities with respect to disbarment rates when comparing Black to white male attorneys with a "disbarment/resignation rate for Black, male attorneys [of] 3.9 percent compared to 1.0 percent for White males").

262. Telephone Interview with Regulator 17 (July 6, 2022); *see also supra* note 139 and accompanying text (describing office meetings at which diversion decisions are discussed).

263. Telephone Interview with Regulator 17 (July 6, 2022).

264. At least in the context of discipline probation and disbarment, representation by an attorney—as opposed to self-representation—helps account for disparities in the imposition of discipline. MACLEOD, *supra* note 261, at 4.

265. *See* RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 508 (2008).

266. For an example, see *Alternative Discipline Program*, STATE BAR CT. OF CAL. (2022), https://www.statebarcourt.ca.gov/Procedures-Programs-and-Rules/Alternative-Discipline-Program [https://perma.cc/K339-JNRZ].

have done—to enable respondent lawyers who would benefit from diversion to participate, even if they cannot afford it.[267]

Regulators can also do more to learn which types of conditions are most likely to achieve diversion's goals of education and rehabilitation. Rather than rely on intuition to identify conditions to address the respondents' problems and assist them in improving their practices, disciplinary counsel should consider research on diversion programs in other fields, including studies of diversion and remedial programs for medical professionals. The legal profession is far behind the medical profession in attempting to evaluate which types of interventions help professionals address impairment issues and otherwise improve their performance. Lessons from the research in the medical field point to the importance of individualized help for respondents, as opposed to trainings that are more general in nature.

A recent review of the medical literature noted that "[l]ittle evidence exists for the efficacy of disciplinary penalties,"[268] although efficacy is admittedly hard to assess. Substance abuse diversion programs for health professionals have had some success.[269] A "lengthy period of intense monitoring . . . under the scrutiny of [an] alternative program" appears to be important for recovery.[270] When it comes to competence issues, peer assessments and practice-based assessments are most effective in ensuring competence, while it is less clear that more traditional continuing education requirements lead to improvements.[271] Research reveals the importance of providing health care providers individualized assessments of practices and feedback.[272] Professionals who received an individualized

267. *See, e.g.*, Telephone Interview with Regulator J (July 14, 2021) (describing handling of payment plans). Another approach was to spread out the time for completion of conditions so the lawyer could pay for them over time. *See* Telephone Interview with Regulator N (July 29, 2021).

268. Ai-Leng Foong-Reichert, Ariane Fung, Caitlin A. Carter, Kelly A. Grindrod & Sherilyn K.D. Houle, *Characteristics, Predictors and Reasons for Regulatory Body Disciplinary Action in Health Care: A Scoping Review*, 107 J. MED. REG. 17, 25 (2021).

269. *See, e.g.*, Heather Hamza & Todd Monroe, *Reentry and Recidivism for Certified Registered Nurse Anesthetists*, 2 J. NURSING REGUL. 17 (2011).

270. Nancy Darbro, *Overview of Issues Related to Coercion and Monitoring in Alternative Diversion Programs for Nurses: A Comparison to Drug Courts: Part 2*, 20 J. ADDICTIONS NURSING 24, 25 (2009).

271. Peter G. Norton, Liane Soberman Ginsburg, Earl Dunn, Roy Beckett & Daniel Faulkner, *Educational Interventions to Improve Practice of Nonspecialty Physicians Who Are Identified in Need by Peer Review,* 24 J. CONTINUING EDUC. IN HEALTH PROS. 244, 251 (2004); *see also* Foong-Reichert, Fung, Carter, Grindrod & Houle, *supra* note 268, at 26. The use of traditional continuing medical education may be insufficient for a variety of reasons. Betsy W. Williams, *The Prevalence and Special Educational Requirements of Dyscompetent Physicians,* 26 J. CONTINUING EDUC. IN HEALTH PROS. 173, 186–87 (2006).

272. Norton, Soberman Ginsburg, Dunn, Beckett & Faulkner, *supra* note 271. Physician participation in a remedial professional development program involving weekly meetings for three to six months can result in improved clinical performance for some period after the intervention. Francois Goulet, Robert Gagnon & Marie-Eve Gingras, *Influence of Remedial Professional Development Programs for Poorly Performing Physicians,* 42 J. CONTINUING EDUC. IN HEALTH PROS. 42, 44, 47 (2007).

assessment and a targeted educational intervention did better than those who were simply monitored.[273]

The research from the medical field suggests that diversion that only requires lecture-type CLE may not be enough to address some respondent lawyers' problems.[274] As Deborah Rhode and Lucy Ricca noted, "The format of most CLE courses is inconsistent with adult learning principles. 'What is heard in the classroom, without advance preparation, classroom participation, review, and application is unlikely to be retained.'"[275] By contrast, the medical field has incorporated adult learning principles into continuing medical education ("CME") and concluded that interactive education is much more effective than lectures.[276] Drawing on the research and experience in the medical field, legal profession regulators should include more targeted and interactive CLEs in diversion terms and incorporate adult learning principles.

Diversion, properly done, cannot only educate lawyers but can also provide opportunities to assist lawyers in improving the overall ethical infrastructure of their practices. Rather than limiting the conditions to those related to the misconduct that triggered the complaint, regulators should consider the feasibility of more holistic approaches that assist lawyers in evaluating and improving their office practices and the manner in which they deliver legal services.[277]

Requiring respondents to complete self-assessments is a relatively low-cost measure to help respondents systematically identify deficiencies, consult resources, and improve their office practice controls, such as conflicts checking procedures. By doing so, lawyers may be able to prevent practice management problems before they occur. In this sense, the self-assessment process is a proactive approach to regulation designed to avoid future discipline and malpractice,

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273. *See* Elizabeth J. Korinek, Alisa R. Johnson, Sindy Michelle Paul, Elizabeth S. Grace, William T. O'Neill & Meredith I. Borine, *Competence Assessment and Structured Educational Remediation: Long-Term Impact on the Quality of Care Provided by Disciplined Physicians*, 108 J. MED. REGUL. 7, 11–14 (2022).

274. *See, e.g.*, Williams, *supra* note 271, at 184. Williams notes that continuing medical education is designed for the average physician and "likely will not meet the needs of a dyscompetent physician." The study finds "[f]irst, many dyscompetent physicians are found to have specific areas of deficits. Second, a dyscompetent physician's initial education and training may have been inadequate, resulting in a lack of fundamental medical knowledge." In addition, "many dyscompetent physicians have special needs that provide a partial basis for their dyscompetence." Finally, "[p]ersonal characteristics, abilities, traits, goals, motivations, and situational factors clearly contribute to an individual's ability to participate in and benefit from an educational endeavor." *Id.*

275. Deborah L. Rhode & Lucy Buford Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?*, PRO. LAW, Spring 2014, at 2, 8 (quoting Paul A. Wolkin, *On Improving the Quality of Lawyering,* 50 ST. JOHN'S L. REV. 523, 529 (1976)).

276. Some CME providers now use a host of approaches, including simulations, reflection-based exercises, case-based assessments, and in situ learning experiences to promote learning that will have an enduring effect. Rima Sirota, *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 17–18 (2022).

277. Resource constraints in some states may appear to be an insurmountable obstacle to tailoring and improving diversion alternatives. Some jurisdictions are already sharing ideas and resources in ways that assist other states as they seek to implement the best possible programs.

as opposed to a reactive system of disciplining lawyers after the misconduct occurs.

As noted, some regulators are already making self-assessments part of diversion programs.[278] Regulators incorporating self-assessments into diversion programs should recognize the limitations of self-assessments and take steps to enhance their effectiveness. Specifically, simply asking lawyers to report their completion of self-assessments may have limited impact if respondent lawyers approach the self-assessment process as a "check-the-box" exercise.[279] To address this concern and provide more individualized feedback on the results of the self-assessment, regulators should require that the results of the self-assessment be reviewed by a regulator, monitor, or approved mentor.[280] This would help ensure completion of the instrument.[281] It also provides an opportunity for discussion of tools and approaches that respondent lawyers could use to improve their practices.

C. RESPONDING TO COMPLAINANTS' CONCERNS

One noteworthy aspect of the interviews was that the regulators appeared to sincerely want to help respondent lawyers but were much less focused on complainants' feelings and concerns. Admittedly, the regulators' priority is public protection, and diversion is only supposed to be used where serious harm did not occur. Nevertheless, part of the reason for creating alternatives to discipline was to let the public—including complainants—know that even "minor" misconduct

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278. *See supra* notes 179–85 and accompanying text. There has been increasing national interest in proactive regulation and the use of self-assessments. In 2019, the ABA House of Delegates adopted a resolution urging state supreme courts to study and adopt jurisdictionally appropriate PMBR programs to "enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms." ABA House of Delegates, Resol. 107, Aug. 12–13, 2019, at 1. Shortly thereafter, the U.S. Conference of Chief Justices adopted a resolution encouraging its members to study PMBR programs to "enable lawyers and law firms to develop and maintain ethical infrastructures that help prevent violations of applicable rules of professional conduct." CONFERENCE OF CHIEF JUSTICES, RESOLUTION 4, at 1 (2019), https://ccj.ncsc.org/__data/assets/pdf_file/0020/23537/07312019-proactive-management-based-ethical-lawyer-regulation.pdf [https://perma.cc/FDT9-6T63].

279. A survey related to PMBR in Australia revealed that 66% of the respondents disagreed with the statement that the self-assessment process "amounts to meaningless box ticking." Only 12% agreed with the statement. Fortney & Gordon, *supra* note 175, at 180. Even for those lawyers who indicated that they were doing the minimum to complete the self-assessment process, the researchers concluded that the self-assessment process provided the regulatory "nudge" for lawyers to examine and revise their existing controls and then adopt new systems. *Id.* at 182.

280. Such a review could also be conducted by a lawyer working with the LOMAP. *See* Telephone Interview with Regulator H (July 8, 2021). For example, one regulator reviews a self-audit form in her initial consultation with respondent lawyers. Telephone Interview with Regulator 1 (June 28, 2021).

281. Results of the study of the Australian PMBR system suggest that another person's review of self-assessments may improve the likelihood that an attorney will not simply check boxes, but instead, will candidly complete the process. *See* Fortney & Gordon, *supra* note 175, at 180 (noting that the largest percentage of respondents (43%) agreed with the following statement: "The possibility of a Practice Audit by the [regulator] contributes to candor when [attorneys] completed the [self-assessment process]").

was being addressed.[282] Interviewees' reports about their communications with complainants indicate this message probably does not come through clearly in most jurisdictions. Nor are most complainants likely to feel satisfied with diversion decisions.

There are four steps that regulators could take to improve the ways in which complainants experience the handling of diversion matters. The first is for regulators to suggest the return of some fees by the lawyer as a condition of diversion, where appropriate. The regulators' responses revealed that they did not often seek restitution in the diversion context.[283] This reluctance to seek restitution may also be due to regulators' general unwillingness to become involved in fee disputes[284] or their concerns about the potential difficulty of obtaining a negotiated settlement. But this attitude places administrative ease above the complainants' interests. If the respondent lawyer did not fully perform the work or performed it in a substandard manner that required a complainant to expend additional funds, restitution is appropriate and should be included as a negotiated diversion condition.[285] If the return of some fees is made a condition of diversion, proof that it occurred need not be complicated: the lawyer can be required to provide evidence of repayment in order for diversion to be deemed completed.

Second, if it appears that the respondent lawyer charged an excessive fee or failed to provide a required written fee agreement and a fee dispute has arisen, regulators should address complainants' concerns in diversion. In both situations, the respondent's conduct constitutes clear professional rule violations.[286] If these fee issues cannot be readily resolved in a negotiated diversion agreement, regulators should include a diversion condition that requires lawyers to participate in fee arbitration. All United States jurisdictions have fee arbitration programs,[287] but only six interviewees indicated that they use fee arbitration in connection with diversion. This situation is problematic because in most jurisdictions, clients cannot compel lawyers to participate in fee arbitration.[288] By making fee arbitration a condition of diversion, regulators provide the complainant with some

282. *See* MCKAY COMM'N REPORT, *supra* note 15, at xv, 47.

283. One stated that "[i]f the attorney cannot afford restitution, they would not include it as a term." Telephone Interview with Regulator N (July 29, 2021).

284. *See, e.g.*, *What to Expect When Filing a Grievance*, N.H. SUP. CT. ATTORNEY DISCIPLINE SYSTEM (2022), https://www.nhattyreg.org/filing-expect.php [https://perma.cc/4EEA-4DX5] (stating that "[f]ee disputes are not handled within the attorney discipline process"); *Complaints Against Lawyers*, VA. STATE BAR (2021), https://www.vsb.org/site/regulation/inquiry [https://perma.cc/BK8L-ZW46] (stating that Virginia State Bar will not open disciplinary cases on a complaint about a fee).

285. *See supra* notes 188–89 and accompanying text. In some jurisdictions, this may require amendments to the rules governing diversion.

286. Most jurisdictions have adopted the prohibition in the *Model Rules of Professional Conduct* against the use of unreasonable fees and require written fee agreements in contingent fee cases. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a), (c) (2020). In addition, fourteen jurisdictions require written fee agreements in most other cases. *See* Leslie C. Levin, *Ordinary Clients, Overreaching Lawyers, and the Failure to Implement Adequate Client Protection Measures*, 71 AM. U. L. REV. 447, 457 n.45 (2021).

287. Levin, *supra* note 286, at 462.

288. *Id.* at 462–63 (reporting that only ten jurisdictions have mandatory fee arbitration programs).

remedy where the lawyer has violated the professional rules concerning fees. The Wisconsin data indicate several instances where fee arbitration was a condition of diversion,[289] reflecting that it is possible for regulators to include this term as part of a negotiated settlement. Because fee arbitration can be prolonged and complicated for relatively low sums of money, it is less desirable for the complainant than providing restitution as a condition of diversion. Nevertheless, determining the proper payments can sometimes be challenging and fee arbitration is preferable to leaving the complainant with no recourse at all.

Complainants would also benefit if regulators sought an apology from respondent lawyers in appropriate cases. The medical profession uses apologies more systematically when patient harm occurred.[290] They are also used to address lawyer misconduct in Canada, England, Australia and elsewhere.[291] Such apologies can benefit both complainants and respondent attorneys.[292] Apologies help advance the rehabilitative function of diversion because lawyers must recognize the errors of their ways before problems can be addressed going forward.[293] Apologies may also help decrease complainants' anger and distress.[294] Contrary to the view of one regulator about "bad" apologies,[295] the social science research indicates that even less-than-sincere or coerced apologies can have some benefits for the recipient.[296] Moreover, affirmation of violated norms can reinforce and signal the importance of these norms to victims and offenders.[297] While one regulator noted concerns that a lawyer apology could be used in a malpractice action, the very nature of diversion (i.e., requiring no serious harm to the complainant) makes it extremely unlikely that the misconduct resulting in diversion would give rise to a malpractice lawsuit or liability.[298]

Finally, regulators should give complainants more information about diversion and, when possible, communicate the outcome of their complaints.[299] Indeed,

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289. LEVIN & FORTNEY, *supra* note 27, at 18.

290. Levin & Robbennolt, *supra* note 10, at 518.

291. *See, e.g.*, LEGAL OMBUDSMAN SCHEME RULES R. 5.38 (U.K. LEGAL OMBUDSMAN 2019); Francesca Bartlett, *Summary Compensation and Apology Orders in England and Wales, Australia and New Zealand: Different Structures, Different Responses*, 24 INT'L J. LEGAL PRO. 177, 178 (2017).

292. Levin & Robbennolt, *supra* note 10, at 517.

293. *Id.* at 518.

294. *See, e.g.*, Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCH. 457, 461 (1994); Ken-ichi Ohbuchi, Masuyo Kameda & Nariyuki Agarie, *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCH. 219, 219 (1989); Bernard Weiner, Sandra Graham, Orli Peter & Mary Zmuidinas, *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 296 (1991).

295. *See supra* note 206 and accompanying text.

296. Levin & Robbennolt, *supra* note 10, at 544–46. If, however, the lawyer experiences the apology as humiliating, this can generate maladaptive responses. *Id.* at 546.

297. *Id.*

298. *See* Fortney, *supra* note 9, at 2055 (noting that pursuing a legal malpractice claim through the courts may not be feasible for many consumers with relatively small claims for damages).

299. The *MRLDE* state that complainants should be provided with more information than they currently receive in some jurisdictions. *See supra* note 52 and accompanying text.

there can be some benefits to obtaining complainants' input during the process.[300] While diversion rules in most jurisdictions require confidentiality, they do not require that diversion be a mystery. It is virtually impossible for complainants to learn about diversion from looking at regulators' websites, leaving them entirely dependent on information communicated by the regulator's office. While complainants probably appreciate a personal call from the regulator, they are more likely to be able to absorb and recall the relevant information if it is also provided in writing. Complainants should be educated about the purpose of diversion through an information sheet that explains the purpose of diversion, the potential length of regulator monitoring of the respondent lawyer, and the consequences for respondents who fail to complete diversion. The explanation should explain how diversion promotes public protection. If the jurisdiction's confidentiality rules prevent disclosure of the precise conditions contained in the diversion the agreement, the information sheet should explain the types of conditions that may be negotiated. Regulators should also advise complainants when the conditions of diversion have been fulfilled so that they are aware of the final outcome of the matter.

D. TRACKING DIVERSIONS AND THEIR EFFECTIVENESS

Even though the McKay Commission recommended the use of diversion thirty years ago, as one regulator noted, "[i]t is glaring that we don't really know how effective diversion is, although we have a gut feeling that it is worthwhile."[301] For several reasons, it is important that regulators more systematically track how they are using diversion and its effects and that they share this information with other regulators and interested parties.

First, it is important to assess whether regulators are offering diversion in appropriate cases and doing so in a consistent fashion. As previously noted, in some jurisdictions, the types of misconduct eligible for diversion is extremely broad. A few regulators observed that diversion was sometimes used in types of cases not included in their rules or guidelines.[302] One stated, "[e]veryone is sold on the idea of diversion, but many may apply [it] in an ad hoc way."[303] If regulators are going to depart from their jurisdictions' guidelines, they should be aware of how often they do so, for what reasons, and whether, with hindsight, they made the right decisions. Without reviewing the cases in which diversion has

300. *See, e.g.*, *supra* note 209 and accompanying text; Telephone Interview with Regulator 16 (July 27, 2021) (stating that a lawyer better understands what it is like to be a client after hearing client input). Advising the complainant of the plan to offer diversion provides them an opportunity to express their views, such as their interest in an apology or restitution. While seeking complainant input would require some additional time and effort, it may increase complainant satisfaction with the process and address skepticism that diversion is a cover-up that only benefits lawyers.

301. Telephone Interview with Regulator 10 (July 16, 2021).

302. *Id.* (noting that most diversions were not done under court rules but were more "ad hoc"); Telephone Interview with Regulator 1 (June 28, 2021) (noting that because guidelines are "suggestive," the "failure to satisfy one [criterion] does not disqualify the attorney from participating in the diversion program").

303. Telephone Interview with Regulator 8 (July 9, 2021).

been utilized, it is impossible to evaluate whether diversion is being offered in a consistent and unbiased fashion.

