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OPEN DOORS, OPEN ARMS, AND SUBSTANTIALLY OPEN RECORDS: CONSUMERISM TAKES HOLD IN THE LEGAL PROFESSION

BURNELE V. POWELL*

I. A TRANSFORMATION IN LAWYER DISCIPLINARY REGULATION

Prologue

The discussion over dinner at Fuller's Restaurant, in Seattle, was longer and somewhat more tedious than expected. The occasion was the first meeting of the chairs of the American Bar Association's five standing committees of the Center for Professional Responsibility.¹ Committee updates from each chair preceded the meal, but with dessert just barely on the table, attention turned to Ray Trombadore, Chair of the ABA Commission on the Evaluation of Disciplinary Enforcement, still popularly known as the McKay Commission in honor of its late chair, Bob McKay.² Trombadore's tone was matter of fact, but

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The author stresses, however, that the statements and opinions expressed in this article are solely those of the author and do not, except where indicated, necessarily represent the views of the American Bar Association or any other organization with which the author is affiliated.

Finally, the research assistance of Brian R. Oglesby is acknowledged.

1. The American Bar Association's (ABA) Center for Professional Responsibility is headquartered in Chicago, Illinois, and, at the time of the reported meeting, consisted of the West Professional Responsibility Library, the National Discipline Data Bank, and five presidentially appointed standing and special committees: Professional Ethics and Responsibility, Lawyers' Responsibility for Client Protection, Professionalism, ABA/BNA Lawyers Manual, and the Standing Committee on Professional Discipline. In 1993, the Standing Committee on Lawyer Competence joined the Center. The National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers also affiliate with the Center.

2. The Commission on Evaluation of Disciplinary Enforcement (The Commission) was created in 1989 at the urging of the Standing Committee on Professional Discipline and the National Organization of Bar Counsel. The result was *The Report of the Commission on Evaluation of Disciplinary Enforcement* (ABA House of Delegates Report, May 1991) [hereinafter *McKay Report*]. The Committee's mandate over the course of three years was to assess the status of lawyer discipline systems nationally in light of the recommendations of its predecessor committee, the 1967 Special Committee on the Evaluation of Disciplinary Enforcement, chaired by Tom Clark, former Supreme

it was unmistakably that of an advocate. Each phrase was calculated to provide the basic information needed by the dozen or so people around the table, but nothing was betrayed that the speaker did not wish disclosed. In a precise, well-practiced cadence, the particulars of the Commission's forthcoming initial public draft were laid out. It took three years of study and a twenty-minute presentation, but it was clear by dessert's end that even to have come this far meant the legal profession had already undergone a major transformation.

The draft report called for the redesign of the way in which jurisdictions discipline attorneys. It challenged the structure and policies underlying reliance by most jurisdictions on the Model Rules for Lawyer Disciplinary Enforcement, as adopted by the ABA House of Delegates in 1989.³ If successful, it intended to end the traditional three-tier lawyer disciplinary review system operating under the auspices of elected state bar officials.⁴ No longer would disciplinary counsel be the hired, supervised, and financed extension of each jurisdiction's bar,⁵ nor would the bar's administrative functions⁶ or advisory opinion

Court Justice. American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (1970) [hereinafter *Clark Report*.]

Upon the death of Robert (Bob) McKay, Raymond R. Trombadore accepted the commission's reins. Trombadore was diligent in the pursuit of reform, and he was savvy in navigating the committee through the rocky political shoals of the ABA. Trombadore also oversaw issuance of The Commission's final report: AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, *LAWYER REGULATION FOR A NEW CENTURY* (1992) [hereinafter *LAWYER REGULATION*].

3. There are approximately 67 bar disciplinary entities responsible for lawyer discipline and disability procedures (including some states that are divided into jurisdictions and other governmental entities such as Puerto Rico, Guam, and the Canal Zone). Most jurisdictions have incorporated major aspects of the Model Rules for Lawyer Disciplinary Enforcement (MRLDE), a model which was most recently amended in 1989. See, e.g., Vermont's PERMANENT RULES GOVERNING ESTABLISHMENT OF PROFESSIONAL CONDUCT BOARD AND ITS OPERATION and Rule 19 of Louisiana's Supreme Court Rules, LA. S. CT. R. 19.

4. Primarily because of the delay involved and what has increasingly come to be seen as at least an appearance of political self-interest, the trend in the jurisdictions has for some time been against the three-tier systems under which local bar officials conduct hearings to determine probable cause, a bar hearing panel adjudicates the matter, and the state bar imposes discipline (subject to an appeal to the state's highest court). The ABA Center for Professional Responsibility reports that the processes for lawyer discipline are separate from the bar in 29 jurisdictions, 11 of which have unified bars. 1 *LAWYER REGULATION BULLETIN* 2 (No. 1, August 1, 1993). In this regard, the *McKay Report* urged that: "All jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court. Disciplinary officials should possess sufficient independent authority to conduct the lawyer discipline function impartially . . ." *McKay Report*, *supra* note 2, at 19 (Recommendation 5: Independence of Disciplinary Officials).

5. In some jurisdictions, elected leaders of the state bar rest at the center of power. With the authority to name, finance, and dismiss disciplinary counsel, as well as to guide the direction and intensity of the system's disciplining of its lawyers, it is understandable that resistance to change in these jurisdictions has been strong. See, e.g., the following states for systems that have retained

responsibilities⁷ continue to be handled by disciplinary counsel.⁸

politically responsive structures—Kentucky: KY. R. S. CT. 3.025, 3.070, 3.090, 3.140, 3.160, 3.170-3.190, 3.230; North Carolina: N.C. GEN. STAT. § 84-15 (1993) (creating state bar), § 84-18 (1993) (setting terms, elections, and appointment of officials), § 84-28 (1993) (establishing discipline and disbarment procedures); Texas: TEX. GOV'T CODE ANN. § 81.011 (West 1993) (setting forth election procedures), § 81.019 (1993) (detailing powers of state bar officials).

In ascendancy, in part due to the rise of unified bars, are systems that separate discipline from the educational and service functions of the bar, instead placing lawyer discipline under the control of the jurisdiction's highest court. Accordingly, the *McKay Report* urged: "Elected 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." *McKay Report*, *supra* note 2, at 20 (Recommendation 5: Independence of Disciplinary Officials, § 5.1). Moreover, the *McKay Report* added: "The Court alone should appoint and for cause remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion." *Id.* at 21 (Recommendation 6: Independence of Disciplinary Counsel, § 6.1).

6. In smaller jurisdictions, cost-saving efforts have resulted in a single lawyer being charged with responsibility to act both as in-house counsel, handling daily legal questions for the bar, and as disciplinary counsel, charged with investigating and prosecuting charges of wrong-doing against individual lawyers. The McKay Commission, however, urged a different approach: "To be fully independent, disciplinary counsel should not perform services of general counsel to the bar and should not use the title 'bar counsel.'" *McKay Report*, *supra* note 2, at 22 (Comments to Recommendation 6).

7. It has been traditional for bar counsels to provide advisory opinions to members of the bar to guide them in their individual representations. *See, e.g.*, North Carolina, where the practice is for bar counsel to provide informal opinions as requested by members of the bar, and to sit as members of the North Carolina Ethics Committee which renders advisory opinions. McKay recognized these traditionally close working arrangements, observing that: "Many disciplinary counsel provide advisory opinions to members of the bar as a service. This diverts resources away from the detection and adjudication of misconduct." *McKay Report*, *supra* note 2, at 22 (Comments to Recommendation 6). Nevertheless, the Commission stated categorically: "Ethics opinions are more appropriately provided by a committee of the Court, bar associations, or by the state bar's general counsel." *Id.*

8. Despite its call for a separation of functions and the need for checks-and-balances between the operations of the bars and those of disciplinary counsel, McKay acknowledged the historic contribution of the bars in providing "the impetus for the development of ethical standards and disciplinary mechanisms." *McKay Report*, *supra* note 2, at 20. The Commission urged only that: "A lawyer can appropriately serve the profession as an elected bar official and as an appointed disciplinary adjudicator—but not simultaneously." *Id.* The Commission went on to point out the following:

Bar associations still can have a fundamental role to play in professional discipline, although not in the processing of cases. In states where no regulatory arm of the highest court exists, bar associations conduct the registration of lawyers and maintain registration records. They provide accounting and financial services, the physical plant and office equipment, ancillary staff services, and many other functions necessary to the operation of the disciplinary agency.

Id.

Finally, the Commission pointed out that its call for the establishment of new programs in Recommendation 3, "Expanding the Scope of Public Protection," suggested new and essential programs for an expanded system of lawyer regulation that might be undertaken by bar associations. *Id.* at 13 (Comments to Recommendation 3).

As proposed by the McKay Commission, the lawyer disciplinary process would reflect a new philosophy. Where once the authority of a state bar to discipline members of the legal profession was viewed as its *raison d'être*,⁹ the new model emphasized the bar's support role in the overall regulation of lawyers. That new regulatory system, moreover, introduced the concept of regulatory specialization.¹⁰ Its independent, but interdependent segments, would be called upon to be more efficient and expert. Emphasis would be placed upon relieving regulatory officers of the burdens of tangential responsibilities, increasing staff and technical support, and better financing the system. Most importantly, the improvements reoriented the system towards the public, declaring responsiveness to be its highest objective.¹¹

A. *New Principles for an Old System*

The recommended changes were literally from top to bottom. The traditional system had viewed lawyer regulation as a function of the bar in the

9. The Supreme Court's acceptance of mandatory union dues to finance collective bargaining in the union shop context (*Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740, (1960)), provided the basis for analogizing to compelled membership and the exaction of compulsory dues to organize and finance state bars in the context of regulating lawyers. In effect, the Court recognized that the public interest in labor peace in the first context was met by its interest in the oversight of lawyer discipline, education, and service in the latter. Still, as the Court made clear in *Keller v. State Bar of California*, 496 U.S. 1 (1990), mandatorily extracted bar dues may properly be applied only to finance activities of benefit to the bar membership as a whole, for example, bar admission standards, lawyer disciplinary enforcement, and establishing professional standards of conduct for lawyers. Given the multi-faceted responsibilities assigned to mandated state bars, however, judicial authority to require lawyer membership and dues must be viewed as encompassing missions beyond mere lawyer regulation. *Levine v. Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988).

