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DUMPING DISCIPLINE: A CONSUMER PROTECTION MODEL FOR REGULATING LAWYERS

by Deborah M. Chalfie*

[T]he public incorrectly perceives the [lawyer disciplinary] system as a consumer protection agency which it is not.

—*State Bar of Texas, to a legal consumer*¹

I. Introduction

More than twenty years ago, the American Bar Association (ABA) made its first-ever national study of lawyer discipline systems. It concluded that the state of lawyer discipline was "scandalous":

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions....²

The ABA further concluded that "[t]he profession does not have much time remaining to reform its own disciplinary structure. Public dissatisfaction is increasing."³

Since the time of the ABA study, numerous reforms have been adopted. Funding for discipline agencies has increased. Professional personnel have largely replaced all-volunteer staffs. Enforcement, once the domain of local grievance committees, has become increasingly centralized in statewide agencies. Non-lawyers have been added to agency governing boards and grievance panels. These and other subsequent reforms, however, have not quelled public criticism of the lawyer discipline system.

If anything, criticism has intensified; from a consumer's point of view, nothing has really changed.⁴ In most states, the discipline process is conducted in secret until final sanctions, if any, are im-

posed. The discipline rules still do not cover most consumer complaints. Of the more than 100,000 complaints registered against lawyers each year, more than 90-95 percent are dismissed.⁵ When a complaint is not dismissed, the system grants the accused lawyer almost all of the procedural rights of a criminal defendant. When misconduct is found, secret discipline and light penalties prevail. Finally, the entire discipline system is designed, run and supervised by lawyers. Public participation in discipline policy-making and enforcement is rare.

However, one thing has changed. In the late 1970s, consumers of legal services organized. Citizen activists pressured state bar associations and discipline agencies to make simple reforms. The consumers demonstrated, testified, held speak-outs and press conferences, and pushed for legislative action. In the face of such challenges, the ABA formed a second lawyer discipline commission in 1989. The commission, headed by the now late Professor Robert McKay, was charged with studying and evaluating the progress made since the first study of lawyer discipline. This time, unlike during the ABA's first study, a great number of consumers were in attendance. In five public hearings around the country, consumers and consumer advocates voiced their concerns to the McKay Commission. Hundreds of consumers told horror stories about their experiences with the attorney discipline system.

The main problem is not that discipline systems are not working well enough. Rather the entire discipline model—the regulatory structure, objectives, responses and process which constitute lawyer discipline—make the discipline model itself the problem. Even if discipline agencies operated perfectly, the discipline model largely ignores consumer concerns.

Public discontent with lawyer discipline stems from the fact that lawyer discipline systems are indeed not consumer protection agencies.

This article explains why discipline will never work for consumers, and what kind of regulatory scheme should replace it. Part II of the article describes and critiques the current system, the so-called "discipline model" of lawyer regulation, from a consumer point of view. Because its structure, objectives, responses, and process for dealing with lawyer misconduct are self-serving and ultimately unresponsive to consumers' needs and expectations, the article argues that discipline is simply the wrong model for regulating lawyers. Part III of the article outlines an alternative model for regulating lawyers that is solidly grounded in consumer protection principles. It identifies the concrete rights consumers need and deserve, the responses and remedies that ought to be available to consumers, and the

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In 1990, the author originally wrote about this subject in the form of testimony for HALT—An Organization of Americans for Legal Reform, when she was their Legislative Director. That original testimony, which was presented to the American Bar Association Commission on Evaluation of Disciplinary Enforcement, has been updated for purposes of this article. Although this article speaks in terms of lawyer regulation, the basic precepts enumerated here apply with equal force to the regulation of nonlawyer legal service providers.

HALT is the only national organization of legal consumers working to make the legal system more accessible, and lawyers more accountable, to the public. The author gratefully acknowledges HALT's policy and advocacy work on lawyer regulation over several years, as well as the comments of present and former HALT staffpersons Kay Ostberg, Glenn Nishimura, Karen Winfield, and John Pomeranz on the original testimony. In addition, a former HALT staffperson, Carol Bergman, conducted much of the research on other consumer protection models and systems that underpins this article.

process by which consumers should obtain these remedies.

In May, 1991, the ABA's Commission on Evaluation of Disciplinary Enforcement (the McKay Commission) issued a report of its findings and recommendations. This article therefore concludes with a summary of those recommendations as well as some predictions for what will happen when the ABA House of Delegates takes up the recommendations in February, 1992. Because of the ABA's influence on actual state discipline rules and operations, its decision regarding the Commission's recommendations will affect the lives of legal consumers for years to come.

II. The Discipline Model

A. The Wrong Objectives: Maintaining Ethics⁶

Consumers have long criticized attorney discipline agencies for being unresponsive to consumer complaints, and every study conducted to date has reached the same conclusion.⁷ The main reason discipline agencies ignore most consumer complaints is that a huge disparity exists between the type of complaints clients make to discipline agencies versus the type of complaints upon which the agencies are empowered to act.⁸

Lawyers and judges are in the best position to observe lawyer misconduct and have an ethical obligation to report it. Yet, the overwhelming majority of the complaints made to discipline agencies are filed by clients rather than lawyers.⁹ Clients mostly complain about incompetence, neglect, and overcharging.¹⁰ In other words, clients tend to complain about the contractual aspects of the lawyer-client relationship: Was the work performed well? Was it performed on time? Was it performed at the agreed-upon, or a reasonable, price?

Yet, discipline agencies act on only a fraction of these complaints. Nationwide, more than ninety percent of all discipline complaints are dismissed.¹¹ The bulk of these complaints are dismissed at the screening stage because they are considered outside the agency's jurisdiction, which is confined to

enforcing the ethical rules that govern lawyers.¹² Thus, even if all the complaints about overcharging, neglect, and incompetence are true, they state no violation of the ethical rules and are therefore dismissed.¹³ Yet the bar points to the mere existence of the lawyer discipline system as the justification for resisting the development of additional regulatory schemes.

The stated purpose of the discipline model is to "educate, investigate and, if necessary, discipline lawyers whose conduct falls below the established minimum levels of the ethical rules governing the profession."¹⁴ According to this standard, "unethical" is understood to mean bad moral character in the most general sense, and refers to those who intentionally commit immoral acts.¹⁵ The prevailing mindset in discipline agencies is that such villains are believed to be few in number¹⁶ compared to the vast majority of lawyers. By weeding out and expelling¹⁷ from the barrel those few bad apples who violate the minimum standards, discipline keeps the rest of the profession ethically clean.¹⁸

The discipline model's narrow focus is illustrated in the three to five percent of the cases in which lawyers are actually disciplined. Convictions for crimes in general, such as for tax evasion or drug offenses, and criminal-like conduct, such as misappropriation of client funds, are among the most common bases for the imposition of discipline.¹⁹ Discipline for soliciting cases (ambulance-chasing) and aggressive or distasteful advertising practices are a somewhat smaller, though well-publicized, staple of grievance committee activity.²⁰

Clients understandably think "ethical" means treating clients well. After all, legal ethics, which are contained in state codes of professional responsibility, are the only regulatory rules that lawyers must follow. In addition, virtually all of the rules are phrased in public protection terms. However, when the content of the ethical rules themselves and the manner in which they are interpreted are analyzed, "ethical" seems to relate only to upholding the profession's

public image and economic status.

For instance, some of the rules condemn behavior that suggests bad moral character—felonies of any sort, fraud, theft, and other acts of "moral turpitude" committed against clients or others.²¹ These rules are the essence of what lawyers mean by "ethics." These rules, however, amount to little more than proscriptions against crime, a form of protection that consumers already have which yields little concrete benefit to those who have been harmed. Other rules prohibit lawyers from engaging in the unauthorized practice of law (or helping others do so) and strictly limit advertising and the solicitation of cases.²² Though couched in consumer protection terms, these rules have consistently been criticized by consumers and others²³ as protecting the profession at the expense of the public by insulating lawyers from competition.