Second, it is important to determine whether diversion is being used—or overused—with lawyers who do not seem to be learning from the diversion experience. As we also noted, lawyers in some jurisdictions who receive diversion are repeat offenders.[304] What percentage of lawyers who receive diversion subsequently reoffend? Do those who reoffend commit misconduct similar to their prior offense? Without tracking this information over an extended time period, it is impossible to know whether diversion is being used appropriately.

Third, and relatedly, it is important to track the lawyers who receive diversion to assess the efficacy of various diversion conditions. Admittedly, it can be difficult to attribute causality to any condition, especially when many factors aside from the diversion conditions may affect future rule compliance. There are, however, ways through self-reports and subsequent monitoring of office practices to assess the efficacy of certain interventions. Without evidence that any educational or rehabilitative efforts are effective in improving how lawyers provide legal services, diversion seemingly serves little purpose except for maintenance of a lawyer's reputation and docket control. Evidence of efficacy may be useful not only in crafting further educational efforts, but in attempting to persuade the public that these interventions are not mere wrist slaps and are actually worthwhile.

In order to generate this information, jurisdictions should develop strategies for data retention and analysis. If necessary, they should seek rule changes so that they can retain sufficient data to determine whether there is significant recidivism and whether their educational efforts and other interventions are effective in reducing future misconduct. The National Organization of Bar Counsel could help jurisdictions develop a uniform strategy for data collection to be used across jurisdictions. Such a national initiative could provide a basis for empirically examining the effectiveness of diversion alternatives. Comparisons can be instructive when different remedial interventions are used. Jurisdictions should also publish their findings—as Wisconsin has done—so that all jurisdictions can benefit from this information.

CONCLUSION

Thirty years ago, the McKay Commission recommended that the judiciary and the profession coordinate preventive educational, substance counseling, and other programs with the disciplinary system to address the minor misconduct that often leads to complaints.[305] Today, some regulators are taking this one step further by exploring proactive measures to help all lawyers avoid misconduct. Rather than having to react to misconduct after it has occurred, proactive efforts recognize

304. *See supra* notes 256–57 and accompanying text.

305. MCKAY COMM'N REPORT, *supra* note 15, at xv–xvi.

that clients and the public generally are more protected if misconduct never occurs.

Jurisdictions considering proactive initiatives should recognize the role that diversion alternatives can play in a comprehensive regulatory regime. Although diversion alternatives do not squarely qualify as proactive programs because some misconduct has already occurred, diversion conditions focus on dealing with the particular problem that precipitated the complaint. More generally, diversion can provide an important intervention opportunity to work with lawyers to examine their mistakes and improve their procedures, practices, and fitness when practicing law. Through these efforts, regulators may be able to better focus diversion to meet lawyers' needs and protect the public.

In the long run, well-conceived diversion programs may also positively affect regulators' relationships with lawyers.[306] Some solo and small firm lawyers view regulators with suspicion or even bitterness, fueled in part by the observation that regulators disproportionately discipline this cohort.[307] By implementing effective alternatives to discipline—and communicating that they genuinely want to help respondent lawyers—regulators may seem less like adversaries. Respondents who feel like they are being treated fairly and with dignity may feel more commitment to educational and rehabilitation efforts.[308]

It is important, however, to be clear-eyed about the limits and costs of diversion. Even with the most well-designed educational program, diversion may not be appropriate for some lawyers and may be especially inappropriate for those who reoffend. Moreover, diversion, as currently employed, has a hidden cost for the regulatory system. Because information about diverted matters is generally treated as confidential, diversion sends no signal to the public that minor misconduct is being addressed or to the larger lawyer community about the types of conduct that lead to a regulatory response. Every time diversion or a private sanction is used in lieu of public discipline, regulators potentially lose an opportunity to educate and deter other lawyers. Research shows that enforcement action must be communicated effectively to have deterrent effects.[309] One alternative to keeping all information on diversion confidential would be to regularly publish, even if in an aggregated form, information about the types of misconduct that gave rise to diversion.

One concluding caveat is in order. There are many questions that remain unanswered about lawyer diversion. As noted, the most important—and most difficult to answer—is how well it works to prevent future misconduct. Second, although the research from the medical field indicates that interactive educational efforts produce better results than lecture-style education, which combination of

306. *See supra* note 132 and accompanying text.

307. *See* Levin, *supra* note 5, at 372.

308. The feeling that the system is fair and treats individuals with dignity enhances their willingness to accept the outcome of legal proceedings. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 273–74, 276 (2006).

309. VAN ROOIJ & FINE, *supra* note 252, at 39.

interventions is likely to have durable effects?[310] Third, is diversion being offered in a consistent manner and in appropriate cases? And finally, at what point is a sanction also an appropriate regulatory response to achieve specific or general deterrence or some other regulatory goal? These important questions can only be answered if regulators maintain data, critically assess it, and share their findings as part of their ongoing efforts to improve lawyer conduct and protect the public.

310. This question is still being debated in the medical field. *See* RONALD M. CERVERO & JULIE K. GAINES, EFFECTIVENESS OF CONTINUING MEDICAL EDUCATION: UPDATED SYNTHESIS OF SYSTEMATIC REVIEWS 8, 15 (2014), https://www.accme.org/publications/effectiveness-continuing-medical-education-updated-synthesis-systematic-reviews [https://perma.cc/G8FZ-8ABM].

July 16, 2020

Rule 9

Share:

Model Rules for Lawyer Disciplinary Enforcement

A. *1* **Grounds for Discipline.** It shall be a ground for discipline for a lawyer to:

(1) violate or attempt to violate the [State Rules of Professional Conduct], or any other rules of this jurisdiction regarding professional conduct of lawyers;
(2) engage in conduct violating applicable rules of professional conduct of another jurisdiction;
(3) willfully violate a valid order of the court or the board imposing discipline, willfully fail to appear before disciplinary counsel for admonition pursuant to Rule 10(A)(5), willfully fail to comply with a subpoena validly issued under Rule 14, or knowingly fail to respond to a lawful demand from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by applicable rules relating to confidentiality.

B. *2* **Lesser Misconduct.** Lesser misconduct is conduct that does not warrant a sanction restricting the respondent's license to practice law. Conduct shall not be considered lesser misconduct if any of the following considerations apply:

(1) the misconduct involves the misappropriation of funds;
(2) the misconduct results in or is likely to result in substantial prejudice to a client or other person;

(3) the respondent has been publicly disciplined in the last three years;
(4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
(5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
(6) the misconduct constitutes a "serious crime' as defined in Rule 19(C); or
(7) the misconduct is part of a pattern of similar misconduct.

Commentary

When a lawyer is admitted to practice, he or she becomes subject to rules of conduct in effect in that jurisdiction. A violation of those rules triggers the jurisdiction of the agency. This does not mean that every violation necessarily requires the imposition of a sanction, but merely that the agency can investigate the matter.

The agency's jurisdiction to investigate and to take whatever action is deemed to be appropriate is triggered by discipline imposed in another state. The imposition of discipline in one jurisdiction does not mean that every other jurisdiction in which the lawyer is admitted must necessarily impose discipline, but the burden is on the respondent to demonstrate that the imposition of the same discipline is inappropriate. See Rule 22.

All lawyers have an affirmative duty to cooperate, including keeping disciplinary counsel advised of current address for service of process, cooperating with disciplinary investigations, and appearing at disciplinary hearings.

This rule establishes the proper policy for the relationship of the disciplinary system to the bar. Respondents are entitled to due process in disciplinary proceedings and are protected by fifth amendment rights against self-incrimination. However, disciplinary proceedings are not criminal proceedings; respondents are not entitled to "stonewall." Although this rule is subject to all applicable constitutional, statutory, and common law privileges, a lawyer relying on any such privileges should do so openly and not use any alleged

right of nondisclosure as a justification for failure to comply with this rule.

To be considered misconduct under these Rules, conduct is a ground for discipline as defined in Rule 9(A). In determining whether misconduct should be treated as "lesser" for purposes of Rule 18(H) (Hearings on Lesser Misconduct), disciplinary counsel should be guided by Rules 9 and 10.

It should be noted that Rule 9(A)(1) incorporates by reference Rule 8.1(b) of the Model Rules of Professional Conduct, which states that a lawyer must not "... knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority ...."

Next - RULE 10. SANCTIONS

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July 15, 2020

Rule 11

Share:

Model Rules for Lawyer Disciplinary Enforcement

A. *1* **Evaluation**. The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity. If the lawyer is not subject to the jurisdiction of the court, the matter shall be referred to the appropriate entity in any jurisdiction in which the lawyer is admitted. If the information, if true, would not constitute misconduct or incapacity, the matter may be referred to the central intake office, or to any of the component agencies of the comprehensive system of lawyer regulation established by Rule 1, or dismissed. If the lawyer is subject to the jurisdiction of the court and the information alleges facts which, if true, would constitute misconduct or incapacity, disciplinary counsel shall conduct an investigation.

> Upon the conclusion of an investigation, disciplinary counsel may:
> (a) dismiss;
> (b) refer respondent, in a matter involving lesser misconduct, to the Alternatives to Discipline Program, pursuant to Rule 11(G); or
> (c) recommend probation, admonition, the filing of formal charges, the petitioning for transfer to disability inactive status, or a stay.

B. *2* **Investigation**.

(1) All investigations shall be conducted by disciplinary counsel. Upon the conclusion of an investigation, disciplinary counsel may:

(a) dismiss;
(b) refer respondent, in a matter involving lesser misconduct, to the Alternatives to Discipline Program, pursuant to Rule 11(G); or
(c) recommend probation, admonition, the filing of formal charges, the petitioning for transfer to disability inactive status, or a stay.

(2) Notice to Respondent. Disciplinary counsel shall not recommend a disposition other than dismissal or stay without first notifying the respondent in writing of the substance of the matter and affording him or her an opportunity to be heard. Notice to the respondent at his or her last known address is sufficient.
(3) Disciplinary counsel's recommended disposition shall not be subject to review upon the respondent's request for review. Disciplinary counsel's recommended disposition other than a dismissal or a referral to the Alternatives to Discipline Program shall be reviewed by the chair of a hearing committee selected in order from the roster established by the board. The complainant shall be notified of the disposition of a matter following investigation. The complainant may file a written request for review of counsel's dismissal within [thirty] days of receipt of notice of disposition pursuant to Rule 4(B)(6)(c). Disciplinary counsel's dismissal shall be reviewed by the chair upon the complainant's request for review. The chair may approve, disapprove, or modify the recommendation or appealed dismissal. Disciplinary counsel may appeal a decision to disapprove or modify his or her recommendation to a reviewing chair of a second hearing committee also selected in order from the roster established by the board who shall approve either disciplinary counsel's recommendation or the action of the first reviewer, but the decision of the second reviewing chair shall not be appealable. Any hearing committee whose chair reviews a recommendation of disciplinary counsel is disqualified from participating in further consideration of the matter.

C. 3 **Admonition or Probation Imposition.**

(1) If a matter is recommended to be concluded by admonition or by probation, disciplinary counsel shall notify the respondent in writing of the proposed disposition and of the right to demand in writing within [fourteen] days that the matter be disposed of by a formal proceeding. Failure of the respondent to so demand within [fourteen] days after written notice of the proposed admonition or probation constitutes consent to the admonition or probation.
(2) If the respondent within [fourteen] days demands a formal hearing, formal charges may be instituted.

D. 4 **Formal Charges.** If a matter is to be resolved by a formal proceeding, disciplinary counsel shall prepare formal charges in writing that give fair and adequate notice of the nature of the alleged misconduct.

(1) Disciplinary counsel shall file the charges with the board.
(2) Disciplinary counsel shall cause a copy of the formal charges to be served upon the respondent and proof of service to be filed with the board.
(3) The respondent shall file a written answer with the board and serve a copy on disciplinary counsel within [twenty] days after service of the formal charges, unless the time is extended by the chair of the hearing committee. In the event the respondent fails to answer within the prescribed time, or the time as extended, the factual allegations shall be deemed admitted as provided in Rule 33(A).
(4) If there are any material issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard in mitigation, the [hearing committee] [board] shall serve a notice of hearing upon disciplinary counsel and the respondent, stating the date and place of hearing at least [twenty-five] days in advance thereof. The notice of hearing shall advise the respondent of the right to be represented by a lawyer, to cross-examine witnesses and to present evidence. The complainant, if any, shall have the right to make a statement to the [hearing committee] [board] concerning the respondent's alleged

misconduct and the effect of the alleged misconduct on the complainant. The hearing shall be recorded. The [hearing committee] [board] shall promptly submit its report containing its findings and decision on dismissal or sanction to the [board] [court] and shall serve the report on disciplinary counsel and respondent.

(5) Information concerning prior discipline of the respondent shall not be divulged to the hearing committee until after the committee has made a finding of misconduct unless said information is probative of issues pending in the present matter.

E. 5 **Review by Board**. Review by the board shall be limited to a review of the report from the hearing committee and the record below. The board shall not review a matter unless: (a) the respondent or disciplinary counsel files objections with the board within [20] days of the date of service of the report, or (b) a majority of the full board, at its next meeting after submission of the report, votes to review the matter. If the board does not review the matter and the hearing committee has decided to dismiss the matter, the matter shall be dismissed. If the board does not review the matter and the sanction recommended by the hearing committee is not disbarment or suspension, the board shall impose the sanction upon the respondent. If the board does not review the matter and the sanction recommended by the hearing committee is disbarment or suspension, the board shall transmit the report of the hearing committee to the court with a statement that the parties have waived objections and the board has declined to review the matter. If the matter is to be reviewed by the board, the respondent and disciplinary counsel should be afforded an opportunity to file briefs and present oral argument during the review by the board. The board shall adopt rules establishing a timetable and procedure for the filing of briefs and presentation of argument.

(1) Decision by Board. Following its review, the board may approve, modify, or disapprove the recommendation of the hearing committee. The board shall prepare a written report containing its findings and

decision on sanction or decision to dismiss the matter. A copy of the report shall promptly be submitted to the court and served on disciplinary counsel and the respondent. If the board determines that the matter shall be dismissed or that a sanction other than disbarment or suspension shall be imposed, and the court does not vote to review the matter, then the board shall dismiss the matter or impose the sanction upon respondent.

(2) During its review, the board shall not receive or consider any evidence that was not presented to the hearing committee, except upon notice to the respondent and disciplinary counsel and opportunity to respond. The hearing committee is the initial trier of fact; the board serves an appellate review function. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee.

F. 6 **Review by the Court**. The court may, within its discretion, review a matter if the respondent or disciplinary counsel files objections to the report of the board or if a majority of the court, within the time for filing objections, votes to review the matter. If the court does not review the matter and the sanction decided upon by the board or by the hearing committee with review declined by the board is suspension or disbarment, the court shall impose the sanction.

(1) The respondent and disciplinary counsel may file objections to the report of the board within [twenty] days from the date of service. Within [sixty] days after the court grants review, the respondent and disciplinary counsel may file briefs and present oral arguments pursuant to the rules governing civil appeals. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order. The decision of the court shall be in writing and state the reasons for the decision. Upon final disposition at any stage of the proceedings, the written findings shall be published in an appropriate journal or reporter and a copy shall be mailed to the respondent and the complainant and to the ABA National Discipline Data Bank.

(2) During its review, the court shall not receive or consider any

evidence that was not presented to the hearing committee, except upon notice to the respondent and disciplinary counsel and opportunity to respond.

(3) If new evidence warranting a reopening of the proceeding is discovered, the case shall be remanded to the hearing committee.

G. *7* **Alternatives to Discipline Program**.

(1) Referral to Program. In a matter involving lesser misconduct as defined in Rule 9(B), prior to the filing of formal charges, disciplinary counsel may refer respondent to the Alternatives to Discipline Program. The Alternatives to Discipline Program may include fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education programs, ethics school or any other program authorized by the court.

(2) Notice to Complainant. Pursuant to Rule 4(B)(6), the complainant, if any, shall be notified of the decision to refer the respondent to the Alternatives to Discipline Program, and shall have a reasonable opportunity to submit a statement offering any new information regarding the respondent. This statement shall be made part of the record.

(3) Factors. The following factors shall be considered in determining whether to refer a respondent to the program:

(a) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the violations listed in the complaint is likely to be no more severe than reprimand or admonition;

(b) whether participation in the program is likely to benefit the respondent and accomplish the goals set forth by the program;

(c) whether aggravating or mitigating factors exist; and

(d) whether diversion was already tried.

(4) Contract. Disciplinary counsel and the respondent shall negotiate a contract, the terms of which shall be tailored to the individual

circumstances. In each case, the contract shall be signed by the respondent and the disciplinary counsel. The contract shall set forth the terms and conditions of the plan for the respondent and, if appropriate, shall identify the use of a practice monitor and/or a recovery monitor and the responsibilities of the monitor(s). The contract shall provide for oversight of fulfillment of the contract terms. Oversight includes reporting of any alleged breach of contract to the disciplinary counsel. The contract shall also provide that the respondent will pay all costs incurred in connection with the contract. The contract shall include a specific acknowledgment that a material violation of a term of the contract renders voidable the respondent's participation in the program for the original charge(s) filed. The contract may be amended upon agreement of the respondent and disciplinary counsel. If a recovery monitor is assigned, the contract shall include respondent's waiver of confidentiality so that the recovery monitor may make necessary disclosures in order to fulfill the monitor's duties under the contract.

(5) Effect of Non-participation in the Program. The respondent has the right not to participate in the Alternatives to Discipline Program. If the respondent does not participate, the matter will proceed as though no referral to the program had been made.

(6) Status of Complaint. After an agreement is reached, the disciplinary complaint shall be held in abeyance [dismissed] pending successful completion of the terms of the contract.

(7) Termination.

(a) Fulfillment of the Contract: The contract is automatically terminated when the terms of the contract have been fulfilled. Successful completion of the contract constitutes a bar to any further disciplinary proceedings based upon the same allegations.

(b) Material Breach: A material breach of the contract shall be cause for termination of the respondent's participation in the program. After a material breach, disciplinary proceedings may be resumed or reinstituted.

Commentary

The evaluation process eliminates those matters over which the agency has no jurisdiction. It precedes investigation, which is reserved for those matters determined to involve a lawyer subject to the jurisdiction of the agency and allegations which, if true, would constitute misconduct.

If the matter is terminated at this stage because the matter does not involve allegations of misconduct, disciplinary counsel should notify the complainant and refer him or her to the central intake office. Disciplinary counsel may refer matters to the central intake office or directly to any of the component agencies included in the comprehensive lawyer regulation system established by Rule 1, such as the lawyer assistance program (which provides assistance for impairment problems) or the fee arbitration program.

Matters terminated at the evaluation stage because they concern a lawyer not admitted to practice in the jurisdiction should be forwarded by disciplinary counsel to the agency for the jurisdiction in which the lawyer is admitted. The complainant should be notified of the disposition if a matter is concluded at the screening stage.

A stay is appropriate only in extraordinary circumstances. Disciplinary counsel must determine whether the complainant or the respondent will suffer prejudice in the pending proceeding should the disciplinary action proceed immediately. In some cases, witnesses and evidence pertinent to both cases might not be obtainable at a later date; in other cases, the disciplinary action may be expedited by waiting for evidence to be adduced in another proceeding.

