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Lawyer Discipline and Disclosure Advertising: Towards a New Ethos

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LAWYER DISCIPLINE AND "DISCLOSURE ADVERTISING": TOWARDS A NEW ETHOS

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In this Article, Professors Sandra L. DeGraw and Bruce W. Burton explore the subject of lawyer disciplinary measures and public confidence in the legal system. They argue that disciplinary action against lawyers is rarely published in any publicly-available, systematic form. At the same time, they assert that an increasing perception of lawyer misconduct has caused a loss of confidence in the legal system. Accordingly, they maintain that regular publication of lawyer misconduct can help assuage this loss of confidence in the legal profession.

Professors DeGraw and Burton begin by analyzing the current state of lawyer advertising. Because the practice of law is evolving from a profession to a business, and because lawyer advertising has become ubiquitous in our society, they feel that nondisclosure of lawyer discipline creates a marketplace of imperfect information. They argue that full disclosure of lawyer misconduct will counterbalance lawyer self-promotion and cure this asymmetry in information. They analyze the constitutional implications of required disclosure of lawyer discipline and conclude that under Bates v. State Bar of Arizona *and its progeny, the Court is likely to approve measures that merely require additional disclosure in lawyer advertising instead of restricting commercial speech itself.*

After justifying the need for mandatory disclosure of lawyer misconduct, Professors DeGraw and Burton provide a detailed proposal for a system of disclosure advertising. They identify and discuss features salient to their system of mandatory disclosure: the description of misconduct that should be disclosed; the types of lawyer communications that should be affected; and the length of time for which disclosure should be required. They conclude by reasserting their contention that mandatory disclosure of law-

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yer misconduct is a necessary step in restoring public confidence in the legal system.

I. INTRODUCTION

By 1990, people came to share a disquieting sense of fragmenting community, of eroding public purpose, of institutions that no longer function . . . .

William Strauss & Neil Howe[1]

1. GENERATIONS: THE HISTORY OF AMERICA'S FUTURE 1584 TO 2069 at 348 (1991).

Grand theft of client funds,[2] court-damaging "wildcat" litigation tactics,[3] sexual harassment of clients,[4] obstruction of justice,[5] inventive conflicts of interest[6]—serious improprieties continuously surface as lawyers are sanc-

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2. An Indiana attorney, previously disbarred in Kentucky, stole $145,000 from a terminally ill, 90-year-old widow-client confined to a nursing home and was sanctioned with 10,000 hours of mandatory community service plus a temporary suspension. NAT'L L.J., Apr. 5, 1993, at 6.

3. As stated by United States District Judge Wayne E. Alley: "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes." Krueger v. Pelican Prod. Corp., No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989). Often the cost of the abusive trial tactics far exceeds the amount in dispute. The frustration of one court system is clear from U.S. Circuit Judge Clarence Arlen Beam's comments:

> [P]laintiff's counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously, . . . was frivolous and abusive and not directed toward 'the just, speedy and inexpensive determination of [the] action'. . . . [T]he costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter.

Lupo v. R. Rowland & Co., 857 F.2d 482, 485-86 (8th Cir. 1988) (citing Bastien v. Rowland & Co., 116 F.R.D. 619, 621 (E.D. Mo. 1987)); *see infra* note 84 and accompanying text.

4. In Wisconsin, a male attorney was found to have made unsolicited sexual advances toward female clients in 1973 and was suspended until he could recover from a personality disorder; subsequently, during the next two decades, the attorney was disciplined on several occasions, including a 60-day suspension for sexual harassment of female clients. The attorney was ultimately disbarred in 1992. *In re* Heilprin, 482 N.W.2d 908, 910 (Wis. 1992).

It should be noted that in other Wisconsin cases, license revocations and suspensions have resulted from similar conduct. *E.g.*, *In re* Hallows, 401 N.W.2d 557, 561 (Wis. 1987); *In re* Gibson, 369 N.W.2d 695, 700 (Wis. 1985). Lenient sanctions have been the custom when attorney sexual misconduct is involved. Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 57, 79 (1993). In South Dakota, an attorney was suspended for a year for leading female clients to believe that sexual favors would reduce his fees for services. *In re* Bergren, 455 N.W.2d 856, 857 (S.D. 1990). A two-year suspension was invoked in New York in response to a repeated pattern of sexual solicitation of both female clients and the wives of male clients. *In re* Bowen, 542 N.Y.S.2d 45, 48 (1989). In Maine and New Hampshire, however, sexual misconduct has led to disbarment. *See, e.g.*, Board of Overseers of the Bar v. Murphy, 570 A.2d 1212, 1213 (Me. 1990); Otis' Case, 609 A.2d 1199, 1204 (N.H. 1992).

5. A West Virginia attorney had his license to practice law revoked after the use of intimidation, physical force, threats, and misleading conduct, all with the intent to influence the testimony of witnesses in an official proceeding in direct violation of a statute. Committee on Legal Ethics of W. Va. State Bar v. Folio, 401 S.E.2d 248, 253 (W. Va. 1990). In Iowa, an attorney who failed to cooperate with an investigation by bar authorities inquiring into his own misconduct was suspended without possibility of reinstatement for three years. *In re* Kirshen, 451 N.W.2d 807, 809 (Iowa 1990).

6. An Iowa attorney persuaded one of his clients to co-sign a note in the amount of $195,000 on behalf of another client, never advising the first client that the attorney and the debtor-client were joint venturers in a business partnership and that the loan was directed toward those ends. The attorney also failed to advise the co-signing client that he should seek independent legal counsel or that the attorney's personal interests in the transaction might affect his professional judgment on the lender-client's behalf. Later, this same attorney persuaded the lender-client to co-sign notes and pay off debts on behalf of the attorney on the theory that other business dealings between the attorney and that client would be put into bankruptcy to the client's detriment. The attorney advised the client to seek separate legal representation *after* all of the

tioned and disciplined for misconduct that ranges across the entire spectrum of abuse. Like a river of negative news with its tributaries flowing from every jurisdiction, disciplinary violations are reported in bar journals and court advance sheets every month and even, on occasion, in daily newspapers of general circulation.[7] Such unlawyerly conduct is generally perceived, at least in part, as one of the major causes of the bar-acknowledged "crisis of confidence" that the public has in the legal profession.[8]

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payment and loan formalities had been completed. Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Hall, 463 N.W.2d 30, 34 (Iowa 1990).

7. More than 30 serious disciplinary cases reported each month are not unusual in large states. For example, during the six-month period of February 1991 through July 1991, *California Lawyer* reported a total of 194 disbarments, suspensions, resignations while charges were pending, and other disciplinary dispositions of named attorneys involving such violations as those noted in text. This averaged about 32 reports per month. The trend in California, which has a detailed reporting system in *California Lawyer*, does not seem to show much abatement. Over the past four years, the November disciplinary reports have ranged from 20 in 1989; 60 in 1990; 52 in 1991; and 39 in 1992. CAL. LAW., Nov. 1992, at 75-88; Nov. 1991, at 81-93; Nov. 1990, at 96-107; Nov. 1989 at 131-33.

Similarly, the *Texas Bar Journal* recently reported 48 disciplinary cases in one month, 19 named attorneys and 29 anonymous ones, with misdeeds ranging from forgery to trust account violations to neglect of client matters. 56 TEX. B.J. 295, 298 (1993). The trend in Texas during recent months shows 47 reports in both January and February 1993; 20 in December 1992; 35 in November 1992; and 39 in October 1992. These figures reveal an average of about 39 reports per month during the six-month period. *Id.* Mar. 1993 at 295-98; Feb. 1993 at 131-32; Jan. 1993 at 73-74; Dec. 1992 at 1187-88; Nov. 1992 at 1087-89; Oct. 1992 at 978-82.

The general media recently reported the second disbarment of a Delaware/Texas lawyer and talk show host, whose misdeeds set the record in Delaware for client complaints. Ruth Piller, *Lawyer Who Was Host of Television Show Is Disbarred*, HOUSTON CHRON., MAR. 27, 1993, at A26.

8. *Lawyer Discipline Hearings*, 76 A.B.A. J., Jan. 1990, at 109. General media reports about the soaring number of client complaints or sensational stories of misconduct may fuel this perception. *E.g.*, William Grady, *As State's Lawyers Rise, Complaints Soar*, CHI. TRIB., May 9, 1989, at C4; Piller, *supra* note 7, at A26. Anti-lawyer sentiments surface in formal fashion, such as the public interest group Help Abolish Legal Tyranny (HALT) and its national movement, or the magazine *Anti-Shyster* published in Dallas. Two of the operative premises underlying the ABA's current concerns with lawyer discipline and other matters are the need to protect the consuming public and the current lack of public confidence. ABA, LAWYER REGULATION FOR A NEW CENTURY: REPORT ON THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT xv, xvii (1992) [*hereinafter* MCKAY REPORT]. In November 1992, the ABA announced that it would make "improving the image of the profession a key goal nationwide during the next few years." Altman et al., *How Can Lawyers Improve Their Image?*, Report to Legal Management 1-12 (1993), also reports a series of negative opinions the public holds toward the legal profession for lacking promptness, clarity of communications, ethics, and reliability; *see* Robert Guzy, *Image of the Lawyer "Revisited,"* 50 BENCH & B. MINN., Apr. 1993, at 5.

Current surveys show that lawyers rank at the bottom of the 12 rated professions in terms of trustworthiness, along with insurance agents. Mary Lahr Schier, *Lawyers' Image: What's to be Done?*, 50 BENCH & B. MINN., Mar. 1993, at 16.

According to former Chief Justice Warren Burger:

> In my view the standing of lawyers is at the very lowest in my time at the Bar. The principal reason, as I see it, is the shyster advertising that our profession is silent about.

Besides this institution-eroding commonality, such cases also share a central procedural theme. The reports of such lawyer misdeeds are not made readily available to the general public as consumer-clients of legal services in America.[9] Rather than being consistently reported in the general news media, notices of lawyer discipline are published typically in specialized bar journals or in court reports, often with anonymity for the miscreant attorney.[10] This process makes the information systematically useless to all but the few, most dedicated aficionados of bar journals.

The TV ads, print ads, and the shocking billboard ads of the ambulance chasers are the major reasons why the public puts lawyers down with used car dealers.

Letter to Robert A. Guzy, President, Minnesota State Bar Association, as reprinted in part, 50 BENCH & B. MINN., Mar. 1993, at 5; *see also* Robert J. Samuelson, *I Am a Big Lawyer Basher*, NEWSWEEK, Apr. 27, 1992, at 62. A recent Ohio newspaper study revealed that only 1% of 20,770 complaints filed against Ohio lawyers between 1987 and 1991 resulted in sanctions, whereas the ABA reported a 3.23% rate nationally for this activity. *Lawyer Complaints Rise* 15 NAT'L L.J., Apr. 26, 1993, at 6.

9. Even those states that require detailed informational disclosure in one form or another, such as California, Texas, and Wisconsin, do so in specialized bar association journals, newsletters, and court opinions that are narrowly targeted toward a very specialized audience. To the extent that the public media report such matters, generally on a hit-or-miss basis, there is somewhat wider distribution to the public. There is no systematic targeting of information to the present or future consumers of legal services of disciplined attorneys with the exception of those jurisdictions, such as Minnesota in recent months, which have adopted the requirement that suspended attorneys send a copy of the disciplinary report to their existing clients explaining why they will not be able to continue representation during the period of the suspension. *See infra* notes 16-22 and accompanying text.

10. The following are a few examples of state reporting methods:

Wisconsin. The publication procedure in Wisconsin rivals California as among the most explicit and systematic in the nation. The *Wisconsin Lawyer*, published monthly, sets forth the names and offense particulars of lawyers who have been disciplined by the Board of Attorneys' Professional Responsibility, an arm of the Wisconsin Supreme Court. The narrative regarding the identity and findings made against sanctioned attorneys is set forth in detail, including dates, pertinent dollar amounts, findings of neglect or misfeasance, and other matters—often running to several paragraphs per sanctioned attorney. For example, the October 1992 edition of the *Wisconsin Lawyer* set forth lengthy descriptions of actions regarding five named, suspended and reprimanded attorneys, together with lengthy descriptions, sometimes of many paragraphs, reciting the particular violations and details underlying the findings that discipline was required. 65 WIS. LAW., Oct. 1992, at 53, 53-59. In addition, the Wisconsin Board of Attorneys' Professional Responsibility sends the information published in the Wisconsin Lawyer to the local media in the city or county where the offending lawyer practices. This increases the chance that local publication may inform some of the general public. Although the current reports that appear in the *Wisconsin Lawyer* are extensive, the amount of detail has been cut back substantially from what used to be printed because of space limitations. Telephone Interview with Joyce Hastings, staff member (Mar. 19, 1993).

California. The *California Lawyer* usually publishes the names and case information of all persons who have been disciplined, together with a "discipline key" indicating what the various disciplinary designations may suggest. *See supra* note 7.

Texas. The publication procedures in Texas are similar. The *Texas Bar Journal* publishes monthly both the names and a paragraph describing the findings of lawyer misconduct (sometimes including the dollar amount of trust funds or other losses caused to the client), together with the age of the offender and the duration of any suspension. Pursuant to the Texas rules, the possibility

The danger signals of the crisis of confidence in lawyers and our legal institutions are becoming manifest.[11] However, some hopeful possibilities are emerging that may help to end the erosion of the bar's institutional credibility with the public while at the same time providing a healthier marketplace for the consumers of legal services.