10. The broad interpretation of lawyer regulation is consistent with data reflecting that the public takes a much broader view than do lawyers of what constitutes lawyer ethics. Basically speaking, the public views any conduct which either disadvantages it or which advances (or appears to advance) the interest of a lawyer or the legal profession at the expense of a client as a problem of lawyer ethics, regardless of whether the disciplinary rules prohibit, or even address, such conduct. Accordingly, the public view of lawyer's ethics includes: a lawyer's failure to return a telephone call, a lawyer having a sexual relationship with a client, fraternization by a lawyer with opposing counsel, and the failure of an attorney to disclose information which may be valuable to a bereaved family member (as when an attorney asserts confidentiality as a reason not to disclose the whereabouts of murder victims). See *infra* note 75.

11. The change from a discipline system to a regulatory system, in fact, runs counter to legislatively mandated commission-style regulatory systems, such as those for electricians, beauticians, and nurses. Under the commission regulatory model, the assumption is that sanctions are the essence of any scheme for protection of the public. Under a lawyer regulatory system, however, the assumption is that regulation can obviate the need to resort to sanctions. Thus, it is the capacity of the system to intervene at numerous levels short of discipline that constitutes the true essence of the system.

service of a jurisdiction's highest court.¹² The new model emphasized that it was no longer appropriate, if it ever was, to speak of the legal profession as *self-regulated*.¹³ Instead, the McKay model viewed *judicial regulation* of the legal profession as the inherent and exclusive responsibility of the highest court of each jurisdiction.¹⁴ Thus, it was not lawyer self-regulation, but the reality of law as a judicially regulated profession that was of importance.¹⁵ Although to some the change appeared more semantic than real—most courts are, after all, comprised of lawyers¹⁶—McKay accepted three additional policy assumptions as underscoring its intent that the changes be more than illusory.

First, the draft called for the establishment of a completely independent Office of Disciplinary Counsel.¹⁷ Henceforth, elected representatives of the bar would be prohibited from participating in the disciplinary process.¹⁸ Furthermore, disciplinary counsel would be appointed by the court,¹⁹ operate

12. In a majority of jurisdictions, discipline is a function of the highest appellate court. However, in some jurisdictions, discipline is a function of courts other than the highest court. For example, in North Carolina, disciplinary matters are heard by a Disciplinary Hearing Commission. Findings of the commission reach the North Carolina Supreme Court only on appeal. Connecticut provides another example, allowing grievance committees to present grievances to the superior courts. CONN. GEN. STAT. ANN. § 51-90(b) (West 1988).

13. The report stated: "We find a significant distinction between *self-regulation* of lawyers: regulation of the disciplinary system by elected bar officials, *self-regulation* creates basic problems. The most serious of these are the appearance of conflicts of interest and the appearance of impropriety." LAWYER REGULATION, *supra* note 2, at 1.

14. "Exclusive judicial regulation of lawyers has developed since colonial times. By the end of the nineteenth century, however, state courts were asserting an exclusive right to regulate lawyers. They based this right on the constitutional doctrine of inherent power and separation of powers." LAWYER REGULATION, *supra* note 2, at 1-2.

15. *Id.* at 5.

16. Some states do, however, allow nonlawyers to serve on their highest court. Connecticut and New Hampshire, for example, have no constitutional or statutory requirements that a justice be a lawyer. CONN. CONST. art. V; N.H. CONST. art. 729-81. The exceptions notwithstanding, the vast majority of the states explicitly require members of the judiciary to be lawyers practicing in the state. Compare N.C. CONST. art. IV, § 22; N.Y. CONST. art. VI, § 20

17. *McKay Report*, *supra* note 2, at 19-20 (Recommendation 5).

18. In a 1984 survey, 33 jurisdictions reported having a system under which the high court appointed members of the disciplinary board, the body which oversees the disability and discipline systems: Arkansas, Colorado, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York (1st Dept.), New York (2d Dept.), New York (3d Dept.), North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

19. Disciplinary counsel is appointed directly by the supreme court in Kansas, Minnesota, Missouri, New York (1st Dept.), New Jersey, and Rhode Island. In Colorado, Louisiana, and Wisconsin, disciplinary counsel is appointed by the disciplinary board with the approval of the supreme court. In Montana and South Dakota, there is no disciplinary counsel, while South Carolina uses deputy assistant attorneys general to carry out this function.

under a budget approved by the court,²⁰ function pursuant to specifically enumerated court powers²¹ (including the right to appeal disciplinary determinations),²² and be prohibited from engaging in activities incompatible with the role of disciplinary counsel.²³

As a second matter, McKay sought to further empower and protect persons seeking redress against lawyers.²⁴ McKay reaffirmed MRLDE 12,²⁵ which gave

20. In most jurisdictions, the governing body of the bar association (under the direction of an Executive Director) recommends a budget for court approval. This can lead to difficulties, as when the lawyers of Washington recently voted down a proposal that would have increased bar dues. Opinions vary regarding why the dues increase was rejected, but whether the vote was a signal of more general dissatisfaction with the Washington Supreme Court or an expression of displeasure about the increasing amounts of financial resources being devoted to lawyer discipline, one message was clear: Politics does not mix well with the financing of lawyer discipline. The *McKay Report* urged the following:

The budget of the office of disciplinary counsel should be formulated by disciplinary counsel. The budget for the statewide disciplinary board should be formulated by the board. Disciplinary budgets should be approved or modified directly by the Court or by an administrative agency of the Court. Disciplinary counsel and the disciplinary board should be accountable for the expenditure of funds only to the Court, except that bar associations may provide accounting and other financial services that do not impair the independence of disciplinary officials.

McKay Report, *supra* note 2, at 20 (Recommendation 5, § 5.3)

21. *See id.*, at 21 (Recommendation 6) (detailing measures required for completely independent discipline counsel).

22. LAWYER REGULATION, *supra* note 2, at 27 (Recommendation 6.1). In 21 jurisdictions, complainants are also entitled to appeal a dismissal prior to the hearing of a discipline complaint: California, Colorado, the District of Columbia, Hawaii, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York (1st and 2nd Depts.), North Dakota, South Carolina, Utah, Washington, and Wisconsin. Memorandum from ABA Center for Professional Responsibility to Burnele V. Powell (Nov. 29, 1993).

23. *See supra* note 6 and accompanying text. The *McKay Report* envisioned that optimally each jurisdiction would have both a disciplinary counsel and a bar counsel, with the latter focusing on the administrative functions of the bar. Although in some jurisdictions it will be deemed financially feasible to have only a part-time disciplinary counsel, the objectives are to develop specialists in lawyer discipline matters and to foster separation of a system's investigative and prosecutorial functions.

24. The intent here is to emphasize that the lawyer disciplinary system has never been restricted to complaints by clients. Anyone with knowledge of lawyer wrongdoing has always had the right to initiate a complaint. *See, e.g., In re McGlothlen*, 663 P.2d 1330, 1336 (Wash. 1983). "A second factor justifying leniency is that [respondent-]McGlothlen appears to have acted in good faith and with honest intent and there is no evidence that [client-]Ward was or felt harmed. The only complaint about his conduct arose from a local real estate agent with whom McGlothlen was apparently feuding . . ." *Id.* Note, too, that in most jurisdictions, other lawyers have a duty to report suspected wrong-doing by an attorney. Still, it has long been the case that most complaints originate with disgruntled clients. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 3.4.2, at 100 (1986). Moreover, lawyers are hesitant to report other lawyers, and this is especially the case if the other lawyer is a partner in their firm. *See* Kenneth Jost, *What Image Do We Deserve?*, A.B.A. J., Nov. 1988, at 47 (containing results of a survey on the public's attitude about lawyers).

immunity from civil or criminal liability to persons reporting lawyer misconduct.²⁶ Criminal liability for abuse of process might still result, but that was to be a matter of prosecutorial discretion.²⁷ As for the disciplinary process itself, the message would be that complaints were welcome, and to the extent possible under a regulatory scheme, were encouraged.

Rule 12 of the MRLDE provides that all communications to the disciplinary hearing board, hearing committees, or disciplinary counsel shall be "absolutely privileged." The McKay Commission's Recommendation 8, on the other hand, provided, more straightforwardly: "Complainants should be absolutely immune from civil suit for all communications with the disciplinary proceeding." Note, however, that during debate before the ABA House of Delegates, the McKay Commission's Recommendation 8, "Complainant Immunity," was withdrawn from consideration.

25. The McKay Commission's original vision fell short of fruition. The effort to design a lawyer regulatory system with completely open records (*see infra* text accompanying notes 92-109) while simultaneously providing absolute immunity for complainants (*see infra* text accompanying notes 26, 39-40) was derailed during debate by amendments from the floor which had the practical effect of retaining the ABA policy of postponing the opening of records until a determination of probable cause (*see infra* text accompanying note 28-32). The McKay Commission's final report explained:

Upon the House of Delegate's adoption of amendments to Commission Recommendation 7 ["Access to Disciplinary Information"] the Commission withdrew its original Recommendation 8 because absolute immunity for complainants is already ABA policy. *See* MRLDE 12A. The Commission's original Recommendations 7 and 8 were new in recommending both absolute immunity and a fully open process.

LAWYER REGULATION, *supra* note 2, at 39.

26. Rule 12 of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) authorizes immunity in both the civil and criminal law context. In the civil context, it provides that communications to the board, hearing committees, or disciplinary counsel related to charges of lawyer misconduct or disability (as well as any resulting testimony in a proceeding) shall be absolutely privileged, and no lawsuit predicated thereon may be instituted against any complainant or witness. Members of the board, members of hearing committees, disciplinary counsel and staff are also immune from suit for conduct in the course of their official duties.

In the criminal law context, the court may grant immunity from criminal prosecution to a witness in a discipline or disability proceeding upon application by disciplinary counsel and notice to the appropriate prosecuting authority.

It should be noted, however, that Rule 12 provides immunity for official reporting only. Thus, it does not free a complainant, for example, to make general public statements or to issue press releases.

In 32 jurisdictions complainants have absolute immunity. Qualified immunity (immunity for good faith claims or under circumstances when the complaints have been filed based on a promise of nondisclosure) is provided for in nine other states. *See* Memorandum, *supra* note 22, at 5.

