Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy

Jennifer M. Kraus

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol84/iss1/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
ATTORNEY DISCIPLINE SYSTEMS: IMPROVING PUBLIC PERCEPTION AND INCREASING EFFICACY

I. INTRODUCTION

Wisconsin newspapers followed the controversy last fall: "Discipline Board Said to Need More Non-Lawyers," 1 "Board on Lawyers Reaches Out to Public; Disciplinary Unit Acts to Adopt a Consumer-Oriented Approach," 2 "Panel Urges Reform in Lawyer Discipline," 3 "Court Wants to Hear on Lawyer Board," 4 and "Don't Kill Lawyer Review Board." 5 The controversy over lawyer discipline isn't unique to Wisconsin, 6 nor is it unique to our time. 7 At the heart of these headlines and similar debates is the question of how to structure the legal profession's self-regulation to best protect both the profession and the public it serves.

Serving the legal profession and protecting the public are not disparate goals; each is served by effective attorney discipline systems. The debate is structural; it involves allocation of the investigative, prosecutorial, and adjudicative functions within discipline systems among the judiciary, the public, and organized bar associations. Points at issue include whether self-regulation adequately protects the public, whether public protection measures such as public participation adequately protect innocent attorneys, and which participants in the

---

4. Court Wants to Hear on Lawyer Board, WIS. ST. J., Sept. 16, 1999, at 3B.
5. Don't Kill Lawyer Review Board, WIS. ST. J., Sept. 15, 1999, at 1A.
7. See ABA CTR. FOR PROF'L RESPONSIBILITY, Lawyer Regulation For a New Century: REPORT OF THE COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992) [hereinafter MCKAY REPORT].
system are most fit to make these decisions. This Comment addresses current criticisms of attorney discipline systems, offering in Part II a model system. The model system includes independent state discipline boards that maintain separate committees to address prosecutorial and adjudicative functions, under the supervision of the state's highest court. Part III surveys several types of discipline systems, including those of other professions, with particular attention to allocation of investigative, adjudicative and prosecutorial functions among various players within the system. Part IV highlights criticisms of state discipline boards at both the national and state levels. Part V addresses these criticisms with suggestions: central intake systems for receiving complaints and public participation in the systems.

II. ESSENTIAL CHARACTERISTICS OF STATE ATTORNEY DISCIPLINE SYSTEMS

A. Judicial Control

Although legislative regulation of the legal profession has been periodically suggested, judicial regulation of attorney discipline systems "is a principle firmly established in every state." The American Bar Association supports judicial regulation, as noted in Recommendation One of the 1992 McKay Report, which states that "[r]egulation of the legal profession should remain under the authority of the judicial branch of government." The ABA finds that judicial control offers better protection to the public and allows the disciplinary system to operate independent of the political pressure that would accompany legislative control.

This recommendation has been emphasized repeatedly by the ABA. In 1979, the ABA Joint Committee on Professional Discipline promulgated the need for politically independent disciplinary commissions, stating, "[t]he commission should be independent of and free from interference from the executive or legislative branches and,

8. See, e.g., Ambrosio & McLaughlin, supra note 6; Dubin, supra note 6.
10. Id. at 2.
11. Id. at 1.
12. See id. at 4.
13. See id. at 7.
14. See, e.g., ABA NAT'L CTR. FOR PROF. RESPONSIBILITY FOR THE JOINT COMMITTEE ON PROF'L DISCIPLINE, Professional Discipline for Lawyers and Judges, 21 (1979) [hereinafter PROFESSIONAL DISCIPLINE].
although operating within the judicial branch, should report only to the supreme court." The Second Recommendation of the McKay Report is entitled, "Supporting Judicial Regulation and Professional Responsibility." Support of judicial control over attorney discipline has a long history and is likely to be included in future reports as a necessary component of effective attorney discipline systems.

The need for judicial control of attorney discipline has been recognized in specific states as discipline systems are re-evaluated. For example, in 1990, greater involvement by the Michigan Supreme Court in that state's system was suggested to prevent improprieties occurring under the then present system. A recent national critique of attorney discipline systems finds that insufficient judicial review of discipline decisions and the attending deference to decisions made by attorneys operating the systems allow attorneys to improperly exercise discretion. Judicial control of discipline systems offers a balance of control by insulating the legal profession from the political pressures inherent in regulation by the legislative or executive branches and concentrating supervision in a body with less incentive than trade associations to protect individual members of the profession.

B. Separation of the Prosecutorial and Adjudicative Functions

The ABA recommends a unitary system under the supervision of the state's highest court in which disciplinary counsel perform the investigative and prosecutorial functions, and the adjudicative function is handled by hearing committee members, disciplinary board members, and members of the court. The prosecutorial staff and adjudicative staff should function separately, as noted in Recommendation 6.2:

The Court should adopt a rule providing that no disciplinary adjudicative official (including hearing committee members, disciplinary board members, or members of the Court) shall communicate ex parte with disciplinary counsel regarding an ongoing investigation or disciplinary matter, except about administrative matters or to report information alleging the

15. Id.
16. MCKAY REPORT, supra note 7, at 8.
17. See Dubin, supra note 6, at 669.
misconduct of a lawyer.\textsuperscript{20}

This recommendation has also been found in ABA reports since 1979. Recommendation 3.2 of the 1979 report states:

Separation of Prosecutorial and Adjudicative Functions. The agency should be a unitary entity. While it should perform both prosecutorial and adjudicative functions, these functions should be separated within the agency insofar as practicable. The prosecutorial functions should be directed by a lawyer employed full-time by the agency and performed, insofar as practicable, by employees of the agency. The adjudicative functions should be performed by practicing lawyers and public members.\textsuperscript{21}

The recommendation is broad enough to encompass various disciplinary system structures, and is generally followed by state discipline systems.\textsuperscript{22} The reasons for this recommendation are obvious. There is an inherent conflict of interest in performance of these functions by the same actors within the disciplinary system, analogous to allowing adjudication by a District Attorney in a criminal prosecution.\textsuperscript{23}

The importance of separate prosecutorial and adjudicative functions is well-accepted, and discipline systems are criticized for failure to adhere to this principle. In the 1970s, for example, the Michigan State Bar Grievance Board was attacked for officially performing both functions, which resulted in the creation of a bifurcated system in that state.\textsuperscript{24} The Attorney Grievance Commission was then responsible for investigation and prosecution while the Attorney Discipline Board was delegated adjudicative responsibilities.\textsuperscript{25}

\textsuperscript{20} MCKAY REPORT, supra note 7, at 29.
\textsuperscript{21} PROFESSIONAL DISCIPLINE, supra note 14, at 82-83.
\textsuperscript{22} See ABA CTR. FOR PROF’L RESPONSIBILITY, National Survey of Attorney Discipline Systems (1996).
\textsuperscript{24} See Dubin, supra note 6, at 669. For an interesting note on the handling of constitutional claims within the Michigan system, see Marcy A. Hahn, Note, The Constitutionality of Michigan’s Attorney Discipline System, 43 WAYNE L. REV. 1565 (1997).
\textsuperscript{25} See Dubin, supra note 6.
More recently in Wisconsin, criticism of the discipline system resulted from claims that members of the Board of Attorney Professional Responsibility, which exercises prosecutorial discretion, contacted members of the investigative staff directly regarding administrative matters.\(^{26}\) While this example involves prosecutors contacting investigative staff, it illustrates the importance of maintaining separation between functions in a discipline system. Contact or association between prosecutors and adjudicators would be deemed an even more egregious compromise of impartiality within any discipline system.