Fairness requires that no recommendation adverse to the respondent be made without providing him or her an opportunity to be heard. This does not mean that the respondent is entitled to notice immediately upon receipt of a complaint. In some instances, early notice would be harmful to the investigation. It does mean that the

respondent has a right to be heard before the investigation is concluded and an adverse disposition formulated. If the matter is dismissed or stayed following investigation, respondent has no reason to appeal.

The review process preserves elements of bifurcation within the unitary system, because the recommendation of disciplinary counsel is subject to review and approval by a representative of the adjudicative body. The approval of counsel's recommendation to file formal charges by the reviewing member amounts to a finding of probable cause to proceed.

In order to prevent any possibility of forum shopping by disciplinary counsel, the hearing committee chairperson should be designated by the board. The hearing committee of which the reviewing chair is a member should be disqualified from any future consideration of the matter, in order to avoid being placed in the position of passing upon the correctness of his or her approval of the recommendation to prosecute formal charges.

The board supervises the operations of the agency. Any person dissatisfied with the action of the agency may complain to the board. The complaint should be submitted to a panel of the board, rather than the entire board, so that those members not serving on the panel will be available to participate in any future proceedings involving the matter.

If the first reviewing chairperson does not approve the recommendation, disciplinary counsel may submit the matter to a second reviewing chairperson who shall decide the issue by approving either the recommendation of disciplinary counsel or the modification thereon made by the first reviewer. The decision of the second reviewing chair shall be final within the agency.

The court, the board, or disciplinary counsel may impose probation. If probation is imposed by the board or by counsel, the consent of the respondent is required. The terms of the probation should specify periodic review of the order of probation, and provide a means to supervise the progress of the respondent.

Admonitions should be in writing and served upon the respondent. If the respondent does not consent to the admonition or probation, formal charges are instituted. The procedure is similar to the rejection of a settlement offer in a civil case or a plea bargain in a criminal case, which results in a trial.

The fact that refusal to consent to the admonition or probation subjects the respondent to formal charges and potentially more serious discipline does not violate due process any more than does the fact that a person charged with a crime is subject to conviction of a more serious offense when he or she refuses to plead to a lesser crime.

Prior discipline is relevant and material to the issue of the sanction to be imposed for the conduct which is the subject of the pending charges. Prior discipline is, except in unusual circumstances, not relevant or material to the issue of whether the conduct alleged has occurred. Consequently, introduction of evidence of prior discipline before a finding that the present charges have been sustained is prejudicial. Such records should not ordinarily be introduced until a finding of guilt has been made.

If evidence of prior discipline is necessary to prove the present charges (e.g. an allegation that the respondent continued to practice despite suspension) or to impeach (e.g. false testimony by respondent as to lack of prior discipline), it may be offered. However, it should not be used as a substitute for proving the allegations at issue.

The hearing may be recorded by any method authorized in the jurisdiction. The record will assist the hearing committee in the

preparation and presentation of its report. If the matter ultimately results in a recommendation for discipline, the record should be forwarded with the findings and recommendation. The recording should be available to the respondent upon request, and a transcript provided at cost. The hearing committee is the initial trier of fact; the board serves an appellate review function. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee.

Unless the decision of the hearing committee or the board is appealed or unless the board or court affirmatively decides to review a matter, cases should be disposed at the earliest possible stage. Of course, the court must retain ultimate responsibility for all disciplinary matters and, thus, must reserve the right to review any matter or even hold a de novo hearing if it so determines. This should occur only in extraordinary cases involving significant questions of law.

In all other cases, the court should rely on its disciplinary counsel, the hearing committee, and the board to dispose of matters in accordance with established disciplinary law. This will both speed up the process and reduce the burden on the court. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee. Written opinions of the court not only serve to educate members of the profession about ethical behavior, but also provide precedent for subsequent cases. Moreover, this requirement is manageable; the courts in the jurisdictions with the heaviest caseloads currently write opinions in every contested disciplinary case they decide. If a matter is concluded without review by the court, the report of the board or hearing committee should be published in the official reporter. The agency should establish time guidelines for proceedings under Rule 11. Time guidelines under this Rule are directory and not jurisdictional.

The agency should establish guidelines for the following: (1) evaluation of information, investigation, and the filing and service of formal

charges or other disposition of a matter; (2) hearing; and (3) review by the board. Evaluation, investigation, and the filing and service of formal charges or other disposition of routine matters generally should be completed within six months; complicated matters generally should be completed within twelve months. The period from the filing and service of formal charges to the filing of the report of the hearing committee generally should not exceed six months. The period for review by the board generally should not exceed six months. Thus, overall time periods generally should not exceed the following: eighteen months for routine matters that are reviewed by the board and twenty-four months for complicated matters that are reviewed by the board.

The overwhelming majority of complaints made against lawyers allege instances of lesser misconduct. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. These complaints are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system.

These cases seldom justify the resources needed to conduct formal disciplinary proceedings. In most of these cases, the respondent's conduct does not justify imposing a disciplinary sanction. Therefore, these matters should be removed from the disciplinary system and handled administratively. It may be appropriate to compensate the client for the respondent's substandard performance by a fee adjustment or other arbitrated or mediated settlement. The respondent may need guidance to improve his or her skills or to overcome a problem with substance abuse.

A respondent has the right to refuse to participate in the Alternatives to Discipline Program. The only adverse consequence of a respondent's refusal to participate shall be that it is a factor to be considered by disciplinary counsel in determining whether to recommend the filing of formal charges. Disciplinary counsel may

recommend formal charges even if the original complaint alleged lesser misconduct as defined in Rule 9(B). Disciplinary counsel, of course, retains the discretion to dismiss the complaint. If fee arbitration is mandatory in the jurisdiction, there is obviously no need for respondent's consent.

Participation in the program is not intended as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program will only be considered in cases where, assuming all the allegations against the respondent are true, the presumptive sanctions would be less than suspension or disbarment or other restrictions on the right to practice. See Rule 9(B). After the filing and service of formal charges, a referral to any of the component agencies included in the comprehensive lawyer regulation system established by Rule 1 shall be made as written conditions pursuant to Rule 10(B).

The existence of one or more aggravating factors does not necessarily exclude participation in the program. For example, neglect cases often include a pattern of misconduct and multiple offenses, but do not involve dishonesty, bad faith, or a breach of fiduciary obligation. Thus, the existence of "a pattern of misconduct" and/or "multiple offenses" should not make a respondent ineligible for the program. A pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying problem.

Factors that may indicate ineligibility for participation in the program include evidence of a dishonest or selfish motive, bad faith in, or the obstruction of, the disciplinary process, the submission of false evidence, or an indifference to making restitution. Both mitigating and aggravating factors should also be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible respondent for the program.

The existence of prior disciplinary offenses would not necessarily make a respondent ineligible for referral to the Alternatives to Discipline Program. Consideration should be given to whether the respondent's prior offenses are of the same or similar nature, whether the respondent has previously been placed in the Alternatives to Discipline Program for similar conduct and whether it is reasonably foreseeable that the respondent's participation in program will be successful.

Each participant in the program will become a party to a contract that is specifically designed to address the alleged violations. It will be the respondent's responsibility to carry out the contract provisions. The contract provisions will indicate who is responsible to oversee the fulfillment of the terms of the contract. The person overseeing the contract must report to the disciplinary counsel any non-compliance with the contract provisions.

In order to encourage voluntary participation in lawyer assistance programs, such programs provide confidentiality. Rule 8.3(c) of the ABA Model Rules of Professional Conduct states: "This Rule does not require disclosure of information . . . gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege." However, participation in the Alternatives to Discipline program differs from voluntary participation in a LAP program. The Alternatives to Discipline Rule recognizes this difference and requires the recovery monitor to make necessary disclosures in order to fulfill his or her duties under the contract.

Next - RULE 12. IMMUNITY.

Table of Contents

CONFIDENTIAL

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Clinical Director

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Fax: (614) 586-0633

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OHIO LAWYERS ASSISTANCE PROGRAM, INC.
CHEMICAL DEPENDENCY CONTRACT

The Parties agree as follows:

I, ____, agree to:

1. Totally refrain from the use of all mood altering substances, including alcohol.

2. Prior to the use of any mood altering/psychoactive prescription medication, I agree to notify the prescribing physician that I am under contract with OLAP, and request that the physician notify OLAP in writing that the physician has knowledge of my chemical dependency, identify the drug or drugs prescribed, and advise of the reason for the prescriptions.

3. Accept_____________________________________ as Monitor of my performance under this Contract and I assume the responsibility of making at least one personal or telephone contact per week with my Monitor or as otherwise directed by my Monitor. Telephone check-in times are Monday through Friday, 9:00 a.m. to 4:00 p.m. (614-586-9196). Call OLAP ____ times/week for check-ins to update us on your recovery. After hour calls are given no credit.

4. Provide my Monitor with whatever substantiating documentation the Monitor/OLAP may require to assure compliance with this Contract.

5. Participate in continuing outpatient, aftercare, private and/or group therapy as required/ recommended by a treatment center, qualified health care professional, my Monitor or OLAP. Treatment center: ____

6. Actively participate in a 12-Step or Self Help Program including, at a minimum, the following:
   - Identify an AA/NA/CA/SAA (12-Step) Home Group or other addiction self-help group and attend its weekly meetings, as well as at least _____ other 12-step or addiction self help meetings per week. Total: _________ per week

   - Identify and enlist the aid of a 12-Step sponsor or addiction self help sponsor within two weeks of the date of this Contract and give my sponsor permission to

disclose appropriate information as requested by OLAP. ¬ Progress satisfactorily through the AA *Big Book* and the AA *12 Steps and 12 Traditions* or the NA *Basic Text,* the NA *It Works: How and Why*, CA *Basic Text*, *Hope & Courage or other literature as required per the program you choose.*

- Prepare for and complete the 12-Step Program or addiction self help program within the time frame recommended by my sponsor.
- Encourage my spouse or significant other to attend Open Discussion, Couples, or Al-Anon or Codependents Anonymous (CODA).
- Encourage my child(ren) to attend Al-Ateen/Al-Anon.
- Attend open meetings with my spouse or significant other, if possible.
- Involve my family in continuing supportive care as recommended by a treatment center, therapist, qualified health care professional.

7. Submit to and pay for random urine drug/alcohol screens as determined by OLAP, pursuant to the OLAP Random Drug Testing Procedure.
8. Immediately notify OLAP and my Monitor in the event that I use any mind altering substances (alcohol, non-prescribed medication or other drugs).
9. I agree to pay OLAP $50.00/ $100.00/ $200.00 monthly administration fee and forward payment to OLAP by the fifth day of each month. You may send a check or money order to our address listed on this contract or pay with Visa, MC, Discover, or AExp thru LawPay at https://secure.lawpay.com/pages/ohiolap/operating
10. Keep an accurate record of 12-Step or addiction self help group meetings on the form provided and submit monthly reports to OLAP (copy to Monitor) by the fifth day of the following month.
11. Make appropriate restitution.
12. Obtain all required CLE's , and provide evidence of attendance to OLAP.
13. Provide appropriate release forms for urine/blood screens, treatment center records, therapist/qualified health care professional reports and other written and verbal information required to assure compliance with the terms of this Contract.
14. Comply with each and every term contained in any Court order or agreement relevant to my program of recovery.

The modification of these Contract terms as required by my Monitor and/or OLAP if dictated by a change in circumstances.

I fully understand the conditions outlined in my Recovery Contract, and realize that non-compliance, as determined by OLAP, will place me on INACTIVE STATUS/TERMINATED . I understand that INACTIVE STATUS/TERMINATED means that OLAP will not provide

advocacy for me. If the deficiencies are corrected and OLAP determines that I am in compliance with my Contract, I understand that I may be returned to ACTIVE STATUS.

Call OLAP ____ times/week for check-ins to update us on your recovery. Please call 614-586-9196 to check in.

OLAP agrees to:

1. Provide a suitable Monitor to act as monitor of the performances required by this Contract.

2. Insofar as addiction and/or mental health recovery are concerned, and where applicable, assume an advocacy role before any committee, commission, court, or with any employer or other person to whom the Participant must report or account.

3. Assume the responsibility to hold this Contract and all information acquired in furtherance thereof in strict confidence unless released from such obligation in writing.

4. Assume the responsibility to report compliance or non-compliance with this Contract to the appropriate person(s).

This Contract shall remain in effect for ________ years from the date of execution and may be extended by order of the Ohio Supreme Court, other court, or agreement of the Parties.

Date: ____________

OHIO LAWYERS ASSISTANCE PROGRAM, INC.

By: ________________________________
Scott R. Mote, Esq.
Laura Valentino
Beverly A. Endslow, CDCA
Paul A. Caimi, J.D.,LCDC-III, CADC

____
Participant

____
Print Name

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OHIO LAWYERS ASSISTANCE PROGRAM, INC.
MENTAL HEALTH CONTRACT

WHEREAS, ___________________________________:

by order of the Supreme Court of Ohio dated ____________, participation in the program offered by the Ohio Lawyers Assistance Program, Inc. (OLAP) is required, and/or, is obligated by reason of an agreement with OLAP to participate in the program offered by OLAP , and/or, is currently involved in the Supreme Court of Ohio disciplinary process, and/or, is applying for admission to the Ohio bar, and/or, has been diagnosed as suffering from a mental health or related disorder(s), and desires assistance from and participation in the program offered by OLAP, and

WHEREAS, OLAP is a not-for- profit Ohio corporation organized by the Ohio State Bar Association to provide evaluation, rehabilitation, and assistance to attorneys suffering from mental health or related disorder(s), and to provide monitoring and reporting services in connection therewith.

NOW, THEREFORE, the parties agree as follows:

I, ____ agree to:

1. Report to ________________________ for an assessment to determine diagnosis, appropriate level of care, and treatment recommendations no later than _______________.
2. Renegotiate the terms of this Agreement upon receipt of the above evaluation if required by OLAP.
3. **Totally refrain from the use of all mood-altering substances, including alcohol.**
4. Prior to the use of any mood altering/psychoactive prescription medication, I agree to notify the prescribing physician that I am under contract with OLAP, and request that the physician notify OLAP in writing that he/she has knowledge of my chemical dependency (if any), identify the drug or drugs prescribed, and advise of the reason for said prescription.
5. Provide OLAP with the name, address and telephone number of each physician and other mental health professional(s) treating me, and I authorize OLAP to obtain any information desired from said professionals.
6. I have selected as my primary physician, _________________________, located at _________________, with telephone number __________________
7. I agree to obtain treatment from my primary physician and mental health professional(s), and to provide free and unlimited release of all information concerning my health and participation in treatment to OLAP.
8. I understand the need for and have requested that my primary physician, as well as any other treating professional(s), notify OLAP immediately of the following:
    a. failure to comply with or progress in treatment;
    b. any change of medication;
    c. discontinuation of therapy;
    d. change of treating professional(s);
    e. failure to appear for appointments, continue prescribed medications or cooperate in the therapeutic process.

9. Accept __________________________ as Monitor of my performance under this contract and I assume the responsibility of making at least one personal contact per week with my Monitor, in addition to other therapy sessions

recommended by my Monitor, treating physician and/or mental health professional(s). Telephone check-in times are Monday through Friday, 9:00 a.m. to 4:00 p.m. (614) 586-9196. After hour calls are given no credit.

10. Provide my OLAP Monitor with whatever substantiating documentation the monitor may require to assure compliance with this contract.
11. Provide OLAP with notification of any changes in my physical or mental health, address, phone number, or employment.
12. If available and endorsed by my Monitor, actively participate in a facilitated support group for recovering professionals.
13. If therapeutically indicated, submit to and pay for random urine drug/alcohol screens at the direction of OLAP.
14. Provide appropriate signed release forms for urine/blood laboratory results, treatment center records, psychiatric or mental health records, physician or therapist reports and other written and verbal information required to assure compliance with the terms of this Agreement.
15. Participate in continuing private and/or group therapy as required by OLAP, treating physician, mental health professional(s) or Monitor.
16. Immediately notify OLAP as well as my monitor in the event I use any mind or mood altering substances without a prescription from the physician above or any new physicians that may not be aware of my condition(s).
17. Agree to pay OLAP $50/$100/$200 per month monitoring fee for each month under contract. You may send a check or money to the address listed on this contract or pay with Visa, MC, Discover, or AExp thru LawPay at https://secure.lawpay.com/pages/ohiolap/operating
18. Involve my family in continuing supportive care as suggested by OLAP, my Monitor, my physician and my mental health professional(s).
19. Make appropriate restitution, if applicable.
20. To perform in accordance with each and every term contained in any court order and this agreement.
21. To the modification of these Contract terms as required by my monitor and dictated by a change in circumstances.

OLAP agrees to:

1. Provide a trained and/or certified individual to monitor the performance required by this Contract.
2. Insofar as treatment and ability to practice law is concerned, and where applicable, assume an advocacy role before any Commission, Court, Agency or with any Employer or other person to whom Participant must report or account.
3. Assume the responsibility to hold this Contract and all information acquired in furtherance thereof in strict confidence unless released from such obligation in writing.
4. Assume the responsibility to report compliance or non-compliance with this Contract to the appropriate person (this report may also be made by the Monitor).

This Contract shall remain in effect for ____________________ (_____) years from the date of execution and may be extended by order of the Court or agreement of the parties.

Date: ______________________________

OHIO LAWYERS
ASSISTANCE PROGRAM, INC.