27. The McKay Commission argued that only a small risk of harm (to the reputations of individual lawyers) existed if complaints against lawyers were made available to the public upon filing. That risk, however, was greatly outweighed by the message sent by an open-records system: "[T]he profession is not only willing to consider but actively seeks out information about unethical lawyers and will protect those who attempt to present it." *McKay Report*, *supra* note 2, at 28 (Comments to Recommendation 8). Furthermore, protecting lawyers, while balancing the interest of the public, could better be achieved by "making the filing of a knowingly false claim a misdemeanor criminal offense." *Id.*

Finally, McKay called for amending MRLDE 16's provision governing the timing of the opening of a respondent's complaint file.²⁸ In relevant part, MRLDE 16 prohibits public disclosure of records concerning complaints lodged against an attorney until the disciplinary agency has determined that there is probable cause to believe that the standards of lawyer conduct have been violated.²⁹ The proposed draft called for what came to be known as the "Oregon rule." This approach treats lawyer discipline complaints as public documents, which upon filing become immediately available upon request to any member of the public.³⁰

B. *New Structures and a New System*

Thus, the *McKay Report* had impact at both a policy and structural level. The three principles underlying the initiatives (judicial regulation of the legal profession, public empowerment, including access, and public accountability) manifested themselves as equally fundamental changes in the organization of the

28. MRLDE 16, "Access to confidential information," provides the following:

- A. *Confidentiality*. Prior to the filing and service of formal charges in a discipline matter, the proceeding is confidential, except that the pendency, subject matter and status of an investigation may be disclosed by disciplinary counsel if:
- (1) the respondent has waived confidentiality;
 - (2) the proceeding is based upon allegations that include either the conviction of a crime or reciprocal discipline;
 - (3) the proceeding is based upon allegations that have been generally known to the public;
 - (4) there is a need to notify another person or organization, including the clients' security fund, in order to protect the public, the administration of justice, or the legal profession.

MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 16 (1989).

29. See text accompanying *supra* note 26. Disciplinary proceedings are neither civil nor criminal, but *sui generis*, stemming from the common law courts' rights to discipline attorneys as officers of the court in protection of the public. See generally *In re Donald McKay*, 191 So. 2d 1 (Ala. 1966); *In re Inquiry Concerning A Judge*, 788 P.2d 716 (Alaska 1990); *In re Phillip W. Marquardt*, 778 P.2d 241 (Ariz. 1989).

30. The McKay Commission relied heavily on testimony by the Oregon State Bar regarding the efficacy of its system. The president of the Oregon State Bar testified:

Oregon is unique that complaints about lawyers are available for inspection from filing with the state bar. . . . [T]he Oregon experience, while not entirely problem free, should be carefully considered by the ABA Commission

Our experience indicates that concerns that lawyers are unnecessarily damaged by an open records process have not been substantiated. If a complaint has been dismissed upon investigation, the lawyer has been vindicated. If the lawyer has been disciplined, a prospective client should be allowed to determine whether that action justifies not going to the lawyer for assistance. The public can be trusted to exercise good judgment in deciding how complaint information affects their decision to hire a particular lawyer.

McKay Report, *supra* note 2, at 24 (Comments to Recommendation 7).

lawyer regulatory system. First, reflecting the policy of judicial regulation, the *McKay Report* called for each high court to create a Central Intake Office (CIO) and to assign to it responsibility for assisting the public in dealing with the disciplinary complaint process.³¹ Second, by way of providing expanded options for redress, McKay urged that in addition to the traditionally available sanctions under a bar disciplinary rule, jurisdictions should provide an array of procedures for intervening in lawyer-client disputes.³² Third, McKay urged the profession to improve the credibility of the lawyer discipline process by opening complaint files³³ and providing complainants with case-status reports covering the disciplinary process from complaint through disposition.³⁴

Although further revisions would follow, it was clear as early as that first public airing that the Commission hoped to persuade jurisdictions to move at an

31. LAWYER REGULATION, *supra* note 2, at 16-21 (Recommendation 3.2, Central Intake Office). See also *McKay Report*, *supra* note 2, at 12-14.

32. The McKay Commission called upon the courts to establish expanded systems of lawyer regulation which included, but were not limited to, components for the following: lawyer discipline, client protection through reimbursements, processes for mandatory arbitration of client-lawyer fee disputes and for the voluntary arbitration of lawyer malpractice claims and other disputes, mediation panels, lawyer practice assistance programs, lawyer substance abuse programs, and a central intake office for the receipt of complaints about lawyers. *McKay Report*, *supra* note 2, at 9-18.

33. The Commission urged openness:

All records of the lawyer disciplinary agency except the work product of disciplinary counsel should be available to the public from the time of the complainant's initial communication with the agency, unless the complainant or respondent . . . obtains a protective order [from the highest court or its designee] for specific [testimony,] documents or records. All proceedings except adjudicative deliberations should be public.

McKay Report, *supra* note 2, at 23 (Recommendation 7: Fully Public Discipline Process).

34. The Commission recommended a series of steps to increase Disciplinary Counsel's communications with complainants regarding the status of their case:

9.1 Complainants should receive notice of the status of disciplinary proceedings at all stages of the proceedings. In general, a complainant should receive, contemporaneously, the same notices and orders the respondent receives as well as copies of respondent's communications to the agency, except information that is subject to another client's privilege.

...

9.3 Complainants should be notified in writing when the complaint has been dismissed. The notice should include a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made.

...

9.5 Complainants should be notified of the date, time, and location of the hearing. Complainants should have the right to personally appear and testify at the hearing.

9.6. All jurisdictions should afford a right of review to complainants whose complaints are dismissed prior to a full hearing on the merits, consistent with ABA MRLDE 11B(3) and 31.

McKay Report, *supra* note 2, at 29 (Recommendation 9: Complainant's Rights). See also LAWYER REGULATION, *supra* note 2, at 16-21 (Recommendation 3.2: Central Intake Office).

accelerated pace in its new direction. True, many states already had supreme court regulation.³⁵ Disciplinary diversion and increased independence for bar disciplinary counsel were also programs that were already gaining support among thoughtful observers and bar disciplinary counsels.³⁶ Although the effort to make the Oregon rule the general rule was daring and innovative, it did not introduce a wholly new issue. As a practical matter, it was already unlikely that a complaint against a very well-known attorney could escape public disclosure. Furthermore, even the existing ABA rule allowed a complaint to be disclosed when the public interest so required.³⁷

Moreover, as was evidenced by the very first question that Trombadore was asked following his remarks, what was problematic about immediately opening complaint records was not solely that it risked generating adverse publicity.³⁸ Of equal concern was that it might be imprudent to link the open records recommendation with the recommendation elsewhere that complainants have absolute immunity from civil or criminal liability.³⁹

35. During the ABA House of Delegates debate on MRLDE 1983, an amendment introduced from the floor modified the Committee's recommendation that the regulatory model presume leadership by the state's highest court. That effort, spearheaded by jurisdictions with autonomous state bars operating subject to judicial review, sought to avoid the implicit criticism that might arise as a result of comparison with an ABA-endorsed supreme court regulated model (*see, e.g., infra* note 98 and accompanying text).

36. The McKay Commission was a product of the joint efforts of the National Organization of Bar Counsel (NOBC) and the ABA Standing Committee on Professional Discipline. *See supra* note 1.

37. *See supra* note 28 (describing MRLDE 16, which states that disclosure is allowed when allegations are generally known, or the need exists to notify another person in order to protect the public, the administration of justice, or the legal profession).

38. As chair of the ABA Committee on Professional Discipline (*see supra* note 2), I wrote Trombadore a letter dated September 27, 1991, following the Standing Committee's heated internal exchange of views on the matter. I reported that some members of the Committee on Professional Discipline objected to "the tone of the report as negative and . . . reflect[ing] an almost quixotic attempt to court public favor for the profession by promoting the public humiliation of lawyers." Letter from Burnele V. Powell, Chairman of the ABA Committee on Professional Discipline, to Raymond R. Trombadore, Chairman of the Commission on Evaluation of Disciplinary Enforcement (Sept. 27, 1991) (on file with author).

The letter went on to note the following:

[W]hen you previewed the report . . . at last winter's dinner for the chairs of the Center . . . , [*see supra* text accompanying notes 1-2] I was fortunate to have the opportunity to ask you the very first question regarding the then-anticipated report. 'Why,' I asked, 'would the Commission propose both immunity and immediately opened records?' Envisioning the likely response of this committee and lawyers generally, nothing was of more concern for me than knowing why it was necessary to propose such a star-crossed marriage.

Id.

39. LAWYER REGULATION, *supra* note 2, at 33-42 (Recommendation 7: Access to Disciplinary Information); *McKay Report*, *supra* note 2, at 26-28 (Recommendation 8: Complainant Immunity).

Because a fuller discussion of the open records issue is taken up below,⁴⁰ suffice it for the moment simply to note that the lively discussion over dessert speculated that, if adopted, an immediate disclosure rule would tend to favor the most outrageous and virulent critics of lawyers. Complainants would, in effect, have an invitation to “launder their complaints” as a means of injuring lawyers against whom they held a grievance. The official status of a government document would immediately attach to every complaint, no matter how ludicrous or irresponsible.

As one attorney who maintained a heavy domestic law practice would later put it, “I can just see the loonies now, waving papers in front of the television screen and saying, ‘I’ve just come from the disciplinary office and I have here in my hands their five complaints alleging that Attorney So-and-So’”⁴¹ Still others pointed out that, given immediate disclosure, such complaints would also be available for litigation purposes. The *horrible hypothetical* envisioned is the scenario in which a complaint is filed against an attorney appearing as a witness or running for elective office, where the only reason for the complaint is to force the attorney to squirm under cross-examination about whether he or she had ever been the subject of an ethics complaint.⁴²

What was remarkable about the first public discussion of the *McKay Report* was not the details of its substantive proposals, as impressive and as enduring as they are likely to be. Nor was the notable thing what was said around that table. What was notable was that left unsaid. Of the dozen or so people seated there—men and women who had given most of their professional lives to the law, lawyers, and the public interest—none voiced an unalterable objection to any of the proposals presented. In effect, what was reported and what was evidenced by the general lack of dissent, confirmed that a sea-change in the way lawyers think about their relationships with their clients (and the profession’s regulation of that relationship) was well underway. In a major American social institution, a revolution had taken place so quietly that few had even heard the gunfire.

40. See *infra* notes 92-109 and accompanying text.

41. This is the author’s personal recollection. Consider, too, Powell’s letter to Trombadore sharing thoughts on this issue. See *supra* note 38.

Subsequent drafts of the immunity provision implicitly conceded the unfortunate link between openness and immunity by recommending that those who knowingly abuse the complaint process be subject to criminal prosecution by the district attorney, rather than to suit by the libeled attorney. Given the reality of prosecutorial priorities, this solution was widely derided as ludicrous by virtually everyone who commented upon it, and rightly so. See *McKay Report*, *supra* note 2, at 26 (Recommendation 8.1).