As we approach the close of this century, there exists in American law a confluence of several powerful cultural and judicial tendencies. The dynamics of these tendencies increasingly affect the practice of law at all levels. This Article will explore these tendencies in relation to a concept of disclosure of both the merits and demerits of lawyer advertising. Second, this Article will examine the virtues and burdens of establishing a new policy to end the increasing asymmetry of information in the marketplace for legal services—a policy of making lawyer disciplinary results readily visi-

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of a "private reprimand" where only a general description of the reprimand will be published without the name of the attorney is available but appears to be limited to offenses of lesser proportions, such as advertising violations or delays and neglect that did not result in major losses to the client. TEX. R. DISC. P., TEX. GOV'T CODE ANN. § 6.07 (West Sup. 1993). Press releases to local media are also utilized. Letter from James M. McCormack, General Counsel of the State Bar of Texas, to Sandra L. DeGraw, co-author (Aug. 5, 1993) (on file with co-author).

Illinois. In Illinois, all investigations are confidential until a complaint has been filed, at which point the proceedings become public. The supreme court imposes disciplinary sanctions. The details of the misconduct will be published, if at all, by the court in its opinion. The *Illinois Bar Journal* does not publish the systematic disciplinary outcomes. However, a Bar Association newsletter publishes some of these from time to time on a space-available basis. As a matter of central reporting, only the Attorney Registration and Discipline Committee's (ARDC) annual report show the statewide statistical data, but this annual report does not contain names of the lawyers sanctioned nor the details of their violations. Interview with James Grogan, Chief Counsel ARDC (Mar. 19, 1993).

New York. Lawyer discipline is handled by eight regional grievance committees that are not required to publish the outcomes of the disciplinary matters that they hear. The first and second departments report their disciplinary matters to the *New York Law Journal*, but the other six departments do not. The central office in Albany publishes an annual report that pulls together statistics from all eight of the grievance committees and disseminates this report upon request. The *New York State Bar Journal* (established in 1929) has never published reports on a systematic basis regarding lawyer discipline actions, according to Jean Gerhardt of the Journal. Telephone Interview with Jean Gerhart, (Mar. 19, 1993).

Florida. The *Florida Bar Journal* does not publish the names or descriptions of lawyer discipline in that state. However, the *Bar News* (a monthly newspaper published by the Bar Association) will publish such information as may be received from the courts from time to time. Such publication is subject to space limitations. Accordingly, not all matters received from the court are published in the newspaper. Interview with Celia Johnson, Bar Association Staff Member (Mar. 19, 1993).

11. *See supra* note 8. Establishing programs "of continuous improvement *in client perception* of product and service quality" is now a consultant-based industry that seeks to help law firms retain present clients and enhance their marketing to new clients. Ward Bower, *Total Quality Management in Law Practice—It's Not Just for Business Anymore*, 39 PRAC. LAW., Apr. 1993, at 25, 35 (emphasis added). Introduction of business practice and management techniques (e.g., "total quality management") into the law firm can sometimes be a positive element, even when it springs from lawyers' concern for how they are perceived in the marketplace.

ble to the potential consumer-client.[12] Finally, this Article suggests that other professions and businesses should consider their own disclosure traditions and follow the lead of a genuinely self-correcting legal profession.

II. THE TRADITION OF INVISIBILITY

[B]e subject to no sight but thine and mine, Invisible to every eyeball else.

William Shakespeare[13]

The question of whether disciplinary sanctions are visible to the potential client-consumers of an attorney's services hinges largely upon the access such consumers have to the information. From the perspective of consumer-clients, most lawyer discipline has been invisible, although some slight movement toward openness has occurred in recent years.[14] This very invisibility serves as the core of the current crisis of confidence in our self-policing system. True, the days when only bar discipline agencies (composed solely of attorneys) and the courts knew of lawyer sanctions have largely faded in most jurisdictions. That is not to say, however, that the facts concerning charges, procedures, and outcomes of lawyer discipline matters in America are effectively visible to the public.[15] They are not, and

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12. By way of illustration, few, if any, female clients of Wisconsin attorney Heilprin, *see supra* note 4, (notwithstanding the extensive efforts of the *Wisconsin Lawyer* in printing the details of disciplinary matters) between the years 1973 and 1992 had effective access to information concerning his ongoing difficulties with sexual misconduct between himself and female clients, notwithstanding the fact that these problems were acted upon, from time to time, by the bar disciplinary authorities. Gerald C. Sternberg, *Dangerous Liaisons: Lawyer Discipline Imposed for Sexual Misconduct*, 66 WIS. LAW., Feb. 1993, at 25-28.

13. WILLIAM SHAKESPEARE, THE TEMPEST, act 1, sc. 2, ln. 302 (Houghton Mifflin Co. 1974).

14. As an ABA report recently noted:

> The Commission's research convinces us that disciplinary systems are fair to both respondents and complainants, but there is a high level of public distrust. *Secret proceedings are the greatest cause of distrust.* If public trust is to be promoted, disciplinary systems can no longer operate secretly. Florida and West Virginia's disciplinary records are open to the public when a charge is filed or a complaint is dismissed. Oregon's records are public when a complaint is made. These open disciplinary systems have proven that lawyers are not harmed by them. Gag rules have already been declared unconstitutional by a number of courts. Without gag rules confidentiality is no longer tenable. An open system of discipline will foster greater respect for the integrity of the system.

REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT TO THE A.B.A. iv (May 1991) (emphasis added) [*hereinafter* A.B.A. DISCIPLINARY ENFORCEMENT REPORT].

For a discussion of the experiences of a non-lawyer who served on several grievance committees during a 14-year period, see Virginia Bowers, *A Lay Person Looks at Lawyer Discipline*, 56 TEX. B.J. 75, 76 (1993). For a discussion of visibility and invisibility to the prospective client-consumer, see *supra* note 12.

15. *See* Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 306-08 (1992). A trend toward some public scrutiny of the lawyer discipline process exists. At

the reason for this functional invisibility lies in the methods of dissemination that are only now evolving.

Among the various states, the current practices of disseminating the names and details of lawyer discipline range from nonexistent to thoroughly systematic to randomly hit-or-miss.[16] Some jurisdictions set forth the name of each disciplined attorney together with extensive descriptions of the case and the sanctions applied.[17] Some reports set forth the names but few details,[18] while others omit names but describe the facts and outcomes of the disciplinary cases.[19] Many states provide a mixture of brief, anonymous reports and detailed information.[20] Even among the most active jurisdictions, however, public disciplinary notices are commonly placed in publications that are *not* designed to reach the general consuming public.[21] If the information is published systematically, it is customarily directed only toward bar association members.[22]

Attorneys contemplating referral of clients to attorneys in different cities, or even different jurisdictions, would have some basic capacity to use their research tools to determine whether actual disciplinary sanctions had been published in the reporter systems concerning the attorneys to whom

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present, about two dozen states are now considering opening disciplinary proceedings to the public after formal charges have been filed. Randall Samborn, *Lawyer Discipline to Open Up*, NAT'L L.J., June 7, 1993, at 3.

16. A current study undertaken by the National Organization for Bar Counsel (NOBC) has sought to identify the significant items of information that could be made available from the NOBC data bank as a topic library concerning professional responsibility. Thirty-nine of the 50 state jurisdictions and the District of Columbia responded to the questionnaire. The responses indicated a mixed quality of publication of disciplinary actions. Even where a court has issued a formal opinion, the percentage of published discipline cases is not 100%. Moreover, the question of who should have access to any discipline data bank showed a wide array of opinion, with only a very small portion responding that either the "public" or "anyone" should have access to the data (6% at most). RESPONSES TO NOBC WEST QUESTIONNAIRE, AMERICAN BAR ASSOCIATION, fax copy dated Mar. 31, 1993 [*hereinafter* NOBC] (on file at the South Texas College of Law Library). *See Lawyer Discipline Hearing*, 76 A.B.A. J. Jan. 1990, at 109, 109. Of the 39 jurisdictions responding, only half required that a lawyer under investigation provide information on all jurisdictions in which that lawyer held a license to practice law. *Id.* Accordingly, it is difficult to envision how information regarding disciplinary matters of an attorney licensed in several jurisdictions would ever come to be targeted toward future consumer-clients of that attorney in jurisdictions other than that where the disciplinary action is taking place; for instance, twice-disbarred attorney Jack Kennedy set the record for filed client grievances in Delaware before his disbarment there, seven years prior to his Texas disbarment in 1993. *See* Ruth Piller, LAWYER WHO WAS HOST OF TELEVISION SHOW IS DISBARRED, HOUSTON CHRON., Mar. 27, 1993, at A26.

17. *E.g.*, Florida Bar v. Riskin, 549 So. 2d 178, 179 (Fla. 1989); *Professional Discipline*, 66 WIS. LAW. 53, 53-55 (Oct. 1992).

18. *E.g.*, *Resignation with Discipline Charges Pending*, 11 CAL. LAW. 89, 89-95 (Feb. 1991) (including category of persons who resigned while disciplinary charges were pending).

19. *E.g.*, *Private Reprimands*, 56 TEX. B.J., Apr. 1993, at 392.

20. For examples from six states, see *supra* note 10.

21. *See supra* note 10.

22. *See supra* note 10.

their clients are being referred. Such referring attorneys would also have the ability to engage in research concerning whether disciplinary notifications had been published in the local bar journals or bar newsletters at the site of the candidate for referral. Obviously, these tools are incomplete, cumbersome, and do not consolidate and carry forward the information in a centralized fashion from year to year.[23]

To a non-lawyer who is directly seeking counsel to represent her interests, the information is not available in any targeted, functionally effective manner. Most prospective consumer-clients will not subscribe to the relevant publications, read the advance sheets, or keep a continuing record. By definition, they would be unfamiliar with the research tools and unlikely to know of the various bar journals and newsletters that may or may not systematically publish notification of disciplinary outcomes. The chance of stumbling across a pertinent report in the local newspapers is, at most, a random possibility. Accordingly, it is a premise of this Article that a functional invisibility exists when it comes to giving notice to the client-consumer of legal services that a particular attorney has been recently disciplined or is subject to ongoing sanctions of one form or another.[24]

One method of increasing discipline visibility for the benefit of client-consumers involves attorney advertising. Law firm promotional literature, *very broadly defined*, targets the desired market segment of potential client-consumers. A system of mandates that requires disclosure of discipline data in promotional literature would render disciplinary action more visible. Any system that imposes restraints upon lawyer advertising, however, must face certain constitutional questions.

III. CONSTITUTIONAL DIMENSIONS OF "DISCLOSURE ADVERTISING"

> *[I]n virtually all our commercial speech decisions to date, we have emphasized that . . . "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.*
>
> Justice Byron White[25]

23. The West/ABA survey regarding the data base of information for professional responsibility, including the sanctions of particular lawyers in various jurisdictions, indicated that only six states out of 39 responding believed that the public should have access to the ABA National Discipline Data Bank through the proposed private file. *See* NOBC, *supra* note 16, at 109. Accordingly, it would appear that there is a very small chance that a private attorney seeking a lawyer to whom to refer a client, whether in the same or a different jurisdiction, will at any time in the foreseeable future have available a data bank with the necessary information. *See id.*

24. *See supra* note 12.

25. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)).

Since the mid-seventies, America has experienced a radical departure from the era in which most lawyer advertising was deemed unacceptable by the bar. The energizing principles of this evolution, as put in place by the Supreme Court, are two-fold:

(1) the First Amendment protects lawyers' freedom of commercial speech,[26] and

(2) potential client-consumers have a right to receive factually accurate data in the marketplace.[27]

The changes in lawyer advertising set in motion by *Bates v. State Bar of Arizona*[28] and its progeny would astound an attorney or client from the pre-*Bates* era awakening in today's world of attorney marketing.[29] For example, over one-half of the 200 top United States law firms now have high-salaried, full-time marketing directors/strategic planners on their permanent payrolls.[30]

A. *Changing Nature of Lawyer Advertising*

Today, lawyers and their law firms seek business-cultivating visibility and look beyond such age-old activities as the seasonal mailing of holiday cards, the printing of an occasional advisory newsletter, visible *pro bono*

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26. Before the landmark *Bates v. State Bar of Arizona* decision of the United States Supreme Court in 1977, the Court had determined that "commercial speech" deserved significant constitutional protection under the First Amendment, although such protection did not rise to the level of political and other non-commercial speech. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-58 (1976); Bigelow v. Virginia, 421 U.S. 809, 818 (1975). With this central predicate in place, the Supreme Court, starting with *Bates v. State Bar of Arizona*, rejected a series of arguments that attorney advertising was not entitled to First Amendment protections consistent with those protections given to other players in the commercial marketplace. 433 U.S. 350, 367-79 (1977).

27. An ongoing thread throughout the cases indicates a powerful concern of the Supreme Court that consumers have the benefit of accurate, competitive pricing of legal services and accurate disclosure of specialization areas of lawyer practice. *Bates*, 433 U.S. at 383-84. *But see id.* at 397 (Powell, J., dissenting); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 106, 116-17 (1990); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988); *Zauderer*, 471 U.S. at 650, 651.

28. 433 U.S. 350 (1977).