By: ________________________________ ____
Participant

Scott R. Mote, Esq.
Megan R. Snyder, MSW, LISW
Beverly A. Endslow, CDCA
Paul A. Caimi, J.D.,LCDC-III, CADC

____
Print Name

ATTACKS ON THE JUDICIARY

Attacks on the Judiciary: Resources

Key Ohio Case	
Disciplinary Counsel v. Gardner	Six-month suspension for knowingly making false accusations about a judge in an appellate brief; no First Amendment protection from discipline even when expressing an opinion that a judge is corrupt during court proceedings when the attorney knows the opinion has no factual basis or is reckless
Accusations of Bias and Corruption	
Disciplinary Counsel v. Cramer	Indefinite suspension for knowingly or recklessly making false statements concerning the integrity of judicial officers in admin of her mother's probate estate
Cleveland Metro Bar v. Morton	One year suspension, six months stayed for conduct degrading to a tribunal and false or reckless statements concerning integrity of judicial official; Kennedy and DeWine would overturn Gardner decision and adopt actual-malice standard in NYT v. Sullivan
Toledo Bar Assn. v. Yoder	Two-year suspension, six months conditionally stayed for false statements about a magistrate and others

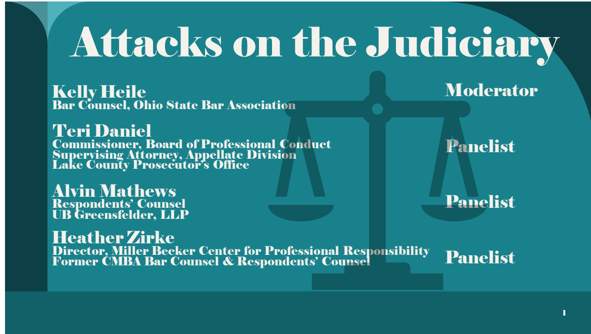
Affidavits of Disqualification	
Disciplinary Counsel v. Pullins	Indefinite suspension for filing false and disrespectful statements in affidavits of disqualification
Disciplinary Counsel v. Shimko (2012)	One year stayed suspension for falsely accusing trial judge of dishonesty and harboring improper motives for his rulings

Social Media/Ex Parte Communication Misconduct	
Disciplinary Counsel v. Berry	Six-month stayed suspension for sending inappropriate Facebook messages and videos to a court employee
Disciplinary Counsel v. Celebrezze (link to certified complaint)	Pending: DR judge had undisclosed romantic relationship with court receiver and mediator
Disciplinary Counsel v. Porzio	Six-month conditionally stayed suspension for ex parte communication with a party after opposing party excused from the courtroom

Ohio State Bar Assn. v. Winkler	Public reprimand for making inaccurate comments on Facebook about a pending guardianship case
Disciplinary Counsel v. Winters	Six-month conditionally stayed suspension for ex parte communications on Facebook

Courtroom /Independent Investigation Misconduct	
Disciplinary Counsel v. Bachman	Six-month suspension for magistrate who jailed a woman for disrupting a trial
Disciplinary Counsel v. Carr	Indefinite suspension for failing to abide by COVID-19 admin order, using capias warrants and jail to compel payment of fines, and lack of decorum.
Disciplinary Counsel v. Grendell (link to Board recommendation)	Pending: Probate and Juvenile judge accused of jailing two minors who refused visitation with their father; Board rec. 18 mo./6 mo. stayed
Disciplinary Counsel v. Hoover, Kim	18 mo suspension with 6 mo stayed for municipal judge who coerced people to pay costs and fines by jailing those who could not
Disciplinary Counsel v. Lemons	Public reprimand for investigating facts in a juvenile court matter.
Disciplinary Counsel v. O'Diam	Conditionally stayed six-month suspension for failing to be patient, dignified or courteous to witness
Disciplinary Counsel v. Repp	One-year suspension for jailing a quiet observer in courtroom who refused to submit to a drug test

Relevant Rules	
Ohio Rules for the Government of the Bar	Gov. Bar Rule I, Section 9(A) (Oath of Office)
	Gov. Bar Rule IV, Section 2 (Duty of Lawyers)
Rules of Professional Conduct	Preamble; A Lawyer's Responsibilities
	Rule 3.1 – meritorious claims/contentions
	Rule 3.5(a)(6) – undignified or discourteous conduct degrading to a tribunal
	Rule 8.2(a) – false statements about a judge's integrity
	Rule 8.4(d) – conduct prejudicial to the admin of justice



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'Unacceptable, dangerous': AG Garland slams threats against

Trump blasts his trial judges. Then his fans call for violence.

When Donald Trump attacks the integrity of judges hearing cases against him, his followers often respond with posts urging that the jurists be beaten, tortured and killed.

Roe v. Wade leaked draft opinion on abortion spikes protests at SCOTUS justices' homes

3

3

Justice Clarence Thomas treated to 38 luxury

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Trust in U.S. Supreme Court Continues to Sink

Posted on October 2, 2024

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Judge puts teen in handcuffs, jail clothes after she fell asleep during ...

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EYEWITNESS NEWS AT 10AM

Play (k)

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Judicial Grievances

6

6

Robed in secrecy: How judges accused of misconduct can dodge public scrutiny

Credit: Bigstock

ANALYSIS

Judicial Conduct Complaints Spiked Across the Country in 2022

"There's a pretty clear connection between the increase in judicial complaints and the polarized nature of the political situation that our country as a whole," Josh Byrne, chair of disciplinary board representation at Marshall Dennehey Warner Coleman & Goggin, said.

May 22, 2023 at 10:19 AM

5 minute read

Judicial Ethics

By Aleeza Furman
Litigation Reporter

7

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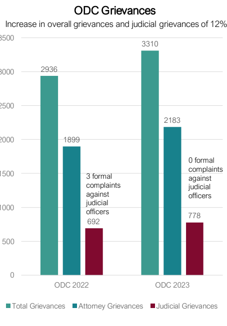

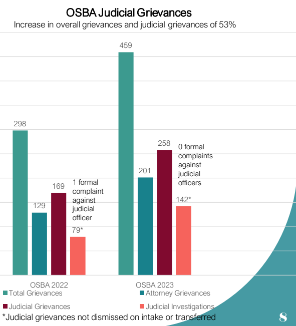

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Cleveland Metro. Bar Assn. v. Morton

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Cleveland Metro. Bar Assn. v. Morton

- Respondent filed a Memorandum in Support of Jurisdiction with the OSC that impugned the integrity of multiple justices.
- Relying on its prior ruling in *Disciplinary Counsel v. Gardner*, the OSC found Respondent's statements were made with knowledge or reckless disregard of their falsity and were not protected free speech.

  "The United States Supreme Court has held that '[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed..'" Gardner at ¶ 14.

- Respondent received a one-year suspension with six months stayed.
- Justices Kennedy and DeWine would overrule *Gardner* and adopt the actual malice standard in *New York Times v. Sullivan*.

11

11

But what about Freedom of Speech?

The freedom to criticize judges and other public officials is necessary to a vibrant democracy. The problem comes when healthy criticism is replaced with more destructive intimidation and sanctions.

— Sandra Day O'Connor —

AZ QUOTES

12

12

Disciplinary Counsel v. Cramer

- Respondent made knowingly or recklessly false statements about the integrity of judicial officers in the administration of her mother's probate estate.
- SCO quoted *Gardner* decision saying:

  "Because lawyers 'possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch of government' we have recognized that '[their] statements made during court proceedings are 'likely to be received as especially authoritative.'" *Gardner* at ¶ 22.

- Respondent received an indefinite suspension for this and other significant misconduct.

13

13

Toledo Bar Assn. v. Yoder

- In representing maternal grandparents seeking custody of their grandchildren, respondent made false and undignified statements about a magistrate
- He claimed the magistrate's decision "was the most absolutely insane decision [he had] ever encountered in almost 40 years" and was not what "a normal, competent magistrate would have done."
- *Gardner* decision cited:
  - "An attorney may be sanctioned for making accusations of judicial impropriety that a reasonable attorney would believe are false." *Gardner* at ¶ 31.
- Respondent received a two-year suspension with six months conditionally stayed for this and other serious misconduct.

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Social Media/Ex Parte Communications Misconduct

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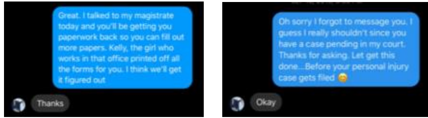
Disciplinary Counsel v. Winters

- Common Pleas and DR Court judge had numerous ex parte communications via Facebook Messenger with an individual who had multiple cases before his court.
- Respondent failed to disclose the ex parte communications or disqualify himself from the proceedings.
- Respondent received a conditionally stayed six-month suspension.



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Ohio State Bar Assn. v. Winkler

17

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Ohio State Bar Assn. v. Winkler

Facebook posts to Rob

Rob McCulloch you're just mad because we had to intercede and take care of your mother when you did not. You were living in your Mothers house in deplorable conditions. I am glad a nice neighbor called Senior services and we got your Mother into a safe , Clean and healthy care facility. God only knows what would have happened to her if a Good Samaritan neighbor had not reported this elder abuse. The home photos in evidence don't lie. Anyone in the public can look at them as they are part of your Mother's case file.

Hamilton County Probate Court, Judge Ralph Winkler
You lost your case because you were wrong . You interviewed this poor woman with dementia with leading and suggestive questions to try to prove you weren't wrong. However, you were wrong for not taking proper care of your mother . When you did make it to Court you often reeked of alcohol . Plus,You also missed many hearings for unknown reasons. Don't try to blame my Court or Magistrate Coes for your shortcomings as a son . I am glad your neighbor reported this to the Authorities. Your mother could have died or suffered needlessly if my Court didn't help her .

- The comments were about an ongoing guardianship case and were not accurate.
- Respondent also authorized a court employee to give inaccurate information about a pending guardianship case to a news reporter.
- Respondent received a public reprimand.

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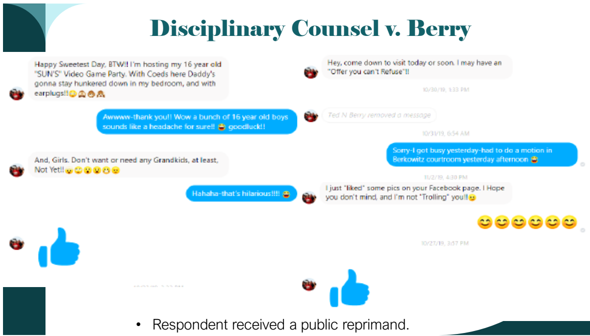

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Disciplinary Counsel v. Repp

Municipal court judge had an undignified, improper, and discourteous demeanor toward a criminal defendant and his girlfriend in his courtroom.

Girlfriend was quietly observing the proceedings when respondent ordered her to submit to a drug test.

Respondent found the girlfriend in direct contempt of court and sentenced her to 10 days when she refused.

Respondent received a one-year suspension from the practice of law and from judicial office without pay.

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Disciplinary Counsel v. Repp

23

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Disciplinary Counsel v. Hoover

- Municipal court judge jailed multiple defendants who could not pay fines and costs despite applicable law to the contrary.
- Respondent repeatedly engaged in discourteous conduct accusing one defendant of "screwing" with the court when the defendant was unable to pay the fines and costs within 30 days.
- Respondent received an 18-month suspension, with six-months conditionally stayed, and an immediate suspension from judicial office without pay for the duration of the suspension.

24

24

Disciplinary Counsel v. Lemons

- Probate and juvenile court judge conducted a home inspection in a matter pending before his court.
- Respondent observed dirty and unsafe conditions and entered an emergency order placing minor children in temporary custody.
- Respondent failed to disclose the home visit to the parents who were incarcerated and also failed to recuse himself from the case.
- Respondent received a public reprimand.

25

25

I believe the judge has engaged in ex parte communications with opposing counsel. I've interrupted the judge and opposing counsel laughing in the judge's chambers and the judge seems to always decide against me. Should I file a grievance?

26

26

My client is acquainted with the assigned judge. She showed me texts where he advised her of possible legal steps she could take and offered names of attorneys, one of which was mine. We had an initial hearing last week where the judge disclosed his acquaintance with my client but never mentioned the texts. Opposing counsel waived any conflict based on the acquaintance. I plan to inform opposing counsel and request that the judge recuse. Does Prof.Cond. R. 8.3 require that I also file a grievance against the judge?

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27

Opposing counsel hade made repeated allegations of bias against the judge. I believe they are baseless. He has filed multiple unsuccessful motions to recuse and affidavits of disqualification against the judge. He makes these allegations in open court, filings, and in front of his client. His client has now become disrespectful to the judge. What should I do?

28

28

A local judge is up for re-election. The judge has made multiple decisions that I believe are completely wrong, although only one has been overturned on appeal. Additionally, 90% of the judge's cases are over the Supreme Court time guidelines. I want to speak out against this judge's reelection, how do I do that appropriately?

29

29

What can lawyers reasonably do?

DEFEND AND SHOW RESPECT

- Defend reasonable decisions
- Share educational tools with the public
- Maintain objectivity
- Cling to professionalism
- Consider the 2018 ABA call to action

WHAT NOT TO DO

- Hasty affidavits of disqualification
- Critical in briefing
- Negative public statements

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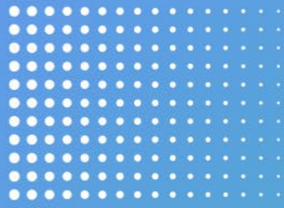
ARTIFICIAL INTELLIGENCE AND ETHICS


ARIZONA SUMMIT ON
ARTIFICIAL INTELLIGENCE
LAW AND THE COURTS

TOPIC: ARTIFICIAL INTELLIGENCE AND DEEPFAKES; PAPER 1

Authored by:

Mark Lanterman

Deepfakes and the Impact of AI on the Courtroom

Mark Lanterman

I. INTRODUCTION

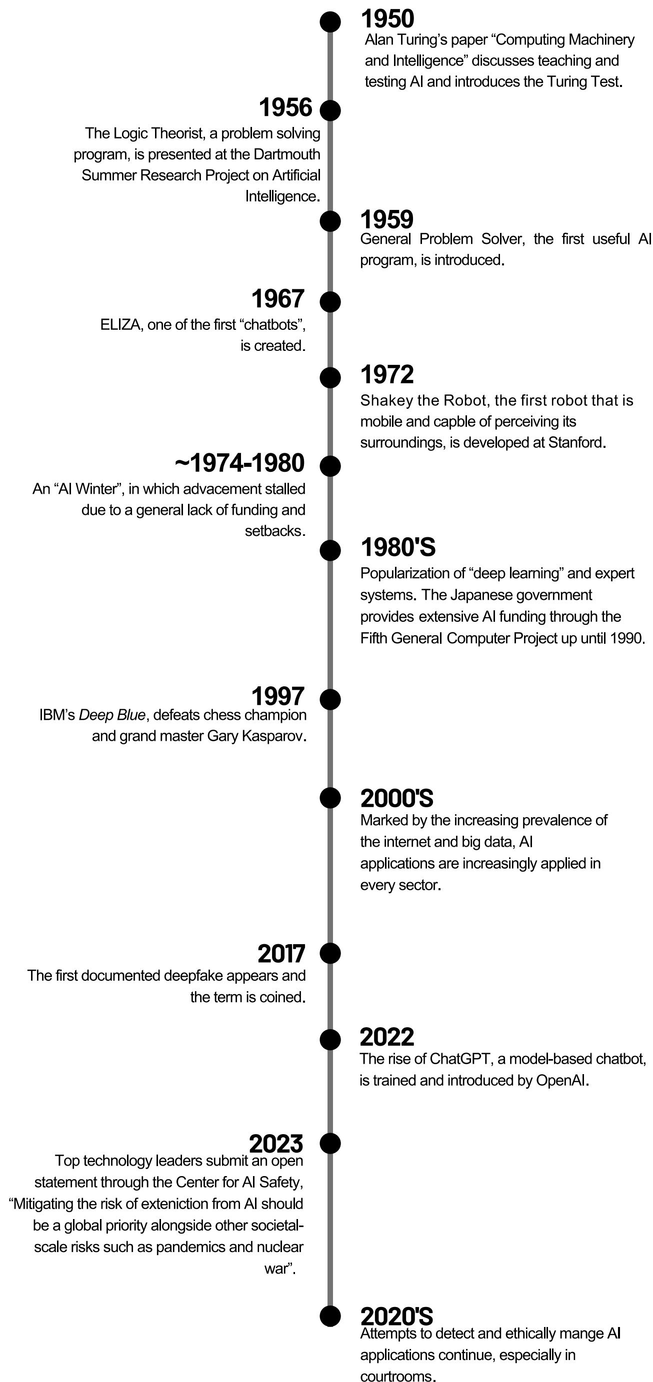
In 2014, Professor Stephen Hawking expressed his weariness over advancements in artificial intelligence, telling the BBC, "The development of full artificial intelligence could spell the end of the human race". Though Hawking himself had a very personal relationship with AI, even making communication possible throughout his battle with ALS, he still feared, "the consequences of creating something that can match or surpass humans."[1] In recent years, AI has only continued to shape how human beings work, learn, and live. The benefits are numerous—from advanced medical technologies to the conveniences afforded by tools such as ChatGPT—and the possibility for new applications seems limitless. The potential is exciting, but equally concerning. Almost ten years later, Stephen Hawking's concerns have resurfaced for many.

On October 30, 2023, the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence was put forth by the Biden Administration.[2] The executive order acknowledges both the risks and manifold benefits of AI technology, as well as the need for establishing governance in managing these technologies as responsibly as possible. It states:

> *Artificial Intelligence must be safe and secure. Meeting this goal requires robust, reliable, repeatable, and standardized evaluation of AI systems, as well as policies, institutions, and, as appropriate, other mechanisms to test, understand, and mitigate risks from these systems before they are put to use.… Testing and evaluations, including post-deployment performance monitoring, will help ensure that AI systems function as intended, are resilient against misuse or dangerous modifications, are ethically developed and operated in a secure manner, and are compliant with applicable Federal laws and policies.* ***Finally, my Administration will help develop effective labeling and content provenance mechanisms, so that Americans are able to determine when content is generated using AI and when it is not.***

Courts are being called upon to address AI in multiple forms; from developing standards and policies for using generative AI tools such as ChatGPT in writing court documents to identifying a potential deepfake submitted into evidence. While the executive order of October 2023 puts forth a goal of enabling Americans to be able to immediately "spot" a product of AI, technologies that would allow for this instant identification with complete accuracy are not

[1] https://www.bbc.com/news/technology-30290540
[2] https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/



currently available. Though this objective may be achieved at some point in the future, it is important that courts prepare themselves for addressing current issues involving AI. Depending on what technologies are developed and implemented in the future, such as watermarking or labeling systems, it will still be important to have protocols in place for instances in which the veracity of digital evidence remains contested.

In particular, courts need reliable methods to manage deepfake technology, especially as it pertains to detection and in addressing the "deepfake defense". This paper will provide a brief history of advancements in artificial intelligence and deepfake technology, an overview of some of the issues that these technologies present in court, and a proposal for how to best address deepfakes given current technological limitations.

II. BACKGROUND

Well before Stephen Hawking's comments, A.M. Turing's 1950 paper, "Computing Machinery and Intelligence" discussed approaches to teaching and testing machines, though resources and knowledge at that time were not sufficient to begin pursuing AI in earnest. As computing technologies developed, and were less expensive to utilize, so too did advancement in artificial intelligence. Marked by numerous setbacks and the need for computing systems to evolve first, the journey to deepfake technologies and applications such as ChatGPT has been a long one. From

the science fiction fantasies of the early 20th century to today, artificial intelligence has taken up a notable position in modern consciousness. Though once primarily restricted to the academic community, many AI applications are now commonly available.

ChatGPT, a chatbot developed by OpenAI, is one such example. Released in November of 2022, ChatGPT quickly became a popular topic in almost every sector. Once released, ChatGPT was lauded for its potential benefits and uses, but ethical questions about its development and concerns about safety and security soon steered the conversation. OpenAI explains in its blog, "We've trained a model called ChatGPT which interacts in a conversational way. The dialogue format makes it possible for ChatGPT to answer followup questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests."[3] From being temporarily banned in Italy to Sam Altman himself, the CEO of OpenAI, admitting to being "a little bit scared of AI",[4] ChatGPT has continued to make international headlines. Within the legal community, problems soon materialized when it came to using ChatGPT in an acceptable way. Many within the legal community are still looking for guidance when it comes to strategically implementing ChatGPT while minimizing the risks. Policies for guiding appropriate use (and when human intervention is necessary to review AI-produced materials) are especially necessary for lawyers tasked with the responsibility of safeguarding their clients' information.