42. There is, however, no evidence that either scenario has occurred or been threatened. Despite the low probability, as long as the possibility exists, the chances for reform in this area remain problematic.

C. *The Principles in Perspective*

Simply put, what happened in Seattle was that the war between the nineteenth-century gentleman lawyer, ever-fearful that the legal profession might become a mere business, and his cosmopolitan twentieth-century counterpart finally came to an end. The battles waged in *Piper v. New Hampshire*,⁴³ *Bates & O'Steen v. State Bar of Arizona*,⁴⁴ *Shapero v. Kentucky Bar Association*,⁴⁵ and *Keller v. State Bar of California*⁴⁶ to forestall the Twentieth Century were lost. For better or worse, the twentieth century had won.

Therefore, Part II of this Article⁴⁷ focuses on McKay's three structural changes as emblematic of the revolution brought about with respect to the lawyer discipline system. It argues that, when taken together, the McKay reform reflects a new consensus that the legal profession has evolved from a relationship of lawyers serving clients into one of attorneys serving client-consumers. The change has been gradual, but the implications are profound and likely to herald increasingly more changes over the next decade.

It is urged, furthermore, that the ABA has, at last, rejected the pejorative aspects of the *professional model* description of the lawyer-client relationship, wherein the relation is expert-to-client and there is an emphasis on inequality.⁴⁸

43. 470 U.S. 274 (1985) (holding that New Hampshire violated the Privileges and Immunities clause by refusing to swear in to the state bar a successful bar examinee who was otherwise qualified, except that her domicile in Vermont made her a resident of that neighboring state).

44. 433 U.S. 350 (1977) (deciding that despite Arizona's laws preventing lawyer advertising, the First Amendment protected the right of a so-called "Legal Clinic" to generate business by advertising the concentration of its practice on routine matters).

45. 486 U.S. 466 (1988) (finding that the state could not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers acting for pecuniary gain from using mail solicitations of persons known to be potentially in need of legal services, so long as the letters involved were truthful and non-deceptive).

46. 496 U.S. 1 (1990) (deciding that lawyers could be required to belong to and pay dues to support a unified state bar that disciplined lawyers, advised on the administration of justice, and carried out other functions, but compulsory dues may not be extracted and applied in support of activities that do not involve the regulatory and educational functions for which the state bar exists).

47. See *infra* notes 52-109 and accompanying text.

48. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 15-22 (1975), for assertions that the lawyer-client relationship does not yield deserved respect or dignity for clients. For example, a pervasive feature of the relationships is inequality that results in lawyers being in a dominant position by virtue of superior knowledge and expertise. As a result, lawyer interactions with clients are often paternalistic and manipulative. See also DEBORAH L. RHODE & DAVID J. LUBAN, *LEGAL ETHICS* 600-02 (1992), viewing the complexity of legal problems as partially responsible for putting clients in the uncomfortable position of not knowing what to do. They also note that clients often simply give-in to their lawyers' definition of their goals. As with Wasserstrom, however, conflicts between clients' desires and lawyers' actions are viewed as inevitably fostering paternalism in legal relationships.

In its place has been substituted the consumer concept of provider-to-customer equality. Towards this end, what once was properly thought of as a lawyer disciplinary system has now been supplanted by a lawyer regulatory system. As opposed to the former profession-driven lawyer disciplinary system, the new model is client-consumer-driven and emphasizes public access and service.

These changes reflect the teaching of the consumer movement to the extent that they accept the learning that service is no longer simply a fiduciary obligation; it is a duty that users of legal services are owed as a matter of right.⁴⁹ More importantly, however, the acceptance of clients as consumers of legal services means that it is no longer sufficient for lawyers to zealously advocate the interest of their clients;⁵⁰ they must anticipate and respond to the needs of their patrons.

Part III of this Article,⁵¹ therefore, anticipates some future initiatives that will have to be taken up as a result of the profession's embrace of consumerism. It suggests that given the firmer ground on which the profession now stands, the time has now come to begin opening even more doors.

49. See, e.g., THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982).

50. Canon 7 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981), has provided the traditional summary of the lawyer's obligations to a client: "[A] lawyer should represent a client zealously within the bounds of law." Subject to the understanding that "[t]he bounds of the law in a given case are often difficult to ascertain" (*id.* at EC 7-2), and appreciation that "the action of a lawyer may depend on whether he is serving as advocate or adviser," (*id.* at EC 7-3), the fullest elaboration of the zealousness ideal is provided by Ethical Consideration EC 7-1:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits

Id. at EC 7-1.

This ideal was restated less dramatically, and thus to debatable effect, in MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client." The required diligence, as elaborated upon in the accompanying commentary, makes clear that, "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." At issue is whether by relegating discussion of the lawyer's duty of *zealousness* to a commentary (as opposed to the black letter law) and treating it as a derivative of the duty of *diligence* truly captures the import of Canon 7.

Regardless of the form of the discussion or the relevant etymology, the fact remains that both the Model Code and the Model Rules impose upon lawyers a continuing duty to act for clients in a reasonable and timely fashion. Thus, although the Model Rules lack an explicit call for fervor and enthusiasm within the bounds of law, such ardor must be read as at least strongly implicit and, more likely than not, mandated. As important, the modern necessity is that the delivery of legal services must be consumer-oriented within the bounds of law.

51. See *infra* notes 110-13 and accompanying text.

II. THE RESTRUCTURED SYSTEM

Appreciation of the policy shift implicit in the McKay model requires brief reference to the Special Committee on Evaluation of Disciplinary Enforcement, the blue-ribbon panel created by the ABA in 1967 under the chairmanship of retired Supreme Court Justice Tom C. Clark.⁵² Most notable about the Report of the Special Committee⁵³ was its silence with respect to each of the policy points lying at the heart of the McKay model. Instead of clients' problems with their lawyers, which McKay saw as central, Clark focused on the disciplinary system's failure to deal with errant attorneys. Thus, the problem of growing public dissatisfaction with the legal profession reflected, first, a failure of many jurisdictions to view the need for lawyer discipline seriously and second, issues of resources,⁵⁴ organization,⁵⁵ and communication.⁵⁶ As the Special Committee stated: "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; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors."⁵⁷

The "scandalous situation that requires the immediate attention of the profession"⁵⁸ was essentially that the profession was not acting like a profession. It was not, for example, preventing attorneys disbarred in one jurisdiction from practicing in other jurisdictions.⁵⁹ Lawyers were being allowed

52. The Special Committee's charge was this:

To assemble and study information relevant to all aspects of professional discipline, including the effectiveness of present enforcement procedures and practices and to make such recommendations as the Committee may deem necessary and appropriate to achieve the highest possible standards of professional conduct and responsibility, and . . . that the study be carried out in cooperation with state and local bar associations.

Clark Report, supra note 2, at xiii.

53. 95 A.B.A. REP. 783 (1970).

54. The *Clark Report* noted, for example, that "state disciplinary agencies are undermanned and underfinanced, many having no staff whatever for the investigation or prosecution of complaints." *Clark Report, supra* note 2, at 2. Elsewhere, the consequences of the financial situation could not have surprised the Special Committee:

Most [disciplinary agencies] do not initiate investigations without receiving a specific complaint. Sometimes this is due to the absence of initiative on the part of the disciplinary authorities, but often it is the result of inadequate funds to retain an adequate staff to process complaints and initiate investigations.

Id. at 6.

55. "There must be more centralization, greater power and swifter action. Moreover, disciplinary action must be clear and certain." *Id.* at 3.

56. *Id.*

57. *Id.* at 1.

58. *Id.*

59. *Id.*

to practice even after conviction of serious crimes.⁶⁰ Lawyers were routinely being readmitted after disbarment.⁶¹ Lawyers were failing to report wrongdoing by other lawyers, and even worse, failing to appear or cooperate in proceedings against them.⁶² Then too, in some communities, bad lawyers had in effect captured the lawyer disciplinary system, with the result that "agencies will not proceed against . . . [or] no disciplinary action is taken, . . . against those with whom they are professionally and socially well acquainted."⁶³

The problem of lawyer regulation in the Clark era, therefore, was the problem of a profession that had failed to discipline itself. The declining esteem in which the public held the legal profession, Clark assumed, was, at the core, the result of the public's well-founded belief that several factors, alone or in combination, were at work: too few attorneys were being disciplined; the right attorneys were not being disciplined; or the attorneys being disciplined were not being disciplined severely enough.⁶⁴

Although never explicitly acknowledged, the *McKay Report* departed from the *Clark Report* in fundamentally different ways in regard to focus, philosophy, and programs. McKay viewed public dissatisfaction with lawyers as the product of the relationship between clients and their lawyers, as opposed to identifying the problem as one between lawyers and the legal profession. Thus viewed, the problem was as much an external as an internal matter. More significantly, McKay's new vantagepoint virtually dictated consideration of different solutions.

McKay's recommendations reflected the need for the profession, as it were, to invite the public inside the lawyer disciplinary process, to embrace the legal profession's critics so that they might feel vested in the lawyer regulatory system, and to lower the barriers of professionalism that have historically left lawyers vulnerable to charges that they care more about themselves than about their clients or the general society.⁶⁵ Accordingly, as reflected by the title of

60. *Clark Report*, *supra* note 2, at 1.

61. *Id.*

62. *Id.*

63. *Id.* at 1-2.

64. In addition to the STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS, adopted February 1979 (later revised as the MODEL RULES FOR DISCIPLINARY ENFORCEMENT (1989)), one of the important developments resulting from the *Clark Report* was the STANDARD FOR IMPOSING LAWYER SANCTIONS (1986). The latter recommends a uniform set of disciplinary sanctions aimed at assuring uniformity and equity throughout the jurisdictions.

65. For a discussion that elucidates the contrasting approach of the Clark Commission, see *supra* text accompanying notes 52-64. See also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

this piece, brief discussions of three of McKay's initiatives help to define the scope and significance of its changes.

A. The Open Door—Inviting the Public In

Perhaps most symbolic of McKay's proposals was the recommendation that courts establish Central Intake Offices⁶⁶ to assist clients in dealing with the complaint process.⁶⁷ As envisioned, the Central Intake Office would have primary responsibility for interacting with the public. It would receive and process inquiries and complaints about lawyers and the legal system. In the tradition of an ombudsman, the intake officer would be responsible for both instructing and advising members of the public. If and when cases develop, the intake officer would docket, refer, and monitor the progress of the proceedings through the system. Moreover, as an independent creation of the highest court, the central intake office would have initial authority to refer cases to disciplinary counsel for consideration for possible sanctions, or to "divert"⁶⁸ particular matters by assigning them to any of several client-centered services programs.⁶⁹

That the central intake office was, first, to exist; second, to be an independent arm of each jurisdiction's highest court; and third, to have a role

66. *McKay Report*, *supra* note 2, at 13 (Recommendation 3.2).