29. Bruce W. Burton, *Rule 11 Sanctions and Lawyer Advertising: A Modest Proposal*, 45 ARK. L. REV. 309, 336 (1992).

30. One analysis of law firm marketing has stated:

> Marketing strategies are more than a brochure or newsletter; they are the end result of a systematic process by which a firm's market is evaluated, targeted and developed. . . . A marketing plan should become as much a part of a law firm's practice as the delivery of legal services.

Arlene Hibschweiler et al., *Strategic Marketing Plans: A Reality for Success in Practicing Law*, 56 TEXAS B.J., Feb. 1993, at 120. The salaries for directors/strategic planners at the top 200 U.S. law firms range from $70,000 to $150,000 per year. Carolyn S. Paschal, *America's Leading Law Firms Talk Candidly About Marketing*, 54 TEX. B.J., Feb. 1993, at 129, 129 (Feb. 1991).

activity, or speaking engagements.[31] The era has now passed when a lawyer might join civic clubs or her firm might sponsor an annual cultural or social function as the sole method of outreach to the marketplace.[32] These time-honored activities seem like the quaint customs of a quiet past when viewed against the use of modern marketing devices as innovative as any that Madison Avenue might devise. Regular news mailings; slick promotional brochures; polished television and radio spots; ad campaigns with multi-media presentations; half-page, three-color advertisements in the yellow pages; daily or weekly advertisements in local television guides; direct mailings; and a cadre of other merchandising techniques are commonplace.[33] For example, while traveling through a tiny town in southern Ohio last year, one of the authors of this article stopped for a hamburger in a small "mom-and-pop" cafe. Each of the dozens of coffee mugs used in the restaurant contained advertising in a special silk-screened format—with one "box" for a local attorney and his private practice and another "box" touting an attorney who was a candidate for district judge.[34]

Since *Bates*, lawyers are free to use all levels of ingenuity to "sell" themselves to consumer-clients in the marketplace and to assert their First Amendment rights. Although these advertisements include bar-mandated information, often they emphasize positives such as practice specialities, while leaving any negatives invisible to the consumers. Bar associations have set standards to police the accuracy of the promotional data flowing to client-consumers.[35] Yet, statements such as one found in *Peel v. Attorney*

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31. Hibschweiler et al., *supra* note 30.

32. *See* RICHARD L. ABEL, AMERICAN LAWYERS 119-22 (1989).

33. During the week of February 23, 1993, one of this article's co-authors received a brochure from the Institute of Professional Training in Pensacola, Florida, offering video sets of information on "How to Market Your Law Firm" for $169 per set, plus workbooks for an additional price. A local television guide was also received that listed, on the pages covering programs for February 23, 1993, a total of 21 separate ads for law firms seeking clients involved with divorce, personal injury, criminal law, social security, worker's compensation, slander, sexual harassment, insurance claim denials, bankruptcy, discrimination or employment termination, tax problems, immigration, family law, and criminal defense. (Materials on file with the authors.) Moreover, it is commonplace in Central Missouri for the telephone yellow pages to contain three-color, half-page lawyer advertisements. Letter from Honorable William Knox, United States Magistrate, Central District of Missouri (Sept. 16, 1991) (on file with the authors).

34. Photographs of the "Amazing Mug" are on display at South Texas College of Law, and copies may be obtained from the authors (713/646-1832). The Ohio cafe owner reported that a California company sends sales representatives through the towns of America making arrangements with local advertisers, including attorneys and judges, to have their literature placed on coffee mugs, which are then sold in bulk to local restaurants.

35. States vary considerably in the requirements they have established respecting disclaimers in lawyer advertising. In Arizona, contingency fee advertisements must explicitly state whether the client will be liable for any costs or expenses; in California, testimonial advertisements must make an express disclaimer: "This testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter"; in Iowa, public advertisements by lawyers must include a statement that the decision to retain a lawyer should not be based

Registration & Disciplinary Commission,[36] to the effect that "disclosure of truthful, relevant information is more likely to make a positive contribution to [consumer] decisionmaking than is concealment of such information,"[37] are at most half-truths. The negative but critically important information concerning disciplinary sanctions and other ethical difficulties that have already been determined is indeed concealed from such advertising. Laudatory as they might appear, proposals to vastly broaden the information that lawyers may include in their business advertising will not ameliorate the lack of "demerit" data.[38] The call now is for adoption of a new principle, "disclosure advertising"—full and fair disclosure of information aimed at responding to public concerns about lawyer misconduct.[39] More specifically, the term "disclosure advertising" means a requirement that an attorney who has been sanctioned or disciplined for serious misconduct must carry information concerning such sanction or discipline in his advertising materials.

B. Constitutional Challenges

Disclosure advertising is premised in part upon the idea that a more fully informed marketplace will be more economically efficient. In an increasingly information-driven era, such a change seems consistent with cultural and marketplace forces of considerable vitality. A move toward requiring greater visibility of lawyer discipline or trial court sanctions would be controversial, however, because it might be seen as a threatening departure from the status quo.[40]

Any attempt by the courts to mandate the disclosure of attorney disciplinary offenses as part of lawyer advertising must satisfy certain constitutional necessities. Currently, the very limited levels of disclosure of

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solely upon the advertisements; South Carolina, ironically, requires a disclaimer on advertising to potential clients that they may obtain information about competing lawyers, whom they may wish to retain other than the advertising lawyer, by consulting the Yellow Pages or by calling a toll-free number for the South Carolina Bar Lawyer Referral Service. ABA/BNA, LAWS. MAN. ON PROF. CONDUCT § 81:405 (1989).

36. 496 U.S. 91 (1990).

37. *Id.* at 108, 116-17.

38. *See, e.g.*, Morton, *supra* note 15, at 295, 325-27.

39. See *infra* notes 176-90 and accompanying text for some examples. Ringing through the concept of disclosure advertising is the Jeffersonian notion that one of the pillars of individual autonomy in a free society is dependable information about matters of significance that affect each individual. *See* Colin Benwick, *Thomas Jefferson: Pragmatist or Visionary?*, 43 HIST. TODAY, Apr. 1993, at 18, 19.

40. The recent NOBC polling of various jurisdictions of disciplinary authorities indicates a strong reluctance to make information available to members of the general public or "anyone who wants it"; these results indicate a strong and continuing reluctance to allow publication of matters affecting the practice of law from a potentially adverse viewpoint to grow beyond current limitations. *See* NOBC, *supra* note 16.

suspension, disbarment, and other sanctions published in the West reporters or the various state bar journals have not generated any successful constitutional challenges.[41] Moreover, a cluster of significant social policies, some of them constitutional, argue strongly in favor of full and fair dissemination of information. These policies include such varied matters as decisions permitting the press and the public to attend criminal trials[42] or sealing off case records from public review.[43] In many areas apart from the practice of law, there are instances when government regulations have mandated the disclosure of unpleasant facts. For example, disclosure requirements are imposed upon: (1) tobacco,[44] alcohol,[45] and gambling;[46] (2) medications that have been licensed for release to the consuming public by the FDA;[47] (3) description of credit terms pursuant to banking laws;[48] and (4) information required by certain safety and environmental statutes.[49] Accordingly, there

41. This is not surprising. Generally, the court of highest appellate jurisdiction in each state controls the ultimate determination of sanctions being imposed upon lawyers found to have violated ethical standards within the jurisdiction. These opinions are frequently published in the reporters. Implicit in this practice is the courts' determination that the publication of the names and details of these disciplinary matters is not a violation of any constitutional principle.

42. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 558 (1980) (holding that members of the public and the press have a constitutional right to attend criminal trials).

43. Woven Electronics Corp. v. Advance Group, Inc., 19 U.S.P.Q.2d 1439, 1443 (4th Cir. 1991) (per curiam) (requiring that even in a trade secrets case, the court should not seal the entire record; rather, the court should review the record and seal only the necessary portions).

44. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585 (D.D.C. 1971).

45. Dunagin v. Oxford, 718 F.2d 738, 750 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

46. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 331 (1986).

47. *See* 21 U.S.C. § 352(n) (1988).

48. At least 20 statutory and regulatory truth-in-lending disclosure programs are published for institutional use by Kenneth F. Hall. KENNETH F. HALL, 1992-93 MORTGAGE LOAN DISCLOSURE HANDBOOK 4 (1992).

49. A Texas court ordered a man who destroyed wetlands to erect and maintain a billboard identifying to passersby that he is remediating the environmental damage caused by his fill and construction. Kevin Moran, *Man Ordered to Advertise His Penance for Harming Wetlands*, HOUSTON CHRON., Apr. 1, 1993, at A30; *see also* Richard A. Dennis, *Federal Criminal Liability and Ethical Considerations*, S. TEX. COLL. OF LAW ENVIRON. LIT. PROG. (Jan. 1990).

Apart from an occasional judge-made requirement for disclosure advertising, such as the wetlands disruption contractor described above, most of the regulations upon commercial speech have been legislative. A variety of powers exists, including the power under the Commerce Clause and general state and federal protections of health, safety, and welfare, which would allow for the command that reasonable disclosures be made in such targeted advertising. In the instance of the practicing lawyer, however, the jurisdiction principally vests in those courts that have licensed the lawyer or the individual court before whom the lawyer appears. Accordingly, rather than looking to such things as the Commerce Clause to empower such regulatory disclosures, one must look to the inherent power of the judiciary to license, regulate, supervise, sanction, and control all those who have been authorized to appear before the bar. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2 (1986) (discussing the "inherent powers of courts to regulate lawyers"). Similarly, the Supreme Court has recently determined that lawyers' busi-

appears to be an existing body of policy that militates in favor of disclosure advertising, at least in certain narrowly targeted areas.

Beyond such general policy matters, a valid constitutional basis must be found for singling out lawyers as a proper classification for such an intrusive proposal. Society has not yet adopted a system that would require furniture retailers to notify consumers—in their weekend television commercials hawking discounts on dining room sets—that official consumer agencies have registered numerous administrative complaints against the sponsoring furniture dealer.[50] Similarly, deceptive contractors in the home renovation industry are not required to inform prospective customers that their ratings with the local Better Business Bureaus are dismal, at best.

There exists no historical tradition in the American system of marketing that *mandates* a full disclosure of the prior business practices, warts and all, to the prospective consumer. Thus, those opposed to disclosure could assert what is essentially an equal protection argument and urge that the business of practicing law ought not to be singled out for a special burden not applicable to other businesses generally. The key analysis in this regard would be whether there are valid grounds to distinguish between lawyers and individuals engaged in other commercial ventures.

Without addressing the question of imposing a regimen of disclosure advertising upon all retailers and service-providers throughout the nation, it is possible to draw some valid distinctions between lawyers and other groups:

1. Access to the administration of justice (including the final adjudication of all fundamental rights flowing from our constitutional system) is achieved through the unique monopoly afforded lawyers.[51] Lawyers are granted licenses from the courts that make the profession the sole medium of access (except the *pro se* amateur) through which a private citizen or business entity may seek to utilize the American system of justice.[52] Seeking the vindication of any and all private rights, pursuant to contract, tort, property, or special statutory grants, as well as the presentation of all defenses against the loss of civil rights and liberties pursuant to criminal provisions, are within the exclusive province of lawyers. This special empowerment is accompanied by a special array of ancillary powers for the use of subpoena, demanding of deposition, and other discovery, all under

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ness-seeking efforts can be more stringently regulated than those of CPAs. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1802-03 (1993).

50. Even furniture dealers deal with truth-in-lending disclosures to the extent that certain closed-end credit purchases are promoted. 15 U.S.C. § 1602, 1631-46 (1988).

51. WOLFRAM, *supra* note 49, at 25-27.

52. *Id.* at 27-31. It is essentially the power sometimes referred to as "negative inherent powers," whereby the courts can prevent legislative action that would permit all citizens to be admitted to the practice of law without any examination or other prerequisite. *Id.*

the aegis of, and with access to, the coercive powers of the state. Such far-reaching empowerment does not inhere to licensed auto dealers, psychiatrists, or restauranteurs.[53]

2. The bias for disclosure is now embedded in judicial thought,[54] which recognizes the existence of a powerful societal interest in deterring false or misleading advertising and protecting the public through warnings or disclaimers.[55] Moreover, there appears to be a nationwide consensus through the *Model Rules of Professional Conduct* to deter unjustified expectations and to avoid, in communications between attorneys and prospective clients, any misleading implication because the communication "contains a material misrepresentation of fact or law, or *omits a fact* necessary to make the statement considered as a whole not materially misleading."[56] Moreover, if a sufficiently compelling public interest exists to

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53. The Preamble to the ABA's 1991 amended *Model Rules of Professional Conduct* recognizes the uniqueness of lawyers:

> A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> * * * *
>
> The legal profession is largely self-governing. Although other professionals also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
>
> To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

ABA/BNA, LAWS. MAN. ON PROF. CONDUCT § 01:101 (1989).

54. In Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990), the United States Supreme Court overturned the censure of an Illinois attorney whose professional letterhead indicated that he had been certified as a trial specialist by the National Board of Trial Advocacy and that he was licensed as an attorney in three states. A sharply divided Supreme Court determined that accurate, factual advertising is not misleading, and the opinion seemed to have been influenced by the "presumption favoring disclosure over concealment." *Id.* at 109-10. It would seem to follow that if disclosure of positive, truthful characteristics that enhance the lawyer's reputation cannot be prohibited by the attorney disciplinary committees of the states, in the interest of protecting the client-consumer of legal services, then disclosure of factually correct but unflattering information would be equally attractive under this same principle. *See also* Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651-52 n.14 ("The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right [as to require a strict scrutiny test.]").