A New York lawyer used ChatGPT to create a legal brief, which was discovered after cited cases were shown to be fabricated.[5] He explained that he had been unaware that ChatGPT could create false information, and expressed remorse for not verifying that the content it produced was accurate. This incident demonstrated the need to create standardized practices for ChatGPT, and AI more generally, when used for legal purposes. It also showed that in spite of ChatGPT's impressive ability to create believable content instantly, human oversight is still needed to ensure its accuracy. Following this incident, U.S. District Judge Brantley Starr of the Northern District of Texas implemented a policy requiring attorneys to "file a certificate to indicate either that no portion of any document they file was generated by an AI tool like ChatGPT, or that a human being has checked any AI-generated text."[6] However, some judges may find this kind of measure to be unwarranted, believing that current standards and ethical responsibilities are sufficient in guiding an attorney's use of AI. In an open letter drafted with the assistance of ChatGPT, Judge Scott U. Schlegel stated his opinion that, "an order specifically prohibiting the use of generative AI or requiring a disclosure of its use is unnecessary, duplicative, and may lead to unintended consequences". Furthermore, he stated that, "Generative AI, much like any tool, is only as effective as the legal expertise guiding it."[7]

In addition to ChatGPT, other types of AI have found their way into the courtroom. While practices are having to be developed to guide how applications such as ChatGPT are used

[3] https://openai.com/blog/chatgpt
[4] https://www.cnbc.com/2023/03/20/openai-ceo-sam-altman-says-hes-a-little-bit-scared-of-ai.html
[5] https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html
[6] https://www.cbsnews.com/news/texas-judge-bans-chatgpt-court-filing/
[7] https://www.judgeschlegel.com/blog/-a-call-for-education-over-regulation-an-open-letter

within the legal profession, the court is being called upon to recognize instances in which AI is being used by litigants to create fake evidence, or as an excuse to weaken real evidence.

III. THE DEEPFAKE

According to the Department of Homeland Security's paper, "Increasing Threat of Deepfake Identities", "Deepfakes, an emergent type of threat falling under the greater and more pervasive umbrella of synthetic media, utilize a form of artificial intelligence/machine learning (AI/ML) to create believable, realistic videos, pictures, audio, and text of events which never happened. Many applications of synthetic media represent innocent forms of entertainment, but others carry risk."[8] Deepfakes are created using readily available deepfake technology; they are completely manufactured and do not incorporate existing media. Though sometimes made for the purposes of entertainment, they are also frequently used as a method for spreading misinformation.

In addition to deepfakes, shallow fakes can be similarly deceiving. Though the terms are often conflated, shallow fakes use basic editing techniques and software tools to alter existing media, for example by slowing down parts of a video or selective splicing. With one small edit, an entire video can be altered to give a drastically different perspective than its original. This type of modified digital content may be simpler to create than a deepfake, thus making them more common. However, since they are made from an existing source, they may be less challenging to identify. Deepfakes remain difficult to distinguish from authentic content, even for experts. As they are entirely generated using AI technology, several different measures may be needed to make a determination as to whether a piece of evidence is a deepfake.

In one UK case, a shallow fake almost had a critical impact on a child custody case. "A woman said her husband was dangerous and that she had the recording to prove it. Except, it turned out she didn't. The husband's lawyer revealed that the woman, using widely available software and online tutorials, had doctored the audio to make it sound like his client, a Dubai resident, was making threats. . . [and] by studying the metadata on the recording, his experts revealed that the mother had manipulated it."[9] In this instance, a third-party expert was required to analyze the evidence in question and provide insight into its origin. Though the evidence in this situation was shown to be a shallow fake, it is likely that harder-to-identify deepfakes will only continue to proliferate and complicate proceedings.

Still, at the time of writing, many believe that the risk of deepfakes being submitted into evidence is a less pressing threat than that of its reversal—the deepfake defense. Capitalizing on the uncertainty and mistrust characterizing the "misinformation age", a new tactic has arisen among litigants when presented with strong evidence. "That's not me; it's fake. Prove it's not." Though it may seem a weak defense at face value, it can deplete resources, fatigue juries,

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[8] https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf
[9] https://www.abajournal.com/web/article/courts-and-lawyers-struggle-with-growing-prevalence-of-deepfakes

and generally prevent a case from moving forward. Depending on the circumstances, it may be difficult to make up for lost time and restore confidence in the evidence as presented.

As both situations continue to play out in the courtroom, courts should be well-equipped to address them. Though judges may not necessarily be directly responsible for identifying deepfakes or altered media, it is important that judges use available measures to gather contextual information and uphold admissibility standards for digital evidence in making authenticity determinations.

IV. THE PROBLEM

Deepfakes are easily generated, easily shared, and can easily fool even the most trained eye. The term deepfake was coined in 2017 after the appearance of what is commonly accepted as the first deepfake; since then, they have become a hallmark of current trends in AI. It should be noted that the best and most convincing deepfakes may require more advanced equipment, processing abilities, and training; however, producing a deepfake is now easier than ever as new tools are introduced to the market. Voice deepfakes (or vocal cloning) can also be eerily convincing. Using AI technology, individuals' voices can be replicated and used to make new recordings.

Deepfakes can pose a two-fold problem in the courtroom. Either deepfakes are admitted as evidence having been maliciously produced by litigants or the deepfake defense will be thrown out indiscriminately to weaken legitimate evidence.

Some believe that the deepfake defense was made in a case involving Tesla and a wrongful death lawsuit.[10] In 2018, Walter Huang died in a car accident while driving a Tesla vehicle. According to the complaint, the vehicle's Autopilot feature did not function properly, leading to Mr. Huang's fatal car accident. His family contends that Tesla misrepresented the risks of the Autopilot feature technology; a statement made by one of the family's attorneys even states that Tesla is guilty of "beta testing its Autopilot software on live drivers."[11]

Huang's family points to a 2016 video of Elon Musk as proof that Tesla and Elon Musk himself have historically overstated the safety of their vehicles. In one video, Elon Musk can be seen stating during a technology conference, "A Model S and Model X at this point can drive autonomously with greater safety than a person. Right now."[12] In response, Musk's legal team stated that not only does Mr. Musk not remember making that specific claim, but that the video itself could be fake. Simply, given Mr. Musk's fame and notoriety, it is possible that the video may be a deepfake.

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[10] Sz Hua Huang et al v. Tesla, Inc., The State of California, no. 19CV346663

[11] https://www.forbes.com/sites/alanohnsman/2019/05/01/tesla-sued-by-family-of-silicon-valley-driver-killed-in-model-x-autopilot-crash/?sh=63f0dbfe1c3f

[12] https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused

V. STRATEGIES FOR MANAGING DEEPFAKES

Judge Evette Pennypacker responded, "Their position is that because Mr. Musk is famous and might be more of a target for deep fakes, his public statements are immune".[13] Furthermore, "In other words, Mr. Musk, and others in his position, can simply say whatever they like in the public domain, then hide behind the potential for their recorded statements being a deep fake to avoid taking ownership of what they did actually say and do".[14] In light of this claim, the court had to decide how to proceed:

Confronted with Tesla's refusal to rule out that some clips could be digitally altered deep fakes and therefore not suitable as evidence, the judge came up with an elegant solution: Put the billionaire entrepreneur and artificial intelligence enthusiast under oath and have him testify as to which statements coming out of his mouth are authentic.[15]

To gather contextual information, Judge Pennypacker allowed for an apex deposition[16] of Mr. Musk in order to establish whether or not he had a) attended the functions as portrayed in the footage and b) made the statements in question. This measure was ultimately deemed necessary to determine the authenticity of the recording, likely an unintended consequence of the defense.

On this occasion, the deepfake defense resulted in a need for additional testimony to assist in establishing the veracity of digital evidence presented. Following the court's response, one lawyer representing Tesla stated that the intention was not to claim any videos were deepfakes, but "we raised this idea, this issue, because we're living in a world today where these things exist"[17]. And this is, more or less, the unfortunate heart of the issue. Namely, that the emergence of the deepfake has opened the door to the claim that any piece of evidence, could, in theory, be fake. This court's response illustrates the fact that when dealing with new technologies, the old rules can still apply. Gathering contextual information using available means (i.e. apex depositions) and going to the source are critical steps in minimizing any negative ramifications of the deepfake defense.

When it comes to determining the role and responsibilities of the court in verifying digital evidence, some stress that a judge is only responsible for following the rules of evidence. Judges are not expected to be experts in every issue that may appear before them, which has also been true in matters involving digital evidence. However, as is always the case, judges are called upon to make credibility determinations based on testimony and the facts of a case.

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[13] https://www.reuters.com/legal/elon-or-deepfake-musk-must-face-questions-autopilot-statements-2023-04-26/
[14] https://news.bloomberglaw.com/esg/musk-likely-must-give-deposition-in-fatal-autopilot-crash-suit
[15] https://fortune.com/2023/04/27/elon-musk-lawyers-argue-recordings-of-him-touting-tesla-autopilot-safety-could-be-deepfakes/
[16] https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-seeing-is-not-believing-authenticating-deepfakes
[17] https://fortune.com/2023/04/27/elon-musk-lawyers-argue-recordings-of-him-touting-tesla-autopilot-safety-could-be-deepfakes/

In Rebecca A. Delfino's paper, "Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery", she submits, "[This article] is the first to propose a new addition to the Federal Rules of Evidence reflecting a novel reallocation of fact-determining responsibilities from the jury to the judge, treating the question of deepfake authenticity as one for the court to decide as an expanded gatekeeping function under the Rules. The challenges of deepfakes—problems of proof, the "deepfake defense," and juror skepticism—can be best addressed by amending the Rules for authenticating digital audiovisual evidence, instructing the jury on its use of that evidence, and limiting counsel's efforts to exploit the existence of deepfakes".[18]

Basic guidelines can help in gathering necessary contextual information.

1. The best defense is proactively upholding authentication standards and the rules of evidence, especially when handling digital media. These measures will best allow for the preservation of original source material, which can be analyzed by third experts should the need arise. When a claim of fake evidence is made, judges can look to how well digital evidence has been managed by both sides as one metric for assessing the likelihood of whether a claim is being made in good faith.

2. Context is key. Additional witness testimony may be required to investigate deepfake claims. Asking specific questions about the evidence at hand, as well as ascertaining how that evidence has been collected, can shape the court's next steps.

3. Third-party forensic experts can be valuable in providing information about a piece of evidence, indicating a probability of its authenticity. A special master appointed by the court can investigate how digital evidence has been handled throughout a case and determine whether best practices have been upheld in the collection, preservation, and analysis of digital evidence. An expert may be able to provide a digital narrative of the evidence in question which may include analyzing original source materials and reporting on any signs of tampering, alteration, or corroborating findings that support claims of inauthenticity. However, it should be noted that is not currently possible to instantly identify a deepfake, or any type of "fake" digital evidence. Can an expert definitively state whether something has been "faked"? Not necessarily. Deepfakes are especially problematic as even technological experts may have difficulty in spotting them. In spite of these challenges, an expert's assessment may be able to supply the court with an additional viewpoint to help inform its own assessment.
4. Expert analysis of digital evidence as well as the gathering of contextual information through deposition and cross-examination can enable the court in its determination (and the assigning of sanctions, if necessary).

[18] https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=4012&context=hastings_law_journal

While costs are a concern when considering utilizing an expert witness, this measure may minimize long term costs incurred due to false claims or the submittal of fake evidence.
The burden of the expense can be assigned at the discretion of the judge, perhaps depending on the results of the expert's opinion. Another benefit is that the potential expense may, in fact, deter individuals from making false claims or submitting fake evidence.
Tools designed to detect deepfake technology, though currently at varying degrees of progress and usability, will likely mirror AI in their evolution and development. According to an October 2023 MIT Technology Review article written in response to the goals stated in the Executive Order on AI, "The trouble is that technologies such as watermarks are still very much works in progress. There currently are no fully reliable ways to label text or investigate whether a piece of content was machine generated. AI detection tools are still easy to fool".[19] Part of the evolution of AI is its pursuit of evading detection. At this stage, courts should likely primarily rely on the existing frameworks and systems in place, combined with additional measures to establish context as required.

VI. IN CONCLUSION

Fake evidence is nothing new—but juries existing within a world of "fake news" and readily available, AI technology, is. Courts have to be enabled to manage the new challenges brought about by AI, in the various forms it may appear; from establishing protocols for how materials produced by ChatGPT must be reviewed by counsel, to creating a course of action to manage instances of the deepfake defense. The bad news is that deep fake technology creates undeniable hurdles; the good news is that many of the same protections that existed before for similar issues still apply. And, when in doubt, every tool available should be used to establish context. This may include involving an objective, third party to provide a reliable digital narrative. Though a number of different information-gathering measures may be needed, movement towards improved detection technologies will continue to shape how courts can most efficiently respond.

The legal community should be mindful of the possibility of altered or fake evidence being presented by their clients. Lawyers are never permitted to present evidence that they know for a fact to be false; however, evolving technologies may render more stringent standards necessary.

Ten years ago, Stephen Hawking had clear reservations about the trajectory of artificial intelligence. Nine years later, a statement titled, "Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war", was signed by hundreds of AI, security, and technology leaders.[20] For some, the risk seems overstated. For others, the warning feels appropriate given current problems. Quietly

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[19] https://www.technologyreview.com/2023/10/30/1082678/three-things-to-know-about-the-white-houses-executive-order-on-ai/
[20] https://www.safe.ai/statement-on-ai-risk

progressing, 2023 seemed to be the year when many began to share a common sentiment with Hawking and others throughout the years who have expressed their concerns.

Even OpenAI founder, Sam Altman, urged increased regulation and oversight at a Senate subcommittee hearing in May of 2023.[21] As the October 2023 Executive Order explains:

> *Artificial intelligence (AI) holds extraordinary potential for both promise and peril. Responsible AI use has the potential to help solve urgent challenges while our world more prosperous, productive, innovative, and secure. At the same time, irresponsible use could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security. Harnessing AI for good and realizing its myriad benefits requires mitigating its substantial risks. This endeavor demands a society-wide effort that includes government, the private sector, academia, and civil society.*

Society is undoubtedly having to grapple with balancing the numerous benefits of these technologies with their significant risks. In the courtroom, existing evidentiary rules can form the basis of how deepfakes, and the deepfake defense, are addressed. Calling for additional testimony, and the input of expert witnesses, are measures that can allow the court to gather contextual information in determining the admissibility of evidence.

[21] https://www.nytimes.com/2023/05/16/technology/openai-altman-artificial-intelligence-regulation.html

MINNESOTA STATE BAR ASSOCIATION

OCTOBER 2023

BENCH + BAR of Minnesota

READING THE FINE PRINT

The extensive changes to Minnesota landlord-tenant law

Deepfakes, AI, and digital evidence

BY MARK LANTERMAN ✉ mlanterman@compforensics.com

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With the ever-expanding prevalence of artificial intelligence, I'm sure that most of us have seen at least a few types of "deepfakes." Elvis Presley singing the latest top hits. Albert Einstein answering viewers' questions about life. Living portraits of old photographs. Or some more problematic examples, such as a menacing speech by Mark Zuckerberg or a video of a politician created to spread disinformation. Some may have even seen a video appearing to depict their company's CEO requesting an immediate wire transfer, as cybercriminals continue to use AI to bolster social engineering campaigns. It seems that just about everybody now has the ability to alter digital media, with varying degrees of believability.

Deepfakes, or digitally altered media that convincingly make one individual appear as another, have also had an impact on the courtroom. According to the Department of Homeland Security's paper, "Increasing Threat of Deepfake Identities," "Deepfakes... utilize a form of artificial intelligence/machine learning (AI/ML) to create believable, realistic videos, pictures, audio, and text of events which never happened. Many applications of synthetic media represent innocent forms of entertainment, but others carry risk."[1] While there have been cases of litigants attempting to enter a deepfake into evidence, the problem has also been reversed—litigants claiming that real evidence has been manipulated or fabricated.

Digitally stored information has repeatedly proved itself to be a pivotal source of evidence, often serving as a critical, unbiased witness. Nearly every case today involves ESI to some extent. When presented with this kind of strong, perhaps damning, evidence, people now have the ability to throw a new defense at the wall and see if it sticks: "It's not real." While a judge may reject the attempt,[2] the "deepfake defense" will still have consequences. As an NPR report about the phenomenon noted, "If accusations that evidence is deepfaked become more common, juries may come to expect even more proof that evidence is real."[3] Though the technology is relatively new, courts already have processes in place to handle fake evidence and can apply these same procedures to managing deepfakes.[4] But courts are less prepared to deal with proving that real evidence is, in fact, real. Furthermore, the better the evidence, the more likely that juries will feel required to verify its legitimacy. With the rise of common applications of artificial intelligence, the pressure is on to verify digital evidence as efficiently as possible.

Deepfakes present a host of legal concerns. From actors losing the rights to their own identities to reputational damage to manufactured evidence affecting the outcomes of custody disputes, we are just beginning to learn how to grapple with deepfakes and artificial intelligence. In the courtroom, well-communicated guidelines, strong authentication standards, and extensive training can address some of the risks. Expectations for juries surrounding the requirements for evidence verification should be well-established, and court-appointed digital forensic experts can manage and analyze digital evidence for both sides, helping to create an even playing field and manage costs.

Emerging laws and regulations will hopefully begin to help the legal community navigate new problems posed by these technologies. But developing tried-and-true methods to identify deepfakes reliably will undoubtedly remain a work in progress. Given how difficult it can be to spot a deepfake, the New York Times wrote recently, "Initiatives from companies such as Microsoft and Adobe now try to authenticate media and train moderation technology to recognize the inconsistencies that mark synthetic content. But they are in a constant struggle to outpace deepfake creators who often discover new ways to fix defects, remove watermarks and alter metadata to cover their tracks."[5]

In the meantime, members of the legal community should be on high alert for the possibility of altered digital media, from opposing parties and their own clients. Attorneys should strive to be especially vigilant in abiding by digital-evidence best practices throughout the entirety of a case. In the event that third-party verification is ultimately required, organizing original source material and making it readily available is essential. ▲

NOTES

1. *https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf*
2. *https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused*
3. *Id.*
4. *Id.*
5. *https://www.nytimes.com/2023/01/22/business/media/deepfake-regulation-difficulty.html*

MINNESOTA STATE BAR ASSOCIATION
DECEMBER 2023
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of Minnesota
LEGAL TECH TRENDS
TRANSFORMING THE PRACTICE OF LAW

Biden issues ambitious executive order on AI

BY MARK LANTERMAN ✉ mlanterman@compforensics.com

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On October 30, the Biden administration issued its Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[1] Coming near the end of what was dubbed by many "the year of AI," the order acknowledges both the risks and manifold benefits of AI technology, as well as the need for governance oversight to manage it as responsibly as possible. The order states:

> "Artificial Intelligence must be safe and secure. Meeting this goal requires robust, reliable, repeatable, and standardized evaluations of AI systems, as well as policies, institutions, and, as appropriate, other mechanisms to test, understand, and mitigate risks from these systems before they are put to use...Testing and evaluations, including post-deployment performance monitoring, will help ensure that AI systems function as intended, are resilient against misuse or dangerous modifications, are ethically developed and operated in a secure manner, and are compliant with applicable Federal laws and policies. Finally, my Administration will help develop effective labeling and content provenance mechanisms, so that Americans are able to determine when content is generated using AI and when it is not."

In the "misinformation" age, marked by deep fakes, vocal cloning, and the unsettling idea that seeing shouldn't always be believing, a labeling system allowing Americans to spot AI-generated content would certainly be a game-changer. Within a year, it is expected that the government will have a better idea of how to best identify and label "synthetic content produced by AI systems, and to establish the authenticity and provenance of digital content, both synthetic and not synthetic, produced by the Federal Government or on its behalf." While these efforts seem to be primarily directed at digital content produced by the United States government, it is less clear how such measures would be applied to AI-produced content more generally.