Of course, the rules of professional responsibility also contain many provisions directly addressing the treatment of clients. Lawyers are supposed to be loyal to their clients and zealously represent a client's interests. This means that lawyers are not supposed to neglect cases, perform incompetently, or overcharge their clients.²⁴ However, these rules contain no meaningful standards²⁵ and are therefore of little discernible effect. Thus, the rules are interpreted to proscribe only the most blatant, extreme instances of abuse. To rise to the occasion of a disciplinary violation, the neglect must be repeated or intentional, the overcharge must be unconscionable, and the negligence must be gross.²⁶ Consequently, complaints under such provisions are routinely trivialized and discredited by discipline agencies as mere communication problems.²⁷

Consumers complain when a lawyer bills more per hour than the client makes in a day, or even a week, and then fails to do the work. This forces the client to find and pay another lawyer to do the same preparatory work the first one was already paid to do. Consumers complain when lawyers fail to up-

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date them on the case, return their calls, or make time to meet with the consumer. Consumers complain when they are issued a final bill of 50-500 percent more than the original estimate. Consumers complain when they learn at trial that the lawyer failed to follow-up on the client's suggestions for sources of relevant evidence. Consumers complain when the lawyer keeps asking for continuances and never seems prepared to move forward.

If a car mechanic did the equivalent of any of these things—took money without fixing the car, charged five times more than the original estimate, failed to call and let the consumer know when the car was ready, delayed the pick-up time repeatedly, or repaired the car incorrectly—the consumer would not consider such problems a mere breakdown in communications. These complaints address the essence of the buyer-seller contract.

Having the wrong objective—maintaining minimum ethical standards—inevitably leads to misguided rules and enforcement priorities. Although keeping the profession ethical in some lofty sense may arguably be a worthwhile goal, it is practically irrelevant to consumers' needs in the context of the lawyer-client relationship. When rules addressing the treatment of clients are either nonexistent or trivialized to the point of nonenforcement, the only operative parts of the system left are the parts that protect the profession's image. It may be comforting to know that your lawyer does not possess a police record, but it would be equally comforting to know that your lawyer is legally required to complete the work she or he was hired to do competently, promptly, and economically.

B. The Wrong Response: License Tinkering

The discipline model's incorrect objective of maintaining minimum ethical standards rather than protecting legal consumers results in the wrong response: discipline. As its name suggests, discipline does

more to punish a bad lawyer than to resolve and remedy a client's complaint. Temporary or permanent revocation of a lawyer's license to practice law is intended to rid the profession of bad apples and to deter others from misconduct. Even the much-used²⁸ penalty of a reprimand or admonition is punitive in nature, like a scolding or a demerit on the attorney's record (or off-the-record, in the case of private reprimands).

Discipline does more to punish a bad lawyer than to resolve and remedy a client's complaint.

These license-tinkering mechanisms are not totally devoid of public benefit. Certainly, the public prefers to avoid outright thieves and those who habitually abandon their clients. To the extent these menaces are indeed removed, discipline protects consumers from future acts of wrongdoing in the same way that putting a criminal in jail helps protect potential victims from that criminal. But, just as jailing a criminal does absolutely nothing of consequence for a criminal's past victims, the discipline system does nothing of consequence for a lawyer's past victims.

Restitution, specific performance, damages, and other kinds of relief that complaining consumers often deserve rarely accompany the imposition of discipline.

Absent within the discipline model are two key features of any adequate consumer protection system: dispute resolution and redress. Although these two features are often related, they represent distinctly different consumer needs. All dissatisfied customers need dispute resolution, particularly those who wish to maintain an ongoing relationship with their lawyer. Only those who have suffered a loss of some sort need redress. The discipline model is ill-equipped to provide either. Most complaints are dismissed and therefore go unresolved. More

to the point, restitution, specific performance, damages, and other kinds of relief that complaining consumers often deserve rarely accompany the imposition of discipline.

Those consumers who want redress are typically told to go find yet another lawyer and sue for malpractice or breach of contract. Malpractice lawsuits are no answer, however, because their practical utility for consumers is largely a figment of lawyers' imagination. The difficulty in finding new counsel to take on a malpractice case against a fellow lawyer, the time involved, the cost of bringing suit in comparison to the amount at stake, and the complexity and risk that must be overcome to win,²⁹ all combine to make lawyer malpractice litigation an impossibility for most consumers. Though slightly less risky, breach of contract litigation still involves most of the same insurmountable hurdles.

Malpractice litigation suffers from the same deviance³⁰ orientation as discipline. That is, legal standards in malpractice litigation assume that most lawyers are competent, and then ask whether the accused lawyer substantially deviated from the standard practice of the legal community. Whether the lawyer deviated from the client's legitimate expectations or served the client well is legally irrelevant. Lawsuits, therefore, cannot fill the discipline model's gaping holes.

Media exposés have made the public increasingly aware that lawyer discipline agencies rarely act on consumer complaints and, when they do, fail to provide any remedy to the consumer. Because of the public relations headaches that flowed from these exposés, the legal profession eventually attempted reform by appending several dispute resolution and remedial programs onto the discipline system. As valiant as attempts to bridge the remedial gap have been, they all fall significantly short from a consumer's point of view.³¹

For example, most states have created statewide or local lawyer-client fee arbitration programs³² to deal with the huge number of fee disputes they receive. However, fee arbitration programs usually are

structured to exclude any consideration of the quality of the lawyer's services in fee-setting, thus circumscribing the kinds of disputes that can be heard. Also, almost every state now has a client security fund, a special fund financed by lawyers' dues to reimburse clients who have been victims of lawyer theft. However, client security funds are typically limited only to reimbursement for theft, and regardless of the amount of money stolen, all funds have caps on the amount clients can recover. None of the remedies address neglect in a way that prompts the lawyer to remedy the situation. Finally, all of these programs, if not actually run by the state bar association, are controlled and dominated by lawyers. This results in an intimidating system inevitably partial toward lawyers.

A good occupational regulation scheme should include sanctions that consist of license-tinkering, especially a disbarment option for egregious anti-consumer conduct. It should also include private rights of action such as malpractice lawsuits. But these should not be the only responses. The discipline model's abdication of responsibility to make sure that consumers harmed by lawyers have a meaningful remedy is the greatest failing of the discipline model.

C. The Wrong Process: Quasi-Criminal

The discipline model's focus on unethical bad guys, as opposed to lawyers who fail to keep their end of the bargain, is also demonstrated by the quasi-criminal apparatus and process used for acting on complaints. Even much of the discipline system's terminology is borrowed from the criminal system. Agencies typically rely on an indictment-like finding of "probable cause" in deciding which cases to "prosecute". Upon finding probable cause that a violation of the ethical code has occurred, the agency prosecutor presents the case at a hearing and later before the state supreme court. The respondent-attorney has practically all of the procedural due process rights of a criminal defendant. These rights usually include the

right to a hearing, the right to hear all testimony, the right to cross-examine the client, and the right to appeal. Mitigating and aggravating factors, which argue in favor of decreasing or increasing a penalty and are used in criminal sentencing, are likewise considered in deciding what discipline to impose upon an attorney. For example, a lawyer's personal and emotional problems, inexperience, or lack of a prior discipline record³³ are often cited as justifications to excuse or reduce the sanction. On the other hand, a lawyer's refusal to cooperate with the agency, lack of remorse, or extensive prior disciplinary record³⁴ often result in the lawyer receiving the discipline which she or he originally deserved.³⁵

A complaining client is usually reduced to the role of complaining witness, just like a victim of a crime. Like a crime victim, a complaining client has far fewer rights³⁶ than the person accused. Although not identical, the relative position of the parties in the proceeding, the nature and weight of the interests at stake,³⁷ and the resulting lopsided allocation of procedural rights is roughly the same in the attorney discipline process and the criminal process. Clients are so marginalized that discipline agencies often neglect to inform them of important agency actions such as dismissal of their complaints or imposition of discipline.