55. *See Zauderer*, 471 U.S. at 651.

56. LAWS. MAN. OF PROF. CONDUCT § 01:167 (ABA/BNA 1989) (emphasis added). Rule 7.1 also indicates that other prohibited communications include the creation of unjustified expectations as to results or invidious comparisons between the advertising lawyer's services and other lawyers' services that cannot be factually substantiated. *Id.* Anti-barratry efforts have recently been publicized in Texas through news conferences and the creation of a toll-free number for the

require a licensed drug manufacturer[57] to disclose information about adverse side effects to the user, it follows *a fortiori* that a licensed "Rambo" litigator could be required by the court to disclose a trail of Rule 11 sanctions that might adversely affect his client.[58]

3. Historically, lawyers as a class are licensed, monitored, and disciplined by the courts.[59] At the outset, the very inquiry whether the courts possess the power to impose a disclosure advertising regimen upon the legal profession presents a quaint paradox. After all, the branch of government that will determine any equal protection, due process, or free speech issues will necessarily be the same branch that will make the policy judgment to impose disclosure advertising on lawyers.[60]

Another issue that must be addressed is the constitutional hurdle posed by First Amendment protections of free speech. After *Bates*, there is no question that advertising by lawyers is a protected form of free speech.[61] The significant question is whether lawyer advertising is so highly protected that it cannot be regulated in the fashion proposed.

Existing First Amendment jurisprudence indicates that commercial speech may be regulated.[62] Regulations pass constitutional muster if there are substantial public interests at stake in the regulation.[63] Such regulations will be valid when the restrictions created upon lawyer advertising are of no broader scope than reasonably necessary to achieve the ends of protecting

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public to report improper solicitations. Texas State Bar Update (April 1993); *Meeting the Candidates*, 56 TEX. B.J., April 1993, at 360.

57. *See supra* note 47 and accompanying text.

58. *See infra* text accompanying note 130.

59. WOLFRAM, *supra* note 49, § 2.2; *see, e.g.*, Ruckenbrod v. Mullins, 133 P.2d 325, 330 (Utah 1943).

60. WOLFRAM, *supra* note 49, at 23.

61. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 100 (1990); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); *see also* Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 768-69 (1988).

62. In *Zauderer*, the Supreme Court recognized the "material differences between disclosure requirements and outright prohibitions [on lawyer advertising]." 471 U.S. at 650. This case also expressly approved certain Ohio Bar regulations that required inclusion of the material facts concerning contingent fee arrangements in lawyer advertising that indicated contingent fees were available. *Id.* At least one state court has held that failure by an attorney to communicate material information in his advertisements and other business solicitations renders such communications false and misleading. Musslewhite v. State Bar of Tex., 786 S.W.2d 437, 441-42 (Tex. Ct. App. 1990), *cert. denied*, 111 S. Ct. 2891 (1991). Inherent in both decisions is an emphasis on the rights of prospective clients to make a more informed choice when selecting an attorney.

63. *Zauderer*, 471 U.S. at 651; *accord* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 749 (1976).

the substantial public interest.[64] The consumer-client's welfare is just such a public interest.[65]

For disclosure advertising to withstand constitutional challenge, a distinction must be made between those regulations upon lawyer advertising that forbid certain claims from being made (i.e., exclusions) and those regulations that require appropriate disclosures or disclaimers (i.e., inclusions). An outright prohibition against lawyer advertising is much less likely to pass constitutional muster than a rule requiring *inclusion* of all facts necessary to make the advertising more valuable to consumers. For example, in response to an Ohio bar rule requiring inclusion of a wide variety of facts concerning lawyers' contingent fee arrangements in attorney advertising, the United States Supreme Court in *Zauderer* engaged in a balancing approach that tilted in favor of the consumer.[66] The *Zauderer* Court decided that requiring attorneys to provide somewhat more information than they might otherwise be inclined to present, particularly information clarifying fee arrangements, presents them with only a slight burden.[67]

In the *Peel* case of 1990, a sharply divided Court held that information on an attorney's professional letterhead indicating that he had been certified for trial specialization by the National Board of Trial Advocacy was acceptable because such information was supported by the notion that it was not misleading and was accurate, factual data.[68] By extension, if disclosure of meritorious characteristics pertaining to the attorney's capacity to represent clients in a satisfactory fashion is permitted in his advertising because it is accurate and factual, then it would seem equally persuasive that the presentation of unflattering information regarding the attorney's disciplinary record can be mandated for disclosure to the consumer-client *when factually accurate.*[69]

Beyond the focus upon consumer protection described above, there exists a public policy question concerning the continued effectiveness of the administration of justice in a climate of growing mistrust and hostility to-

64. *Bates*, 433 U.S. at 383-84; *see also Peel*, 496 U.S. at 107.

65. *Zauderer*, 471 U.S. at 650-51. The interest at stake may be high enough, e.g., where a state by regulation attempts to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess . . . their faith therein." West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *accord* Wooley v. Maynard, 430 U.S. 705, 717 (1977); Miami Herald Publishing, Co. v. Tornillo, 418 U.S. 241, 258 (1974).

66. *Zauderer*, 471 U.S. at 650. Notably, the *Zauderer* Court determined that it is neither impractical nor burdensome to require the weeding out of false and misleading advertising by attorneys and that disclosures, including warnings or disclaimers, are appropriate in the interest of protecting the public; requiring attorneys to provide only somewhat more information than they might otherwise be inclined to present to the public is not an undue burden. *Id.* at 646 n.13.

67. *Id.* at 652-53 n.15.

68. *Peel* 496 U.S. at 110.

69. *See supra* note 54.

ward legal institutions generally and lawyers specifically.[70] Some observers believe that America is passing through a growing climate of distrust accompanied by some features of a progressing civil dissolution.[71] An indispensable element enabling cooperation among citizens at every level—social trust—can be lost. A fear exists that the population can "become resigned to a society in which taking advantage of others when one can is standard and accepted behavior."[72] Similar comments about the erosion of basic public trust in the structures of society over recent years have been widespread.[73] The wave of state high court promulgations of a proposed "lawyer's creed" is only one indication of the grievous magnitude of the *perceived* disintegration of the image of the legal profession.[74] Unfortunately, surveys and independent studies appear to verify this decline.[75] At some point, the broad social consequences of a downward spiral in the public perception of courts and judicial administration will have major implications for all of American culture.[76]

No court weighing the need for tangible reform of the bar can turn its back complacently on certain existing risks.[77] Recall for a moment that in the last forty years, courts have often supplanted both the legislative and the executive branches as the agent of ultimate social and cultural change.[78] Simultaneously, legislatures and bureaucrats have seen public trust and con-

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70. Notably, University of North Carolina Law School Professor Burnele Powell, Chair of the ABA Committee on Professional Discipline, regards this crisis of confidence as directly linked to the need for "ordinary morality" in the relationship between the Bar and the consuming client public. *See infra* notes 207-14 and accompanying text.

71. *See* VIRGINIA HELD, RIGHTS AND GOODS JUSTIFYING SOCIAL ACTION 62-63 (1984).

72. *Id.* The *New York State Bar Journal* recently reported that more than 40 jurisdictions had adopted a version of the *Lawyer's Creed of Professionalism.* "It is appropriate for every lawyer to consider in this time of concern about *the legal profession's public image.*" *Profiles in Professionalism*, 64 N.Y. ST. B.J., Jan. 1992, at 45, 48 (emphasis added).

73. *See supra* text accompanying note 1; *infra* notes 210-14 and accompanying text.

74. *See supra* note 72.

75. *See infra* notes 79.

76. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The *ABA Model Rules of Professional Conduct*, when properly applied, serve to define that relationship.

77. The late Robert B. McKay, when he chaired the ABA Commission on Evaluation of Disciplinary Enforcement, warned of one significant risk: "If the disciplinary process does not meet [an acceptable] standard, a disaffected public is likely to impose limits upon the process . . . ." MCKAY REPORT, *supra* note 8, at iii.

78. *See* Baker v. Carr, 369 U.S. 186, 236-37 (1962); Brown v. Board of Educ., 347 U.S. 483, 495 (1954); Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Sir Sidney William Templeman has remarked on the manner in which the current challenges of society have progressed further by way of case law in the United States than in the United Kingdom. Sir Sidney William Templeman, *An English View of the Judicial Function, in* LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 7 (Harry W. Jones ed., 1977).

fidence in their institutions plummet.[79] Thus, if the bench and bar of America are unable to shore up their eroding claims to public trust and confidence, then the institution that has become most vital to the functioning of a society based on law is called into question.[80] Loss of public trust and confidence eventually could prove to be socially seismic.

IV. COURT SANCTIONS AND DISCLOSURE ADVERTISING

[P]laintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously. . . . The Court does not hold plaintiffs blameless. This was their litigation, and their counsel must be deemed to have acted at their direction.

U.S. District Judge George F. Gunn, Jr.
(levying $100,000 in sanctions on
counsel and their clients)[81]

Two major sources of demerit information exist that could be required elements of lawyer advertising. First and most obvious—needing little explanation—are suspensions, reprimands, disbarments, and the like imposed through the lawyer discipline agencies in each jurisdiction. These are ultimately enforced by the power of the judicial branch to control the admission to, and to regulate the practice of, law.[82] There are, however, also classic sources of demerit information to be derived from direct control over attorneys appearing before a judicial tribunal that are grounded in court rules, statutes, or the inherent powers of the courts.[83]

One of the key signals that law has been evolving from a profession to a commodity is from this second source—the increasing judicial control

79. Some polls show that the confidence that the public has in lawyers and its respect for the legal profession is at the same low level as that of Congress and below that enjoyed by many other professional organizations. RICHARD L. ABEL, AMERICAN LAWYER 163 (1989); Mary Lahr Schier, *Lawyers' Image: What's to be Done?*, BENCH & B. MINN. 16 (Mar. 1993); *see also* Altman et al., *supra* note 8, at 1-12; Robert J. Samuelson, *I Am a Big Lawyer Basher*, NEWSWEEK, Apr. 27, 1992, at 62; Sherman E. Stock & Nancy M. Rottier, *Cronkite's Back . . . and It's Bad News for Civil Justice*, WIS. ACAD. TRIAL LAW. (1992).

80. In effect, the question of disciplinary visibility has already been answered in a general fashion. Significant activity within the bar presently exists to bring the process of disciplinary proceedings more closely to public scrutiny, sometimes through the admission of lay members on the disciplinary committees and the acknowledged problem that "secrecy and discipline proceedings [continue] to be the greatest single source of public distrust of lawyer disciplinary systems." A.B.A. DISCIPLINARY ENFORCEMENT REPORT, *supra* note 14, at 23-26 (May 1991). Also, the movement in Oregon and other jurisdictions for greater emphasis on the informational needs of the client-consumer in the selection of counsel is becoming widely noticed. *Id.* at 23-24.

81. Bastien v. R. Rowland & Co., 116 F.R.D. 619, 621 (E.D. Mo. 1987).

82. *See* WOLFRAM, *supra* note 49, at 22-32.

83. *E.g.*, United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1344-45 (2d Cir. 1991). The inherent power of the court is so broad as to justify huge monetary awards against a party for fraud, "lying to the court," and similar justice-blocking conduct. Chambers v. Nasco, Inc., 111 S. Ct. 2123, 2133 (1991).

over wildcat litigation tactics that has swept through the state and federal courts.[84] Judges have identified a "rogue's gallery"[85] of improper practices and have greatly fortified the judicial powers to combat such tactics.[86] In addition to the courts' inherent power to levy sanctions against improper lawyer conduct (including seven-digit awards against a party for lying to the court and fraud), statutes and court rules also authorize a vast array of sanctions against abusive litigators and their clients.[87] Chief among these judicial powers stand amended federal Rule 11 and its state counterparts.[88]

The reinvigoration of the courts' sanctioning power is a direct response to a perceived rising tide of litigation abuses. For example, some law firms that engaged in plaintiff's litigation on a "Rambo" level began to initiate a "collective-farm" approach by serving complaints indiscriminately upon any potential defendants just because their names were found in the local yellow pages.[89] Other firms began the practice of soliciting large numbers of potential plaintiffs arising out of catastrophes with blizzards of letters, brochures, newspaper advertisements, and other contacts.[90] In retaliation, defense counsel began filing foundationless pleadings and endless, often irrelevant, discovery demands.[91] Judicial concern became revulsion, and amended Rule 11 sanctions arose in federal courts, while many states adopted local counterparts to Rule 11 for reasons largely identical to those

84. *E.g.*, Viola Sportswear Inc. v. Mimun, 574 F. Supp. 619, 621 (E.D.N.Y. 1983) (awarding attorney's fees after motion for summary judgment granted without opposition following filing of trademark infringement suit after one pair of $10 jeans sold—without reasonable inquiry as to allegations); Miller v. Schweikart, 413 F. Supp. 1059, 1062 (S.D.N.Y. 1976) (naming parties in blunderbuss fashion as defendants in class action securities fraud without an attempt by the plaintiff's attorney to confirm hearsay or rumors before commencement of suit). As one example of the 40 jurisdictions that have recently promulgated a lawyer's creed to stem the tide of improper conduct, see Transmittal Letter from the Honorable Eugene A. Cook to the lawyers of Texas (Dec. 22, 1989), *accompanying* THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS, THE TEXAS LAWYERS' CREED—A MANDATE FOR PROFESSIONALISM (1989). A Model Creed of Professionalism follows similar lines. MODEL STANDARDS § 01:401 (ABA/BNA ed. 1988).