Separation of prosecution and adjudication within state discipline systems promotes a balanced process in two ways: it represents the interests of both the public and the attorneys under investigation and allows participation by a variety of groups, reducing the opportunities for error based on partiality. This check on attorney discipline systems is vital in ensuring that discipline systems protect both the public and the legal profession.

**C. Adjudication Independent of State Bar Associations**

While State Bar Associations are generally involved in the administration of state discipline systems, it is important that systems remain under the ultimate control of the judiciary. It is likewise necessary to avoid ultimate adjudication solely by members of state bar associations, which are viewed as biased because of their role as trade associations.

The ABA addresses the role of the state bar in Recommendation Five of the McKay Report, relating to the Independence of Disciplinary Officials.\(^{27}\) The recommendation clarifies that the control of the system should be under the supreme court, and Recommendation 5.1 states that "[e]lected bar officials, their appointees and employees should provide only administrative and other services for the disciplinary system that support the operation of the system without impairing the independence of disciplinary officials."\(^{28}\) The comments to the recommendation clarify that there are many roles for the bar and its officials within the system, but not as adjudicators: "[A] lawyer can appropriately serve the profession as an elected bar official and as an appointed disciplinary

\(^{26}\) State Bar of Wisconsin BAPR Study Committee Report to the Board of Governors, June 3, 1999 (on file with the author).

\(^{27}\) MCKAY REPORT, supra note 7.

\(^{28}\) Id. at 24.
adjudicator—but not simultaneously." The position of the ABA does not exclude state bar officials altogether from the disciplinary process, but focuses on the conflict of interest between the leadership in a trade association and the regulation of its members.

The conflict of interest in adjudication by state bar associations is noted within the profession. In California, a 1985 task force on that state's disciplinary process found that the state bar association, as both a trade association and a disciplinary agency, could not regulate effectively based on the conflict of interest inherent in performance of both roles. The task force subsequently recommended implementation of an independent regulatory authority under the control of the state supreme court. Leslie C. Levin also points to the discretion of the bar in adjudication as a weakness of disciplinary systems: "The absence of [clear disciplinary] standards leaves the sanctioning decisions largely to the discretion of the bar, which remains heavily involved in the discipline process." Levin suggests that standards for imposition of disciplinary sanctions would counter this effect.

In Michigan, the attorney discipline system was removed from the control of the state bar association in the early 1970s, with results that were viewed positively by the public and other critics of the previously low discipline rates. In the two years following the change, the newly created State Bar Grievance Board, under the control of the Michigan Supreme Court, disciplined more lawyers than the state-bar controlled discipline system had in the preceding thirty-five years. To the skeptical public, increased numbers of discipline cases meant greater protection from inappropriate treatment by lawyers. As discussed

29. Id. at 25.
30. For criticism of the unified bar's administration of the discipline system, see Bradley A. Smith, The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession, 22 FLA. ST. U. L. REV. 35 (1994). Smith suggests that voluntary bar associations are more effective and make better use of funds than do unified bar associations. Smith further argues that attorney discipline should be handled by state agencies rather than by the unified bar under the direction of the state's supreme court, citing the Ohio system as an example. For a critique of the Ohio system, see Jack A. Guttenberg, The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for Change, 62 U. Cin. L. REV. 947 (1994).
32. See id.
33. Levin, supra note 18, at 10.
34. See id.
35. See Dubin, supra note 6, at 669.
36. Id.
previously, it is essential that control of disciplinary systems remain under the judiciary.\textsuperscript{37} While state bar associations are a valuable resource in implementation of such systems, performance of the adjudicative function by state bar associations may result in biased decisions and public distrust.\textsuperscript{38}

The recommendations for effective attorney discipline discussed herein involve proper allocation of functions within the disciplinary process to avoid both the appearance and reality of improper influence over the decision-making process. Concentrating control of these systems under each state's highest court and separating prosecutorial and adjudicative functions are essential to proper functioning.\textsuperscript{39} It is likewise essential that state bar associations perform only administrative functions and avoid adjudication by state bar officials.\textsuperscript{40} Implementation of these recommendations promotes public confidence in attorney discipline systems, which is essential to the integrity of the legal profession. The recommendations, each supported by the ABA and members of the profession, may be implemented in systems unique to each state.

III. ALLOCATION OF FUNCTIONS IN SELECT STATE DISCIPLINE SYSTEMS

State disciplinary boards have utilized the recommendations of the ABA in a variety of system structures. Colorado,\textsuperscript{41} Minnesota,\textsuperscript{42} and Wisconsin\textsuperscript{43} offer examples of the diverse ways in which discipline systems may be structured. This Comment compares these systems to the Wisconsin regulation system for other professions which is centralized under the Wisconsin Department of Regulation and

\textsuperscript{37} See supra text accompanying notes 9-18.

\textsuperscript{38} See, e.g., PROFESSIONAL DISCIPLINE, supra note 14; MCKAY REPORT, supra note 7.

\textsuperscript{39} See, e.g., PROFESSIONAL DISCIPLINE, supra note 14; MCKAY REPORT, supra note 7; Dubin, supra note 6.

\textsuperscript{40} See, e.g., MCKAY REPORT, supra note 7; Gallagher, supra note 31; Levin, supra note 18; Dubin, supra note 6.

\textsuperscript{41} See Linda Donnelly et al., How the New Attorney Regulation System Will Work, 28—FEB COLO. LAW. 57 at 1—2 (1999).


Licensing. The variety of discipline systems explored in this Part illustrate the flexibility that is possible in accommodating the characteristics described in Part II. The differences in the structure of these systems may highlight areas for criticism which are discussed in Part IV and addressed by suggested reform in Part V.