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From a consumer's perspective, however, there are a few significant deviations from the criminal process that are worth noting. Most states screen complaints, hold hearings, and make discipline decisions in secret. In the majority of states, the case records and information about them become public

only if and when public discipline is recommended to or imposed by the state's highest court.³⁸ Because of the secrecy requirement, half to three-fourths of all states impose upon complainants a gag rule that forbids them from talking with anyone about the existence or substance of their complaint.³⁹ There is no analogue for this gag rule in the criminal system. In addition, client complaints that are dismissed, and those that end in private reprimands, are kept confidential from the consuming public. Nothing comparable to secret acquittals and secret sentences exists in the criminal system. Also, unlike the criminal justice system's requirement for a speedy trial, discipline proceedings often continue for years.⁴⁰ Meanwhile, the lawyer is out "on bond", free to practice and possibly harm more consumers.⁴¹ It would seem, then, that complaining clients suffer from all of the liabilities of the criminal process yet reap none of its benefits. If consumer protection is key, lawyer regulation should not be modeled after the criminal justice system.

D. The Wrong Regulatory Structure: Self-Regulation

In every single state, lawyers are regulated solely by other lawyers. In many states, the discipline agency is run by the state bar association where the governing board of the bar is the governing board of the attorney discipline agency. In other states the disciplinary agency is structurally independent of, but still heavily influenced by the state bar association. In all cases, however, lawyers dominate the governing boards that make the rules, the staff that screens complaints, and the hearing panels that decide whether to recommend discipline. Finally, it is lawyer-judges on state supreme courts who decide whether to impose discipline. Because state supreme courts in almost every state have made the power to regulate lawyers an exclusive power of the courts,⁴² the legal profession is beyond the regulatory reach of state legislatures. Thus, consumers have no input in or control over discipline policy-making and enforcement.

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There is a built-in conflict of interest⁴³ in any system of self-regulation. In the case of lawyer regulation, the source of this conflict is two-fold. First, a conflict of interest is inevitable when an agency is charged with protecting the interests of multiple constituencies who have opposing interests, or who have actual disputes with one another.⁴⁴ This conflict is aggravated when the agency is also a trade association, as is the case with bar associations. Lawyers' trade associations cannot simultaneously advance the interests of lawyers and advance the interests of consumers without sacrificing someone's interests. Unfortunately, it is usually consumer interests that are sacrificed.

Beyond the conflict of interest that results from charging an agency with conflicting responsibilities, a conflict of interest exists in allowing lawyers to regulate other lawyers. There is nothing unique in this conflict-of-interest criticism of lawyer self-regulation. Lawyers may be able to judge other kinds of disputes between other kinds of parties impartially, but "[n]o licensed vocation is well situated to assess the points at which public and parochial interests diverge."⁴⁵ Aggrieved legal consumers should not be expected to take their complaints to a panel of lawyers any more than aggrieved tenants should be expected to take their complaints to a panel of landlords.

Nor does oversight of discipline by state supreme courts cure the conflict-of-interest problem. Supreme court justices are lawyers; they may not be currently-practicing lawyers, but they are lawyers nonetheless. For the most part, judges are exclusively selected from lawyers' ranks, and upon leaving the bench commonly return to law practice. Besides, in reality, courts are too busy to take an active hand in regulation and so they delegate the job to lawyers (in and out of bar associations) and defer to their judgment.⁴⁶

The legal profession claims self-regulation is necessary and desirable because "only lawyers know

when a fellow lawyer made a mistake," or "lawyers have the highest stake in getting rid of the bad apples." If the word "doctor" or

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"car manufacturer" was substituted for "lawyer" in these claims, lawyers would be the first to challenge this conflict of interest. When it comes to consumers of legal services, however, the legal profession instantly becomes blind to its conflict of interest. Self-regulation results in an obliviousness to consumers which is characteristic of the discipline model.

III. The Alternative: A Consumer Protection Model

From a consumer's point of view, there is no question but that the discipline model must be scrapped, and that a consumer protection system must take its place. Under a consumer protection model for regulating lawyers, the regulatory structure, objectives, responses, and process would be radically different. When it comes to lawyer regulation, the bar usually shudders at hearing lawyers' services compared to the services of auto mechanics or the like, believing it denigrates the profession. The sad truth, however, is that despite the importance of legal services both to individuals' lives and to the vindication of legal rights generally, consumers appear to be better protected when having a car fixed than when hiring a lawyer. Lawyers, therefore, should be regulated more like auto mechanics.

The key question thus becomes, "What should this new consumer protection system look like?" The consumer protection laws, remedies, and processes now available to consumers in other non-legal contexts are a starting point. To-

gether with what we already know about the pitfalls of professional regulation and the needs of consumers of legal services, it is possible to devise a new model of legal consumer protection.

Although no state currently has such a consumer model in place, the key objectives and attributes of any adequate replacement are clear.⁴⁷ The agency in charge should be wholly independent of the bar, publicly dominated and publicly accountable, and all of its operations should be open to public scrutiny. The agency's services should be accessible to all consumers in terms of cost, user-friendliness, and visibility. In handling complaints, the agency should be pro-consumer in orientation but impartial in deciding disputes. The process should be speedy and enable the parties to actively participate in dispute resolution. Disputes should be resolved, harm should be redressed, and the results or remedies should be final and carried out.⁴⁸

A. The Right Regulatory Structure: A Publicly-Dominated, Independent Agency

Because of the inherent conflict of interest in self-regulation, the pivotal first step in creating a new system for regulating lawyers is to take all consumer protection functions away from lawyers—as individuals, as organized bar associations, or as supreme court justices—and invest them somewhere else. This could be a new agency or an existing agency, but non-lawyers should dominate the entire regulatory process, from making the policy that governs the system to hearing and deciding complaints. Our entire jury system rests on the notion that non-experts can and should decide even the most complex cases.

The same kinds of agencies and officials who now regulate auto mechanics, such as state consumer protection agencies and state attorneys general,⁴⁹ are obvious candidates for handling lawyer regulation. Some of these agencies have been criticized as ineffective in protecting consumer interests, by lawyers⁵⁰ as well as consumer advocates. Much of the time, this is

because these agencies operate according to the same discipline model used by attorney regulation schemes. If a particular state agency has not been effective, consumer advocates and the public are generally aware of it. Thus, they can decide whether to reform an existing agency or to form a new one. More important, placing lawyer regulation firmly within the legislature's power would provide a measure of public accountability which is currently absent. Legislative regulation of lawyers cannot guarantee consumers a perfect system, but it would guarantee them recourse if reforms are needed.

Similarly, in pressing for new enabling legislation, advocates can decide whether existing consumer protection statutes could simply be amended to cover legal services,⁵¹ or whether to pass a whole new law. State "unfair and deceptive acts and practices ("UDAP")" laws already cover a multitude of unfair advertising, contract, and other business practices in other settings.⁵² To the extent that such laws are not adequate to cover the full range of client expectations and meet consumer needs⁵³ however, the agency could adopt specific regulations relating to lawyers. Whether a new law is passed or an old one is amended, new rules for defining and governing the lawyer-client relationship are necessary.

B. The Right Objectives: Consumer Rights

Obviously, it is possible to have pro-consumer laws against theft, fraud, or misrepresentation without a code of professional ethics. After all, consumers are able to secure important rights in their transactions with banks, auto mechanics, and others without ethical codes. For instance, the duty to keep client confidences could easily be replaced with a duty to preserve a customer's privacy, a duty which is imposed on banks and many other businesses. Current restrictions on client solicitation, which purportedly exist to prevent lawyers from placing undue pressure on prospective clients, could be replaced with telemarketing-like rules on disclosure,

cooling-off periods (permitting consumers to cancel a contract after they have had time to "cool-off" from a high-pressure sales pitch) and fraud.