67. *Id.* Recommendation 3.2 calls for the highest court in each jurisdiction to establish a system of regulation of the legal profession, including the following:

[A] central intake office for the receipt of all complaints about lawyers, whose functions should include: (a) providing assistance to complainants in stating their complaints; (b) making a preliminary determination as to the validity of the complaint; (c) dismissing the complaint or determining the appropriate component agency or agencies to which the complaint should be directed and forwarding the complaint; (d) providing information to complainants about available remedies, operations and procedures, and the status of their complaints; and (e) coordinating among agencies and tracking the handling and disposition of each complaint.

Id.

68. Unfortunately, the popular terminology—analyzed to the criminal prosecution system—continues to prevail. "Submission to non-disciplinary proceedings" is technically the correct term. The *McKay Report's* key provision is Recommendation 10: "Procedures in Lieu of Discipline for Minor Misconduct," which calls upon jurisdictions to adopt procedures in lieu of discipline when a lawyer has engaged in minor misconduct, minor incompetence, or minor neglect. More specifically, it provides the following:

If disciplinary counsel determines that a matter meets the criteria established by the Court, disciplinary counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, or any other non-disciplinary proceedings authorized by the Court. Disciplinary counsel shall then refer the matter to the agency or agencies authorized by the Court to conduct the proceedings.

McKay Report, *supra* note 2, at 33-34 (Recommendation 10.2).

69. *See infra* text accompanying notes 82-90.

related to (but independent of) the disciplinary office, represent gains for clients, the importance of which is difficult to overestimate. Even two years following the issuance of the report, and well after approval by the House of Delegates as ABA policy,⁷⁰ debate continued over whether the central intake recommendation actually meant what it appeared to say: that supreme courts (as opposed to the bar or disciplinary counsel) were to establish the office; that it was not to be physically or administratively under the control of the system's bar disciplinary counsel; and that the intake officer (rather than disciplinary counsel) was empowered to assign complaints for disposition (e.g., to the lawyer assistance or the law office management program).

Several interest groups, including most notably the National Organization of Bar Counsels, took the position before conforming amendments were referred to the ABA House of Delegates⁷¹ that it had always been envisioned that the traditional role of bar disciplinary counsel as coordinator of the disciplinary system would be preserved. Thus, it was urged that the implementing structure should reflect the need to draw upon bar counsel's expertise in dealing with complaints. Although in this view it was not specifically required that the central intake officer be physically located within disciplinary counsel's office suite, the officer should be on the staff or, at minimum, under the supervision of disciplinary counsel. This would not only assure that complaints would be handled in a professional way, but it would be essential if bar counsel were to be able to make knowledgeable decisions about which complaints might most appropriately be prosecuted and which might better be diverted for handling by another office. For example, it was urged that only bar disciplinary counsel would have enough information about the history of any particular lawyer's involvement with the disciplinary system to be able knowledgeably to say how a new complaint ought to be handled.

Only occasionally hinted at by opponents of an independent central intake office was another consideration: if the intake officer was truly independent, a new center of power, potentially rivaling disciplinary counsel's historic status, could emerge. In the worst case scenario, the intake officer and disciplinary counsel might not know that each was proceeding against a respondent. The intake officer might view the matter as appropriate for the law office management program, while disciplinary counsel might view the situation as

70. Report No. 119, *Report of the Commission on Evaluation of Disciplinary Enforcement*, was largely adopted by the ABA House of Delegates at the 1992 Midyear Meeting of the ABA in Dallas, Texas, February 3-4, 1992. See *supra* notes 25, 26, & 30 (legislative history following withdrawal of the "probable cause" and "immunity proposals").

71. Report and Recommendations No. 104 to the House of Delegates (Proposed Amendments to the Model Rules for Lawyer Disciplinary Enforcement) (submitted May 1993) successfully advanced amendments incorporating the policy recommendations of the McKay Commission.

reflecting a pattern of practice warranting prosecution. Even if coordination of information made comity between the offices possible, the possibility of an issue arising regarding who should prevail in the event of the always-possible, hypothetical disagreement was determinative for some.

It is significant, however, that at least at this writing, the question of the nature and scope of the central intake office has been resolved as a consumer matter and not as a matter of prosecutorial control.⁷² The prevailing arguments relied on the literal language of McKay⁷³ and the fact that the report had included a schematic diagram picturing the intake office as a separate and distinct off-shoot of the highest court, rather than the office of disciplinary counsel.⁷⁴ In addition, three other arguments were supportive.

First, it was noted that the primary purpose of the central intake office was to give the lawyer regulatory system a new face. The intent was to respond to the public's need for one-stop relief for their complaints about lawyers. No longer would it suffice to say to complainants that a matter about which they complained was worthy of sympathy and ironically malpractice liability, but must be dismissed because it did not involve a violation of any standard of professional ethics.⁷⁵ The new approach would be to assure that any person with

72. Responsibility for proposing the conforming amendments to the ABA Model Rules for Lawyer Disciplinary Enforcement necessary to incorporate McKay's policy changes rested with the ABA Standing Committee on Professional Discipline. The Committee extensively debated proposed central intake structures prior to submission of the McKay recommendations to the ABA House of Delegates at the ABA Annual Meeting in August 1993, and endorsed an independent central intake office—with line responsibility directly from a state's highest court and separate and distinct from control and oversight by the disciplinary counsel.

73. In conversation with the author, Commission Reporter Timothy McPike urged attention to comments in the Commission's final report that:

Detecting unethical behavior should remain the highest priority of the judicial branch.

The central intake *agency* should screen all complaints for allegations of conduct that violates ethics rules. It should *forward* those complaints to the *disciplinary agency* and to any other relevant agency, to insure misconduct is not overlooked.

McKay Report, *supra* note 2, at 13 (emphasis added). See also *supra* note 67.

74. *McKay Report*, *supra* note 2, at 12. See also *LAWYER REGULATION*, *supra* note 2, at 15, 28.

75. The Commission contended that up to 90% of disciplinary complaints were summarily dismissed in some jurisdictions, primarily for "failing to allege unethical conduct." *McKay Report*, *supra* note 2, at 9. However, the Commission noted that many of the dismissed complaints do, in fact, allege conduct that should be scrutinized, since the number of dismissed complaints "shows a gap exists between reasonable client expectations and existing regulation." *Id.* "It is clear that tens of thousands of clients [alleging legitimate grounds for dissatisfaction] are being turned away" because the conduct alleged would not be a violation of disciplinary rules. *Id.*

One part of the problem is that conduct that literally may violate the rules, such as a failure to return telephone calls, is not generally deemed actionable unless it involves a *pattern of conduct*. Thus, a pattern of technical failings may give rise to discipline based on a finding that an attorney has failed to communicate with a client, prosecuting such failures of client relations as *per se*

a complaint against a lawyer could, in effect, enter a single door to get help, regardless of the nature of the required relief.⁷⁶

Consistent with the ideal of single-door central intake was a second point: behind the single door would be a friendly person responsible for processing complaints and advising complainants about lawyers, the workings of the legal system (especially in regard to lawyers' professional standards), and the status of their cases. In the latter circumstance, the intent was to assure complainants that their case was being monitored by someone who viewed it as their highest priority. At each step along the way, whether a complaint resulted in disciplinary action or diversion, the ideal was to redirect the focus of the old lawyer discipline system towards the broader vision of the new lawyer regulatory system. In the former, the process existed to protect the profession;⁷⁷ under the new open-door process, the interest of complainants is to be at least as important.

Finally, it was urged that there was an additional reason to favor an independent central intake office. Just as McKay had elsewhere sought to free disciplinary counsel from subordination to bar officials,⁷⁸ it was consistent to free the intake officer (the regulatory system's public representative) from interference—real or imagined—by bar counsel. The public would not view judicial regulation of the system as anything but a semantical change absent visible evidence that from the very first contact the new system reflected but one interest—that of assuring the public that resolution of complaints was the system's priority.⁷⁹

violations could easily bankrupt most disciplinary systems. A second part of the problem is not so much financial as a question of analysis. For example, the ABA has ruled that it is not a violation of the MRPC for a lawyer to have sex with a client. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992). Although most attorneys would agree that it poses an impermissible conflict of interest for an attorney to allow his or her self-interest to interfere with the representation of a client, debate continues regarding whether, in the absence of demonstrated prejudicial effects, sexual intimacy with a client ought to be viewed as self-interested conduct. See Nancy E. Goldberg, *Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule*, 26 AKRON L. REV. 45 (1992); Joanne Pitulla, *Unfair Advantage*, A.B.A. J., Nov. 1992, at 76, 76-80.

76. LAWYER REGULATION, *supra* note 2, at 16.

77. See *supra* text accompanying notes 17-23 (discussing that the bar disciplinary counsel is not under control of elected officials).

78. See *supra* notes 4-8 and accompanying text.

79. The actuality of the sub-text victory won by consumers was not apparent when the recommendations conforming the MRLDE to the adopted policies of the *McKay Report* were presented to the House of Delegates. Yet, the system described by the recommendation was one in which the central intake office was created by the highest court of each jurisdiction as a separate and independent unit. Having reached a consensus about the independence of the central intake office, the Standing Committee on Professional Discipline and the NOBC agreed that the NOBC would develop for discussion a draft of proposed regulations to implement the central intake concept.

B. Open Arms

Having figuratively opened the door to the public with the creation of the central intake office, the McKay Commission next opened its arms to embrace the public. McKay called for the creation of several entities to assist clients and lawyers in resolving the problems confronting them. Here too, however, the options were consumer-oriented in the sense that they emphasized the delivery of legal services and client satisfaction as opposed to the imposition of sanctions against lawyers. Rather than a system premised on discipline with sanctions as the first resort—or as McKay described it, a system where sanctions were the *only* resort⁸⁰—the new lawyer regulatory system viewed sanctions as but one of several ways to protect the public and the profession.

The availability of sanctions under the old system had the benefit of appearing to reflect a strong commitment to enforcement of lawyer standards, but implicit in the new approach is an acknowledgement of the reality that for up to ninety percent of the complaints entering the system, little or no relief was forthcoming.⁸¹ Under the client-consumer approach, therefore, confidence was instead placed on a process in which sanctions could be held in abeyance—as a reminder, if not a threat—to induce a lawyer to seek medical or instructional guidance. As indirect as the new approach is, the recourse to programs promoting consumer satisfaction and the delivery of quality legal services is deemed more likely than sanctions to result in greater direct benefits to clients, individual lawyers, and the public.