For both entertainment and insight, see the Oklahoma County Bar Association's Lawyer's Creed, as referenced in a particularly jolly jeremiad by U.S. District Judge Wayne E. Alley in Krueger v. Pelican Prod. Corp., No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989).

85. Crigler v. Pennzoil Co., 687 F. Supp. 120, 123 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 307 (2d Cir. 1989).

86. *See* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 323 (1991).

87. *See supra* note 83; Musslewhite v. State Bar of Tex., 786 S.W.2d 437 (Tex. Ct. App. 1990), *cert. denied*, 111 S. Ct. 2891 (1991).

88. *See* FED. R. CIV. P. 11.

89. OLSON, *supra* note 86, at 323.

90. *E.g.*, *Musslewhite*, 786 S.W.2d at 439-40.

91. One survey of federal judges determined that approximately 40% of all Rule 11 sanctions are being placed upon defendant's counsel with 60% on plaintiff's. Elizabeth C. Wiggins & Thomas Willging, *Rule 11 Final Report to the Advisory Committee on Civil Rules to the Judicial Conference of the United States*, 47 Comments to p. 8 No. 33 (1992).

of the federal judiciary.[92] Although Rule 11 and its state counterparts have received the lion's share of attention in recent years, there are also statutory powers and inherent powers of the court that can lead to discipline and sanctions.[93]

By 1993, at least forty states had also adopted some version of a "lawyer's creed."[94] As one state supreme court justice stated in a letter to the bar accompanying the distribution of such a creed: "Lawyers with this [Rambo] attitude instead of being part of the solution have become part of the problem. Lawyers want to restore civility to the courtroom, to the discovery process, and to the entire practice of law."[95]

In an effort to control the destructive tide, the federal courts have been refining and enforcing Rule 11 with ingenuity and vigor.[96] The principal purpose of amended Rule 11 is to deter the filing of frivolous litigation, use of time-wasting, cost-escalating tactics, and similar practices.[97] Field studies of the federal courts since 1983 indicate that most judges view deterrence as the primary goal of amended Rule 11.[98] Accordingly, they have sought to design and impose the least severe sanctions that are compatible with deterring future lawyer misconduct in the courts.[99] Moreover, there has been a shift in focus recently toward the imposition of Rule 11 sanc-

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92. *E.g.*, TEXAS R. CIV. P. 13, 125.

93. Federal courts have traditionally enjoyed three bases for imposing sanctions, namely Federal Rule 11, 28 U.S.C § 1927 (1988), and the general inherent powers in the federal system. The chief attraction of Rule 11 is its authorization to sanction clients of abusive counsel as well as the counsel themselves and its enhanced flexibility since the 1983 amendments. United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1343-45 (2d Cir. 1991).

94. *See supra* note 84; *infra* note 95.

95. THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS, THE TEXAS LAWYERS' CREED—A MANDATE FOR PROFESSIONALISM (Nov. 7, 1989), accompanying Transmittal Letter from Justice Eugene Cook to the lawyers of Texas (Dec. 22, 1989), *supra* note 84, at 1. A Model Creed of Professionalism promulgated by the ABA follows similar lines. MODEL STANDARDS § 01:401 (ABA/BNA ed., 1988).

96. *See* THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS 11-12 (1988). A key element of the proposed revision to Rule 11 is a 21-day cure period (a "safe harbor" provision) during which offending counsel may remedy the violation and avoid further sanctions. *See* Sam D. Johnson et al., *The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions*, 54 TEX. B.J. 952, 952 (1991).

The courts' continuing determination to play a strong role in using Rule 11 is made strikingly clear from the recently formulated Supreme Court doctrine that even where the trial court is found to lack subject matter jurisdiction over the claim, it retains the power to impose Rule 11 sanctions. The trial court enjoys this power notwithstanding the seeming paradox that the basis of the Rule 11 sanction might be the court's determination that the plaintiff's claim was of a frivolous nature. Willy v. Coastal Corp., 112 S. Ct. 1076, 1079-81 (1992); FED. R. CIV. P. 11 Advisory Committee's Note (1983) [*hereinafter* Advisory Committee Note]; William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985).

97. WILLGING, *supra* note 96, at 20, 30.

98. *Id.* at 22-23, 30.

99. *But see* Johnson et al., *supra* note 96, at 952 (noting that the "least severe sanctions" standard of Rule 11 application has been effective). For a concise litigator's update on the current

tions not only on plaintiff's counsel but also upon defense counsel who may have engaged in inappropriate pleadings and other tactics.[100] Rule 11 sanctions are imposed not merely for the filing of frivolous pleadings, but in instances when a litigator, with or without her client, persists with baseless claims, fails to follow the federal rules, or engages in other conduct inimical to the efficient functioning of the judicial process.[101]

Amended Rule 11 is also intended to provide compensation to the abused party, and studies have indicated that the customary measuring stick in this approach has been attorneys' fees.[102] Naturally, an award of attorneys' fees is often inadequate compensation to a victimized party, because it does not compensate for any intangibles such as harassment, harm, added business costs, or emotional trauma associated with the inappropriate conduct of opposing counsel.[103] Thus, some courts have adopted the imposition of substantial monetary sanctions in excess of that needed to deter further litigation misconduct by the offending party.[104]

Unlike some of the state counterparts to Rule 11, the federal judiciary is required to take the initiative and *sua sponte* unmask prohibited tactics that violate the spirit of Rule 11.[105] The concerns for the integrity and efficiency of the system of justice have led toward the increasing use of imaginative sanctions in checking such abuses of the court system. Disclosure advertising, with its deterrent effect, however, has not yet been used by the federal courts.

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status of Rule 11, see Thomas Fraser & Laurie Miller, *Costs of Aggression: An Update on Rule 11*, 50 BENCH & B. MINN., Apr. 1993, at 25, 28.

100. *See supra* note 91.

101. Crigler v. Pennzoil Co., 687 F. Supp. 120, 123 (S.D.N.Y 1988), *aff'd*, 875 F.2d 307 (2d Cir. 1989); National Union Fire Ins. Co. v. Continental Ill. Corp., 113 F.R.D. 637, 642 n.15 (N.D. Ill. 1987); *see also* Community Elec. Serv. of Los Angeles, Inc. v. National Elec. Contractors Ass'n, 869 F.2d 1235, 1241-43 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989) (denying Rule 11 sanctions because competent counsel could form a reasonable belief that pleading was warranted by existing law); Mercury Serv., Inc. v. Allied Bank, 117 F.R.D. 147, 155-57 (C.D. Cal. 1987), *aff'd*, 907 F.2d 154 (9th Cir. 1990) (imposing Rule 11 sanctions for filing of paper lacking factual foundation and intending to mislead court); Fraser & Miller, *supra* note 99, at 29-30.

102. *E.g.*, Brown v. Federation of State Med. Bds., 830 F.2d 1429, 1437-38 (7th Cir. 1987) (holding that in imposing attorney fees as sanctions under Rule 11, a court should consider the amount of time reasonably needed to defend against frivolous claims); Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974) (holding when sanctions imposed in a Rule 41(b) case, lack of prejudice to defendant should be considered); *see* Schwarzer, *supra* note 96, at 201.

103. Knox, *supra* note 33.

104. WILLGING, *supra* note 96, at 30. Recent amendments to Rule 11 would target more narrowly monetary sanctions toward deterrence and would create a safe harbor rule in which an attorney may cure certain types of tactical misconduct within 21 days. *Id.*

105. One recent study showed that federal judges acting *sua sponte* were responsible for 2% to 7% of all Rule 11 motions/orders. Wiggins & Willging, *supra* note 91, § 1A, at 5 (1992).

A. *Deterrence and Disclosure Advertising*

In applying Rule 11, federal judges have been concerned with the need to devise nonmonetary sanctions that will deter the undesirable conduct. This has resulted in fourteen or fifteen types of sanctions[106] that are applied within the discretion of the federal trial court.[107] These sanctions may be imposed upon both the wildcat attorneys *and* their clients. Of these sanctions, only a couple go toward compensating the victim, and the vast majority are targeted to have an impact upon the present or future conduct of the instant wildcat litigator and to deter others from similar practices.[108] Federal courts have dismissed frivolous claims and enjoined further litigation on these claims under the threat of imposing further sanctions.[109] In addition, "censure, suspension, or disbarment from practicing before the forum court" are among the particularly stringent sanctions available.[110] The principal guideline continues to be that a sanction imposed under Rule 11 should be "limited to what is sufficient to deter comparable conduct by persons similarly situated," thus reducing the need for future sanctions in other cases or further sanctions in the pending case.[111]

Under present practices, the wildcat litigator runs the risk of widespread publicity for his violations only under a very limited set of circumstances. Naturally, it is within the power of the courts to disseminate, by issuance of a press release or other communication to selected media or to

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106. American Bar Association, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 124 (1988) [*hereinafter ABA Standards and Guidelines*]; William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1020 (1988); Timothy B. Phelps, Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337, 348-51 (1987). Many of the sanctions include censure, dismissing the cause of action, and issuing disbarment complaints. It is significant in this regard that some have concluded that both the consuming public and the bar benefit when the full light of public access to disciplinary information is made available. A.B.A. DISCIPLINARY ENFORCEMENT REPORT, *supra* note 14, at 23-26; *see also* WILLGING, *supra* note 96, at 5, 12-13.

107. FED. R. CIV. P. 11. The amendment to Rule 11, adopted by the Supreme Court on April 22, 1993, places some restraints on the imposition of sanctions, particularly for discovery disputes. The amendments also required that the imposition of monetary sanctions awarded in the Court's initiative be preceded by show cause orders. NAT'L L.J., June 7, 1993, at S1-S2.

108. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397 (1990) (citing FED. R. CIV. P. 11 Advisory Committee's Note); *see also* WILLGING, *supra* note 96, at 11. In the Willging study, more than one-third of the attorneys interviewed reported a change in pleading practice by: (1) elimination of overstatement in pleadings; (2) avoidance of boilerplate answers and defenses; and (3) deflation or elimination of inflated damage requests. WILLGING, *supra* note 96, at 11. As standards for imposition of Rule 11 sanctions have evolved, some of the initial confusion about the exact legal standard necessary to trigger such a sanction is emerging: "Deterrence of sanctionable behavior depends not only on clear guidelines for attorney behavior, but also on dissemination of information. On this score, the educational effects of Rule 11 are palpable." *Id.* at 12. *See also* Fraser & Miller, *supra* note 99, at 26-27.

109. *E.g.*, Haugen v. Sutherlin, 804 F.2d 490, 491 (8th Cir. 1986).

110. *ABA Standards and Guidelines*, *supra* note 106, at 124.

111. WILLGING, *supra* note 96, at 30; *see also* Fraser & Miller, *supra* note 99, at 25-28.

the general media, an announcement regarding the imposition of sanctions upon the rule-violating attorney or his client.[112] Although this is sometimes done, only a remote chance exists that the information will be effectively disseminated to current or future clients of the particular attorney in question.[113] A second possibility is that the violation will be significant enough to require the court to proceed to a level of formal disciplinary action, perhaps even resulting in suspension or disbarment.[114] Here again, however, information regarding suspension, disbarment, and other discipline is haphazardly disseminated to the public and can usually be found only in specialized bar publications.[115] Naturally, there is some deterrent value even in such limited visibility—the offending attorney may risk losing future client referrals from other attorneys who happen to read of the disciplinary matter. A remote risk also exists that present or future clients will learn of the matter; for example, corporate clients whose in-house counsel come across a notice of discipline in a bar journal or newsletter may become aware of the sanctions. Any deterrent effect is even less likely in those jurisdictions that do not publish the names of offenders or details of the sanctions.

The possibility of real impact is further diminished by the sequential method of such disclosures. Even in a jurisdiction such as Wisconsin, where highly detailed discussions of ethical violations and the sanctions imposed on a named attorney are published in the *Wisconsin Lawyer*,[116] the deterrent effect is fleeting at best, since the reports are not carried cumulatively from month to month or year to year.

Under Federal Rule 11, the particular attorney's history of prior sanctions needs to be available for consideration by his prospective clients, because any future court determination about imposing financial sanctions for a violation would include this history.[117] A prospective client should realize that both her case and her pocketbook are at risk. Any monetary sanc-

112. *ABA Standards & Guidelines*, *supra* note 106, at 122-25.

113. *See supra* note 24 and accompanying text.

114. *ABA Standards & Guidelines*, *supra* note 106, at 124.

115. *See supra* note 24 and accompanying text.

116. *See supra* note 10.