Instead of attempting to identify and weed out unethical behavior, the prime objective of a consumer protection model should be to enforce legitimate consumer expectations as to cost, promptness, and quality of service. Right now, these expectations are not enforced either in the form of consumer rights or ethical obligations. The consumer protection model would view a lawyer's treatment of the client and the lawyer's performance of the contract as a business transaction. Like a business transaction, the lawyer's services would be defined and scrutinized according to reasonable client expectations enacted into law as express consumer rights and according to the contract itself.

The prime objective of a consumer protection model should be to enforce legitimate consumer expectations as to cost, promptness, and quality of service.

Legal consumers should be entitled, by law, to receive accurate and full disclosure of pertinent information in advance of hiring a lawyer. Consumers cannot be expected to make intelligent hiring decisions unless they know all the facts up-front. They need easy access to information, both from the consumer protection agency and from the lawyers themselves. Lawyers should be required to make several disclosures to potential clients prior to being retained. An attorney should offer a summary of the client's options for attaining her or his objectives, including the chances of success, time, and cost associated with each. The client should receive a description of the process for authorizing, calculating and billing fees and other costs. The lawyer should disclose the specific services to be performed, the person expected to perform them, and the level of service qual-

ity to be provided.⁵⁴ Finally, the client should know how changes in circumstances and disputes are to be handled. Although much of this information might initially be given orally, these disclosures and decisions should be incorporated into a plain-language, written contract⁵⁵ soon after the client decides to retain the attorney. Although this process would serve to reduce confusion and disputes, lawyers should also be required to inform clients how and where they can register a complaint about the lawyer's services.⁵⁶

Further, the consumer should have rights to ongoing control of the terms of the bargain. For instance, consumers should have the right to make all important decisions about the case. Importance should be determined by what a reasonable client would consider important. The client should have the right to set parameters on time, cost, and courses of conduct requiring the attorney to obtain the client's permission before exceeding them.⁵⁷ Finally, the client should be able to fire an attorney or to file a complaint without intimidation or other adverse action.⁵⁸

These rights, whether enacted into law or adopted by administrative rulemaking, should also include provisions which insure that consumers are aware of and are able to exercise their rights to control the attorney-client transaction. It is not unusual for service providers to be required to give customers important disclosures about their rights. For example, airlines must notify customers about their rights in the event of overbooking, and credit card companies must notify customers of the process for disputing a charge. Likewise, lawyers should be required not only to provide itemized billings of time and expenses, but also to inform clients, on the face of the lawyer's bill, of their right to control those costs and the process for handling a dispute.

In addition to protecting consumer rights to information and control, the law should also address attorney attentiveness and quality of service. For instance, the consumer should have the stat-

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utory right to receive regular progress reports and to have phone calls returned within a specified reasonable time.⁵⁹ Missing deadlines, as well as less blatant forms of neglect, such as taking too long to probate an estate or asking for too many continuances due to an excessive caseload, should also be proscribed.

Statutory prohibitions on negligent and incompetent service, in particular, would benefit the consumer. However, to be meaningful and helpful to consumers, the standard of care to which lawyers are held accountable would have to be changed from the reasonable lawyer's perspective to the reasonable client's perspective. The standard would thus become, "what would the reasonable client under these circumstances have a legitimate right to expect?" Deviance from consumer expectations about quality would be the touchstone, instead of deviance from prevailing lawyer practice.⁶⁰ If the courts can posit how a reasonable attorney exercising due care should act, agencies and courts should be able to posit what a reasonable client hiring an attorney would expect.

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A shift in focus to the expectations of a reasonable client is a step toward adequate reform, but it is not the end. Still to be determined is whether there should be a single "uniform"⁶¹ standard or instead, many standards that could take into account specialty,⁶² the type of service provider involved,⁶³ or even the contract itself.⁶⁴ Client complaints made to discipline agencies about negligence and incompetence might prove to be a fertile starting place for defining the standard. Whatever standard that is developed would be refined through the adjudication of complaints.

C. The Right Response: Adequate Remedies for Harm

Clients need ready access to a hospitable forum where their grievances are aired and a serious effort is made to resolve and remedy them. For "the aggrieved consumer, the important personal remedy is neither the preventing of future deceptive acts and practices nor the punishment of the misfeasor, but rather restitution for his particular injury. The injured consumer wants either his money's worth or his money back with a minimum of expense and time."⁶⁵ The availability of quick remedial action for the type of problems clients most often experience constitutes one of the most significant advantages of the consumer protection model.

An emphasis on dispute resolution and remedial action does not mean license-tinkering would completely disappear. The power to disbar a lawyer for very egregious conduct should continue to be a part of the agency's panoply of regulatory responses. But, such action would be rare with the addition of remedies and the reversal in emphasis from criminal-like conduct to contract-like complaints. Unfair business practices injunctions and similar legal strategies which can result in the shut down of a business are wholly compatible with enforcement of consumer protection laws, yet carry none of the conceptual or operational baggage of discipline.

Certainly, when a lawyer's poor performance harms a client, compensation for damages should be available to that client. Harming a client is a clearly foreseeable result of negligent performance. If the customer elects arbitration instead of a lawsuit,⁶⁶ however, only contract-like compensatory damage awards should be allowed. That is, only damage awards for actual losses and consequential damages should be available. Traditionally in contract law, punitive and other non-economic damages are considered inappropriate for breach of contract, presumably because the injury is usually a purely financial one. One of the aims of the consumer protection model is to take lawyer-client relations out of the

realm of ethics and place them squarely in the marketplace. If a consumer views her or his injury more like a betrayal of trust, that consumer would remain free to sue for malpractice and to try for a non-economic damage award.

One of the aims of the consumer protection model is to take lawyer-client relations out of the realm of ethics and place them squarely in the marketplace.

In addition to providing damages for poor service, the agency should also be empowered to adjust fees when service is of poor quality but does not lead to concrete loss.⁶⁷ For example, just as consumers can expect to receive a discount on a dented but otherwise usable appliance, legal consumers should be able to receive a discount if an attorney fails to complete the work on time. The ability to get a fee reduced or voided may be sufficient in most cases. Forms of overcharge, such as wrongly withheld retainers, payments for unnecessary work or services, or charges for work never performed, should be refunded.

Using alternative dispute resolution techniques in an administrative setting offers tremendous potential for developing innovative, responsive remedies. For example, if a lawyer fails to complete the promised services, the agency could quickly order specific performance or a refund. Further, in contrast to reprimands for minor misconduct, the agency could impose fines with minimal procedural hassles. Fines for relatively minor violations of consumer protection laws, especially in cases where the client has suffered aggravation rather than economic loss, are a potentially useful enforcement tool.⁶⁸

D. The Right Process: Alternative Dispute Resolution

A system of dispute resolution and remedial functions responsive to consumer needs requires several important features. First and foremost, consumers of legal services

need access to an out-of-court forum for handling their complaints. Besides being hard to bring and win, lawsuits give lawyers the unfair advantage of playing on the home court. Lawyers possess knowledge of the players and technical rules, cost advantages by being able to represent themselves, and the confidence that flows from knowing that an opponent—the client—has none of those advantages.⁶⁹ The greater speed with which an out-of-court forum is able to render a decision also helps minimize any advantage lawyers may try to gain through delay.