Colorado offers an excellent example of a recently reformed system. The state implemented a new attorney discipline system in January 1999, replacing the former Grievance Committee structure with a central intake system and Attorney Regulation Counsel, individual attorneys who perform an investigative/prosecutorial function.\textsuperscript{44} The Regulation Counsel makes recommendations to the Regulation Committee, a board composed of six attorneys and three public members,\textsuperscript{45} suggesting sanctions such as: dismissal, a letter of admonition, or the filing of formal charges.\textsuperscript{46} The dismissal of charges by the Regulation Counsel may be appealed to the Regulation Committee which decides whether to act on the Regulation Counsel's recommendation.\textsuperscript{47} Finally, formal charges are governed under the Colorado Rules of Civil Procedure and adjudicated by three-member panels consisting of the Presiding Disciplinary Judge and two members appointed by the Colorado Supreme Court from a pool of lawyers and public members.\textsuperscript{48} In this system, the prosecutorial function is performed by the Regulation Committee, composed of one-third public members,\textsuperscript{49} and the adjudicative function is performed by a separate panel under the control of the supreme court.\textsuperscript{50}

In contrast to the Colorado system, the Minnesota attorney discipline system utilizes bar association committees called District Ethics Committees. These committees, which include members of the public, perform investigative and prosecutorial functions.\textsuperscript{51} Adjudicative hearings are presided over by three-member panels from the Lawyers Professional Responsibility Board, that consists of twenty-three members, fourteen of whom are attorneys and nine of whom are members of the public.\textsuperscript{52} Individual board members hear appeals on a

\textsuperscript{44} See Donnelly, et al., \textit{supra} note 41, at 57-58.
\textsuperscript{45} See id. at 58.
\textsuperscript{46} See id.
\textsuperscript{47} See id. at 57.
\textsuperscript{48} See id. at 58.
\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} See Minnesota Report, \textit{supra} note 42.
\textsuperscript{52} See id.
The Board performs the adjudicative function in this system, leaving the investigative and prosecutorial functions to bar association district ethics committees.

The Wisconsin attorney discipline system uses district committees similar to those in the Minnesota system to perform its investigative function. The committees, which represent the public interest, consist of both lawyer and non-lawyer members. The investigative function is coordinated by an administrator "over whom the [s]upreme [c]ourt has the ultimate personnel authority." The district committees generate reports reflecting all exculpatory and inculpatory information that are reviewed by the administrator. If the administrator finds that the grievance does not warrant dismissal, he or she prepares a report regarding the investigation which is submitted to the Board together with a recommendation regarding disposition of the grievance. The administrator's performance is supervised by the Board of Attorney Professional Responsibility which serves a prosecutorial function.

Although the Board supervises the administrator, under the Wisconsin Supreme Court's policies and procedures the Board is not permitted to contact the investigative staff directly about investigative matters. Adjudicative responsibilities are handled by an individual referee from a panel of referees established by the Wisconsin Supreme Court. The court makes final rulings based on the decisions of the referees. In the Wisconsin system, investigation is handled by District Ethics Committees ("DECs"), prosecution is performed by the Board, and adjudication is under the control of the court and its referees.

Attorney discipline boards are controversial in part because members of the legal profession handle all of the functions in the

53. See id.
54. See ROSE & MARTIN, supra note 43.
55. See WISCONSIN SUPREME COURT, STATEMENT OF PRINCIPLES, POLICIES AND PROCEDURES: LAWYER DISCIPLINE SYSTEM (Adopted Feb. 27, 1998) at 6 (on file with the clerk of the Wisconsin Supreme Court and with the author).
56. Id. at 3.
57. See id. at 4.
58. See id.
59. See id. at 4.
60. See ROSE & MARTIN, supra note 43.
61. See Wis. Sup. Ct., supra note 55, at 8 (A member of the Board may not contact the investigative or prosecutorial staff directly and privately in respect to investigatory matters whether completed, pending, or contemplated, except about administrative matters).
62. See ROSE & MARTIN, supra note 43.
63. See id.
regulatory systems. Other professions generally have adjudicative boards composed of professional members, but these may be supervised by another regulatory body. The Wisconsin Department of Regulation and Licensing ("WDRL"), for example, oversees a number of professional boards, including: the Accounting Examining Board, Designers and Land Surveyors Board, Chiropractic Examining Board, Dentistry Examining Board, Medical Examining Board, Board of Nursing, Optometry Examining Board, Veterinary Examining Board, and boards for Architects and Professional Engineers, among others.\(^64\) The boards for each profession are housed within the WDRL, and functions within the complaint process are delegated between the WDRL staff and the individual regulation boards.\(^65\)

The case-handling process of the WDRL involves four stages: the intake stage, the investigation stage, the legal action stage, and the hearing stage.\(^66\) Complaints received by the WDRL are referred to a screening panel. The panel consists of members of the particular credentialing authority, as well as the attorney supervisor and investigator supervisor, who are both members outside the profession. Stuart Engerman, the Investigative Staff Supervisor of the Division of Enforcement of the WDRL, states, "The panel brings together the professional expertise of the board members and the case handling [sic] expertise of the department staff."\(^67\) Fifty percent of cases are closed at this stage, and complainants are notified of closures in writing.\(^68\) Cases that are not closed are referred to a case handling team, which performs the investigation function.\(^69\)

Investigation within the WDRL occurs under a case advisor.\(^70\) Each case is investigated by an investigator who reports to a case advisor.\(^71\) After investigation, the case advisor may recommend closure of the case along with specified reasons for closure.\(^72\) If the case advisor does not recommend closure, the case proceeds to the legal action stage


\(^{65}\) See id.


\(^{67}\) Id. at 2.

\(^{68}\) See Id.

\(^{69}\) See id.

\(^{70}\) See id. at 3.

\(^{71}\) See id.

\(^{72}\) See Engerman, supra note 66, at 3.
regarding any issues warranting formal action.\textsuperscript{73}

In the legal action stage, the case advisor consults with the Division of Enforcement ("DOE") attorney to exercise prosecutorial discretion and either solve the case informally\textsuperscript{74} or prepare for a formal administrative hearing. The DOE attorney files a formal complaint to begin the formal hearing process.\textsuperscript{75} During the hearing stage, both the complainant and the credential holder have a right to discovery. Hearings are presided over by an administrative law judge of the WDRL, who issues a proposed decision to the professional board.\textsuperscript{76} The board issues a Final Decision and Order, which may be appealed to the Circuit Court.\textsuperscript{77}

The Wisconsin Department of Regulation and Licensing serves an administrative function for the many professional boards that it oversees. The boards for each profession have input regarding the substantive issues involved in complaints through the initial screening and sentencing stages of the proceeding, while the investigation and portions of the prosecution and adjudication functions are performed by a member of the DOE.\textsuperscript{78} In this way, professions are allowed a measure of self-regulation without the control over the entire discipline process that generates much of the criticism of attorney discipline systems.