The idea of an identification system itself is promising in light of current challenges, and the executive order signals progress in the right direction, but it remains to be seen how these objectives will come to fruition. For example, the order describes watermarking as "the act of embedding information, which is typically difficult to remove, into outputs created by AI." However, as noted by MIT Technology Review, "The trouble is that technologies such as watermarks are still very much works in progress. There currently are no fully reliable ways to label text or investigate whether a piece of content was machine generated. AI detection tools are still easy to fool. The executive order also falls shorts of requiring industry players or government agencies to use these technologies."[2] At this point in time, enabling Americans to distinguish AI-generated content from authentic content will still require a substantial amount of time and effort on several different fronts.

Furthermore, the order's call for AI applications to be made resilient against misuse or dangerous modifications will be similarly difficult. As is common with rapidly evolving technology, the methods needed to use or adapt it for nefarious purposes tend to develop at the same rate. Though the objectives of the order are welcome, and likely reflect the wishes of the American people when it comes to navigating a world infiltrated by "fake news," they will be challenging to achieve. In the meantime, especially in the courtroom, policies and procedures should be considered for the here and now. From the deepfake defense ("That's not me, prove it is") to fake content being submitted as evidence, methodologies should be established for managing AI in the courtroom in the absence of widescale, standard technological detection methods.

The executive order indicates that AI's inherently dual-sided nature is being acknowledged within government. However, legislation is still required to effectively combat its risks and maximize benefits. Some of the proposed objectives are still elusive, and it is unclear when individuals can be expected to consistently spot a deepfake in daily life or at the very least be assured that the government communications they receive are real. That being said, improved governance, safety protocols, transparency, and a commitment to testing are all positive goals that would assist in making better protections for consumers a reality. ▲

NOTES

[1] *https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/*

[2] *https://www.technologyreview.com/2023/10/30/1082678/three-things-to-know-about-the-white-houses-executive-order-on-ai/*

MINNESOTA STATE BAR ASSOCIATION

MAY/JUNE 2023

BENCH+BAR of Minnesota

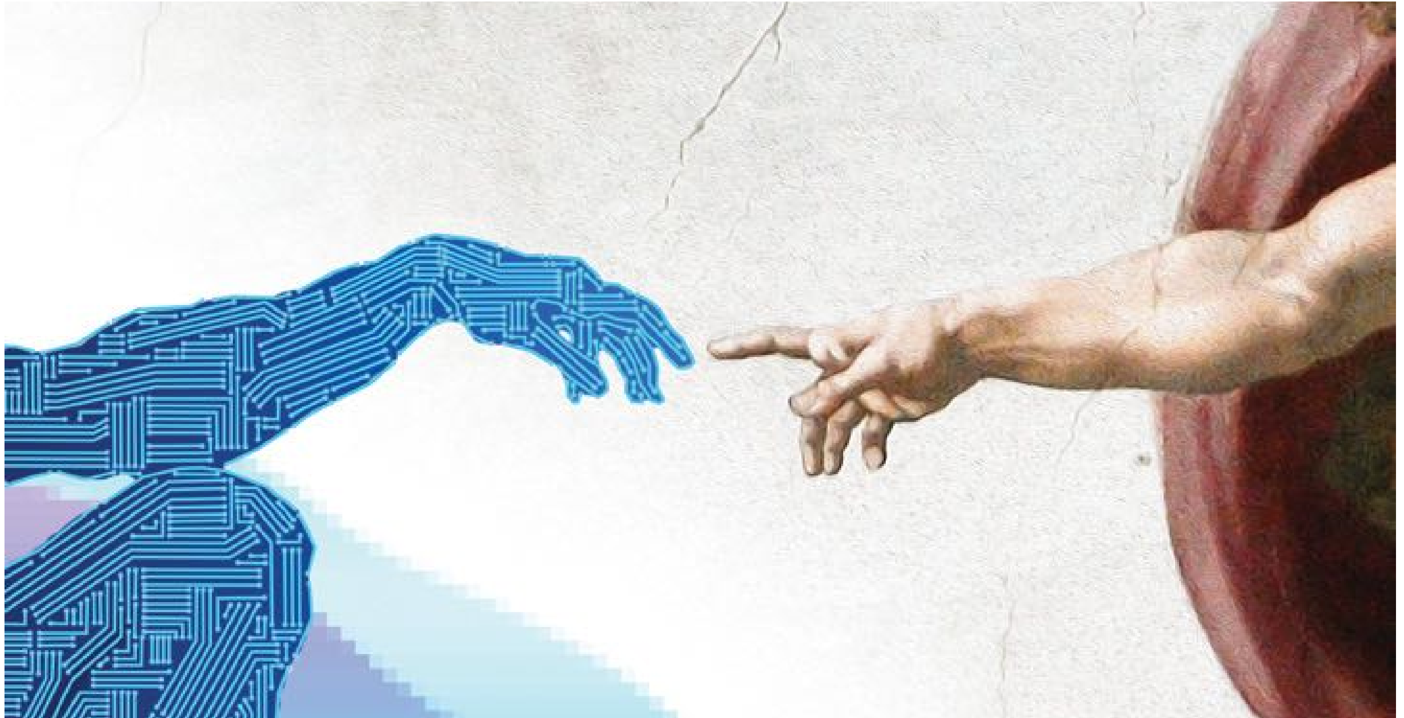
We need to talk about ChatGPT

A lawyer's introduction to the exploding field of AI and large language models

THIS ARTICLE IS HUMAN-WRITTEN

ChatGPT and navigating AI

BY MARK LANTERMAN *mlanterman@compforensics.com*



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Since its release in November 2022, ChatGPT has been met with a wide variety of responses. It's been praised for passing the bar exam.[1] It's been feared for its potential to replace certain jobs. It's been banned in Italy (at least temporarily). Its inherent security and privacy risks have been acknowledged, along with its potential for improving cybersecurity postures. AI has been a much-discussed topic in recent months, and with good reason.

In an open letter titled "Pause Giant AI Experiments" from the Future of Life Institute, signed by the likes of Elon Musk and Steve Wozniak, the question is posed: "*Should* we develop nonhuman minds that might eventually outnumber, outsmart, obsolete and replace us?... Powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable."[2] The letter asks for a six-month pause on training for "AI systems more powerful than GPT-4," and calls for increased governance, safety protocols, and improvements in accuracy and transparency. The letter was recently referenced by a group of European Union members requesting a global summit on AI to establish governance for its "development, control, and deployment." In an open letter from these EU lawmakers, responsibility and internal cooperation are highlighted as necessary components in ensuring that progress in AI remains "human-centric, safe, and trustworthy."[3]

The utilization of new technology always comes with a caveat—namely, that gains in convenience result in losses to security. AI, and the ubiquity of ChatGPT more specifically, have presented an especially complex and multifaceted conundrum for individuals, organizations, firms, governments, and security professionals, to name a few. The potential benefits seem overwhelming—reduced time spent on simple tasks, improved efficiency in problem-solving, and limited costs to clients being prime examples. In the words of a recent ABA Journal column, "Despite its current shortcomings, ChatGPT has the potential to significantly enhance efficiency in the delivery of legal services... It can be a tremendous time-saver and is a great place to start your research on just about any topic. But whether you use ChatGPT for personal or professional reasons, you'll need to have a full understanding of the issue at hand and should thoroughly review, edit and supplement any results or draft language it provides you."[4]

First drafts, letters, and correspondence with clients could all be supported with the use of AI.

But actually using the information generated by AI tools requires a great deal of discretion and careful review. As of right now, inaccuracies, false information, and misleading statements abound. The time required to fact check, and the efforts required to mitigate any problems resulting from an error slipping through the cracks, may diminish or even negate the convenience factor. Furthermore, many observers are acknowledging the possible negative impact on new lawyers, with AI taking away opportunities for valuable experience. This reality is of great concern outside the legal community as well, as AI may begin to replace the skillsets of human beings. Additionally, ethical questions have arisen as to what can be legally used from a chatbot conversation, since it may contain trademarked, copyrighted, or simply false information.[5]

The double-edged nature of AI is similarly challenging from a cybersecurity perspective. The benefits may include an improved ability to automate security measures, including those needed for monitoring and detection.[6] But it can also be utilized by cybercriminals to assist in the creation of malware or more convincing phishing attacks. Notably, ChatGPT suffered its own data breach in March, which resulted in the leak of users' personal information and conversation content.[7]

The all-too-critical human element of security especially comes into play when analyzing the risks and benefits of this tool. When any new technology is incorporated into an organization, it is important to fully map out how that technology will be used, and then communicate that information clearly to employees. While ChatGPT urges users to avoid entering sensitive information into conversations,[8] confidential data and personal identifiable information are being entered nonetheless; in some instances, employees themselves are entering confidential company information, constituting a data breach. The tool itself is trained on vast amounts of data gathered from the internet, further blurring an important question—is it ethical to use ChatGPT, given the way it was, and continues to be, trained? If yes, what parameters should be created to regulate its use? If no, how will future AI projects be regulated?

At the time of this writing, Italy has banned ChatGPT, citing violations against the European General Data Protection Regulation (GDPR): "OpenAI doesn't have age controls to stop people under the age of 13 from using the text generation system; it can provide information about people that isn't accurate; and people haven't been told their data was collected. Perhaps most importantly, its fourth argument claims there is 'no legal basis' for collecting people's personal information in the massive swells of data used to train ChatGPT."[9] In spite of this list, it may be reinstated by the time you read this should OpenAI comply with a set of hard and fast rules required by the Italian Data Protection Authority. Regardless of the outcome, overarching concerns surely remain.

For a lot of us, the recent conversations surrounding chatbots and AI may feel like a sci-fi movie, with robots overpowering humans and taking over the world. What happens when technology gets *too* smart, if the conveniences afforded by technology become *too* convenient, literally replacing the very human beings who created it and allowed it to flourish? It's certainly an interesting (if scary!) thought, and while not everyone concurs with such an alarming viewpoint, the rapid development of AI certainly requires political attention, careful planning in its applications, and a complete-as-possible assessment of its extensive societal impact.

For the legal community, the question of how to best implement AI will likely be complicated as these issues unfold. While it seems safe to say that many, if not most, organizations will soon be using AI at least in some capacity, law firms are always held to a higher standard in managing client data and ensuring a strong security posture. Though the immediate benefits of a quickly written draft or assistance in correspondence may be tempting, be sure to bide your time in approaching AI and establishing how it will be incorporated into your firm. Specify what data can be entered into conversations, train employees in appropriate use, and establish guidelines for how your firm will use the tool in the most productive and secure way possible. ▲

NOTES

[1] *https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile*

[2] *https://futureoflife.org/open-letter/pause-giant-ai-experiments/*

[3] *https://www.cnbc.com/2023/04/17/eu-lawmakers-call-for-rules-for-general-purpose-ai-tools-like-chatgpt.html*

[4] *https://www.abajournal.com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai*

[5] *https://news.bloomberglaw.com/us-law-week/employers-should-consider-these-risks-when-employees-use-chatgpt*

[6] *https://www.forbes.com/sites/forbestechcouncil/2023/03/15/how-ai-is-disrupting-and-transforming-the-cybersecurity-landscape/?sh=2c41fff34683*

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[9] *https://www.wired.com/story/italy-ban-chatgpt-privacy-gdpr/*

MINNESOTA STATE BAR ASSOCIATION
JULY 2023
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The artful lawyer

ChatGPT: *The human element*

BY MARK LANTERMAN *mlanterman@compforensics.com*

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/ forensic experience and has testified in over 2,000 matters. He is a member of the MN Lawyers Professional Responsibility Board.

ChatGPT is continuing to make headlines. It seems like the talk surrounding AI is continuing to evolve as well. Sam Altman, the CEO of OpenAI, admits that even he is a little afraid of the possibilities.[1] On May 16, Altman told a Senate Judiciary subcommittee that "regulatory intervention by governments will be critical to mitigate the risks of increasingly powerful models."[2] During this hearing, Altman highlighted the double-edged nature of AI—the potential loss of jobs, but likewise the potential creation of new jobs; the risk of voter fraud and misinformation, but also the ways in which AI can be used to counter these issues.

The May 16 hearing is being seen by many commentators as what one called "the beginning of what will likely be a long, but broadly bipartisan, process regulating the use of AI and its amazing promise.... [A] regulatory roadmap is beginning to coalesce."[3] Altman proposed strict adherence to safety requirements and extensive testing processes in AI development, all within the structure of federal regulation and oversight. Acknowledging the great potential for worldwide harm as a result of misused or unrestrained AI technologies, Altman emphasized the need for government and industry collaboration and transparency.

Last month I wrote that ChatGPT was still banned in Italy owing to numerous privacy concerns ("This article is human-written: ChatGPT and navigating AI," May/June Bench & Bar). Since then, it's been reinstated after adding certain disclosures and controls.[4] This episode illustrates the tweaks to AI's functioning that will likely continue to be made. In the meantime, however, some of the previously hypothetical crises have indeed come to fruition.

In May, a New York City attorney was found to have used ChatGPT to find case citations for court documents.[5] When these citations were found to be fake, he admitted to using ChatGPT in conducting his research. In a sworn affidavit, he stated that he has "never utilized Chat GPT as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that its content could be false."[6] As with any new technology that an organization may plan on incorporating, it is critical to conduct research and create a plan for how it will be best implemented. A quick Google search easily reveals that ChatGPT is rather notorious for giving misleading or even completely false information in conversations. In this case, the consequences for not knowing ChatGPT's weaknesses have been steep.

Partly in response to this event, restrictions are being adopted to manage AI in the courtroom. U.S. District Judge Brantley Starr of the Northern District of Texas, for example, "has ordered attorneys to attest that they will not use ChatGPT or other generative artificial intelligence technology to write legal briefs because the AI tool can invent facts."[7] Though Judge Starr acknowledged some possible uses of the technology that could be appropriate in other situations, he banned using AI alone for legal briefing given its unreliability. Regardless of its application, verifying the authenticity and accuracy of what ChatGPT produces is the user's responsibility, especially within the legal community.

In addition to the ethical issues on display in this particular case, ChatGPT is even being viewed by some as a harbinger of the end—human extinction. What will happen when jobs are replaced by AI? What if life as we know it is taken over by "minds" more powerful than ours? This alarmist view is tempered by the idea that this is a tool that can be used carefully and efficiently to improve human life, not tear it asunder.

Within the cybersecurity field, many experts believe that AI holds the key in combatting the ever-growing number and variety of cyberattacks that are perpetrated daily. If AI can be used to develop sophisticated phishing campaigns, maybe AI is the best resource we have to combat those types of attacks. As far as detection and mitigation goes, ever-evolving AI could be a deal breaker in how organizations scan and respond to cyberattacks. But some take it even a step further. Could AI possibly be the foolproof cybersecurity solution we've been hoping for all along?

Maybe not. In his recently published book, *Fancy Bear Goes Phishing: The Dark History of the Information Age in Five Extraordinary Hacks,*[8] Yale Professor Scott J. Shapiro describes the dangers of solutionism, especially within the realm of cybersecurity. He explains that cybersecurity technology tools are often touted as the best of the best, with AI frequently being the deciding factor as to what makes one product better than any other. But Shapiro goes on to point out that technological fixes are not always what's needed to correct cybersecurity problems. "Cybersecurity is not a primarily technological problem that requires a

primarily engineering solution," he writes. "It is a human problem that requires an understanding of human behavior." Similarly, though ChatGPT "passed" the bar,[9] it is not bound to the same standards required of an actual attorney, who must be qualified to deal with "human problems." Judge Starr further highlights this disqualifying feature of AI in his ban: "Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle."[10]

Though I frequently discuss the "human element" of cybersecurity, I think the prevalence of AI and the fears surrounding its ascent are making us all question the "human element" in other industries. For one, AI poses a data security risk—consider an employee who inputs confidential data into a conversation. Or a breach that compromises chat history. But AI may also pose a greater "security" risk as many see it—the risk to human beings' way of life. Within the legal community, it's been challenging to weigh the risks and benefits, as both seem abundant. Ethical guidelines and governance rules will undoubtedly continue to be created to manage the strengths of AI in relation to its pitfalls. In the meantime, it is important to keep an eye on how AI is being used today. Establishing firm requirements for its use and setting clear expectations can help mitigate risk. ▲

NOTES

1 *https://www.cnbc.com/2023/03/20/openai-ceo-sam-altman-says-hes-a-little-bit-scared-of-ai.html*

2 *https://www.cnn.com/2023/05/16/tech/sam-altman-openai-congress/index.html*

3 *https://www.forbes.com/sites/michaelperegrine/2023/05/17/sam-altman-sends-a-message-to-corporate-leaders-on-ai-risk-management/?sh=42ab1e96dbef*

4 *https://www.bbc.com/news/technology-65431914#*

5 *https://www.forbes.com/sites/mattnovak/2023/05/27/lawyer-uses-chatgpt-in-federal-court-and-it-goes-horribly-wrong/?sh=4a4c089d3494*

6 *https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.32.1_1.pdf*

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8 Shapiro, Scott. J. *Fancy Bear Goes Phishing: The Dark History of the Information Age, in Five Extraordinary Hacks,"* Farrar, Straus and Giroux, 2023.

9 *https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile*

10 *https://www.txnd.uscourts.gov/judge/judge-brantley-starr*

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Ohio Board of Professional Conduct

THE ETHICS OF AI FOR LAWYERS

Miller Becker Seminar (2024)

D. Allan Asbury, Senior Counsel

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1

ARTIFICIAL INTELLIGENCE

"Lawyers working with AI will replace lawyers who don't work with AI."

Erik Brynjolfsson, director, Stanford Digital Economy Lab

2

Ohio Board of Professional Conduct

WHAT IS ARTIFICIAL INTELLIGENCE?-

3

ARTIFICIAL INTELLIGENCE

- Artificial intelligence (AI) is not a single piece of hardware or software but a multitude of technologies that provide a computer system with the ability to perform tasks, solve problems, or draft documents that would otherwise require human intelligence.

4

ARTIFICIAL INTELLIGENCE

- Traditional AI - Netflix recommendations, suggested Facebook friends, spellcheck, grammar check, Google maps, Siri, Alexa, etc.

- Generative AI - is a type of artificial intelligence (AI) that can create new content based on user prompts or large datasets. This content can be in the form of text, images, videos, audio, computer code, or other media.

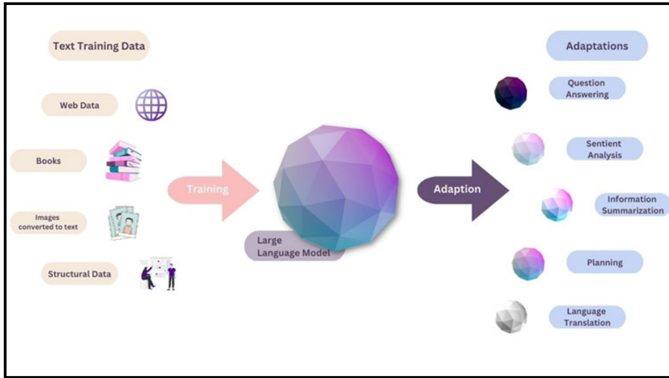
5

ARTIFICIAL INTELLIGENCE

- Large Language Models (LLMs) are deep learning models that use a transformer architecture to process and generate human-like text.

- The transformer architecture is made up of neural networks that work together to learn the meaning of text by analyzing relationships between words and phrases.