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Second, an out-of-court forum should have the power to mediate disputes on an informal basis. In mediation, the parties have an opportunity to work out a solution among themselves, quickly and inexpensively. This is especially effective for disputing parties who must or wish to maintain an ongoing business relationship. It also permits the parties flexibility in arriving at solutions. Because of these and several other advantages, mediation is now widely used to resolve consumer disputes in non-legal areas.

However, if no agreement can be reached, consumers will need access to an effective, fair, and final solution to their problem. Thus, a special branch of the consumer protection agency should also be empowered to conduct mandatory and binding arbitration. Under such an arrangement, the lawyer would be required to participate at the client's option, and the result would bind both parties, appealable only for procedural irregularities.⁷⁰

Like mediation, arbitration is also widely available to resolve consumer disputes. However, because many of the available programs have been sponsored by the industry against which consumers lodge their complaints,⁷¹ consumers have not always found them to

be fair and effective.⁷² Consumers deserve a neutral, if not an overtly pro-consumer, forum in which to resolve their grievances. Thus, the process must be housed in a neutral, third party agency, using lay arbitrators.⁷³

IV. Conclusion/Epilogue

When the ABA's McKay Commission was formed, it announced it would hold a series of four⁷⁴ public hearings. HALT, a consumer organization advocating legal reform, notified its membership and ran newspaper ads informing the public of the opportunity to testify. For the first hearing on February 10, 1990, in Los Angeles, the Commission staff was so deluged with advance calls from consumers wanting to sign up to testify that the staff began telling consumers the schedule was full. The consumers came anyway, and the hearing, originally scheduled for a few hours, lasted all day.

The Commission allowed local bar officials to testify first and at length about the recent cosmetic reforms they had adopted under protest. Eventually, most of the nearly 150 consumers in attendance were able to testify. While solicitous to the bar officials, the commissioners grilled the consumers to determine whether they indeed had legitimate complaints.

By the time of the second hearing in New York City, the Commission had already made some changes. More time was scheduled to permit consumers to testify, and the Commission arranged to have local bar officials present to accept consumers' complaints. More important, the commission decided to expand the scope of its inquiry; instead of looking just at the progress made since the first ABA study, it decided to assess how well discipline was meeting the public need by looking at other models of occupational regulation.

The tables had turned by the final two hearings. The Commission welcomed the consumers who testified, apologized to them for any poor treatment they received, and thanked them for stepping forward. This time the local bar officials were sharply questioned about why their discipline systems

secretly dismissed more than ninety percent of all consumer complaints.

The hundreds of consumers who participated in the McKay Commission's hearings had a dramatic impact. The National Organization of Bar Counsel—the national group of lawyer discipline prosecutors—issued its own report and recommendations in September, 1990. That report repeated many of the recommendations HALT had made earlier in its own report. The most significant of these recommendations included: (1) creating alternatives to discipline by expanding redress; (2) creating an independent, voluntary panel of mediators to handle minor complaints; (3) making the process more open to the public; (4) increasing public participation; (5) improving the agency's visibility and accessibility; and (6) imposing stricter deadlines on agency action.⁷⁵

In May, 1991, the McKay Commission followed suit, adopting roughly seventy-five percent of the reforms HALT and consumers had urged. The McKay Commission recommended a fully open disciplinary process—opening up complaints from the moment they are filed, making hearings open to the public, increasing public representation on grievance panels, abolishing the gag rule on complainants, and getting rid of private reprimands. It also recommended increasing consumers' rights in the process by granting consumers absolute immunity from retaliatory lawsuits, giving consumers an opportunity to rebut the lawyer's story before the complaint is dismissed, and giving consumers the right to appear and testify at hearings. Most important, the Commission recommended expanding the scope of public protection to include mandatory fee arbitration, voluntary malpractice arbitration, and mediation.

The McKay Commission recommended that disciplinary functions be taken away from bar associations, but it did not support abolishing lawyer self-regulation. Instead, it adamantly endorsed giving state supreme courts "direct

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and exclusive control"⁷⁶ over discipline. Further, it referred to continued bar involvement in remedial programs, such as fee arbitration and client security funds, as wholly desirable and appropriate.

Although the Commission made several pro-consumer recommendations, it certainly did not dispose of the discipline model for regulating lawyers. For instance, although it conceded that "the great majority of complaints against lawyers, while stating legitimate grounds for dispute, do not allege facts constituting misconduct,"⁷⁷ and that the system needed to respond to a wider range of complaints, it clung to the notion that "[d]etecting unethical behavior must remain the highest priority...."⁷⁸ Similarly, although the Commission agreed that complaints about malpractice and conduct just short of malpractice needed a remedy, it recommended that such programs be voluntary rather than mandatory, thereby making consumer remedies optional.

This ordering of priorities was also reflected in the recommendation to retain self-regulation. Responding to consumer concerns about bias, the Commission agreed the discipline function of determining lawyer ethical violations should be removed from bar associations. However, the Commission then proceeded to expressly approve of bar associations maintaining control over all other kinds of complaints. Because the vast majority of complaints fall into this latter category, the Commission's recommendation would leave the bar in charge of more than ninety percent of consumer complaints. If the bar is to remain in charge of anything, consumers would prefer it to be in charge of the ten percent of complaints involving ethical violations and not the other ninety percent of complaints brought by consumers.

Putting aside the conflict of interest in court regulation, the Commission also ignored the reality that court regulation is actually lawyer and bar regulation. The Commission's own survey of state

high court justices found that "most were not aware of the many problems we have discovered."⁷⁹ Conceding that the Court must delegate day-to-day administration of the system, the Commission then fails to identify to whom the court should delegate the responsibility. Since a publicly-controlled governing board is nowhere mentioned, it can be assumed that it will be a lawyer-dominated board, composed of bar association nominees or appointees.

HALT reacted to the report with measured praise. It hailed many of the specific recommendations as pro-consumer and bemoaned the likelihood that the recommendations would be sabotaged by self-regulation and lawyers' conflict of interest. The bar, however, immediately objected to the proposed elimination of secrecy.⁸⁰ The purported concern about ruining innocent lawyers' reputations with unfounded complaints continues unabated. Lawyers have given little or no attention to any of the other recommendations, including the addition of remedial programs.

The bar's narrow focus on secrecy demonstrates in the clearest possible terms the conflict of interest and the kind of obstacles to real reform inherent in self-regulation. The fact that the bar has totally ignored what consumers would consider core recommendations is striking evidence in support of the need to adopt the remainder of HALT's recommendations to eliminate self-regulation.

The McKay Report will be voted on very soon by the ABA House of Delegates. If it approves the recommendations, it will place the weight of its authority and influence behind them and lobby the states to adopt them. The author predicts, however, that many of the recommendations, especially those on which the profession's interests directly conflict with consumers', will be watered down or disappear altogether. More to the point, even if the ABA endorses the entire report, the power to make actual reforms remains with the lawyer-run agencies that have resisted reform in the past.

The consumer model for regulating lawyers is the appropriate

standard for evaluating the ABA's report. Consumers will not be satisfied with anything less than a real consumer protection agency. The consumer protection model is the blueprint for reform that consumer advocates should continue to pursue, regardless of the ABA's actions.

Author's Note: On February 4, 1992, the American Bar Association's House of Delegates considered and voted on the McKay Commission recommendations. As expected, the House voted to retain the ABA's current policy of maintaining secrecy until probable cause of ethical misconduct is found. With hardly any debate, however, it formally recognized the need for consumer rights and consumer protection. For the first time, the House agreed that consumer protection mechanisms should be created to address the 90-95 percent of consumer complaints that are currently dismissed. It also adopted the recommendation to take discipline functions away from bar associations, although the courts would retain control. Finally, in stark contrast to the follow-up ordered after the first ABA report, the House did not approve a major effort by the ABA to encourage states to adopt reforms. Instead, it suggested that states set up their own commissions to study reforms.