In contrast to the Wisconsin regulation system for other professions, attorneys are highly involved in self-regulation through performance of the investigative and prosecutorial functions. Self-regulation within a system designed to protect the public may naturally lead to some level of public suspicion regarding whether the profession places its own interests above the public welfare.\textsuperscript{79} This is one reason disciplinary proceedings are placed under the control of the judiciary.\textsuperscript{80} However,

\textsuperscript{73} See id. at 4.

\textsuperscript{74} Informal resolution of cases may involve a stipulated agreement, an informal settlement conference, and/or issuance of a letter of concern. See id. at 4. At this stage, an expert witness may be consulted regarding whether practice standards have been violated. The case advisor may reconsider closure based on the expert opinion. See id.

\textsuperscript{75} See Engerman, supra note 66, at 5.

\textsuperscript{76} See id.

\textsuperscript{77} See id.

\textsuperscript{78} See id.

\textsuperscript{79} See, e.g., Gallagher, supra note 31; HALT, AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM, Attorney Discipline National Survey and Report (1990); Levin, supra note 18.

additional procedural restraints on self-regulation, as well as public participation, may be necessary to promote public confidence in attorney discipline systems. This is evidenced by current criticisms of attorney discipline procedures nation-wide.

IV. CRITICISMS OF STATE ATTORNEY DISCIPLINE SYSTEMS

Just as judicial control of attorney discipline systems has historically been criticized, the general principle of attorney self-regulation has been criticized. Much criticism of attorney discipline systems stems from natural public distrust of its self-regulatory nature. The legal profession is not alone in self-regulating. To some extent, all professions are self-regulated. One sociological theory, structural functionalism, "views self-regulation as a necessary concomitant to professionalism." From a structural functionalist perspective, self-regulation is utilized by professions both to ensure appropriate discipline and "to maintain necessary professional independence from the state." Proponents of self-regulation explain that lawyers possess both the specialized knowledge and unique understanding of problems involved in legal practice which render them best equipped to address these problems. Critics find the practice of self-regulation an unnecessary conflict of interest because many of the issues involved in attorney discipline cases are easily understood by members outside of the legal profession. Distrust of self-regulation within the legal profession is reflected more specifically in criticisms of attorney discipline systems.

A. National Criticism of State Attorney Discipline Systems

While specific attorney discipline systems are frequently criticized at the state level, more general nationwide critiques of attorney discipline provide perspective on the general trends in perception of attorney discipline. The first national review of attorney discipline systems was

81. See supra notes 8-10 and accompanying text.
82. See, e.g., Gallagher, supra note 31, at 493 ("[S]elf-regulation has traditionally been considered theoretically central to the professional enterprise").
83. Id. at 493.
84. Id.
85. See id. at 489.
86. See id. at 490.
the Clark Report, published in 1970 by the ABA Special Committee on the Evaluation of Disciplinary Enforcement, which criticized the lack of coordination, guidance, and research in attorney discipline systems. The Clark Report was met with widespread reforms at the state level. Since then, the ABA and consumer advocate groups have continued to critique the evolution of attorney discipline systems.

Criticism of attorney discipline procedures in the past decade has labeled systems unresponsive to the public and more protective of attorneys than of the public interest. A 1991 survey by HALT, for example, summarizes that "the state of attorney discipline across the country continues to be inexcusably irresponsible toward consumers... [s]tate agencies serve neither consumers nor the legal profession because of:... [s]ecrecy... [l]eniency... [d]elay... [u]nfair and [u]nresponsive [p]rocess... [and] [l]ack of [p]ublic [p]articipation." HALT cites that of the 93,000-plus complaints filed in 1988, over 85,000 were dismissed without action, and less than five percent resulted in private reprimands or public discipline. HALT concludes that "[t]he few lawyers who receive public discipline are usually thieves, felons, or guilty of repeated misconduct." Consumers are discouraged by complaint responses stating that many disagreements and mistakes on the part of attorneys do not amount to unethical conduct. The public interest concerns voiced by consumer advocate groups have been addressed by members of the profession itself.

87. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, Problems and Recommendations in Disciplinary Enforcement (1970) [hereinafter CLARK REPORT]; Gallagher, supra note 31, at 491.
88. See MCKAY REPORT, supra note 7.
89. See, e.g., MCKAY REPORT, supra note 7; Ambrosio & McLaughlin, supra note 6; Dubin, supra note 6; Gallagher, supra note 31; Levin, supra note 18.
90. The Legal profession's failure to protect the public is also affected by many factors outside of professional discipline systems. See Deborah L. Rhode, Institutionalizing Ethics, 44 CASE W. RES. L. REv. 665 (1994) (suggesting that professional ideals must be improved through market incentives and socialization efforts within law schools, law firms, and bar associations, as well as administration of discipline systems).
91. HALT, supra note 79, at 2-3.
92. See id. at 17.
93. Id. at 19. For information on the response of attorney discipline systems to substance abuse issues, see Nathaniel S. Currall, Note, The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession, 12 GEO. J. LEGAL ETHICS 739, (1999); Jeffrey J. Fleury, Comment, Kicking the Habit: Diversion in Michigan—The Sensible Approach, 73 U. DET. MERCY L. REV. 11 (1995); Patricia Sue Heil, Comment, Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline, 24 ST. MARY'S L.J. 1263 (1993).
94. See HALT, supra note 79, at 35.
Academics within the legal profession echo HALT's claims that state discipline systems currently fail to protect the public. Leslie C. Levin, Associate Professor of Law at the University of Connecticut School of Law, blames the failure of discipline systems to protect the public on a lack of standards for imposition of sanctions:

[T]he lack of well-defined standards, the tendency to impose non-public sanctions on lawyers, the failure to publicize the "public" sanctions, and the amount of recidivism that seems to occur, also raise serious questions about how well the sanctions imposed on lawyers achieve the basic goals of lawyer discipline: protection of the public, protection of the administration of justice and preservation of confidence in the legal profession.

Levin cites that only about five percent of all complaints result in discipline, and that the sanctions imposed "are often light and inconsistent." The statistic is alarming to both the public and members of the profession because it reflects the small percentage of concerns that are addressed by current systems. A large number of concerns that the public takes seriously enough to file complaints are not deemed worthy of disciplinary attention. Levin offers an outcome-based assessment of state systems, pointing to structural flaws as the source of lenient treatment.

As evidence of lenient treatment, Levin points to the predominance of private admonitions and the use of such brief suspensions that attorneys may continue to practice. Levin explains that the predominance of "light treatment" is due to a lack of uniform standards that leaves decisions to the discretion of attorneys involved in the discipline process.