Accordingly, McKay called for each jurisdiction to create essentially two kinds of client-centered programs to assist lawyers in the representation of their clients: programs designed to involve clients directly (hereinafter referred to as client-focused programs) and those designed to benefit clients indirectly (hereinafter referred to as lawyer-focused programs). While client-focused programs seek to involve clients directly in resolving conflicts with lawyers (e.g., through mediation), lawyer-focused programs address the respondent lawyer's ability to deliver legal services (e.g., by improving the personal health or management skills of the lawyer).⁸²

80. See *supra* note 75 and accompanying text (finding that most complaints are dismissed because they do not involve grounds for discipline).

81. See *supra* note 75 and accompanying text.

82. The report envisions that programs already existing in many jurisdictions will be universally adopted. These programs include the following: client protection programs which provide for the reimbursement of client funds lost as a result of lawyer wrongdoing; trust account overdraft notification, requiring that banks notify appropriate authorities when a lawyer's management of a client account results in an overdraft; implementation of a record verification rule, establishing minimum standards for the record-keeping incident to a lawyer's maintenance of client trust accounts; and the adoption of payee notification rules, requiring that third-party settlements be

Thus, McKay's client-focused services included the call for the mandatory arbitration of fee disputes between lawyers and clients,⁸³ the voluntary arbitration of lawyer malpractice claims (and other disputes),⁸⁴ and the voluntary mediation of all other lawyer/client disputes.⁸⁵ Correspondingly, McKay's call for lawyer-focused services included the establishment of law office management programs,⁸⁶ the creation of lawyer assistance programs for substance abusers,⁸⁷ and the implementation of programs for the random auditing of lawyer's client trust accounts.⁸⁸

It is striking that the client-centered services approach rejects the idea that the legal profession can look inwardly for diagnosis and revitalization.⁸⁹ McKay celebrates that its viewpoints were shaped by over two years of involvement in public meetings, consultations, and dialogue with people and organizations from around the country. It accepts with sincerity and a sense of recognition, therefore, testimony that many in the public have had largely negative experiences with lawyers and the lawyer disciplinary system.⁹⁰ Not surprisingly, then, the expression to which McKay gives voice in each of its major recommendations is not simply the voice of legal clients, but also that of legal consumers.⁹¹

Recognition seems, at last, to have come to the legal profession that lawyers who handle legal problems will still have failed their broader professional duty to the extent that they do not recognize that clients are also consumers. As such clients are entitled to expect that those from whom they buy services will consult with and inform them, treat their legitimate objectives

accompanied by written notice to claimants that the claim has been paid.

83. LAWYER REGULATION, *supra* note 2, at 14 (Recommendation 3.1(c)).

84. *Id.* (Recommendation 3.1(d)).

85. *Id.* (Recommendation 3.1(e)).

86. *Id.* at 21 (Recommendation 4).

87. *Id.* at 14 (Recommendation 3.1).

88. *Id.* at 75 (Recommendation 16).

89. The Commission reported that during the course of its investigations, it "heard much criticism of the profession," some of which reflected public misunderstandings and others "misplaced unhappiness with the results of legal proceedings," but "much of the criticism we heard is justified and accurate." *McKay Report, supra* note 2, at xxiii-xxiv.

90. The McKay Commission's general views largely anticipated the findings of the recently commissioned Peter Hart survey of public attitudes about the profession. The ABA-commissioned study found that only 40% of the public held a favorable view of lawyers (as compared with 84% for teachers, 71% for doctors, and 21% for politicians) and, as one summary stated, "[overall]... the public has mixed feelings. But one fundamental fact surfaced: The problem goes far beyond image. The public perception seems based on strongly rooted dissatisfactions with some aspects of the way the system works and how lawyers practice their skills." Gary A. Hengstler, *Vox Populi*, A.B.A. J., Sept. 1993, at 60, 60-65.

91. Ellen Feingold of Boston, Massachusetts, was the lone nonlawyer on the Commission.

as the primary focus of any transaction, and reflect understanding of the basic rule of the market place: that customer loyalty is a function of product satisfaction. Thus, McKay's response is the appropriate one in that it emphasizes opening the disciplinary system to public scrutiny, enhancing the accountability of its officers, protecting the process from the influences—actual or perceived—of bar politics, and emphasizing solutions that reflect a desire to benefit clients, rather than a single-minded absorption with the punishment of lawyers.

C. Substantially Open Records

Despite consumer gains represented by the Central Intake Office and the array of consumer-centered services, McKay reflects less success with respect to the third of the major initiatives discussed here: the "totally open records rule," which would have required the opening of complaint records to the public from the time of the filing of the complaint.⁹² The reasons for that loss, like the reasons for success in other respects, is complicated and not susceptible to explanation by any single factor.⁹³ But the fact that the totally open-records proposal retained the strong public support of the Commission's members long after it was apparent to many observers that the measure could not gain a majority of votes before the House of Delegates,⁹⁴ suggests a depth of

92. See *supra* note 25 and accompanying text.

93. One such factor was that voices in opposition represented a coalition that spanned a broad spectrum. ABA delegations from some states such as North Carolina and Texas, for example, made their general opposition to the McKay reforms known because they opposed McKay's call for regulation of the profession by the judiciary. Thus, their opposition to open records was only incidental to their more general opposition. In addition, some opponents were from states where confidentiality of complaints was statutorily mandated (e.g., New York, New Jersey). For some, but by no means all, a vote to open the records upon the filing of a complaint was simply a vote to hold longstanding and well-considered state policies up to ridicule. Still other delegates were generally supportive of the reforms, but nevertheless opposed McKay (and coincidentally the open records proposal) because they disagreed with the overall tone of the report, pointing out that the report made it appear that the ABA was only knuckling-under to naysaying lawyer-bashers. And, of course, there were those who genuinely disagreed with the Commission, regarding whether opening records would prove harmful to otherwise innocent lawyers. Among this group, it might be noted, could also be counted delegates who opposed even the then-existing rule, requiring that the records be open to the public upon a determination that probable cause existed to believe that a complaint was true.

94. It appears that the McKay Commission wisely pursued a calculated strategy not to withdraw the open-records rule beforehand. Soon after the Standing Committee on Discipline's letter of September 27, 1991, questioning the open-records/absolute immunity stance (see *supra* note 39), it was apparent that there would be substantial numbers of individuals within the ABA who would oppose the measure. By persisting in its support of Recommendation 7 (open records) and Recommendation 8 (absolute immunity) all the way to the ABA House of Delegates debate, however, the Commission established a justification for including the legislative histories of both proposals in its final report. Had the recommendations been withdrawn before reaching the House of Delegates, preservation of their legislative histories would have been, at best gratuitous.

commitment on the part of its supporters which assures that it will not die as an issue.⁹⁵

Indeed, it is worth noting that historically, many of the most significant proposals endorsed by the ABA initially required several efforts by proponents to get the policy adopted.⁹⁶ The *McKay Report* itself benefitted from the momentum of earlier initiatives such as the initially proposed, then withdrawn, proposal for random audits of lawyers' trust accounts.⁹⁷ Similarly, in the course of approving the 1989 amendments to the Model Rules for Disciplinary Enforcement, the recommendation that the highest court in each jurisdiction assume direct control over matters relating to the regulation of the legal profession failed in its original incarnation, when amendments acknowledging a role for non-judicial regulation of the bar were added during the House of Delegates debate.⁹⁸ In each instance, however, subsequent changes in the legal profession and, undoubtedly, in the ABA itself eventually resulted in policy changes.

The lesson in the failure of the ABA to abandon its substantially open records rule in favor of the Oregon rule's totally open records is not, therefore, that this change is beyond reach, but that it was probably reached for too soon. For if the ABA has embraced the basic idea of consumerism—as is asserted here it clearly has, given the strong support for the core McKay recommen-

95. Continuing to urge that states exercise their authority to choose an alternative to those courses recommended by the ABA's model disciplinary rules, during public hearings in New York City, chaired by Assemblyman G. Oliver Koppell on September 23, 1993, Trombadore urged that New York State adopt the Oregon rule. Jan Hoffman, *New Guidelines for Lawyers Ignite Debate*, N.Y. TIMES, Nov. 8, 1993, at B1. See also *Experiencing the "Velvet Revolution"*, PROF. LAW., Nov. 1993, at 2.

96. Technically speaking, it is fairer to note the process of policy-making in the ABA is most often evolutionary. Some proposals suffer defeat, but more often the case is that a proposal will be withdrawn and reworked. Even a true defect, however, may not end the matter. Recall, for example, that ABA policy opposing discrimination on the basis of sexual orientation was defeated in 1987, but subsequently became ABA policy in 1989.

97. In 1970, the Special Committee called for a court rule requiring the maintenance of client trust account records for a reasonable period of time following final distribution of the funds and added that "these records be audited annually." *Clark Report*, *supra* note 2, at 173. It was not until August 1992 that the ABA endorsed the policy of auditing a lawyer's client trust account in the absence of probable cause, and thereafter adopted the MODEL RULE FOR THE RANDOM AUDIT OF LAWYER TRUST ACCOUNTS in August 1993.

98. The amendment was a subtle one that added bracketed language to the "Structure and Scope" caption for the ABA *Model Rules for Lawyer Disciplinary Enforcement*, Rule 2. Rather than captioning the rule "The Disciplinary Board of the Supreme Court . . .," the amended caption provides: "The Disciplinary Board of the Supreme Court [State Bar] of . . ."

ditions⁹⁹—what is now required in order for proponents to make a persuasive case for general adoption of the Oregon rule is either more experience with the Oregon rule or a stronger empirical analysis of the limited experience that is available.