ENDNOTES

- 1 Letter from General Counsel of the State Bar of Texas to Ray Dittmar (Feb. 3, 1989) (attached as Appendix 1 in HALT, *Report on The State Bar of Texas for The Texas Sunset Advisory Commission* (1989)) [hereinafter *Dittmar Letter*].
- 2 ABA Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* at 1 (Final Draft, June, 1970) (Tom C. Clark, *Chairman*) [hereinafter *Clark Report*].
- 3 *Id.* at 8.
- 4 The following criticisms are supported and discussed in greater detail in HALT, *Attorney Discipline National Survey*, at 13 (1990) [hereinafter *HALT Report*]. This report, as well as other materials on lawyer regulation, are available directly from HALT, 1319 F St., NW, Washington, DC 20004, 202-347-9600.
- 5 *Id.* at 17.
- 6 Although HALT developed its critique of the discipline model independently,

- based on consumers' actual experience, other commentators have articulated the problems with discipline in very similar ways. See, e.g., F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L. FORUM 193 (1974) [hereinafter Marks & Cathcart]; Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917 (1976) [hereinafter Steele & Nimmer]. The author is particularly indebted to these commentators for their conceptualization of discipline's focus on "deviance" as a way of thinking and talking about what is wrong with the discipline model.
- 7 Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 547 n. 250 (1985) (citing the *Clark Report*, *supra* note 2, at 1-2, Steele & Nimmer, *supra* note 6, at 993-99, and Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 723-36 (1981) [hereinafter Martyn]); See also, Marks & Cathcart, *supra* note 6, at 225.
 - 8 "[C]lients complain chiefly about matters touching on performance while the agencies to which they complain concern themselves almost exclusively with misconduct. A mismatch is apparent." Marks & Cathcart, *supra* note 6, at 225; See also, Steele & Nimmer, *supra* note 6, at 923 ("[C]lient complaints tend neither to present allegations conforming to the profession's definitions of unethical conduct nor to request agency action consistent with its enforcement emphasis. . . . Thus, an explicit tension is created within the agency between its formal policy objective (the discipline of unethical conduct) and its actual caseload (complaints primarily concerning contract disputes). . . .").
 - 9 See Marks & Cathcart, *supra* note 6, at 207; Steele & Nimmer, *supra* note 6, at 973.
 - 10 Steele & Nimmer, *supra* note 6, at 923; Marks & Cathcart, *supra* note 6, at 217.
 - 11 ABA Ctr. for Prof. Resp. & Standing Comm'n on Prof. Discipline, *Survey on Lawyer Discipline Systems—1988 Data*, at 9 (1989); HALT Report, *supra* note 4, at 17. There is evidence indicating that this dismissal rate is very conservative. See *infra* note 13.
 - 12 "In sum, most disciplinary agencies decline to take jurisdiction in the types of cases with which most complainants are concerned—neglect, other negligence, and fee disputes. They devote a large amount of their time to screening out these complaints and to an informal handling of those complaints. . . ." Marks & Cathcart, *supra* note 6, at 217.
 - 13 In fact, sometimes agencies do not even label these nonjurisdictional matters as "complaints," thus vastly understating the number of client complaints and dismissals, and overstating the frequency of discipline. Steele & Nimmer, *supra* note 6, at 979. In addition, very few clients who experience problems actually complain to agencies, Steele & Nimmer, *supra* note 6, at 957, and the few that try are often unsuccessful. See, e.g., Robert C. Fellmeth, *Initial Report to the Assembly and Senate Judiciary Committees and Chief Justice of the Supreme Court of California on the Performance of the Disciplinary System of the California State Bar*, at 33 (1987) [hereinafter Fellmeth Initial Report].
 - 14 *Dittmar Letter*, *supra* note 1.
 - 15 Steele & Nimmer, *supra* note 6, at 925-29.
 - 16 Many agency brochures warn consumers that "what may appear to be misconduct is often merely a misunderstanding because 'few' lawyers engage in misconduct." HALT Report, *supra* note 4, at 35. This mindset is also reflected in the common claim that most complaints are due to lawyers who commit multiple acts of misconduct, thereby inflating the real number of "bad apples" complained against and disciplined. "The number of such repeat complaints is remarkable. . . . And a large number of the repeat complaints do not concern attorneys with one or two other pending complaints, but with many such complaints. . . . These data suggest that there is a hard core of 1-2% of the profession . . . accounting for an extraordinary proportion of consumer complaints. . . ." Robert C. Fellmeth, *Sixth Progress Report of the State Bar Discipline Monitor*, at 25-26 (Mar. 1, 1990). Although Fellmeth's observation may be accurate as applied to the universe of cases the agency will pay attention to, it is certainly not accurate as applied to the universe of consumer complaints made to agencies, nor as applied to the universe of consumer dissatisfaction with their lawyers. See *supra* note 13.
 - 17 Although this article concentrates on discipline, admissions to the bar operate on the same assumptions and model—applicants who have an unethical incident (usually a criminal conviction) lurking in their past may be determined ineligible to join, as their admission would spoil the whole barrel.
 - 18 Steele & Nimmer, *supra* note 6, at 925.
 - 19 Of 12 possible disciplinary offenses, felony convictions led to the third greatest number of lawyers disbarred. When felonies are combined with other criminal-like offenses such as commingling, converting, or misappropriating client funds, it becomes apparent that criminal-like conduct is the overwhelming basis for all public discipline. A.B.A. Center for Prof. Resp., *Statistical Report re: Factual Information on Public Discipline Imposed Against Lawyers by State Jurisdictions During 1985*, at 5 Chart III (1986). "An impression gained from reading appellate decisions is that courts most often impose significant disciplinary sanctions on lawyers who have already been tried and convicted in a separate criminal proceeding." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 90 (1986) [hereinafter WOLFRAM].
 - 20 See, e.g., "Bar Panels Begin Erratic Attack on Ad Disclaimers," TEX. LAWYER, at 6 (Apr. 9, 1990).
 - 21 See, e.g., American Bar Association, *Model Rules of Professional Conduct* (1983) [hereinafter *Model Rules*], Rule 8.4 (crimes, dishonesty, fraud) and Rule 4.1 (lying to non-clients).
 - 22 See, *id.*, Rule 5.5 (unauthorized practice of law), Rule 7.2 (advertising), and Rule 7.3 (solicitation). According to Professor Thomas Morgan, roughly 25% of the 1975 version of the rules, the Code of Professional Responsibility, is devoted to restrictions on how lawyers may market their services. Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 712 (1977) [hereinafter Morgan].
 - 23 On unauthorized practice of law prohibitions, see, e.g., HALT, *Challenges to the Lawyer Monopoly* (1988); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); *Report of the Public Protection Committee* (Apr. 22, 1988) (available from Office of Professional Standards, State Bar of California). On advertising, see, e.g., Federal Trade Commission, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984). See generally, Morgan, *supra* note 22, at 714 (the content of lawyers' ethical code consistently places the interests of lawyers over the interests of both individual clients and the public at large).
 - 24 See, e.g., *Model Rules*, *supra* note 21 Rule 1.3 (diligence and promptness) and Rule 1.5 (fee shall be reasonable).
 - 25 For a discussion regarding the absence of standards of competence for lawyers, see, Martyn, *supra* note 7, and Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639 (1983) [hereinafter Garth]. HALT has criticized the ABA's standards as they relate to probate fees. See, *Testimony of Charles Mosse, HALT Representative, Regarding Pro-consumer Probate Reforms* (presented to Cal. Law Revision Commission, Jan. 15, 1988) (available from HALT).
 - 26 See, e.g., HALT Report, *supra* note 4, at 19, n. 28 (Michigan lawyer disbarred only after 5 clients complained about "aggravated neglect" and lying over a 7-year period).
 - 27 Marks & Cathcart, *supra* note 6, at 217.
 - 28 All private sanctions (given in about 2.5% of all cases) are reprimands, and a significant number of public sanctions (given in about 2% of all cases) are also reprimands. For instance, in California, of the 834 lawyers disciplined in the first half of 1991, 63% (526) received public or private reprimands, letters of warning, or other forms of informal discipline. Robert C. Fellmeth, *Final Report of the State Bar Discipline Monitor*, at 43 (Sept. 20, 1991) [hereinafter Fellmeth Final Report].
 - 29 Recent data from the ABA indicate that fewer than 30% of all malpractice