117. The ABA Standards specifically state that factors which should be included in a determination to impose monetary sanctions require the court to examine the "experience, *reputation* and ability of the attorneys." *ABA Standards & Guidelines*, *supra* note 106, at 126 (emphasis added). In order to assess any lawyer's reputation under such circumstances, a court would need to inquire into that lawyer's prior history of Rule 11 sanctions. Examining such a history is part of the "reputation" inquiry. Eastway Constr. Corp. v. City of N.Y., 637 F. Supp. 558, 573 (E.D.N.Y. 1986) (citing Schwarzer, *supra* note 96, at 201), *modified*, 821 F.2d 121 (2d Cir. 1987); *In re* Itel Sec. Litig., 596 F. Supp. 226, 235 (N.D. Cal. 1984) (imposing heavy sanctions on plaintiff's counsel based in part on his "history in this type of litigation"), *aff'd*, 791 F.2d 672 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

tions could become joint and several;[118] nonmonetary sanctions might have significant adverse impact upon the client's case itself.[119] Accordingly, information about the prior history of sanctions needs to be available to a potential client during the attorney selection process.[120]

Notably, our research has uncovered no jurisdiction that presently accumulates disciplinary information about a specific lawyer and publishes such information in a form designed to come to the attention of the lawyer's existing clients or potential future clients. The closest analogy to such a circumstance is the procedure in some jurisdictions, such as Minnesota, which requires the disciplined attorney to notify *existing clients* by letter of any disciplinary suspension and, by recent amendment, to supply such clients with a copy of the disciplinary order itself.[121] The new Minnesota rule requiring enclosure of the disciplinary order clearly responds to the need for client-targeted disclosures and illustrates the perceived force of their deterrent effect.[122] If this limited Minnesota rule has deterrent effect, visualize the enormity of the deterrent effect of a national disclosure advertising visibility requirement. Disclosure advertising would target information about all disciplinary matters toward *prospective as well as existing clients.*[123]

B. Disclosure Advertising as an Additional Nonmonetary Sanction

The federal courts include "targeted dissemination of decisions imposing sanctions (e.g., to colleagues or a client)" among the nonmonetary enforcement tools at a court's disposal.[124] This is so in part because the

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118. United States v. Allen L. Wright Dev. Corp., 667 F. Supp. 1218, 1221 (N.D. Ill. 1987).

119. *See* Valle v. Taylor, 587 F. Supp. 514, 518 (D.N.D. 1984) (dismissing claims under Rules 11, 16, and 41(b)). The 1983 Advisory Committee did not favor the use of Rule 11's authority to deal with claims on the merits. *See* Proposed Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 199 (1983); *see also* Fraser & Miller, *supra* note 99, at 27 (outlining proposed amendments to Rule 11).

120. The client is at risk to be damaged by a Rule 11 sanction imposed because her counsel engaged in "shoddy legal analysis." Chemiakin v. Yefimov, 932 F.2d 124, 126 (2d Cir. 1991). Knowledge of a lawyer's previous Rule 11 sanctions may help clients avoid this problem.

121. William J. Wernz, *Professional Responsibility Board—Proposed Procedural Changes*, 47 BENCH & B. MINN., Nov. 1990, at 15, 18-19 (discussing new Rule 26A). The impetus for this amendment seems to come from lawyer abuses in which suspended attorneys would notify their clients in a manner suggesting that the attorney was merely going on a vacation or leave of absence rather than being disciplined for a breach of professional responsibility standards. *Id.*

122. *See id.* Prior to this new mandate, candid communications to clients about attorney discipline were apparently seen as undesirable to the disciplined lawyer, while "taking a vacation" seemed to cover the situation adequately. A policy of mandated disclosure could help move the focus away from actively seeking to camouflage the fact of violation toward seeking to avoid such violations in the first instance.

123. *See infra* notes 163-168, 176-82 and accompanying text (discussing advertising methods covered by disclosure requirements).

124. WILLGING, *supra* note 96, at 5. Moreover, if a formal disciplinary action were held, there may be some dissemination to peers, clients, the legal media, and others under present practices.

federal system of sanctions recognizes that rule-violating conduct has many nonmonetary risks as well as monetary impact.[125] A client-consumer vitally needs to be aware that nonmonetary sanctions, which are also possible under Rule 11, can be extraordinarily damaging to the client's interests. For example:

- the federal court's dismissal of the client's cause of action pursuant to Rule 11 would have significant implications for the business or personal life of the client, irrespective of the lack of any monetary sanctions;[126]
- the client's business or personal objectives could be affected adversely by such things as threatened Rule 11 orders precluding the introduction of evidence, preventing the litigation of certain claims or defenses, or prohibiting future litigation;[127]
- the entry of a default judgment could arise under Rule 11;[128] or
- other nonmonetary sanctions may be tailored in a Rule 11 situation to the circumstances of the case.[129]

If the attorney-client relationship is predicated upon mutual trust and confidence, this predicate will not go unscathed when nonmonetary sanctions are imposed pursuant to Rule 11.[130]

With such consequences in mind, ponder for a moment the lawyer selection process of the sophisticated client-consumer of legal services, or that of a referring attorney. When a sophisticated person makes a determination about the selection, retention, or referral of counsel, the following concerns would be present when a history of disciplinary sanctions[131] is made functionally visible:

(a) Whether effects of past sanctions will be felt in a current case, especially if it is to be tried before the *same judge* who had imposed sanctions upon the violating lawyer in a previous case.

See WOLFRAM, *supra* note 49, at 127; *see also ABA Standards and Guidelines*, *supra* note 106, at 127-28 (outlining procedural considerations for the imposition of sanctions).

125. *See* Lupo v. Rowland & Co., 857 F.2d 482, 485 (8th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989); United States v. Allen L. Wright Dev. Corp., 667 F. Supp. 1218, 1221 (N.D. Ill. 1987); WILLGING, *supra* note 96, at 31.

126. *See* Haugen v. Sutherlin, 804 F.2d 490, 491 (8th Cir. 1986).

127. *See* Fraser & Miller, *supra* note 99, at 26-28.

128. *See Haugen*, 804 F.2d at 491. *But see* Fraser & Miller, *supra* note 99, at 27.

129. *See* Phelps, *supra* note 106, at 348-49; Schwarzer, *supra* note 106, at 1020; FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION §§ 42.24, 42.3 (2d ed. 1985). Entry of default judgment of Rule 11 has replaced a pre-1983 amended remedy of mere dismissal. *But see* Fraser & Miller, *supra* note 99, at 27 (outlining proposed amendments to Rule 11).

130. *See supra* notes 125-29 and accompanying text.

131. Courts can review the attorney's past conduct to determine appropriate sanctions. *In re* Kunstler, 914 F.2d 505, 525 (4th Cir. 1990), *cert. denied*, Kunstler v. Britt, 111 S. Ct. 1607 (1991); *see supra* note 117 and accompanying text.

(b) Whether the effect of past sanctions, even before a different trial judge but in the same district, raises similar concerns.

(c) Whether the sanctioned attorney—once burned, twice cautious—will tend to throttle back too greatly his zeal in the new case on behalf of the new client because of past Rule 11 sanctions.[132]

(d) Whether the sanctions signal that the sanctioned attorney is so inherently competitive, i.e., an incurable "Rambo," that he may also conduct the new case with excessive zeal.

(e) Whether Rule 11 sanctions imposed during the new litigation would impact on trial or settlement negotiations.

(f) In the event that monetary as well as nonmonetary sanctions have been imposed upon the attorney, whether the business reality of this financial loss will affect the attorney's judgment and conduct in the present matter.

Such information could decisively affect the client's selection of an attorney or a referring counsel's choice of attorney. Viewed in this light, disclosure advertising of such sanctions could potentially pose a significant threat to some of the future business sought by the sanctioned attorney. Thus, visibility in the marketplace should enhance sanction avoidance and act as a deterrent against inappropriate lawyer conduct.[133]

C. Better-Functioning Courts

The entire panoply of social interests underlying Rule 11 (and its state counterparts) weighs in favor of the visibility proposal. In addition to the client-consumer, the judicial system as a whole would benefit from disclosure advertising. In an institutional sense, the threat to the administration of justice and to the court system itself lies at the heart of the efforts since 1983 to impose order upon the growing "Rambo" approach to use of the

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132. The very purpose of deterrence is to stem the tide of wildcat litigation tactics. There may, in many instances, exist a fine line between excessive zeal and sufficient, but inexcessive, zeal. Just exactly how "gun shy" a sanctioned attorney may become is a matter of serious speculation.

133. Certainly some negative effects may arise in the small class of cases where the client is so intent upon achieving a "Rambo"-like result that the client specifically seeks out a lawyer with a trail of sanctions. *See* Knox, *supra* note 33, at 1. In this same light, there may be some wildcatters who wear their sanctions as a badge of honor and direct their services toward such clients. Ironically, in terms of economic efficiency, such lawyers and clients could both be well-served by discipline visibility, which would clearly identify those who have had Rule 11 sanctions frequently imposed to any prospective client who might view that as desirable in a litigator. We submit, however, that the universe of potential litigation clients overwhelmingly consists of those who do not want to take the risks involved in a potential court-sanction snarl. Potential clients and referring attorneys generally should view themselves as especially well-served by receiving information through disclosure advertising, which allows them to make an informed choice during the lawyer selection process.

judicial system.[134] The broad social interest in stemming this tide of behavior, the courts' significant distaste for monetary sanctions, and the accompanying search for effective nonmonetary systems of deterrence, support a policy of disciplinary visibility.

V. INFORMATION ASYMMETRY AND DISLOCATIONS IN THE MARKETPLACE

If you really believe in a competitive open-market economy, if you believe in the worth of your own product or service, then be honest. Drop the old working plan of first getting on, then getting honest, and finally hoping to get honor. Reverse the order. . . .

Ivan Hill[135]

Law is devolving from a profession to a business, or even a commodity, in the marketplace, and many of the perceived present difficulties with the legal profession arise from this change.[136] If the offering of legal services is becoming increasingly more of a commodity in this post-*Bates* era, then the need for disclosure advertising is considerably heightened. The marketplace factors, especially the wider asymmetry of information between lawyers and consumer-clients, become increasingly salient when one views law as no longer deeply rooted in its professional base. This Article does not suggest that disclosure advertising will reverse this trend line from professionalism to commodity; however, it does suggest that disclosure advertising would help redress certain dislocations caused by the metamorphosis in the practice of law.

This transition from a profession has created something of a "Reichian dislocation." Professor Charles A. Reich has observed that when new constitutional principles are created and take hold in our society, something of a rule of unintended consequences may appear.[137] The former rights, pro-

134. *See supra* notes 84-105 and accompanying text.

135. Ivan Hill, *The Meaning of Ethics and Freedom, in* THE ETHICAL BASIS OF ECONOMIC FREEDOM 19 (Ivan Hill ed., 1990).

136. *See* ABEL, *supra* note 79, at 163-65, 184-88; ABA COMMISSION ON ADVERTISING, REPORT ON THE SURVEY ON THE IMAGE OF LAWYERS AND ADVERTISING 41-42 (1990). "The Commission is convinced that secrecy and discipline proceedings continue to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does *great harm to the reputation of the profession*." MCKAY REPORT, *supra* note 8, at 33 (emphasis added). However, the business part of law has always been present to a degree. Even so great a jurist-lawyer as Oliver Wendell Holmes, Jr., acknowledged the need for "'the greedy watch for clients and the practice of shopkeepers' arts'" as part of daily lawyering. Thomas A. Balmer, *Holmes on Law as a Business and a Profession*, 42 J.L. ED. 591-92 (1992).

137. Writing in a different context, Professor Reich has observed how the American constitutional order can have a growing dysfunctional impact upon individual citizens. This can come about when new constitutional or other legal principles are created and eventually take hold in the system. Such legal principles may dilute or skew the previously established individual rights and expectations of citizens and thus give rise to the functional impairment of what were formerly the

tections, and legal structures that safeguarded the individual citizen and her needs within the previous legal framework of society may be dislocated or impaired; but no new structures or replacement protections are invented, or their need even foreseen.[138] Such a dislocation, to the disadvantage of the client-consumer, may have been at work in the marketplace for legal services since *Bates*.[139]

In the past, clients learned of the skills and flaws of their potential counsel through discussions with friends, relatives, co-workers, neighbors, or members of their church, club, or lodge.[140] With increasing urbanization and the advent of lawyer advertising, the old marketplace equation, imperfect as it may have been, is no longer available to the client-consumer of legal services. Although lawyer discipline existed in this earlier, quieter era, the dimensions of the problem of wildcat litigators, client trust fund abusers, and sexual harassers were not perceived by the consuming public to be as rampant or as destructive.[141]

In many respects, the practice of law in this new marketplace is still treated as a profession. Disciplinary information is largely not available in a form useful to the client-consumer.[142] This is advantageous to lawyers as vendors of services. Simultaneously, the practice of law is treated as a business empowered to use very sophisticated marketing techniques, again favoring only lawyer-vendors.[143] Meanwhile, the client-consumer has not been granted a concomitant benefit, and hence the dislocation in the former marketplace equation.

That attorneys in the post-*Bates* era have advertised and marketed their services with ever increasing ingenuity, some might say ferocity, is itself

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protections and legal structures safeguarding individuals and the individuals' needs within the framework of society. This comes about without the provision for any new structures or replacement protections. The cumulative impact upon the individual may not be intended, nor even envisioned, when the new constitutional principles are being created, but such unintended consequences of significance can accrue. Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1412-15 (1991).