6



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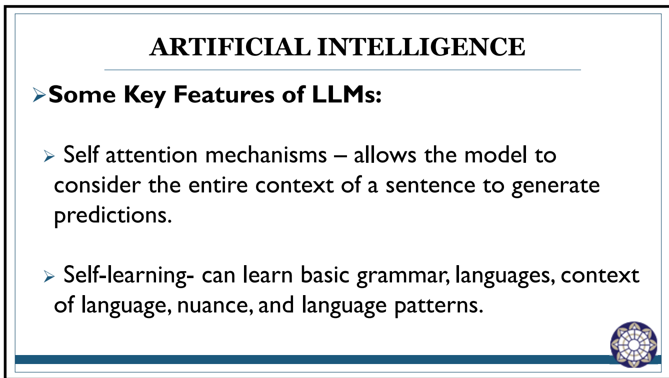

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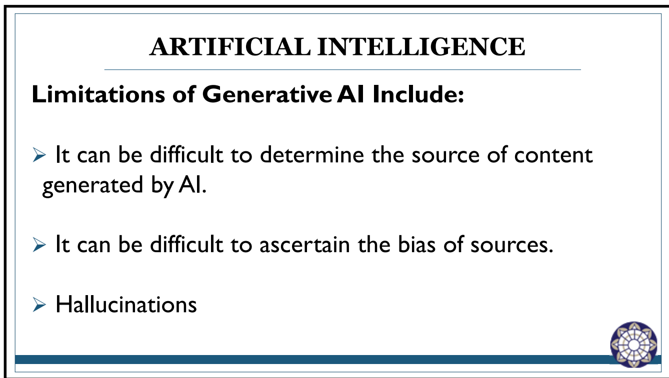


9

THE LEGAL PROFESSION & AI

- AI is "[t]o powerful not to use." - NCSC - *Fundamentals of AI in the U.S. Court System* (8/28/24)
- Bar Exam Passage by ChatGPT-4 in the 90th percentile (2023).
- 44 % of all legal tasks performed by lawyers can be automated by AI. – Goldman Sachs – March, 2023
- 10% -21% of Law Firms using AI in some aspect of the practice of law.

10

THE LEGAL PROFESSION & AI

- Using AI is lawyer "key skill" – now being taught in most law schools.
- Job performance may be measured by how well an employee is delegating tasks to AI.
- Every lawyer will have or need an "AI assistant" in five years.

11

ARTIFICIAL INTELLIGENCE

"AI allows lawyers to provide better, faster, and more efficient legal services to companies and organizations. The end result is that lawyers using AI are better counselors for their clients."

ABA, Report on House of Delegates Resolution No. 112 (Aug. 12–13, 2019)

12

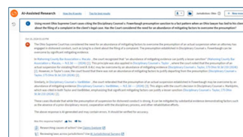
Ohio Board of Professional Conduct

ETHICAL FRAMEWORK FOR LAWYERS

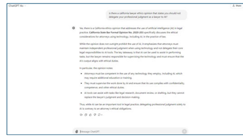
13

AI TOOLS

- Westlaw and Lexis AI
- CoCounsel
- AI.Law



- Chat-GPT
- Claude AI
- Gemini
- Bard



14

COMPETENCE

- **Prof.Cond.R. 1.1**
  - Competence requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
  - Must keep abreast of the risks and benefits associated with relevant technology. Cmt.[8].
  - Ensuring AI tools are accurate, reliable, and do not compromise the quality of the representation.

15

COMPETENCE

- Must ensure that work product generated by AI is coherent, defensible, and consistent, reflecting sound legal knowledge.
- A misunderstanding of AI technology can lead to problematic reliance on generative AI results.

16

SCENARIO

Attorney Jennifer, a solo practitioner, takes on a complex criminal defense case involving cutting-edge forensic technology. She uses a new AI tool designed to analyze forensic evidence, but she does not understand how the tool operates or its potential limitations. Relying solely on the AI analysis, Jennifer advises her client to accept a plea deal without consulting a forensic expert or fully understanding the science behind the evidence. Later, it's discovered that the AI tool misinterpreted the evidence, and if properly analyzed, the evidence could have exonerated the client.

17

INDEPENDENT PROFESSIONAL JUDGMENT

Prof. Cond. 2.1

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
- Independent professional judgment refers to a lawyer's ability to make decisions and provide advice based on their legal knowledge and ethical obligations, without undue influence.

18

INDEPENDENT PROFESSIONAL JUDGMENT

Prof. Cond. 2.1 (cont.)

- Lawyer should not delegate their independent professional judgment to AI. – California Advisory Opinion (2020).

19

INDEPENDENT PROFESSIONAL JUDGMENT

Prof.Cond.R. 2.1in the context of AI

- A lawyer should not rely solely on AI for legal research or decision-making that may undermine their independent professional judgment.
- Lawyers should approach AI as a tool that supports, not replaces, their independent judgment.
- Critically assess results and work product generated by AI.
- Be able to explain how AI was used to form the basis for advice or a recommendation to clients.

20

SCENARIO

Attorney Ben represents a client in a high-stakes litigation matter. He uses an AI-powered settlement analysis tool that recommends a settlement figure significantly lower than what Ben thinks is appropriate. Without discussing the tool's recommendation with the client or considering the specific facts of the case, Ben pushes his client to accept the AI-recommended settlement offer.

21

CONFIDENTIALITY

- **Prof.Cond.R. 1.6**
- Duty to maintain all information related to the representation of a client confidential.
- Rule 1.6 encompasses the rule of confidentiality, the attorney-client privilege, and attorney work product.

22

CONFIDENTIALITY

- **Confidentiality In the Context of AI**
  - Do not disclose client related information to an open AI tool like Chat-GPT.
  - Do not disclose information that could lead to the discovery of the client.
  - Only use AI tools that do not share information or use prompts to learn, i.e., Westlaw and Lexis AI tools.
  - Review vendor specifications for contracted tools.

23

SCENARIO

Attorney Megan is working on a sensitive merger and acquisition deal. She uses a third-party AI contract review platform to analyze hundreds of documents, but she neglects to check whether the platform encrypts the data or has strong confidentiality protections. The platform suffers a data breach, and confidential deal terms are leaked to the public.

24

CLIENT COMMUNICATION

- **Prof.Cond.R. 1.4**
  - A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.
  - Duty to inform clients of the lawyer's use of AI, include the risks and benefits? Or impliedly authorized?
  - Review any client instructions regarding the use of AI.

25

SCENARIO

Attorney Tom uses an AI tool to predict the likelihood of success in a medical malpractice case. The AI predicts a low chance of winning, so Tom advises his client to settle without explaining that the AI's prediction was based solely on historical data and may not fully apply to their unique circumstances. The client, unaware of the AI's limitations, agrees to the settlement.

26

NONLAWYER ASSISTANTS

- **Prof.Cond.R. 5.3**
  - Responsibility for the conduct of nonlawyers employed or contracted by the law firm.
  - AI tools care treated under the rule as "nonlawyer assistance."

27

NONLAWYER ASSISTANTS

- **Prof.Cond.R. 5.3 (cont.)**
  - Must ensure the AI tool complies with ethical obligations of the lawyer.
  - A supervisory lawyer should ensure that the use of AI by firm employees adheres to the lawyers' ethical obligations, e.g. training, etc.

28

NONLAWYER ASSISTANTS

- **Prof.Cond.R. 5.3 (cont.)**
  - Considerations to determine if a vendor's services are compatible with the lawyer's professional responsibility:
    - Experience, reputation, stability
    - TOS describes security measures
    - Information retrieval and destruction

29

SCENARIO

A law firm employs a sophisticated AI tool to manage e-discovery in large cases. The firm's managing partner, Kate, assumes the AI tool can automatically identify privileged information and doesn't provide human oversight. The AI inadvertently discloses privileged documents to opposing counsel, leading to a major setback in the litigation.

30

FEES

- **Prof.Cond.R. 1.5**
  - Consider the reasonableness of the fee using Rule1.5(a) factors.
  - Lawyer may only charge a client for the actual costs incurred on the client's behalf.
  - Cannot duplicate charges or inflate the lawyer's billable hours.
  - AI is more efficient - client may question why lawyer did not use AI to reduce costs.

31

SCENARIO

Attorney Sam decides to use an AI tool to draft a standard employment contract for a client. The AI tool finishes the contract in minutes, but Sam charges his client for 10 hours of work because he normally would have spent that much time drafting the contract by hand. When the client later discovers how quickly the contract was generated, they feel misled and overcharged.

32

ADVERTISING

- **Prof.Cond.R. 7.1**
- A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services.
  - Truthful statements that are misleading are prohibited. Cmt.[2].
  - Misleading if it will lead a reasonable person to the conclusion for which there is no factual foundation. Cmt.[2].

33

ADVERTISING

- **Prof.Cond.R. 7.1 (cont.)**
- Lawyers may generally advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms.'

34

ADVERTISING

- **Other Advertising Considerations**
- AI chatbots for advertising and client intake purposes.
- Inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee.

35

SCENARIO

A small law firm advertises that it uses "cutting-edge AI" to guarantee faster resolution of cases compared to other firms. However, the firm's use of AI has not measurably reduced the time it takes to resolve cases, and in some instances, the cases are prolonged due to AI errors. A prospective client hires the firm based on the misleading promise of faster results and is later disappointed when the case drags on.

36

CANDOR TO THE TRIBUNAL

- **Prof.Cond.R. 3.3**
  - A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

37

CANDOR TO THE TRIBUNAL

- **Candor in the Context of AI**
  - Lawyers have an ethical duty to ensure that legal authorities and propositions of law that are presented to a court are accurate.
  - Citing non-existent judicial opinions, false quotes and fake citations in filings with a court may implicate Rule 3.3.
  - *See also* Rule 3.1 – meritorious claims

38

SCENARIO

Attorney Emily files a motion citing a legal case found through an AI research tool. She later learns that the case is not from a valid legal database but was incorrectly pulled from an AI-generated legal summary. Despite knowing this, she fails to correct the error in her filing, assuming the court won't notice.

39

CANDOR TO THE TRIBUNAL

- **Best Practices**
  - Review AI output from both commercial and free resources.
  - Verify sources, citations, and quotes.
  - If relying on law clerks or associates, review all filings for accuracy.
  - Use reliable sources- Westlaw, Lexis, Decisis, etc.

40

CITATION AND QUOTE FABRICATION USING AI

- **Potential Rule Violations**
  - Lawyer Competence – RPC 1.1
  - Meritorious Claims – RPC 3.1
  - Candor to tribunal – RPC 3.3
  - Conduct prejudicial to the administration of justice – RPC 8.4(d)
  - Rule 11 concerns

41

CITATION AND QUOTE FABRICATION

- **Disciplinary cases and sanctioned lawyers**

- *People v. Crabill* (Colorado, 2023)
- *In re Neusom* (M.D. FL, 2024)
- *Mata v. Avianca, Inc.* (S.D. N.Y, 2024)
- *Park v. Kim* (United States 2d. Cir., 2024)
- *Smith v. Farwell* (Mass., 2024)

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QUESTIONS

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ETHICS ASSISTANCE

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512 **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

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[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.

[54] *See* ABA Formal Op. 08-451, *supra* note 15.

[55] Fla. Bar Advisory Op. 12-3 (2013).

[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].

[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.

[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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CASE TRENDS UPDATE

Ohio Board of Professional Conduct

RECENT DISCIPLINARY CASE TRENDS

Miller-Becker Seminar
October 25, 2024

1

Ohio Board of Professional Conduct

JUDICIAL MISCONDUCT

2

CASE TRENDS

Increase in frequency of charged misconduct by judicial officers:

- Pre-2019—two to four cases per year
- 2019 and 2020—six cases each year
- 2021-2023—two to three decisions each year
- 2024—four decisions (including one RWDP) and five pending cases (four @ BPC, one @ SCO)

3

RECENT CASES

- *ODC v. Gaul*, 2023-Ohio-4751 (1-yr. susp.)
- *ODC v. Warner*, 2024-Ohio-511 (indefinite susp.)
- *OSBA v. Winkler*, 2024-Ohio-3141 (public reprimand)
- *ODC v. Brandt* (resignation w/ discipline pending)
- *ODC v. Hoover*, 2024-Ohio-4608 (18 mo. susp., 6 mos. stayed)

4

ODC v. GAUL

Respondent committed 29 rule violations in eight matters (seven cases, one non-case related). Misconduct included:

- Demeaning behavior toward litigants;
- Abuse of contempt authority;
- Coercing guilty pleas; and
- Abusing prestige of office.

5

ODC v. WARNER

- Respondent and wife left the scene of an auto accident in which another driver was seriously injured. Did not report the incident until the following day.
- Both convicted of felony offenses and sentenced to jail.
- Judge violated Jud. Cond. R. 1.1 and 1.2 and Prof. Cond. 8.4(b), (d), and (h).
- Contested validity of criminal conviction and denied any misconduct other than Jud. Cond. R. 1.2 violation

6

OSBA v. WINKLER

- Respondent permitted court staff to make inaccurate comments to the media about a pending guardianship matter and repeated these comments on the court's Facebook page in replying to a post from a family member of the ward.
- Judge stipulated to violations of Jud. Cond. R. 1.2, 2.8(B), and 2.10(A) and (C).

7

ODC v. BRANDT

- Respondent charged with violations of Jud. Cond. R. 1.1 and 1.2 and Prof. Cond. R. 8.4(c) and (h) for embezzling more than $65,000 while serving as treasurer of a judicial association.
- Respondent resigned with disciplinary action pending, prior to any adjudication of the misconduct.

8

ODC v. HOOVER

- Respondent committed 64 rule violations relative to 16 municipal court cases. He coerced payment of outstanding fines/costs through incarceration and threats of incarceration, failed to follow applicable legal procedures, and displayed bias toward defendants based on race and socioeconomic status.
- Rules violated: Jud. Cond. R. 1.2, 2.2, 2.3(B) and Prof. Cond. R. 8.4(d).

9

TRENDS IN ATTORNEY MISCONDUCT CASES

10

PLEA BARGAIN? WHAT PLEA BARGAIN?

ODC v. Goodman, 2024-Ohio-852 (disbarment)

- Court disregarded the offense to which respondent pled (unlawful sexual conduct with a minor) and imposed sanction for what it deemed the underlying conduct (rape).
- "[W]e are not limited to considering the charges brought for a particular crime; rather, we must also examine the conduct underlying the offense." ¶24

11

PLEA BARGAIN? WHAT PLEA BARGAIN?

ODC v. Perrico, 2024-Ohio-1540 (2-yr. susp., one yr. stayed)

- Respondent charged with sexual imposition; pled to misdemeanor assault to avoid sex offender status.
- Majority agreed with Board's findings and recommendation.
- Two justices would have imposed a 2-yr. suspension, equating respondent's conduct with GSI.

12

PLEA BARGAIN? WHAT PLEA BARGAIN?

ODC v. Bell, 2024-Ohio-846 (indefinite susp., no credit for IFS)

- Respondent solicited an undercover police officer posing as an underage sex worker. Pled to unlawful use of a telecom device.
- Majority—attempt to engage in sex with a minor and respondent's position as a prosecutor merited more severe sanction than 2-yr. suspension recommended by the Board.

13

FOWERBAUGH STANDARD

Mahoning CBA v. Macala, 2024-Ohio-3158

- Lengthy discussion of application of *Fowerbaugh* standard beginning at ¶21.
- "Course of conduct" vs. single act of dishonesty
- Departure—(1) isolated incident or (2) abundance of mitigation
- Downward departure can go as low as PR, but not in Macala's case.

14

SEXUAL HARASSMENT

ODC v. Bennett, 2023-Ohio-4752 (2-yr. susp., stayed)

- AUSA sexually harassed a law student intern over the course of two Summer assignments.
- Based on *Mismas*, Board recommended 6-mo. Actual suspension.
- Majority imposed a fully stayed suspension based on lack of direct supervisory authority, loss of federal job, and self report.

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Ohio Board of Professional Conduct

QUESTIONS

- Rick Dove: rick.dove@bpc.ohio.gov
- Website: www.bpc.ohio.gov
- Telephone: 614-387-9370

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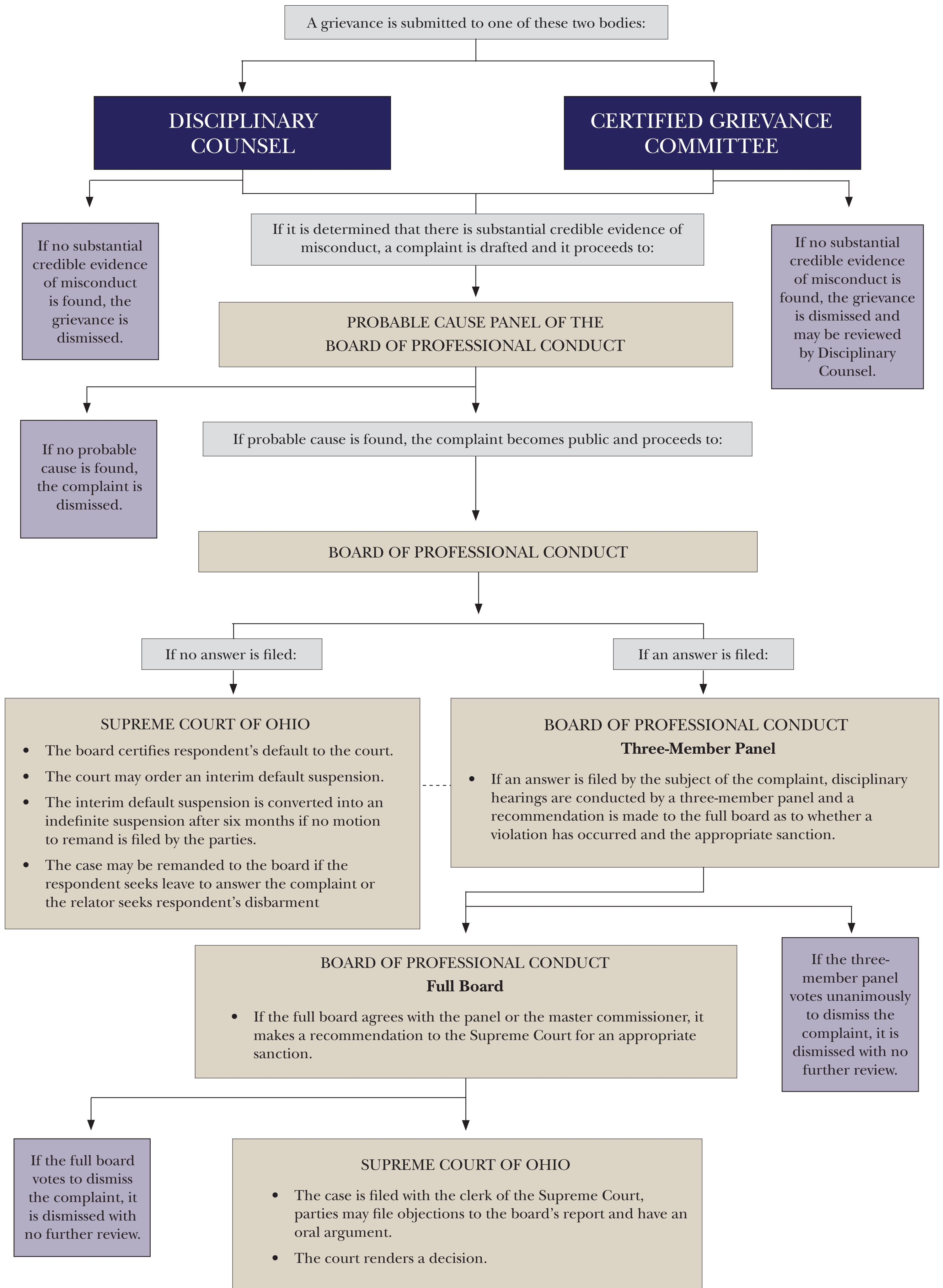
DISCIPLINARY PROCESS OVERVIEW

(Optional)

DISCIPLINARY PROCESS

A grievance against a judge or attorney may be submitted to the Disciplinary Counsel or a certified grievance committee of a local bar association. If either of those bodies determines that substantial credible evidence of professional misconduct exists, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Professional Conduct, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Professional Conduct. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct, and issues an appropriate sanction.