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- claims filed between 1983 and 1985 led to lawsuits; clients received no compensation in more than 63% of the claims; clients who don't settle win only 1.2% of the time; and extremely few clients ever receive compensation over \$1,000. KAY OSTBERG & THERESA MEEHAN RUDY, *If You Want to Sue a Lawyer*, at 27 (1991) (citing ABA, *Profile of Legal Malpractice: A Statistical Study of Determinative Characteristics of Claims Asserted Against Attorneys* (1986)).
- 30 The basis for "deviance" was discussed earlier, *supra* note 6 and accompanying text.
- 31 For a fuller discussion of consumer criticisms of these programs, see, HALT Report, *supra* note 4, at 26-7, n. 52; HALT, *Fee Arbitration: Model Rules and Commentary*, at 5-7 (1989) [hereinafter *Fee Arbitration Rules*].
- 32 HALT, *Arbitrating Lawyer-Client Fee Disputes: A National Survey*, at Appendix I (1988) [hereinafter *Fee Arbitration Survey*].
- 33 A.B.A. Ctr. for Prof. Resp., *Standards for Imposing Lawyer Sanctions*, at 50 (1986).
- 34 *Id.*
- 35 This observation is based on the author's own perceptions from reading summaries of discipline cases for six years. Aggravating circumstances rarely seem to result in making the discipline more severe than it otherwise would be. Rather, the presence of aggravating circumstances is usually used by the prosecutor to argue why the lawyer should not receive a more lenient form of discipline. In other words, once a particular sanction is deemed appropriate, these factors can be used to defend that sanction or lower it, but rarely to raise it.
- 36 For a detailed comparison of the procedural rights of complaining clients and accused attorneys, see HALT Report, *supra* note 4, at 36-37.
- 37 Lawyers typically argue that they deserve criminal-like due process rights because they have a constitutionally-protected property interest—their license to practice law—on the line, just like criminal defendants have a constitutionally-protected interest in liberty on the line. Although this argument is somewhat persuasive when suspension or disbarment is threatened, it is less convincing when minor sanctions such as reprimands are at issue. If remedies other than license tinkering were available, the need for such procedural safeguards would disappear.
- 38 HALT Report, *supra* note 4, at 13.
- 39 *Id.* at 35-36.
- 40 About half of the state agencies have no formal or informal deadlines for processing complaints, *id.* at 31, and therefore tremendous backlogs are common.
- 41 To address this problem, at least one state, California, has created for itself interim suspension powers to prevent a likely risk from harming more clients, Cal. Bus. & Prof. Code §6007(c) (West 1990), which could be viewed as similar to preventive detention in the criminal system.
- 42 Although the power to regulate lawyers has long been viewed as an inherent power of the judicial branch, it is only within the last century, and especially the last fifty years, that courts began interpreting this inherent power as an exclusive power, ousting state legislatures of their historical power over lawyer regulation. See, WOLFRAM *supra* note 19, at 22-31; Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 625 (1983).
- 43 Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 671 (1990) ("a fundamental and pervasive conflict of interest exists between lawyer and client—the lawyer's profit motivation.") [hereinafter Lerman]; Barbara B. Gregg, *Characteristics of a Model Consumer Dispute Resolution Mechanism*, in A.B.A. SPEC. COMM. ON ALTERNATIVE DISPUTE RESOLUTION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES, 27, 32 (1983) [hereinafter Gregg] ("natural tension between buyer and seller" favors third party mechanisms, as opposed to industry-sponsored and industry-run mechanisms, to resolve disputes).
- 44 "[T]he current disciplinary approach reveals an underlying schizophrenia. It reveals that there are indeed conflicting constituencies. . . . [T]he profession is unintentionally and unconsciously misleading itself and the public. . . . [I]t gives the appearance of self-regulation without in fact engaging in the act of self-regulation." Marks & Cathcart, *supra* note 6, at 228.
- 45 Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 293 (1986).
- 46 "[C]ourts serve as the largely passive sounding boards and official approvers or disapprovers of initiatives that are taken by lawyers operating through bar associations." WOLFRAM, *supra* note 19, at 33-34.
- 47 HALT has drafted and introduced several legislative proposals that identify the key objectives and attributes for both lawyer and non-lawyer regulation. See, e.g., S. 916, Ill. Legis. (intro'd 1989) and H.B. 1293, Tex. Legis. (intro'd 1990).
- 48 Many of these features and others are articulated in Gregg, *supra* note 43, at 28 (citing Professor Chris Wheeler for some of the criteria).
- 49 Although attorneys general tend to be lawyers, two built-in features help to minimize the likelihood of anti-consumer bias by these particular attorneys. First, attorneys general are routinely charged with consumer protection duties, and therefore are likely to have an institutional commitment to consumer protection. Second, the vast majority of attorneys general (43) are directly elected by the public, (Telephone Inquiry to Mr. Rob Biesenbach, Nat'l Association of Attorneys General (Nov. 13, 1991)), making them far more accountable to the public than the lawyers appointed to lawyer discipline boards.
- 50 See, e.g., "Bar Spends More, Disciplines More Than DPR," THE FLORIDA BAR NEWS, at 1 (Mar. 15, 1991) (hailing finding that the Florida Bar, for two consecutive years, spent more on discipline and disciplined a larger percentage of its members than the Florida Dept. of Professional Regulation); A.B.A., *Report of the Comm'n on Evaluation of Disciplinary Enforcement*, at 3 (May, 1991) [hereinafter *McKay Report*] (legislatively-created regulatory bodies suffer from the same problems).
- 51 See generally, Richard Hesse & Mitchell Simon, *Serving the Needs of Both the Consumer of Legal Services and the Profession Through the Application of Consumer Protection Statutes to Lawyers*, 3 LOY. CONSUMER L. RPTR. 116 (1991); Timothy L. McMahan, *Note, Tolling the Death Knell on the 'Learned Profession' Immunity Under the Consumer Protection Act: Short v. Demopolis*, 21 WILLAMETTE L. REV. 899 (1985). Although only a few states specifically exempt lawyers from their statutory scope, many others immunize lawyers under the auspices of an exemption for practices or occupations that are comprehensively regulated by other means. See, Jonathan Sheldon, *Unfair and Deceptive Acts and Practices* (2d ed. 1988) (published by and available from the National Consumer Law Center, Boston, MA) [hereinafter UDAP].
- 52 See generally, UDAP, *supra* note 51.
- 53 See, discussion at note 69, *infra*, concerning the procedural problems a UDAP strategy might pose for consumers.
- 54 Since it is a fiction that all lawyers provide services of uniformly high quality, consumers should have the right to choose among a variety of service options and service providers. "[A]cquiescence in unequal standards of performance is inevitable in the real world. . . . This is not to say that redistribution [of] highest-quality legal services should not be pursued as far as possible, but a uniform competence standard will not solve problems that ultimately must be traced to the unequal distribution of societal resources." Garth, *supra* note 25, at 669-70.
- 55 Although several states require contingency fee agreements to be in writing, only a few states require lawyers to use written contracts for non-contingency cases. HALT, "Does Your Legal System Make the Grade?," THE LEGAL REFORMER, 14, 18 (July-Sept., 1990).
- 56 In some states, lawyers must notify clients of their right to take a fee dispute to fee arbitration before being able to file a collection suit against the client. See, *Fee Arbitration Survey*, *supra* note 32 at Appendix I.
- 57 Auto mechanics are routinely required to give an oral or written estimate of the cost of repair, and must obtain the customer's permission to exceed it. UDAP, *supra* note 51 at 180.
- 58 Although attorneys are not supposed to retaliate against clients who express

dissatisfaction in these ways, consumers regularly report to HALT that they do. Retaliation, for such challenges as questioning a lawyer's bill, questioning a lawyer's strategy, is all too common. Clients report that retaliation most often takes the form of "backing off" the client's case, i.e., not trying hard. Because of the fear their lawyer will abandon them, directly or indirectly, clients often wait until the relationship sours completely before taking any action. See, Steele & Nimmer, *supra* note 6, at 960.