Presently, however, other jurisdictions have shown reluctance to follow Oregon's approach. Following consideration by several states, which named blue ribbon committees to study McKay's recommendations, none adopted an Oregon-style rule. Furthermore, some jurisdictions, including New York¹⁰⁰ and New Jersey,¹⁰¹ continue to adhere to procedures that the ABA superseded in

99. Most of the McKay Commission recommendations were approved by voice vote, but one, Recommendation 8, "Complainant Immunity," was withdrawn; four were amended; one, "Independence of Disciplinary Officials," was approved after a division of the house by votes of 203 to 170. The specific tally was as follows:

- 1) Regulation of profession by judiciary — approved;
- 2) Supporting judicial regulatory and professional responsibility — approved;
- 3) Expanding the scope of public protection — approved;
- 4) Lawyer Practice Assistance Committees — approved;
- 5) Independence of disciplinary officials — approved by a vote of 203 to 170;
- 6) Independence of disciplinary counsel — approved as amended;
- 7) Fully public discipline process—Access to disciplinary information — approved as amended;
- *) Complainant immunity — withdrawn by the Commission;
- 8) Complainant's rights [this recommendation and those that followed have been renumbered following withdrawal of recommendation 8 regarding complainant immunity] — approved;
- 9) Procedures in lieu of discipline for minor misconduct — approved;
- 10) Expedited procedures for minor misconduct — approved as amended;
- 11) Disposition of cases by a hearing committee, the Board, or Court — approved;
- 12) Interim suspension for threat of harm — approved;
- 13) Funding and staffing — approved;
- 14) Standards for resources — approved;
- 15) Field investigations — approved;
- 16) Random audit of trust accounts — approved as amended;
- 17) Burden of proof in arbitration of fee disputes — approved;
- 18) Mandatory malpractice insurance — approved;
- 19) National Discipline Data Bank — approved;
- 20) Coordinating interstate identification — approved.

100. Since February 1992, when the ABA adopted the recommendations of the *McKay Report*, Massachusetts, New Mexico, Vermont, and Rhode Island have taken steps to adopt rules providing for the opening of complaint records following a determination of probable cause.

Through a combination of judicial orders and legislative initiatives, New York was studying changes in their lawyer discipline system as this article was being written. See *supra* note 95 and accompanying text.

101. See *NJSBA Counters Michels Findings*, N.J. L.J., Oct. 4, 1993, at 1. New Jersey is expected to schedule public hearings at a later date.

1979.¹⁰² These old-style procedures, to a much greater degree than either the ABA or Oregon procedures, reflect the view that a lawyer's reputation is fragile and irreplaceably unique given the goodwill necessary for the successful practice of law.¹⁰³ In this view, lawyer discipline processes require even more protection than would be due a defendant in a criminal law proceeding because reputation is the lawyer's stock and trade.¹⁰⁴ As such, adherents of the most restrictive disclosure rules continue to insist that the only fair system would withhold public disclosure of a complaint against a lawyer until the charges against that lawyer have been sustained.¹⁰⁵

The failure of other jurisdictions notwithstanding, there is no reason that a convincing case for adopting the Oregon rule could not be built on a rigorous study of the rule's impact in Oregon. To this point, however, supporters of the Oregon rule have been satisfied simply to rely on anecdotal evidence of the rule's effectiveness.¹⁰⁶ In response to the primary objection raised to it, the reputation argument, supporters have been satisfied to recount the public hearings that the Commission held around the country (including in Oregon). They argue that of the hundreds of Oregon lawyers and lay witnesses invited to

102. See *supra* note 98 (the New York rule). See also *supra* note 100 (Koppell hearings); Jan Hoffman, *Debate over Public Disciplinary Hearings for Lawyers*, N.Y. TIMES, Sept. 26, 1993, §1, at 41.

103. *Id.* See also Andrew Blum, *Climbing Back from Acquittal*, NAT'L L.J., Oct. 4, 1993, at 1 (discussing attorneys who have had to battle criminal prosecutions).

104. In *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110 (1st Cir. 1983), *Prob. juris. noted*, 466 U.S. 949 (1984), for example, the Supreme Court accepted the basic role of reputation, in rejecting New Hampshire's claimed need to deny bar admission to lawyers residing out-of-state, in part, because "professional integrity, desirable and essential as it is, cannot logically be linked with a lawyer's state of residence." *Id.* at 116.

Still, there has been an evolution away from the rule that existed prior to Clark—that disciplinary proceedings must be conducted in secret until the state's highest court has finally determined that professional misconduct has occurred. As in the case of criminal law proceedings, the direction is towards increasing openness. Since 1984, West Virginia has released the records of dismissed complaints. Florida not only opens dismissed complaints to the public, but, as a result of a court order, was prohibited from attempting to bar complainants from going public with their charges. See *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990). Oregon, on the other hand, has for some time operated a completely open disciplinary system under which complaints are treated as public documents, available from the time of filing.

105. See also *supra* note 101 (opposition by the NJSBA).

106. The *McKay Report* states:

The arguments in favor of fully open disciplinary systems are supported by hard evidence—the years of experience of those states that have them: Oregon, West Virginia, and Florida. There is no evidence from those states of any harm to lawyers from making disciplinary records public. The arguments against open disciplinary systems are based on conjecture and emotion, not experience.

McKay Report, *supra* note 2, at 23. Elsewhere, McKay clarified the reference to West Virginia and Florida by noting that it is dismissed complaints, rather than the raw complaints of the Oregon system, that the two states make available. *Id.* at 24-25.

testify, not a single person testified that they or anybody who they knew had been harmed by Oregon's early opening of its records. On the contrary, lawyers testified that although they initially believed that the Oregon rule would cause tremendous damage to their reputations, none had resulted.¹⁰⁷

Thus, supporters of the Oregon rule suggest that the reality of totally open records is different from what many fear. Most people, including reporters, simply are not interested in lawyer discipline proceedings. Rather, following a period of initial press curiosity and a few months of reviewing the humdrum complaints and petty grievances that constitute the bulk of lawyer discipline complaint files, reporters become too bored to be concerned about lawyers being disciplined for relatively minor matters. Unless a complaint involves a highly exaggerated set of facts or a high-profile personality, a report about a complaint against a lawyer is lucky to warrant page seventeen coverage. In sum, in Oregon's large and small communities, among firms of every size and description, lawyers do not suffer unfair stigmatization as a result of complaints being made public from the time of their filing.

Anecdotal evidence is better than no evidence at all and for that much McKay's efforts in support of the Oregon rule are to be commended. The need remains, however, to systematically study the Oregon rule. Rather than public hearings where naysayers might feel threatened about coming forward publicly to call for closing records that certainly many members of the public (and many potential clients) would like to see remain open,¹⁰⁸ it would be better to conduct an anonymous survey of Oregon's attorneys. Rather than asking attorneys if they have suffered injury to their reputations, it would be better to survey individuals who are known regularly to make marketplace decisions about lawyers on the basis of their reputations and to determine whether (and, if so, to what extent) their choices are affected by the raw allegations of published complaints.

For instance, such a survey might ask hiring partners in Oregon's law firms, social workers, ministers, and other attorneys about their past and likely behavior when afforded the opportunity to refer persons to individuals who have

107. These comments summarize Trombadore's arguments to the author and to various public forums. Compare the testimony of the Oregon State Bar, which testified, in part: "Fifteen years' experience under our open system has shown it can work and that lawyers are not victimized in the process." *Id.* at 24.

108. Asking an attorney who has suffered from newspaper attacks to come to a public hearing to testify that records which have traditionally been open should now be closed, because of the lawyer's bad experience, recalls the story of the politician who called a press conference to deny a campaign opponent's charge that he was the stupidest man in the state. At best, you call attention to your plight; at worst, you demonstrate the truth of the underlying charges or the need for the rule, as the case may be.

recently been the subject of a disciplinary complaint. And rather than public testimony by the most zealous advocates, it would be helpful to have studies of ordinary citizens faced with the choice of selecting an attorney from among those whose cases were recently reported in the press and those who have never been reported. Finally, the absence of a content analysis study of the media's (print and electronic) handling of lawyer discipline cases was a glaring omission by the Oregon rule's proponents. What sort of play is the coverage given? What frequency, page, layout, language, and follow-up is generally descriptive of the coverage?

The point here is not, however, to detail in any exhaustive way how the problem of empirically grounding recommendations for an Oregon-style rule might proceed. The suggestion is only that on a matter as important as a record-opening rule for disciplinary proceedings, more and better evidence can only help. The failure of the Commission to support its recommendation empirically undoubtedly contributed to its defeat as written and ultimately amended.¹⁰⁹

Still, the time is not too late. The question at this stage is whether there is recognition that for the most part the potentially easy victories for consumers have now been won. To go further will demand equal doses of passion and proof. Further gains for clients, as consumers of legal services, will not be forthcoming until it is accepted that objective evidence is not the enemy, but the ally, of consumerism. Just as the lawyer's work is greatly assisted by a systematic marshalling of the facts on behalf of a client, clients must participate in marshalling the facts that support the need for greater attention to their needs. The goal must be to equate the lawyer's delivery of quality legal representation with ideals of excellence in customer servicing practices.

Clients, too, are entitled to the kinds of practices reflecting that a customer is important. Customer satisfaction, when understood as the key concern of any business relationship, must mean that in the practice of law there will be evidence that no measures will be foregone in the effort to make amends for the slightest offense (real or imagined). In addition, it must reflect that the attorney/client representation is about cultivating a relationship (as opposed to completing a transaction). Accordingly, the task that remains is that of outlining the future agenda for the lawyer regulatory system implied by a client/consumer-oriented approach.

109. See *LAWYER REGULATION*, *supra* note 2, at 35 (legislative history).

III. FUTURE INITIATIVE TO IMPROVE THE LAWYER REGULATORY SYSTEM

Just as certainly as the McKay Commission followed in the wake of the Clark Commission, sometime in the future another dinner meeting will herald new efforts to improve the lawyer regulatory system. The last effort's major contribution (committing to the ideal that the consumer principle of customer service is not only compatible with, but integral to, the ideal of legal practice as a profession) has had, and will continue to have, far-reaching consequences.

In each of the three areas discussed here, however, there remain issues of vital concern that must be addressed. Necessary actions regarding the almost-open records have been noted.¹¹⁰ The remaining task, therefore, is to suggest ways of enhancing lawyer regulatory systems with respect to the central intake office (the open doors effort) and the delivery of client-centered services (the open arms effort). Although minimal suggestions, the recommendations that follow represent starting points.

A. *Keeping the Door Open*

In regard to the open door effort (central intake), continuing attention will have to be given to assuring the independence of the officer assigned to these duties. At every turn, courts must be prepared to reinforce the central intake officer's independence structurally, financially, and symbolically. In most jurisdictions, for example, the initial temptation will likely be to house the central intake office in the offices of the state bar or in a suite with (or in proximity to) the office of the disciplinary counsel. Although this approach might be understandable during an initial short term, the long-term best interest is that the office be physically located as close as possible to the highest court, as conspicuously open to the public as efficiency will allow, and as far away as physically and symbolically possible from elected bar officials and disciplinary counsel.