Indeed, in many states, lawyers—not judges—continue to impose most lawyer discipline and their determinations often are not reviewed by courts. Even when a court does review these

95. See Dubin, supra note 6; Levin, supra note 18.
96. Levin, supra note 18, at 5-6 (citations omitted).
97. Id. at 8-9.
98. Id. at 9.
99. See id. at 46 (Levin notes that "[f]rom the public's perspective, admonitions permit lawyers to be treated leniently behind closed doors and deprive the public of information about a lawyer's full disciplinary history.")
100. See id.
101. Id.
determinations, they may be afforded great deference. Who you are, where you practice, and who you know can directly affect the severity of the sanction imposed and the lawyer's ability to continue the practice of law.  

The use of "light treatment," including the use of private admonitions, is designed to protect the accused attorney's reputation in cases where the misconduct is minor or causes little or no injury. However, Levin points out that the public needs protection from the types of misconduct that warrant these sanctions and that these practices "effectively value[] the lawyer's reputation over the protection of the public." Even if the minor misconduct discussed does not directly harm the client, failure of the legal profession to address such conduct creates public perception of a disciplinary system that is self-preserving. As a profession dedicated to serving the public by definition, attorneys have an obligation to address the concerns of the public. If the profession does not have the trust and respect of the public, it cannot effectively serve that public.

Levin suggests strict standards for imposition of sanctions as a solution to the disparity between misconduct and sanctions. This remedy addresses the "symptom" of disparate treatment but fails to address the greater problem of bias inherent in the self-regulation system, or public perception of such bias. While standards for the imposition of sanctions are necessary to consistent application of ethics rules, attorney self-regulation systems must be structured to combat inherent bias, such as suggested in Parts II and V.

The ABA recognizes problems of self-interested behavior and unresponsiveness as well, especially when state bar associations perform many of the functions of the discipline system. The ABA Disciplinary Commission states that regulation by bar officials, often involved in the formal disciplinary process, creates "the appearance of conflicts of

102. Id. at 10-11.
103. See id. at 46.
104. Id.
interest and the appearance of impropriety. The Commission also reports that some jurisdictions dismiss up to ninety percent of complaints as failing to allege unethical conduct, that the reasonable expectations of clients are not addressed by existing systems, and that "there is significant distrust of the fairness and impartiality of self-regulation." Thus, national criticism of disciplinary systems from consumer advocates, academics, and the ABA suggests that unresponsiveness, inadequacy, and public perception remain concerns in a variety of different procedural systems.

B. Criticism of Specific State Discipline Systems

Across the country at the state level, criticisms are similar. In Wisconsin, newspapers last fall announced that distrust of attorney discipline systems was well-founded. They reported that the Wisconsin Board of Attorney Professional Responsibility had been criticized by its own administrative staff as protective of attorneys and unfair, and that the ABA had found the system "less consumer friendly than it might be." Similar reports stated that members were accused of making lawyer-friendly decisions, becoming involved in cases in which there was a conflict of interest, and improperly influencing investigations. While the Board's administrative committee denied the allegations, a negative impression on the public had already been made. In response, the Wisconsin Supreme Court reassessed the entire discipline system, a process that involved both a public hearing in review of the system and review by an ABA Discipline System Assistance Team.

106. MCKAY REPORT, supra note 7, at 1.
107. See id. at 11.
108. See id.
109. Id. at 23.
110. See Jones, supra note 3, at 2.
111. See id.
112. Id.
113. See Segall, supra note 2, at 1B.
114. See id.
115. See id.
116. See id.
117. See Wisconsin Supreme Court, In the Matter of Review of the Lawyer Disciplinary System, Order No. 99-03 dated October 1, 1999 (on file with clerk of Wisconsin Supreme Court).
118. See ABA, Preliminary Draft of the Report on the Wisconsin Lawyer Disciplinary System (Sept. 1999)(on file with the author and the clerk of the Wisconsin Supreme Court).
Although it was apparent that the Wisconsin Supreme Court was prepared to make changes in the disciplinary process, journalists continued to warn the public of its inadequacies. A December 1999 article criticized the discipline system, citing that only two-tenths of one percent of complaints lead to public discipline and that the process "is cloaked in secrecy." The article further noted:

Want to find out how many complaints have been filed against a particular attorney? You can't, unless the offenses were egregious enough to send to the high court for review. Want to know if your attorney has ever been reprimanded by the state board? Again, you can't, unless the board decides to issue a relatively rare public reprimand—or the attorney does something really bad later and gets sent up before the Supreme Court, which opens up the lawyer's disciplinary file.

The article states that many attorneys consider the discipline system a "big joke" and explains that habitual offenders face no specific limit on the number of violations allowed before their ability to practice is threatened. In Wisconsin, as in many other states, the attorney discipline system must continually combat criticism with policies that inspire public confidence.

Similar levels of public dissatisfaction in California led the state legislature to investigate their discipline system in the early 1990s. Investigators found the system "slow, unresponsive, and overly-protective of the interests of lawyers rather than the public interest." Criticism of the California system at that time focused on the fact that the system was largely run by the State Bar and that the organized bar was unable to promote the public interest over the professional interest of its attorneys. The California critique focused on the familiar question of the "legitimacy of lawyer self-regulation." While the California system was dramatically altered, the State Bar actually

120. See id.
121. Id.
122. Id.
123. Id.
124. See id.
125. Gallagher, supra note 31, at 490.
126. See id. at 491.
127. Id.
expanded its authority.128 Increased funding, organization and staff were implemented to increase the system's efficacy.129 As in California, criticism at both the national and state level is often accompanied by suggestions to improve both the public image and efficacy of discipline systems.