138. *Id.* Consider the marketplace for a new car buyer who is choosing, for example, between a Toyota Camry, Dodge Intrepid, and Ford Taurus. The competing dealership sales brochures list scores of features—whole charts full of details about each vehicle. The consumer can also read reams of comparative data in *Consumer Reports* or *Motor Trend*. The consumer can test drive each vehicle and dicker over the pricing. Who would argue that open access to all this visible information is *not* positive for the consumer, the marketplace and, in the long run, the auto manufacturers and the overall economy? Carefully selecting not merely your auto, but your lawyer, is at least equally important.

139. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 375 (1977).

140. *See* ABEL, *supra* note 79, at 119-20.

141. As the McKay Commission has pointed out, there is a need to remove the public perception that secrecy in disciplinary proceedings is a source of distrust and harm to the profession. MCKAY REPORT, *supra* note 8, at 133.

142. *See supra* notes 16-24 and accompanying text.

143. *See supra* notes 31-39 and accompanying text.

some evidence of the impact of the marketplace upon law firms.[144] Some commentators submit that those who value advertising as a part of the operation of their legal services business, and the benefits that promotional visibility brings, are the very attorneys who would view the need to disclose factual information about disciplinary actions against them in their own advertising as inimical to their business interests.[145] That some serious conduct modification would naturally flow from this is a self-evident presumption. The long history of invisible discipline suggests that attorneys, as business-generating professionals, resist the publication of negative information.[146] Thus, the historic invisibility of discipline answers much of the question as to whether disclosure advertising would have a deterrent effect.[147]

Given the marketplace experiences of businesses outside the practice of law such as the Tylenol scare, airline crashes, or the defective General Motors pick-up trucks, there is little doubt that the general business community regards negative information as inimical to economic success and expends considerable effort implementing marketing plans to overcome such negatives, either to correct or to rebut them.[148] Accordingly, it ap-

144. Edward Poll, *Make Money Through Marketing, in* COMPLEAT LAW., Spring 1991, at 38. Notably, a study by the National Association of Law Firm Marketing (NALFMA) indicated that professional marketing services to law firms can generate salaries of up to $219,000 annually. Carolyn S. Paschal, *America's Leading Law Firms Talk Candidly About Marketing*, 54 TEX. B.J. 129, 129 (1991). High echelon strategic planners with an MBA generally earn between $70,000 and $150,000. Mid-level marketing specialists earn between $40,000 and $60,000. There is a very active market for these professionals, complete with placement networks and trade associations. *Id. But see* Mark Hansen, *Brochures, Newsletters Ineffective*, A.B.A. J., Oct. 1991, at 30.

145. Given the popularity of articles in various bar journals concerning marketing tools and strategies, together with the mail order market for such materials, most of the practicing bar is now very sensitive to the marketing factors and the image sought to be projected. *See* Hibschweiler et al., *supra* note 30, at 120. Among the most notable of the mailed solicitations are those of the Institute of Professional Training, Inc. of Pensacola, Florida, which will supply any law firm with a three-hour video program for $169 plus shipping and handling, together with 50-page workbooks, all devoted toward "How to Market Your Law Firm"; the materials include specialized sections on how to get new clients, build referral networks, get more business out of existing clients, survey clients, market activities, use newsletters, brochures, and other public relations tools, use alternative billing techniques as a marketing tool, etc. The advertising blurbs for the video set contain anonymous testimonials from eight attorneys that border on the Siskel & Ebert reviews of hit movies. *See* MCKAY REPORT, *supra* note 8, at 33.

146. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 368-79 (1977); ABEL, *supra* note 79, at 144-45; MCKAY REPORT, *supra* note 8, at 33.

147. In the area of court sanctions, at least one commentator has suggested that visibility has a deterrent effect. WILLGING, *supra* note 96, at 30.

148. *See* Gary R. Garner, *Toward a Positive Image: Changing the Negative Image*, BUREAUCRAT: J. FOR PUB. MGRS., Spring 1991, at 35; Robert Howard, *Crisis Control Becomes a Growth Industry as Companies Struggle to Regain Positive Image*, L.A. BUS. J., Nov. 9, 1987, § 1 at 9. During the early days of the 1987 odometer scandal involving Chrysler products, the major news was the strategy of making a straightforward admission and apology by company president Lee Iococca in an effort to restore customer confidence. *See, e.g., The News Is That Iacocca's Re-*

pears something of a marketplace axiom that negative information will have a decided impact upon success.[149]

Since *Bates*, no significant marketplace realignments have been developed to offer client-consumers advantages complementing those gained by lawyers during this period. In sum, disclosure advertising would help to bring about that balance of rights and protections that each client-consumer requires in order to make a more economically efficient choice in the marketplace.[150]

VI. QUALITY, INVISIBILITY, AND THE MARKETPLACE

[A]nd if we think [the people] not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Thomas Jefferson[151]

The new era in lawyer advertising is necessarily related to economic theories involving market efficiency. Under classic economic theory, purchasers of goods or services acting in a free market, making millions of individual purchasing decisions, will determine the price and quantity of goods and services.[152] Classic market theory holds that the person or firm offering goods or services will revise its behavior in response to the signals

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sponse Made News, CHI. TRIB., July 27, 1987, at 6; James Risen, *Iacocca Admits Mileage Tampering Was 'Dumb'*, L.A. TIMES, July 2, 1987, § 4, at 1.

"Crisis communication" has developed into a business specialty in recent years, and at least one university, the University of Southern California, has established a specialty for its MBA program. *See* Howard, *supra*, § 1, at 9. The bar's crisis of confidence identified by Professor Powell and others is not a single, sudden marketplace disaster. The bar may profit, however, from the twin strategies of damage control and regaining public trust that have been developed by the advertising and public relations industry. One essential is for "the corporation to convince the public it is putting the general welfare ahead of its own bottom line." Bob Papoe, *Merrell Dow was Quick Study in Dealing With Seldane Scare*, THE GAZETTE (Montreal), Sept. 3, 1992, at C2. Public relations people deem it necessary to "demonstrate that their first responsibility is to their customers." *Id.*

149. According to the head of one crisis management group from the business sector, all marketplace crises pass through eight stages. The fourth of these, which needs to be contemplated by the bar, is "loss of control." *See* Howard, *supra* note 148, § 1, at 9 .

150. It is not suggested, however, that the current theories of economic market efficiency (or economic capital market efficiency—ECMH), so heavily researched in securities law and accounting, are at work in this area. The uninformed, barely controlled chaos of the marketplace where extensive lawyer advertising exists is not a highly efficient exchange with sophisticated transaction agents and ongoing discourses of financial and other data. *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 549-53 (1984); Arthur R. Wyatt, *Efficient Market Theory: Its Impact on Accounting*, J. ACCT., Feb. 1983, at 56.

151. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* BARTLETT'S FAMILIAR QUOTATIONS 389 (15th ed. 1980).

152. WAYNE C. CURTIS, MICROECONOMIC CONCEPTS FOR ATTORNEYS 9-16 (1984); PAUL SAMUELSON, ECONOMICS 57-61 (11th ed. 1980); Sumner H. Slichter, *Free Private Enterprise*, *in* READINGS IN ECONOMICS 14 (7th ed. 1973).

sent from consumers about the value of its goods and services in the marketplace.[153] This presupposes an efficient marketplace, which in turn presupposes that consumers have access to the necessary forms of information concerning the products that are offered to them.[154] In order to survive, a vendor of goods or services in an efficient marketplace must modify and adapt its behavior in areas such as pricing and quality of goods and services offered. The likely alternative to such adaptive market behavior is to be driven out by competitors.[155]

Even the most laissez-faire free market economists concede that monopolies are the greatest danger to consumers in the marketplace.[156] Of necessity, the practicing bar holds a regulated monopoly on access to justice.[157] Although this monopoly characteristic should be offset by a seemingly unlimited supply of new lawyers entering the market, it is not. The influx of additional vendors does not remove the problem of asymmetric information[158] caused by lawyer advertising in a regulated monopoly coupled with disciplinary invisibility. Generally, the consumer's best protection against poor quality or overpricing is free competition. The benefits of free competition hinge upon the access to information about both price and quality.[159] Information in typical retail situations is supplied through competitive advertising and pricing among rival vendors of similar goods, plus

153. *Id.*; *see also* GEOFFREY M. HODGSON, ECONOMICS AND INSTITUTIONS 173-74 (1988).

154. Disclosure advertising is purposed upon overturning the ancient philosopher's saying that "[t]he market is a place set apart where men may deceive one another." *Id.* at 172 (quoting Anacharsis of Scythia (c. 600 B.C.)). It is axiomatic that a consumer informed of negative information may not hire that disciplined lawyer. That is the marketplace power of information. "Calling attention to danger may reduce demand for that class of products in general." A. ALLEN SCHMID, PROPERTY, POWER, AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND ECONOMICS 106 (2d ed. 1987).

155. HODGSON, *supra* note 153, at 174-75; Slichter, *supra* note 152, at 14. *But see* SAMUELSON, *supra* note 152, at 62. A *pareto optimum* can be reached, at least theoretically, through consumer sovereignty not distorted by advertising (i.e., incomplete or demand-creating information); ROBERT L. HEILBRONER & LESTER C. THUROW, ECONOMICS EXPLAINED 179-81 (1982).

156. MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE, A PERSONAL STATEMENT 226 (1980). The close cousin of monopolies, oligopolies or industry-wide deception, may also cause information suppression to distort the market adversely to the consumer. SCHMID, *supra* note 154, at 107; SAMUELSON, *supra* note 152, at 475-78.

157. *See supra* notes 51-53 and accompanying text.

158. The core of the problem is not based on the number of lawyers in the marketplace, but upon the consumer's exposure to advertising without other significant sources of information from which to choose. Asymmetric information is the enemy of perfect competition. The marketplace in which client-consumers must function is one that lacks information or the information is too complex or cumbersome to ingest rationally. Neoclassical economists and their critics both agree that consumers' inability to maximize marketplace decisions arises from *both* lack of information and an inability to process complex information. *See* HODGSON, *supra* note 153, at 79-82; THE MIT DICTIONARY OF MODERN ECONOMICS 78 (4th ed. 1992).

159. SCHMID, *supra* note 154, at 106; L.G. Tesler, *Some Aspects of the Economics of Advertising*, *in* READINGS IN ECONOMICS 163, 166-68 (7th ed. 1973).

information from various third-party sources such as *Consumer Reports* or the Better Business Bureau.[160] When necessary information is not available, the market will not function as efficiently to the benefit of consumers.[161]

In selecting a lawyer, the only data concerning quality that is functionally available to most prospective client-consumers comes from the self-serving advertising of lawyer-vendors and from the general practice of lawyer licensing by the courts.[162] This data is hardly informative on issues of quality. Sometimes the information about quality, which is vital to make the market function efficiently, is held by government agencies.[163] When this circumstance arises, as it does in the case of lawyer disciplinary actions, there are two possible governmental responses. One response is to retain the information and proceed with a network of bureaucratic regulation and policing of the marketplace, using the pertinent information to restrict, change, or weed out the inefficient or poor-quality providers.[164] The other approach, and the one advocated by those with greatest regard for the freedom of the marketplace, is that the government should make such information available to the consuming public so that the public will have full knowledge of the merits and demerits of the competing products.[165]

To a limited extent, the American model in the marketplace for legal services has adopted some aspects of both approaches. Since the *Bates* case in 1977, the competing suppliers of lawyer services may advertise in the marketplace as an element of free commercial speech.[166] Meanwhile, the bar disciplinary process is more public in certain respects. For example, in many jurisdictions, lay members of the consuming public are members of some of the disciplinary or grievance committees that police the practice of law.[167] In some jurisdictions, the statistical data regarding lawyer sanctions

160. Tesler, *supra* note 159, at 166-68; FRIEDMAN & FRIEDMAN, *supra* note 156, at 224.

161. Tesler, *supra* note 159, at 165-68. The Efficient Market Hypothesis (EMH) predicates that all relevant information will be available to the market and will be digested as part of the market process. *See* Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 786 (1985); HEILBRONER & THUROW, *supra* note 155, at 168.

162. *See supra* notes 35, 59 and accompanying text.

163. FRIEDMAN & FRIEDMAN, *supra* note 156, at 227; *see also* HODGSON, *supra* note 153, at 183-84.

164. FRIEDMAN & FRIEDMAN, *supra* note 156, at 227; *see also* ABEL, *supra* note 79, at 151-54; SAMUELSON, *supra* note 152, at 141-49.

165. FRIEDMAN & FRIEDMAN, *supra* note 156, at 227. In the authors' view, Nobel Laureate Milton Friedman is the economist most strongly identified with free market principles in modern times. *See* HODGSON, *supra* note 153, at 131-32.

166. *See supra* note 27.

167. Virginia Bowers, *A Lay Person Looks at Lawyer Discipline*, 56 TEX. B.J. 75 (1993) *excerpted from* Virginia Bowers, A Speech to the Farm, Ranch, and Agri-Business Bankruptcy Institute (Oct. 9, 1992). *See supra* note 15 and accompanying text.

is published anonymously, and, as noted above, names and details may sometimes be published. In nearly all circumstances, however, publication takes place in specialized bar journals or case reports instead of in a systematic fashion generally accessible to the consuming public.[168] Protection is almost exclusively in the realm of sanctions imposed by courts and disciplinary committees, which are neither functionally visible nor disciplined by marketplace economic principles.[169]

VII. IMPLEMENTATION

Breathes there a lawyer with soul so dead That never to himself hath said This is mine own, my letterhead.