- 59 Laws that enforce legitimate and reasonable consumer expectations as to service exist in other business contexts. For example, California recently enacted a law which requires repair services to estimate their arrival time and actually show up within a limited time period or be liable for the damages to the customer. Cal. Civ. Code § 1722(a)(1) (West Supp. 1992). Prof. Lerman proposes a disciplinary rule requiring a lawyer to "respond to a client call within two business days after receiving it," or make arrangements for someone else to respond. Lerman, *supra* note 43, at 756. The requirement is unfortunately framed as an ethical obligation rather than a straightforward legal right, but Prof. Lerman is definitely on the right track in her attempt to make the rules governing lawyers meet consumer needs.
- 60 There is at least one precedent for a consumer-oriented standard of care in the law of professional malpractice. See, *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) (adequacy of disclosure by doctor is judged by determining what a reasonable patient would want to know before making medical treatment decision). See also, Martyn, *supra* note 7, at 732-33 ("[C]ommon law malpractice standards seem to be moving away from exclusive reliance on professional definitions of the requisite standard of care.")
- 61 *But, see*, discussion *supra* note 54, regarding the futility of assuming lawyers can provide "uniform" standards of service.
- 62 The author has the opinion, shared by many others, that there is no such thing as general competence. "Attorneys may practice in more than one area competently, but no attorney can practice competently in a substantial number of the twenty-odd specialties which have evolved. . . . What the state really tests is general aptitude, not [general competence]." Robert C. Fellmeth, *A Theory of Regulation*, 5 CALIF. REGULATORY L. RPTR. 3, 14 (1985). Standards of competence, then, may need to be developed according to the specialized area of law being practiced or the legal task being performed.
- 63 Would clients expect the same level of quality from a lawyer and a nonlawyer provider such as an independent paralegal? Should they?
- 64 "Two general approaches to evaluating competence can be outlined. . . . [T]he profession's model, which is based largely on a uniform, professionally enforced ideal, . . . [and t]he other, implicit in the critique of traditional professionalism, is based on contract and the competition of the marketplace." Garth, *supra* note 25, at 668. "If the client can bargain for a particular level of services, negligence can no longer be determined simply by referring to what a typical practitioner would have done. . . . Increasingly the question will be whether the lawyer was negligent under the circumstances established in the bargain with the client, a more complex and difficult question to resolve." *Id.* at 675.
- 65 Robert C. Mussehl, *The Neighborhood Consumer Center: Relief for the Consumer at the Grass-Roots Level*, 47 NOTRE DAME L. REV. 1093, 1129 (1972).
- 66 Arbitration should be available in addition to, not instead of, private rights of action. There is no consumer advantage in cutting off access to existing remedial routes, no matter how inaccessible they are. However, to encourage finality, if the customer elects arbitration, the arbitration result should be binding and no civil action should be permitted based on the same complaint.
- 67 Garth, *supra* note 25, at 676 (suggesting a client ought to pay less for substandard service that does not result in financial damage).
- 68 Fines have been suggested by several others, including Martyn, *supra* note 7, at 732, and the Chicago Council of Lawyers, *Report on Investigation of the Operation of the Attorney Registration and Disciplinary Commission*, at 39-40 (Feb. 1978). For example, in addition to other enforcement tools, fines might be appropriate for lawyers who fail to make required disclosures, return client calls, or use a written contract. Fines have the additional advantage of helping to finance the operations of the consumer protection agency.
- 69 For these reasons, exclusive reliance on lawsuits of any sort to enforce consumer rights is problematic for consumers. One of the problems with the strategy of just extending UDAP statutes to lawyers is that lawsuits are often required in order to enforce them. Frequently, the consumer can bring a private action, but some statutes require the consumer to rely upon a government agency to bring the action, further diminishing the chances that the consumer's complaint will be addressed. A similar problem arises with just extending the jurisdiction of existing consumer protection agencies to handle complaints about legal services, rather than creating a new agency. Some agencies, especially Attorneys General, are not set up to handle ADR, but only to handle lawsuits. *But see*, John Cooley, *Alternative Dispute Resolution and Consumer Protection: An 'Odd-Couple' Thriving in the Offices of State Attorneys General*, 1 LOY. CONSUMER L. RPTR. 1 (1988) (increasing utilization of ADR together with law enforcement by attorneys general).
- 70 Arbitration programs in which the lawyer's participation is voluntary, or the result is non-binding, do not work for consumers. Lawyers can too easily force the client into court merely by refusing to participate in the first place or by appealing the decision afterward. See, *Fee Arbitration Rules*, *supra* note 31, at 13, for a discussion of this problem in the context of lawyer-client fee arbitration.
- 71 "Consumer Action Panels [CAPs] . . . have been set up on a national level by the major appliance industry, the carpet and rug industry, and the funeral industry; they have been established for the automobile dealers at the state and local levels." Dean W. Determan, *Forums for Resolving Conflict: Considerations for the Private Sector*, in A.B.A. SPEC. COMM. ON ALTERNATIVE DISPUTE RESOLUTION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES, at 39 (1983).
- 72 Garth, *supra* note 25, at 678 (citing Eaton, *The Better Business Bureau: The Voice of the People in the Marketplace*, in NO ACCESS TO LAW 233 (1980), for the proposition that consumers have fared poorly in all industry-sponsored arbitration); *Accord*, Gregg, *supra* note 43; Charlotte Newton, *A Consumer's View of Third Party Mechanisms*, in A.B.A. SPEC. COMM. ON ALTERNATIVE DISPUTE RESOLUTION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES, at 45 (1983) ("Many consumer advocates criticize [industry-sponsored] efforts as ineffective and look upon them as window-dressing."). HALT has found that bar-run lawyer-client fee arbitration programs suffer from this same defect. *Fee Arbitration Rules*, *supra* note 31.
- 73 Other features that increase arbitration's responsiveness and user-friendliness for consumers include strict deadlines for holding hearings and issuing decisions, and a ban on using formal rules of evidence or procedure in arbitration hearings. For a fuller discussion of these features, see *Fee Arbitration Rules*, *supra* note 31.
- 74 The Commission later decided to add a fifth hearing in Portland, Oregon to focus on the issue of secrecy in lawyer discipline. Portland was chosen because Oregon is the only state that opens complaints to public scrutiny from the moment they are filed.
- 75 National Organization of Bar Counsel, *Recommendations to American Bar Association Commission on Evaluation of Disciplinary Enforcement* (Sept. 1990).
- 76 *McKay Report*, *supra* note 50, at 19.
- 77 *Id.* at 16.
- 78 *Id.* at 13.
- 79 *Id.* at 6.
- 80 In the press coverage and formal bar gatherings that followed the report's issuance, secrecy was the issue for lawyers. See, e.g., "Panel: End Disciplinary Secrecy," A.B.A. J. at 18 (Aug. 1991); "Call for Disciplinary Reform," NAT'L L.J., at 1 (June 3, 1991); "ABA Panel Calls on Lawyers to Open Discipline," WASH. POST, at A1 (May 22, 1991).