V. MEETING THE CONCERNS OF THE PUBLIC

The consumer focus in lawyer discipline is a relatively new idea, the first evidence of which was the 1970 ABA Clark Report on the status of disciplinary enforcement against lawyers.130 Some scholars suggest that historical events of the 1970s served as the impetus for reform.131 The Nixon impeachment scandal, in implicating the United States Attorney General and other government officials, shook public confidence in the justice system and the legal profession.132 Another suggestion is that social factors leading to public distrust of the legal profession began in the late 1960s with the civil rights movement, as the role of the legal profession in upholding a racist social system in the South became suspect,133 and continued to worsen into the 1970s:

128. See id.

129. In the years following these reforms, California State Bar dues increased steadily. See Steve Albert, Discipline Doesn't Come Easy; Better but Still Flawed, the State Bar's Disciplinary System Struggles to Improve While Facing Possible Cuts, RECORDER, May 9, 1994, at 1. In 1994, over seventy percent of the Bar's almost fifty six million dollar budget was dedicated to attorney discipline. See id. Then, in 1997, Governor Pete Wilson vetoed a funding bill that would have mandated a fee of $458 per attorney for 1998. See Mike McKee, RECORDER, Dec. 8, 1999, at In Brief. The Bar continued to operate some programs on the seventy-seven dollar fee authorized by statute, assisted by an emergency assessment of $173 per attorney, authorized by the California Supreme Court. See Howard Mintz, Calif. High Court Issues Emergency Order to Help State Bar Police Lawyers, SAN JOSE MERCURY NEWS, Dec. 3, 1998. The funding crisis appears to be over, as the State Bar adopted a year 2000 budget of $ 82.3 million. Mike McKee, THE RECORDER, December 8, 1999, at In Brief. For more information on the California budget crisis, see Steve Albert, Better But Still Flawed, the State Bar's Disciplinary System Struggles to Improve While Facing Possible Cuts, THE RECORDER, May 9, 1994, at 1; David Kline, Davis Focuses on Education, Doesn't Mention State Bar, Law Matters in His First State of State Address, METROPOLITAN NEWS-ENTERPRISE, January 7, 1999, at 1; David Kline, Supreme Court to Consider State Bar's Request Todaydeck: Meanwhile, 'Stopgap' Bill Amended to Protect State Bar Employees, METROPOLITAN NEWS-ENTERPRISE, June 24, 1998, at 1; Mike McKee, THE RECORDER, Dec. 8, 1999 at In Brief; Greg Mitchell, Court Orders $173 Dues for Attorney Discipline, THE RECORDER, Dec. 4, 1998, at 1; Howard Mintz, Calif. High Court Issues Emergency Order to Help State Bar Police Lawyers, SAN JOSE MERCURY NEWS, Dec. 3, 1998.

130. CLARK REPORT, supra note 87.

131. See Ambrosio & McLaughlin, supra note 6, at 359.

132. See id.

133. See Gallagher, supra note 31, at 532-33 (citing JEROLD AUERBACH, UNEQUAL
Disenchantment with the American policy in Vietnam also contributed to general disrespect for numerous social institutions, including the legal profession. There were increasing pressures on the bar to conform its actual behavior to its professed high ideals of public service and equal justice. Watergate especially... provided a glaring example of the failure of professional values, since most of those involved in the Nixon administration scandal, including the president himself, were lawyers.134

During this turbulent decade, the three-year ABA investigation and ensuing report involved myriad suggestions for reform, including: more adequate funding,135 centralized systems,136 term limitations for disciplinary agency members,137 adequate staffing,138 abolition of required complaint verification,139 and grievant immunity.140 The criticism of the 1970s was met with reform, but scrutiny of attorney discipline systems has continued for three decades.

States have responded to decades of criticism in ways as diverse as the systems they are designed to improve. Some recent successful reforms involve consumer assistance/intake systems to initially field complaints and public participation in the investigative, prosecutorial, and/or adjudicative aspects of the disciplinary process.

A. Consumer Assistance/Central Intake Programs

Georgia was one of the first states to experiment with a central intake system in June of 1995.141 The State Bar of Georgia reasoned that a majority of complaints were dismissed as nondisciplinary in nature, and this was a source of "substantial public disillusionment and

---

134. Id. at 533 (citation omitted).
135. See CLARK REPORT, supra note 87, at 20.
136. See id. at 26.
137. See id. at 39.
138. See id. at 49.
139. See id. at 71.
140. See id. at 74.
141. See Sobelson, supra note 105.
dissatisfaction with the lawyer discipline process.\textsuperscript{142} In response, the Consumer Assistance Program was created with the purpose of "resolv[ing] as many nondisciplinary complaints as possible through conciliation, negotiation, and education... [or through referral] to ancillary services or agencies, such as Fee Arbitration, the Lawyer Assistance Program, the Clients' Security Fund, lawyer referral services, and the like."\textsuperscript{143}

In 1996, the Mercer Law Review reported a positive response to the new system.\textsuperscript{144} In its first year of operation, the Consumer Assistance Program handled almost four thousand phone calls,\textsuperscript{145} actively handled sixty percent of the cases,\textsuperscript{146} and resolved twenty-six percent of the cases without referral.\textsuperscript{147} In addition, the numbers of both requests for grievance forms and grievances filed decreased during the first year of the Consumer Assistance Program's operation.\textsuperscript{148} Decreased complaints show public satisfaction with the handling of minor disputes. In turn, fewer formal complaints by the public improve the reputation of the profession. Georgia's Consumer Assistance Program is a successful model for other state discipline systems desiring to improve their efficiency and consumer focus.

Consumer Assistance/Central Intake systems have been adopted by a number of states following Georgia's successful example. In January of 1999, in response to an extensive review process, Colorado implemented a new attorney discipline system with an education and rehabilitation emphasis.\textsuperscript{149} One of the most dramatic changes to the system was implementation of a Central Intake System for referring matters not covered by the disciplinary system to appropriate programs.\textsuperscript{150}

Diversion through this program is optional on the part of the attorney\textsuperscript{151} and may involve informal resolution of the conflict or referral to an appropriate program.\textsuperscript{152} Programs for referral include mediation,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{142} \textit{Id.} at 387.
  \item \textsuperscript{143} \textit{Id.} at 388.
  \item \textsuperscript{144} \textit{See} \textit{id.}
  \item \textsuperscript{145} \textit{See} \textit{id.} at 388.
  \item \textsuperscript{146} \textit{See} Sobelson, \textit{supra} note 105, at 388.
  \item \textsuperscript{147} \textit{See} \textit{id.}
  \item \textsuperscript{148} \textit{See} \textit{id.}
  \item \textsuperscript{149} \textit{See} Donnelly et al., \textit{supra} note 41, at 58.
  \item \textsuperscript{150} \textit{See} \textit{id.}
  \item \textsuperscript{151} \textit{See} \textit{id.}
  \item \textsuperscript{152} \textit{See} \textit{id.}
\end{itemize}
\end{footnotesize}
fee arbitration, ethics school, attorney assistance programs, or the Colorado Lawyer's Health Program. Ethics school is a previously established program offering general legal ethics training and office management skills training, while the Colorado Lawyer's Health Program aids attorneys with substance abuse or mental health issues. Successful completion of any of the diversion options results in a dismissal of the grievance by the Colorado Office of Attorney Regulation Counsel.