Ohio Board of Professional Conduct

Disciplinary Case Statistics
2021-2023

Supreme Court Decisions
(excluding defaults and reinstatements)

2021	2022	2023
47	31	22

Sanction Imposed
(excluding defaults)

	2021	2022	2023
Public reprimand	10	2	3
Term suspension	29	21	16
Indefinite suspension	5	6	3
Disbarment	3	0	0
Dismissal	0	2	0

Court Action on Board-Recommended Sanction

	2021	2022	2023
Imposed recommended sanction	46 (98%)	26 (84%)	18 (82%)
Modified recommended sanction	1 (2%)	5 (16%)	4 (18%)
· Increased	1	2	2
· Decreased	0	3	2

Court Action on Consent to Discipline Cases
(cases in which the Board recommended acceptance)

	2021	2022	2023
Accept with public reprimand	7	0	3
Accept with term suspension	6	4	1
Rejected and remanded	0	0	0

Default Cases

	2021	2022	2023
Total defaults certified to SCO	3	9	6
Interim suspension imposed	2	9	4
Indefinite suspension imposed	7	6	0

Ohio Board of Professional Conduct

Disciplinary Case Statistics
2021-2023

Respondent with Prior Discipline

(includes discipline for misconduct and suspensions for non-compliance with CLE or attorney registration requirements.)

2021	2022	2023
13 (28%)	6 (19%)	4 (18%)

License Reinstatements

	2021	2022	2023
Upon application	14	13	9
Upon petition:			
· Granted	4	1	2
· Denied	0	2	0
· Withdrawn	1	1	0

Judicial Misconduct Cases (Board Dispositions)

(includes all cases involving violations of the Code of Judicial Conduct when the respondent was a judicial officer or candidate at the time the misconduct occurred.)

	2021	2022	2023*
Total	4	4	5
Rule V cases	3	3	3
Judicial campaign misconduct (expedited)	1	1	2
Dismissals	0	1	1

* Two judicial misconduct cases were pending as of 12/31/2023.

Miscellaneous Disciplinary Dispositions

	2021	2022	2023
Resignations with discipline pending accepted	12	9	9
Resignations with discipline pending denied	0	0	0
Interim remedial suspension imposed	3	3	2
Child support default suspension imposed	1	0	0
Interim felony suspension imposed	3	8	12
Impairment suspension imposed	0	0	2
Reciprocal discipline imposed	4	2	2

Ohio Board of Professional Conduct

Disciplinary Case Statistics
2021-2023

Top Five Disciplinary Offenses of 2023
(based on total number of grievances opened for investigation and primary misconduct alleged)

	2023
1. Neglect/failure to protect client's interest	30%
2. Judicial misconduct	13%
3. Excessive fee	9%
4. Misrepresentation/False Statement	7%
5. Trial misconduct/IOLTA (tie)	6%

	2021	2022	2023
Active Registered Attorneys	43,626	44,399	43,249
Awards to Victims of Lawyers by Lawyers' Fund for Client Protection	$545,891	$998,363	$749,942

	2021	2022**	2023***
Total Grievances Filed	**3,454**	**3,697**	**4,151**
Disciplinary Counsel (ODC)	2,654 (77%)	2,719 (74%)	3,114 (75%)
Certified Grievance Committees (CGC)	801 (23%)	978 (25%)	1,037 (25%)
Total Dismissals on Intake*	**801**	**668**	**646**
Dismissed after initial review by ODC	447 (13%)	285 (8%)	312 (8%)
Dismissed after initial review by CGC	354 (10%)	383 (10%)	334 (8%)
Total Grievances Investigated*	**2,653**	**3,029**	**3,505**
Opened for Investigation by ODC	2,084 (60%)	2,434 (66%)	2,802 (68%)
Opened for Investigation by CGC	570 (16%)	595 (16%)	703 (17%)
Complaints filed with the Board	**39**	**45**	**45**

* Percentages based on total grievances

** 2022 totals do not reflect missing quarterly reports from Miami and Portage grievance committees.

*** 2023 totals do not reflect missting reports from Portage grievance committee.

DISCIPLINARY PROCESS OVERVIEW

Richard A. Dove
Director
Board of Professional Conduct

Joseph M. Caligiuri
Disciplinary Counsel

1

GOV. BAR R. V

Three-tiered process:

- **Investigation**—grievance investigated by by Office of Disciplinary Counsel (ODC) or certified grievance committees (CGCs)
- **Adjudication**—formal complaint heard before Board of Professional Conduct (BPC)
- **Review and imposition of discipline**—Supreme Court

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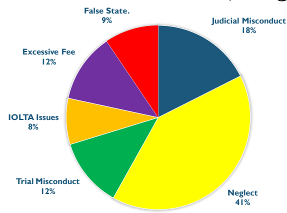
2023 STATISTICS

- 4,151 grievances filed; 75% with ODC, 25% with CGCs
- 15% of all grievances dismissed on intake (DOI)
- 80% of investigations conducted by ODC, 20% by CGCs
- 45 formal complaints filed with the Board (pre-Covid average—65-70/year)

3

COMMON GROUNDS FOR DISCIPLINE (2023)



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GRIEVANCE PROCESS

- Letter of Inquiry (LOI)
- Investigation—response to LOI, subpoenas, witness interviews, depositions
- Letter of Dismissal or Notice of Intent

5

LETTER OF INQUIRY

- Includes copy of grievance
- Written response within 2 weeks (may extend)
- Failure to respond—not a good idea
- Duty to cooperate

6

INVESTIGATION

- Response from attorney/judge
- Response may be provided to grievant
- Investigators @ ODC
- Subpoena power
- Witness interviews

7

FORMAL COMPLAINT

- Notice of intent
- Response from attorney/judge
- File with Board:
  - Complaint
  - Response, if any
  - Summary of investigation
  - Exhibits
- Waiver of probable cause

8

PROBABLE CAUSE

- Two, three-member panels, with alternates
- One panel meets each month
- Review materials submitted by relator
- Standard—substantial, credible evidence
- Options—certify, dismiss, certify in part/dismiss in part
- Appeal from dismissal

9

CERTIFICATION OF COMPLAINT

- If probable cause is found:
  - Complaint is certified to Board and served on Respondent
  - Respondent has 20 days to answer
  - Default proceedings, if no answer
- Complaint is public once certified—on-line docket

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BOARD PROCEEDINGS

- Answer filed—case assigned to 3-commissioner panel
- Prehearing telephone conference with parties
- Time guidelines for Board proceedings:
- 20 days—initial prehearing conference
- 150 days—hearing scheduled
- 40 days—after submission of case to panel, report prepared for submission to full Board

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BOARD PROCEEDINGS

- Amended complaint—motion for leave to amend (absent Respondent's consent); no separate probable cause determination
- Stipulations—strongly encouraged, especially as to facts
- Joint exhibits—strongly encouraged
- Consent to discipline

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DEFAULT PROCEEDINGS

- No answer to formal complaint:
  - Certify respondent's default to Supreme Court
  - Court issues show cause order
  - No reply, interim default suspension imposed
  - Relator or respondent can seek remand to Board
  - If no remand, second show cause order issued three months after interim default suspension is imposed
  - No reply, indefinite suspension
  - Relator or respondent can seek remand

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HEARING PROCEDURES

- Formal hearing
- Rules of Evidence and Civil Rules apply
- Relator—BOP by clear and convincing evidence
- CGCs—bar counsel responsible for serving as lead counsel and litigating case to the panel
- Primary issues: (1) facts; (2) rule violations; (3) aggravating & mitigating factors; and (4) sanction

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PANEL AND BOARD

- Panel questions Respondent
- Panel findings/dismissals
- Panel prepares written report to full Board
- Full Board deliberates and votes
- Approve/modify findings of fact, conclusions of law, aggravating/mitigating factors, and recommended sanction

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SUPREME COURT OF OHIO

- Board report and record filed with Supreme Court
- Court issues show cause order (except consent to discipline); parties have 20 days to object
- No objections—Court considers on report and record
- Objections—oral argument (except reinstatement)
- Supreme Court is NOT bound by Board recommendation, even if no objections

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WHAT INFLUENCES SANCTION?

- Aggravating factors:
  - Prior discipline (what is or is not?)
  - Dishonest or selfish motive
  - Pattern of misconduct
  - Noncooperation
  - Failure to make restitution
  - Failure to acknowledge wrongdoing

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WHAT INFLUENCES SANCTION?

- Mitigating factors:
  - No prior discipline
  - Absence of a dishonest or selfish motive
  - Full and free disclosure
  - Acknowledge wrongdoing
  - Character and reputation
  - Restitution

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WHAT INFLUENCES SANCTION?

- Disorder—defined in Section 35
- Four requirements for a disorder to be considered in mitigation:
  - *Diagnosis*—qualified health care professional
  - *Prognosis*—opinion that attorney can engage in competent and ethical professional practice of law
  - *Treatment/counseling*—sustained period of successful treatment (mental disorder) or completion of approved treatment program (substance use disorder)
  - *Causation*—disorder caused or contributed to misconduct

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DISPOSITION TIMES

- ODC/CGCs—up to one year to investigate
- Board—8 months from filing to disposition; 6 months or less if consent-to-discipline
- Supreme Court—8-10 months; faster if consent-to-discipline or no objections to Board report

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QUESTIONS

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PRESENTERS' BIOS

PRESENTERS' BIOGRAPHICAL INFORMATION

D.ALLAN ASBURY joined the Ohio Board of Professional Conduct in 2014 as Senior Counsel. Before joining the Board, Allan served as Administrative Counsel for the Supreme Court and Secretary of the Board on the Unauthorized Practice of Law. His primary duties for the Board include researching and drafting advisory opinions, providing ethics advice to Ohio lawyers, judges, and judicial candidates, and assisting in the Board's ethics outreach and education efforts. Allan received his undergraduate and law degrees from Capital University. He began his practice of law as in-house counsel for a regional transit authority where he had primary responsibility for personal injury defense, labor, and employment matters. He is admitted to practice in Ohio, United States District Court for the Southern District of Ohio, and the U.S. Supreme Court. Allan is a Certified Court Manager (CCM) through a certification program of the National Center for State Courts.

MARTHA S. ASSEFF joined the Office of Disciplinary Counsel in 2020. In that role, she investigates and prosecutes lawyers and judges in professional misconduct cases. Before her work at the Office of Disciplinary Counsel, Ms. Asseff served as Secretary to the Supreme Court of Ohio Commission on Professionalism, overseeing several statewide initiatives, including the nationally recognized Lawyer to Lawyer Mentoring Program. Ms. Asseff previously spent more than a decade in private practice at large firms in Columbus, Ohio where her practice focused on commercial and fiduciary litigation in Ohio federal and state courts. She is a graduate of Georgetown University and the University of Virginia School of Law.

JOSEPH M. CALIGIURI is Disciplinary Counsel in the Office of Disciplinary Counsel, where he has worked since 2002. He is responsible for investigating and prosecuting lawyers and judges accused of ethical misconduct. Joe is a frequent lecturer for the Ohio Judicial College, Ohio State Bar Association, and the Association of Judicial Disciplinary Counsel, where he recently completed a three-year term as President. Joe also teaches Professional Responsibility at The Ohio State University's Moritz College of Law. Joe was a former prosecutor in Buffalo, NY, and is a graduate of New England Law and the Clemson University MBA Program.

TERI R. DANIEL is the appellate division supervisor at the Lake County Prosecutor's Office where she has worked since 2007. Teri has served as a commissioner on the Board of Professional Conduct since the spring of 2018 and has been a member of the advisory opinion and probable cause committees. She graduated magna cum laude from Cleveland-Marshall College of Law and was the research editor of the Cleveland State Law Review. Teri earned an MBA from Cleveland State University and her undergraduate degree from Washington and Jefferson College. In her free time, she sits on the boards of directors of several community organizations and serves as both a coach and a chauffeur for her daughter's youth sports teams.

RICHARD A. DOVE is the Director of the Board of Professional Conduct and serves as the Board's chief legal and administrative officer. Prior to his appointment in 2011, Rick

served for more than 22 years on the staff of the Supreme Court of Ohio, the last four of which as Assistant Administrative Director. He is past president of the National Council of Lawyer Disciplinary Boards and in 2019 was recognized as Distinguished Alumnus of the Year by Capital University Law School. Rick is a graduate of Wittenberg University and Capital University Law School and is admitted to practice in Ohio, before the United States District Court for the Southern District of Ohio, and before the Supreme Court of the United States.

ELISABETH DUESLER is the Proactive Management-Based Regulation (PMBR) Program Manager for the Office of Disciplinary Counsel. Elisabeth's responsibilities include designing, developing, implementing, and administering the new PMBR education curriculum for Ohio-licensed lawyers and assisting attorneys with related inquiries. Elisabeth earned her J.D. from Capital University and graduated from Miami University with a B.A. in Communication. Prior to joining the Office of Disciplinary Counsel, Elisabeth practiced consumer bankruptcy, domestic relations, and estate planning law in Central Ohio.

SUSAN FORTNEY serves as the Stephen Alton University Professor and Professor of Law at Texas A&M School of Law. At Texas A&M she directs the Program for the Advancement of Legal Ethics. Fortney 's teaching and scholarship focuses on legal ethics and malpractice issues, as well as organizational ethics. She co-authored numerous books and articles, including the West hornbook, Legal Ethics, Professional Responsibility, and the Legal Profession (2018) and Legal Malpractice Law: Problems and Prevention (3d 2021), the first textbook to focus on legal malpractice issues. Fortney has conducted numerous empirical studies on legal ethics and the legal profession. She has been recognized for her work as a teacher, scholar and public servant. In 2024 she received from the ABA the Michael Franck Professional Responsibility Award. She currently serves as a member of the eight-person committee that drafts the Multistate Professional Responsibility Examination for the National Conference of Bar Examiners.

MICHELLE A. HALL joined the Office of Disciplinary Counsel in 2020 and was named Chief Assistant Disciplinary Counsel two years later. Ms. Hall investigates and prosecutes lawyers and judges in professional misconduct cases and coordinates ethics outreach initiatives. B efore her work at the Office of Disciplinary Counsel, Ms. Hall was Senior Counsel to the Board of Professional Conduct, where she researched and drafted advisory opinions, provided ethics consultation to lawyers, judges, and judicial candidates, and participated in educational programs such as new judge orientation and the judicial candidate seminar. Ms. Hall has served the Supreme Court of Ohio as Staff Counsel, Attorney Services Counsel, and Secretary of the Board on the Unauthorized Practice of Law and Commission on Professionalism. She also has experience representing the Ohio Board of Nursing and other healthcare regulatory boards as an assistant attorney general and as a law clerk in the Twelfth District Court of Appeals. She graduated from the Ohio State University and Wake Forest University School of Law. Ms. Hall is admitted to practice in Ohio and the United States District Court for the Southern District of Ohio. She currently serves on the board of the Association of Judicial Disciplinary Counsel.

KELLY HEILE is Bar Counsel with the Ohio State Bar Association. Since January 2015, Kelly has been a member of the Ohio State Bar Association's Certified Grievance Committee and served as relator's counsel before the Board of Professional Conduct and the Ohio Supreme Court. Prior to becoming Bar Counsel, Kelly spent fifteen years as an assistant prosecuting attorney, mostly in Butler County, where she prosecuted adult sexual assaults, child sexual abuse, child physical abuse, and homicide cases. In that role, she received significant honors including the Ohio Prosecuting Attorneys Association Meritorious Attorney Award, Women Helping Women's Change Agent Award, and was selected to be a part of the Governor's Working Group on Reviewing the Medical Board's Handling of the Investigation Involving Dr. Richard Strauss.

GEORGE D. JONSON is a partner in the Cincinnati law firm of Montgomery Jonson LLP. His practice centers on the representation of Ohio lawyers and judges in disciplinary inquiries/proceedings, giving ethics advice to Ohio lawyers and judges, and defending legal malpractice claims. He is also engaged in general civil litigation. In this spare time, Jonson writes and publishes haiku about quantitative easing.

MARK LANTERMAN is the Chief Technology Officer of Computer Forensic Services. Before entering the private sector, Mark was a sworn member of the U.S. Secret Service Electronic Crimes Taskforce. Mark has over 30 years of security and forensic experience and has testified in over 2000 cases. Mark is faculty for the National Judicial College in Reno, Nevada, and has conducted training for members of the federal judiciary through the Federal Judicial Center in Washington, D.C. Mark is a professor in the cybersecurity program at the St. Thomas School of Law in Minneapolis, Minnesota. Mark has provided training in digital evidence, computer forensics and cyber security to the United States Supreme Court.

ALVIN E. MATHEWS, JR. is a partner in the litigation group at UB Greensfelder LLP. He also serves as the firm's Chief Diversity Officer and Assistant General Counsel. From 1991 to 1997, he served as an Assistant Disciplinary Counsel. He has since devoted a significant part of his practice to helping lawyers. He has been asked to provide representation on hundreds of matters, including ethics opinions, grievance investigations, and formal disciplinary proceedings involving the Board of Professional Conduct and the Ohio Supreme Court. He serves as an expert witness on lawyer conduct questions. He is an adjunct lecturer at the Ohio State University, Moritz College of Law. He has earned a Preeminent AV rating from Martindale-Hubbell, has been recognized by Ohio Super Lawyers every year since 2011 (Top 50 List, Columbus, 2015-2017) and named to *The Best Lawyers in America©* for Administrative & Regulatory Law (2022 Administrative & Regulatory Law Lawyer of the Year in Columbus). He received his bachelor's degree from Miami University, and his law degree from Ohio Northern University College of Law.

LAURA VALENTINO is a licensed Independently Licensed Social. She received a Bachelor of Arts in Psychology and Philosophy from Assumption University in Worcester, Massachusetts, and her Master of Social Work from The Ohio State University. Aside from being the Clinical Director of the Ohio Lawyers Assistance Program, Laura owns and

operates a mental health private practice located in Hilliard, Ohio. She also is a staff lecturer for The Ohio State University College of Social Work.

HEATHER M. ZIRKE is the Director of the Joseph G. Miller and William C. Becker Center for Professional Responsibility of the University of Akron School of Law and Assistant Professor. Prior to joining Akron Law, she served as General Counsel and Bar Counsel for the Cleveland Metropolitan Bar Association. Heather is a graduate of Cleveland State University College of Law and Baldwin Wallace University.