Similarly, steps should be taken to assure the absolute minimum involvement of bar officials and disciplinary counsel in the appointment of the central intake officer. Although these bodies should generally be allowed to nominate candidates for the office, courts should consider, at least during alternate terms, appointing a nonlawyer with consumerism credentials.

Finally, as a means of assuring the financial stability of the Central Intake Office, courts should build in funding formulas that include cost of living adjustments. Thus, funding might be established as a fixed portion of the annual

110. See *supra* part II.C.

attorney registration fee, plus or minus the annual inflation index. Courts might also consider making fees a fixed part of the costs required for access to the courts.

B. A Warmer Embrace

Turning, then, to the open-arms initiative (client-centered services), the critical point is that despite how promising the introduction of diversion into the regulatory process is, the existence of non-disciplinary options for dealing with lawyer deficiencies is only a first step. Beyond having available such approaches as law office management assistance programs, binding arbitration of fee disputes, and lawyer assistance programs,¹¹¹ there is a need to establish minimum standards for such programs. It is well to point to a law management assistance program as evidence that a regulatory system values a client's work with lawyers. What is needed, though, are criteria to identify what a quality management program looks like.

It will also be necessary to take the next step beyond viewing client-centered services as remedial efforts. If the lawyer regulatory system is to operate maximally, the profession must adopt preventative systems. The court should be assured, for example, that a law firm has in place model procedures for the supervision of lawyers and nonlawyers within the firm.¹¹² Similarly, the court should be assured that model procedures are being used to orient clients, from start to finish, about the firm's operations and procedures.

It is also well past the time when law firms should be required to have in place procedures for regularly subjecting themselves to outside *ethical audits*. Firms have become comfortable with the idea of outside financial reviews by independent certified public accountants. It is time we become as serious about the fiduciary obligations that also support law firm operations. Rather than wait until a client has had money stolen, the firm has been charged with failing to communicate with a client, or the firm has been named as the respondent in a fee dispute arbitration, it is time for the legal profession to adopt rules and

111. *McKay Report*, *supra* note 2, at 33-34 (Recommendation 10.2).

112. See Model Rule 5.1, "Responsibilities of a Partner or Supervisory Lawyer," (providing that a partner must supervise subordinates) and 5.2, "Responsibilities Regarding Nonlawyer Assistants," (providing that a lawyer must act to assure that nonlawyer assistants act compatibly with the obligations of the lawyer), have related provisions, respectively, at DR 1-103(A) (requiring lawyers with knowledge of certain violations to report such knowledge) and DR 4-101(D) (exercise of reasonable care to prevent disclosure of client confidences or secrets) DR 7-107(J)(exercise reasonable care to prevent employees and associates from making certain extrajudicial statements).

procedures for regular ethical audits.¹¹³ Every firm, whether it be an international mega-firm or a sole practitioner, should be required to have their procedures for dealing with ethics problems reviewed by outside experts on a regular basis.

Finally, there is a parallel need for each lawyer regulatory system to be reviewed on a regular basis. It is ironic that the ABA has worked since the 1950s to establish the regular review of the nation's law schools. More recently, the ABA has endorsed the regular training of lawyers, noting that continuing legal education is a virtual necessity for any lawyer wishing to stay current in the practice of law. Then, too, in connection with its efforts to set standards for those who certify lawyers as specialists, the ABA has recently established a program for regular review of lawyer-certifying entities.¹¹⁴ Notwithstanding efforts by the ABA to review certifying entities regularly, and despite its considerable expertise in (and commitment to) regular review as a means of maintaining and improving quality, the ABA—now ninety-five years since its founding—has not called upon the various jurisdictions to undertake mandatory outside reviews of their disciplinary operations. However, just as ABA law school inspection teams have made invaluable contributions to the maintenance of high-quality law schools, the ABA also has a major role to play here.

IV. CONCLUSION

It is, of course, an open question whether the profession will adopt the initiatives discussed here. Some will view them as simply further evidence of a continuing vulgarization of a once mighty and transcendent profession. For the price of populist popularity, it will be charged, the profession has sold its independence and professional standing. For the sake of currying favor with a hodgepodge of dissident voices, McKay will be said to have endorsed a dubious principle: clients, like consumers in common commercial ventures, are owed product satisfaction.

113. The law management assistance programs of such entities as North Carolina Lawyers Mutual are acknowledged and praised. Such efforts, however, are premised on an idea that is only partially true: that the avoidance of malpractice problems will avoid ethics problems. What is needed is a program aimed at developing and spreading a firm ethos. That will not be accomplished by standardized procedures alone. A full program should include, among other things, regular in-house continuing legal education programs, a peer review program for ethics and professionalism, a pro bono legal services program, a client orientation program, a case de-briefing process, and an ethics audit.

114. The ABA appointed a Commission on Nonlawyer Practice. The Commission, chaired by Herbert M. Rosenthal, has conducted nationwide public hearings and is scheduled to release its report in 1995.

In the name of traditional professional values, therefore, it will be urged that every attempt to equate the practice of law with the rewards and penalties of the marketplace should be condemned. Moreover, the failure to resist such a connection will be said to condemn the profession to a future of eroding ethical standards, diminished social status, and ultimately the loss of social and political power.

In this skeptical view, unless, and until, the legal profession is prepared to resist encroachments on the authority of the profession's elected officials, efforts such as McKay's simply feed the desires of the profession's staunchest critics. To listen to them is someday to succumb to regulation by citizens' boards of nonlawyers, reminiscent of the way in which we regulate electricians and plumbers. No matter how seemingly beneficial, efforts such as McKay's simply impede progress by giving credibility and attention to those seeking fundamental change in the way lawyers are governed.

Nor will the dissenting chorus consist only of those committed to the status quo. Some critics will charge that the recently approved ABA initiatives fail to go far enough. For example, the ABA's failure to call for the immediate opening of all complaint records will be urged as evidence that hidebound institutions lack either the will or the knowledge to produce real change. Realistically, it is probable that a virtual cottage industry of legal profession critics will not be mollified by changes which originate within the legal profession itself.¹¹⁵ In this view, changes brought about from within are, by definition, changes that an institution has been forced to make. Conversely, those which it resists or which are absent from the record of public discourse are the true measures of reform.

Hence, the argument will be made that McKay should be condemned for its failure to address the following: the hostility of the organized bar to the participation of nonlawyers in the delivery of legal services;¹¹⁶ the need to make the practice of law less adversarial;¹¹⁷ the relationship of the billable

115. H.A.L.T., an erstwhile national law reform organization, criticized the McKay Commission's efforts early-on for leaving the disciplinary system in the hands of judges. Sandra Torry, *ABA Panel Calls on Lawyers to Open Discipline*, WASH. POST, May 22, 1991, at A1. See also Bruce Vielmetti, *Questions of Law, Without the Lawyers*, ST. PETERSBURG TIMES (Tampa, Fla.), Feb. 26, 1993, at A1. ("[Emilio L.] Ippolito wants to cast aside the rules and laws of court and the legal profession, and rely instead on his unusual interpretation of the U.S. Constitution.")

116. See *supra* text accompanying note 115.

117. See Judy Klemesrud, *Women in the Law: Many Are Getting Out*, N.Y. TIMES, Aug. 9, 1985, at A14; CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Lynn Hecht Schafraan, *Lawyers' Lives, Clients' Lives: Can Women Liberate the Profession?*, 34 VILL. L. REV. 1105 (1989); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988). But see *Lawyers' Stress: It's All A Matter of Perspective*,

hours required of lawyer associates to the quality and professionalism of legal services;¹¹⁸ or the societal damage stemming from the legal profession's willingness to subordinate client confidentiality to the need to protect the interests of clients.¹¹⁹ Unless, and until, the legal profession is regulated by nonlawyers—perhaps by boards of citizen representatives—McKay-style attempts at reform, no matter how seemingly beneficial, will only delay real reform. By directing attention and energy away from those seeking fundamental change in the way lawyers are governed,¹²⁰ McKay-style solutions actually make things worse.

But just as there is wide room for disagreement about the future course of lawyer regulation, there remains even wider room for agreement that there are new actors and programs before the American public as a result of the work of the McKay Commission. It should come as no surprise that changes outlined in the *McKay Report* would suggest closer oversight of the legal profession. Nor could it have been much of a surprise that McKay urged the various state supreme courts to provide that oversight. What is surprising, however, is that included prominently in those recommendations are calls for mechanisms within the lawyer regulatory system which would achieve the following: make it easier for persons to complain about lawyer misconduct; provide mechanisms for healing as well as sanctioning those engaged in such misconduct; and force lawyers, like respondents before the judicial system generally, to face public scrutiny of charges against them after such complaints have been determined to be serious.

N.C. LAW., Nov./Dec. 1993, at 13-14 ("Changing our perspective can help restore a sense of control.").

118. From Attorney General Reno on down, in recent years the legal profession has become increasingly introspective about quality-of-life issues and the practice of law. Reno recently urged lawyers to give more time to their families, especially their children and the nation's children. See Nina J. Easton & Ronald J. Ostrow, *Ms. Reno Objects: Can the Popular Attorney General Muster the Political Savvy to Sell the "Tough Love" Vision of Justice*, L.A. TIMES, Oct. 31, 1993, at 14) (stating that lawyers spend too much time on their careers and not enough on their children).

119. For consideration of one of the most celebrated cases triggering public outrage, see *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975); *In re Armani*, 83 Misc. 2d 252, 371 N.Y.S.2d 563 (1975) (where two attorneys representing accused killer Robert Garrow, refused for several months during the course of defendant's representation to divulge the location of the bodies of the victims and were subsequently tried for failure to report the death of the victims and failure to give a dead person a decent burial).

120. The McKay Commission considered a variety of proposed alternatives to regulation of lawyers by the judiciary, including: legal challenges to the constitutionality of judicial regulation; legislative regulation of the bar (Florida); legislative review of the judiciary's oversight of lawyer discipline (California); federal agency oversight through the Federal Trade Commission; and state agency regulation by panels consisting primarily of nonlawyers. *McKay Report*, *supra* note 2, at 1-2.

These efforts to open the doors of the lawyer regulatory system to complainants, to provide them with alternatives to filing malpractice suits to resolve their difficulties, and to deal with complaints about lawyers in an open process, will certainly not resolve all of the problems facing the legal profession. What they can do is make members of the public feel welcome, assist them in dealing with the lawyer discipline process, and provide clear and current information. And after all, a heart-felt greeting and a "Let me help you by showing you this" are still the best way I know for dealing with any consumer.