The result of the Central Intake System on the Colorado disciplinary process is a reduction in the number of cases docketed for investigation under the formal disciplinary process. Linda Donnelly, Justice Rebecca Love Kourlis and Justice Michael L. Bender explain that:

The new attorney regulation system shifts the emphasis from punishment to prevention. It will better protect the public as well as educate attorneys. The process will reduce delay and focus resources on the more serious cases filed . . . the court has completely overhauled the attorney regulation process to make it more helpful to . . . the public and to ensure that it operates efficiently and expeditiously.

In Colorado, the public image of the attorney discipline system has been improved by meeting the needs of many consumers previously not addressed by the formal discipline process. The Central Intake System addresses minor misconduct such as fee disputes and poor office management skills, and in the process, demonstrates the legal system's commitment to serving the public.

As recently as 1999, screening and direction as handled by a Central Intake System have been recommended by the judiciary as a way to improve complaint handling in attorney discipline systems, leading to more effective lawyer regulation. Recommendation (D)(1) of the Conference of Chief Justices states in part:

The disciplinary agency, or central intake office if separate,

153. See id.
154. See id.
155. See Donnelly et al., supra note 41, at 58.
156. See id. at 57.
157. Id. at 59 (emphasis added).
158. See id.
159. See A NATIONAL ACTION PLAN, supra note 105.
should review complaints expeditiously. Matters that do not fall under the jurisdiction of the disciplinary agency or do not state facts that, if true, would constitute a violation of the rules of professional conduct should be promptly referred to a more appropriate mechanism for resolution.\textsuperscript{160}

The recommendations go on to suggest that minor misconduct should be referred to the programs to which central intake generally refers:

The state's system of lawyer regulation should include procedures for referring matters involving lesser misconduct to an appropriate remedial program. Such procedures may include:

\begin{itemize}
  \item Required participation in a law office management program;
  \item Required participation in a lawyer assistance program;
  \item Enrollment in an "ethics school" or other mandatory CLE; and
  \item Participation in a fee arbitration or mediation program.\textsuperscript{161}
\end{itemize}

The development of Consumer Assistance/Central Intake Programs is supported by the growing number of states that have successfully implemented such systems and representatives of the judiciary, as improving the efficacy of attorney discipline systems.

A majority of the complaints surrounding state lawyer discipline systems relate to claims of self-serving within the profession and dismissal of claims that the public feels are valid. The development of Consumer Assistance/Central Intake Systems allows states to meet these claims without a dramatic overhaul of the formal discipline process, and without reallocation of the functions within the system. Self-regulation, through either the investigative or prosecutorial functions, may be a legitimate way to regulate attorneys and serve the public as long as there is some alternate system for resolving complaints that do not reach the level of misconduct requiring formal discipline. The Consumer Assistance/Central Intake Systems models of Georgia and Colorado meet the public desire to have less serious concerns addressed through the attorney discipline system. At the same time, formal procedures may be conducted by attorneys who are best equipped to investigate and prosecute the types of problems or

\begin{itemize}
  \item \textsuperscript{160} Id. at 34.
  \item \textsuperscript{161} Id. at 35 (quoting Recommendation (D)(2)).
\end{itemize}
misconduct that arise within the profession.

B. Public Involvement in State Disciplinary Proceedings

Another way to safeguard the public, largely within the scope of present state attorney discipline systems, is the use of members of the public in some or all of the steps in the process. Public criticism stems from "closed" systems of discipline that purportedly hide inconsistencies, cronyism, and lenient sanctions behind a veil of secrecy. The most logical way to dispel those criticisms is to allow members of the public into the discipline system. Such policies allow discipline boards the benefit of the perspective of public members in difficult discipline decisions. Public criticism of the system is less formidable when the public is scrutinizing decisions of its own members who are disinterested in the preservation of reputations or careers within the legal profession. Many states utilize public membership in one or several stages of the discipline process.

In California, the "[S]tate Bar . . . self-regulates as an adjunct of the judicial branch of government." However, non-lawyer members have been a part of the discipline board since 1976, and non-lawyer members also perform an important oversight function. In 1987, the Bar established the Complainants' Grievance Panel to review cases initially dismissed by the intake staff. Members of the public compose almost half of the Panel. The Complainants' Grievance Panel has the authority to review those cases and initiate further investigation or to

162. See, e.g., Gallagher, supra note 31; HALT, supra note 79; Levin, supra note 18; Kelly, supra note 119.
164. Gallagher, supra note 31, at 488.
165. See id. at 566.
166. See id. at 597.
167. See id. The Panel membership is composed of four lawyers and three non-lawyers. The non-lawyer members are appointed by the Governor, the Speaker of the Assembly, and the Senate Committee on rules. See id.
recommend the filing of formal charges.\textsuperscript{168}

The Panel may review the disciplinary process in two ways. First, it may review closed bar investigations when requested by a complainant.\textsuperscript{169} Second, the Panel may randomly audit closed cases.\textsuperscript{170} This unique role is intended to protect the public, but has posed some difficulties in implementation.\textsuperscript{171} For example, prosecutors point out that the Panel views cases out of context and challenges the prosecutorial discretion of the investigative staff, creating additional pressure in an overworked system.\textsuperscript{172} The Panel agrees with the decisions made by other offices over seventy percent of the time, and has been found valuable in highlighting problems within the discipline system.\textsuperscript{173}

The importance of the public review element is evident in the approximately thirty percent rate of disagreement upon review. This number represents the disparity between successful outcomes based on the public's perspective and that of the legal profession. The number suggests that the Panel serves as a useful check within the system, and may be used to gauge the success of other efforts to improve the system.

California's approach to public participation in the disciplinary system is unique in preserving the right to self-regulation and largely reserving prosecutorial discretion for lawyer members. The Panel adds a distinct oversight role to the discipline process, rather than taking over a role previously filled by attorneys. In the process, the Panel provides valuable insight into the efficacy of the process and suggestions for continual improvement.

In New Jersey, the disciplinary system underwent a dramatic series of changes from 1979 to 1996, under the leadership of Robert Wilentz as Chief Justice of the New Jersey Supreme Court.\textsuperscript{174} Justice Wilentz strongly believed in the importance of public satisfaction with the legal profession\textsuperscript{175} and strove to achieve this in part through public participation in most aspects of the disciplinary process.\textsuperscript{176}

\begin{footnotes}
\item[168] See Gallagher, \textit{supra} note 31, at 597.
\item[169] See id.
\item[170] See id.
\item[171] See id.
\item[172] See id.
\item[173] See id. at 598-99.
\item[175] See Ambrosio & McLaughlin, \textit{supra} note 6, at 380.
\item[176] See id. at 380-81.
\end{footnotes}
Two aspects of the system involving members of the public are the DECs and the Disciplinary Review Board ("DRB"). The DECs perform initial investigation and prosecution functions. The DECs consist of at least eight members, two of whom must be public members, and DEC hearing panels are three members, one of whom must be a public member. The DRB has appellate jurisdiction and also utilizes members of the public. The DRB includes nine members, at least three of whom are members of the public, and all members are appointed by the supreme court for three year terms. Public membership is essential to the functioning of the New Jersey disciplinary system. The New Jersey Supreme Court has noted:

We increase public participation despite the obvious specialized nature of these matters that often require legal training for full understanding; we do so because of our belief that the public has something valuable to contribute to the process and to increase the confidence of the public in this important aspect of our system of justice.

Chief Justice Wilentz dedicated his seventeen-year tenure to improving public opinion of the legal profession; he found public participation in the discipline process an integral part of meeting that goal, as evidenced by his reforms in this area.

---

177. See id.
178. See id.
179. See id. at 374-75.
180. See id. at 378.
181. See id.
182. See id.
183. Id. at 381 (quoting Supreme Court of New Jersey Administrative Determinations Relating to the 1993 Report of the New Jersey Ethics Commission July 14, 1994).
184. Chief Justice Wilentz expressed this goal best himself, at the Law Day ceremonies at the New Jersey Law Center in 1994:

The bar is not loved; it is not appreciated or understood, and one message therefore on today's rededication [sic] . . . risks being lost . . . . It is a message of the importance of attorneys, their importance to our system of justice and to society. And it is a message of their dedication and their honesty. I'd like to help deliver that message since practicing law was once my life.

185. See id.
For states that do not utilize public participation in the disciplinary process, criticism follows. In Michigan, for instance, public participation in the disciplinary system was one of the main suggestions in a recent law review article calling for reforms to "better protect the public."\footnote{Dubin, \textit{supra} note 6.}

Lawrence A. Dubin, a professor at the University of Detroit Mercy School of Law and former chair of the Michigan Attorney Grievance Committee,\footnote{Id. at 701.} states that based on the Disciplinary Board's 1995 Report,\footnote{1995 Mich. Atty. Disc. Bd. and Atty. Griev. Comm. Joint Ann. Rep.} there were 4000 requests for disciplinary investigations, while only 196 orders of discipline were entered against attorneys in Michigan.\footnote{See Dubin, \textit{supra} note 6.}

Dubin suggests several reforms to improve the system, including increased inclusion of public membership in the disciplinary process.\footnote{See id.}

The Michigan Attorney Disciplinary Board has as its trier of fact hearing panels consisting of three attorneys.\footnote{See id. at 676.} The panels act by majority vote and require a quorum of two members.\footnote{See \textit{id.}} Dubin suggests that the membership of the panels consist of two attorneys and one public member, as the Michigan Attorney Grievance Commission suggested in 1986.\footnote{See id. See also A.B.A., \textit{Report of the Commission on Evaluation of Disciplinary Enforcement to the American Bar Association} (May, 1991).}

Dubin points out that implementation of this suggestion would serve the ultimate goal of protecting the public and that such a policy is recommended under the ABA standards for attorney discipline systems.\footnote{See id.} The Michigan system currently utilizes members of the public on both its Attorney Grievance Commission, which handles the investigative and prosecutorial functions, and Attorney Discipline Board, which is responsible for performing the adjudicative functions within the system.\footnote{See Dubin, \textit{supra} note 6, at 676.}

The 1999 Conference of Chief Justices also supports public participation in the discipline process. Under the heading of public outreach, the Justices state, in part:

The participation of the public should be supported in all levels
of court and bar institutional policy-making by judges, lawyers, and bar programs. Judges, lawyers, and bar programs should:

- Publicize the nomination and appointment process for public representatives on court and bar committees;
- Once appointed, provide lay members access to the tools necessary for effective participation.\(^{196}\)

The comment to the suggestion notes that public members bring a "fresh perspective\(^{197}\) and "common sense,\(^{198}\) and notes that public members should not only participate, but have the tools to participate actively.\(^{199}\) The judiciary, which properly controls the disciplinary system, thus supports public participation as adding depth and perspective to the discipline process, both of which support the goals of attorney discipline.

Public participation in one or more of the investigative, prosecutorial, adjudicative, or oversight functions improves the public image of attorney discipline systems in two ways. First, discipline systems that utilize public members dispel the image of cronyism and self-serving among members of the legal profession in self-regulation.\(^{200}\) Second, members of the public add a valuable perspective on the public's expectations and needs regarding the legal profession.\(^{201}\) Their presence on disciplinary boards ensures that the public is protected through impartial decision-making. The many ways that public members are introduced into the disciplinary process in California, New Jersey, and Michigan show that at any stage in the process, public membership may be used to ensure fair decision-making and public confidence in the system.

Self-regulation by the legal profession is criticized and distrusted, both by the public and by members of the profession. Attorney discipline systems have been publicly criticized for the last three decades, notably beginning in 1970 with the ABA Clark Report,\(^{202}\) which called for widespread reforms. Since then, many states have made a

---

196. A NATIONAL ACTION PLAN, \textit{supra} note 105, at 41.
197. \textit{Id.}
198. \textit{Id.}
199. \textit{See id.}
201. \textit{See, e.g.,} A NATIONAL ACTION PLAN, \textit{supra} note 105.
202. CLARK REPORT, \textit{supra} note 87.
variety of changes in their disciplinary system structures to address criticism and better protect the public.

This Comment offers three essential characteristics of effective attorney discipline systems: judicial control, strictly separated prosecutorial and adjudicative functions, and adjudication independent of state bar associations. Examples of select discipline systems, including one state's approach to regulating other professions, illustrate the many ways discipline systems may be organized under the general guide of these characteristics.

Recently, state discipline systems have continued to be criticized for failure to protect the public and for promoting the interests of the profession above those of the public. Many of these criticisms may be addressed without radical structural change of the present systems, through the implementation of Consumer Assistance/Central Intake programs and improved public participation in different aspects of the discipline process. Central Intake Systems address public concerns through alternative referrals and hold attorneys accountable for minor misconduct without damaging important professional reputations through formal discipline. Public participation in the discipline process is important to effective and impartial functioning of the process. Both appropriate intake systems and public participation improve the efficacy of and promote public confidence in state attorney discipline systems. Both the public and professional groups will continue to scrutinize methods of self regulation by the legal profession. To preserve its effectiveness, the profession must dispel poor public perception with policies that truly protect the public as well as the integrity of the legal profession.

JENNIFER M. KRAUS*

203. See Engerman, supra note 66.

* The author wishes to thank Professor Michael K. McChrystal of Marquette University Law School for his encouragement and insight, Stuart Engerman from the Wisconsin Department of Regulation and Licensing for providing helpful material and her family, including her fiance, for their support.