Anonymous Attorney

If increased visibility of lawyer discipline is to promote an efficient marketplace, requirements for disclosure advertising must be systematic and uniform.[170] If the imposition of such disclosure advertising is left solely to the ad hoc discretion of the disciplinary body, whether a court or an ethics panel acting pursuant to a court directive, the marketplace effects will continue to be skewed.[171] For instance, if only some attorneys who violate the use of client trust funds are required to make disclosure, and others are not, the maximum marketplace benefits will not occur, and the efficiency of the marketplace will not be optimized.[172] Moreover, without the certainty of such a sanction, if it is imposed purely on an ad hoc discretionary fashion, some risk-takers would not be deterred.[173] Certainty and uniformity of the imposition of the burden of disclosure advertising are probably the best assurances of both deterrence and marketplace efficiency.

A. *Devising a System*

Any disclosure plan needs to be systematic and include even-handed rules for the application of visibility requirements.[174] For purposes of ad-

168. *See supra* notes 21-22 and accompanying text.

169. *See supra* notes 22, 156-61 and accompanying text.

170. It is informative to read the comments of federal district judges concerned with the application of Rule 11 sanctions. One recurring theme is that the appellate-approved standards for application of Rule 11 are not sufficiently clear so that sanctions may be applied with some level of predictability of outcome. Wiggins & Willging, *supra* note 91, at Comments to questions 13 and to p. 8 found in the Comments section, pp. 1-22 and 1-55, respectively. One of the axioms of free marketplace competition is a level field of information. *See* Gordon & Kornhauser, *supra* note 161, at 168.

171. Asymmetrical information can be achieved in various ways. *See supra* note 158.

172. *See supra* notes 162-69 and accompanying text.

173. Part of the justification of the instant proposal is deterrence of potential wrongdoers; another is the deterrence of repeated wrongdoing by previously sanctioned lawyers.

174. The ongoing struggle within the disciplinary bodies of the bar regarding the question of visibility gives some sense of the extreme level of suspicion that the practicing bar has to the

vancing discussion, an illustrative grid is attached as Exhibit A at the end of this Article. This grid suggests a pattern that would require maximum scope and minimal duration for first-time sanctions and would tend not to place much confidence in any mandatory disclosure that affected only discretionary communications of the sanctioned attorney.

This Article does not purport, however, to formulate a set of "sentencing guidelines" that would apply whenever a lawyer has been sanctioned or disciplined.[175] Rather, this section will describe a number of elements that should be considered when devising a mandate of disclosure advertising. Exhibit A is intended to reflect these elements in an ordered manner.

1. Scope of Disclosure Advertising

Only a saint or incompetent would voluntarily finance the disclosure of his own misdeeds. Hence, a sanctioned attorney could be expected to dodge a visibility mandate by discontinuing that portion of his advertising budget that is purely discretionary. Accordingly, visibility mandates that affect only the broad range of discretionary advertising, such as magazine ads, brochures, TV spots, or coffee mugs, would have little impact. Most sanctioned attorneys, however, would be extremely sensitive to those disclosure requirements that affected their letterheads, business cards, and other everyday, near-nondiscretionary communications to clients, peers, and potential clients.[176] Thus, when the offense or the repeated offenses are of a serious magnitude, the scope of the disclosure mandate must reach both discretionary and near-nondiscretionary communications.

Near-nondiscretionary communications would include:

- letterheads;[177]

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notion of public access to disciplinary information. Given this historic level of hostility, it would be a disservice to the client-consumers, the public, and the attorneys involved if visibility requirements were not uniformly applied. *See* McKAY REPORT, *supra* note 8, at 33.

175. Exhibit A, attached at the end of this Article, is not intended as a finished and complete proposal for a grid of guidelines with respect to the visibility requirements, but is attached solely for purposes of discussion and focus on the nature of the considerations that would need to be balanced in defining the visibility standards of any jurisdiction.

176. Any attorney who has been through the selection process for a firm's new letterhead style or the selection of uniform business cards understands how heightened the concerns of even the most senior, responsible practitioners can become at times.

177. One commentator has noted that "[m]eticulous rules governing the contents of letterheads have been traditional. . . . [But] most lawyers will probably continue to comply without challenging the regulations, however, because letterheads are *hardly a very effective form of advertising*." WOLFRAM, *supra* note 49, at 785 (emphasis added). Letterheads do, notwithstanding this history, constitute an especially unusual problem for the transactional or business attorney. Extraordinary efforts continue at every business-oriented firm throughout the bar to devise, perfect, and define the contents and scope of the formal law firm *legal opinion letter*. This missive, fostering reliance and attendant exposures to liability, is customarily reported on the letterhead of the law firm rendering such opinion. In the transactional practice of law, it is hard to envision any

- business cards;[178]
- office signage;[179]
- telephone listings;[180]
- Martindale-Hubbell listings;[181] and
- local or state bar journal listings.[182]

Discretionary communications would include:

- advertising in the yellow pages;
- newspaper and magazine advertising;
- broadcast television, radio, and cable advertising;
- mailings of letters, brochures, newsletters, client advisories and the like;
- sponsorship of cultural, social, or educational matters; and
- coffee mugs, T-shirts, pen sets, and other bric-a-brac.

A comprehensive system of lawyer disclosure would encompass both discretionary and nondiscretionary communications, include enough information to put the client-consumer on notice, be imposed for a duration com-

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matter of significance going forward without much rendering of legal opinions from among the various participating law firms. Contemplating what might be the effect of a disclosure advertising statement on the firm letterhead that some or all of the members of the firm have been subject to serious disciplinary actions or court sanctions in recent times could greatly color the general desirability and marketplace value of the firm's opinion letters. *See, e.g.*, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, THE ATTORNEY'S OPINION LETTER IN REAL ESTATE TRANSACTIONS (1992); ABA Committee on Legal Opinions, *Third Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW., Nov. 1991, at 167.

178. *See* WOLFRAM, *supra* note 49, at 776.

179. Since Model Rule 7.2(a) seems to authorize outdoor billboard advertising, the scope of office signage has expanded from the painted announcement on an office door or window—the traditional "shingle" that a lawyer would hang out by the office—to the potential for a neonized and pyloned billboard. *See* WOLFRAM, *supra* note 49, at 785.

180. In central Missouri, the yellow pages of the telephone include half-page, three-color announcements by local attorneys publicizing their forms and practices. *See* Knox, *supra* note 33.

181. Because MARTINDALE-HUBBELL is the most uniformly available method of referral used by attorneys in one city or area to find representation for a client in another jurisdiction, there would be vast utility in having disciplinary sanctions noted in such listings. Quite apart from any questions, specious or otherwise, regarding "negligence in making a referral," the referring counsel presumably has an interest in furthering client good will by seeing that the client is referred to an appropriate counsel. *See* WOLFRAM, *supra* note 49, at 775.

182. *Id.* Some jurisdictions publish an annual edition of their bar association membership, listing various bar members, their addresses, and telephone or fax numbers. *See, e.g., Alphabetical Listings*, 50 BENCH & B. MINN., Jan. 1993, at A-1, A-1 to A-125. In addition, many specialized associations also publish listings of their membership nationally for the convenience of other members and, in some instances, for purposes of client referral work. For example, the *1992 American College of Real Estate Lawyers Handbook & Directory* publishes photographs, addresses, educational backgrounds, bar memberships, ages, home addresses, and similar information with respect to each of its members.

mensurate with the offense, and reflect the seriousness of the offense through both scope and duration.

2. Information to be Disclosed

One of the most extensive bar journal disclosure sections can be found in the *Wisconsin Lawyer*.[183] The name of the offending attorney, together with a detailed synopsis of the disciplinary case, sometimes running many paragraphs, is reported. This Wisconsin approach to mandatory publication parallels that of the *California Lawyer*,[184] which sets forth the name and details of the offense, together with a legend explaining in very general terms the nature of various offenses and sanctions. As a variation, Minnesota recently adopted a rule that requires the suspended attorney to communicate this fact to his existing clients and to provide the clients with a copy of the actual order or other disciplinary directive.[185]

In addition to visible and indexed publication of the official reports by a court or disciplinary agency, attorney advertising should include a brief statement naming the attorney who has been disciplined and the nature of the discipline. The attorney should also be required to furnish a copy of the disciplinary order to all existing and potential clients or at least the telephone number or address of the appropriate disciplinary body or court.[186]

A second level of concern is the length of disclosure, particularly on letterheads, business cards, and other limited space, near non-discretionary communications. The disclosure needs to be sufficient to give notice and also information on where to make further inquiries. Some standard language can be crafted readily.

3. Duration of Mandatory Disclosure

America has built much of its success, both as a society and in the marketplace, on notions of the "second chance."[187] Consequently, only rarely should an attorney who has been disciplined or sanctioned, but not permanently disbarred, be required to disclose the disciplinary matter in perpetuity.[188]

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183. *See supra* note 10 and accompanying text.

184. *See supra* note 10 and accompanying text.

185. *See supra* note 121 and accompanying text.

186. For example, the *California Lawyer* lists addresses and telephone numbers in the key that accompanies monthly discipline reports. *See supra* note 10.

187. For example, the Bankruptcy Code is designed to discharge debtors of most of their pre-bankruptcy debts, either voluntarily or involuntarily, and afford them a fresh start in the marketplace. *See* 11 U.S.C. § 109 (1988).

188. It is hoped that a disciplinary body would not see fit to substitute permanent disclosure advertising of very significant breaches of professional standards (e.g., misappropriation of client

On the other hand, the great American sports pastime has a notion of "three strikes and you're out," and this idea of a repeated pattern of wrongdoing is echoed in cultural and legal institutions.[189] Permanently requiring disclosure would seem worthwhile regarding recidivist offenders, such as the sexually harassing Wisconsin attorney[190] or the Texas attorney who continued to practice after suspension of his license.[191] In addition, lawyers who repeat offenses of a more minor nature, such as procrastination in handling client matters, would also be subject to significant disclosure mandates.[192]

Certainly, mandatory disclosure must extend for a period long enough to exert a significant deterrent effect.[193] Moreover, imposition of a lengthy or permanent period of mandatory disclosure only upon the offending attorney's discretionary communications would be meaningless, as the attorney would simply cease to use the regulated forms of discretionary communication, yet still continue to conduct business in a relatively normal fashion. In many circumstances, deterrence would probably be most effective if the duration was short—for example, one to three years—but the scope included both discretionary and near-nondiscretionary communications.

4. Nature of the Offense

Certain types of offenses are of seismically serious proportions because of their destructive potential for the clients involved or for the credibility of the legal system itself.[194] In this category fall fraud on the court, obstruction of justice, misappropriation of client trust funds or other client property, significant conflicts of interest, sexual exploitation of clients, or unauthorized and harmful betrayal of client confidences. Serious discipli-

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monies) in lieu of a permanent or long-term revocation of the offending counsel's license to practice law.

189. As noted in the text, the setting of sanctions pursuant to Rule 11 violations reflects the history of prior sanctions. *See supra* note 117 and accompanying text.

190. *See supra* note 4.

191. Musslewhite v. State Bar of Tex., 786 S.W.2d 437 (Tex. Ct. App. 1990), *cert. denied*, 111 S. Ct. 2891 (1991).

192. Ponder for a moment how many female clients might have avoided the problems involved in dealing with attorney Heilprin during the years between 1973 and 1992 had they been aware of his various disciplinary problems involving sexual harassment of female clients. *See supra* note 4.

193. There are ranges of time that would seem to be minimal (such as one to three years) and ranges of time short of perpetual which would be regarded as maximums (such as ten years). *See* Exhibit A.

194. Certainly, some reprimands for minor delays in completing client business would not pose a threat to the system of justice itself, whereas more significant problems might. Moreover, the failure to remove public suspicion of the process of discipline could result, as Professor McKay noted in 1990, in the public's imposing its desires upon the process of lawyer regulation. McKAY REPORT, *supra* note 8, at iii.

nary matters would call for disclosure on all communications and would include a complete description of the nature of the offense for the longest period possible.[195]

A certain type of repeat offender requires added consideration. An offender who does the same thing in a repeated fashion, such as the Wisconsin attorney with the repeated sexual harassment record, would likely deserve a permanent visibility mandate on all communications. Similarly, consider an attorney who has been disciplined for one type of matter in the past (e.g., dilatory representation of a client in court) and is now being disciplined for some different misconduct (e.g., wrongful communication with a lay person represented by counsel). Such a repeat offender would deserve some level of mandatory disclosure as well. Both could be dealt with in accordance with the principles noted above.

Now consider the special type of repeat violator who has taken on the guise of "Artful Dodger" (an attorney who violated client trust accounts in the past and has now found a new, technically different fashion to appropriate other client property). Artful Dodger has demonstrated a cunning disregard for the codes and disciplinary rules. Such a repeat offender may be irredeemable and would fall into the category of those who deserve a perpetual mandate of disclosure on all discretionary and near-nondiscretionary communications.

B. Special Considerations: Near-Nondiscretionary Communications

Although mandated disclosure on correspondence should be particularly effective, such a mandate presents an interesting problem if the attorney is not a sole practitioner.[196] When one or a few attorneys from a firm have been disciplined, should a disclosure be required on the firm letterhead if that letterhead lists *all* of the attorneys in the firm, including those who

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195. One commentator has recently observed that it is necessary to "assess both actual and potential future injury to clients when assessing whether a lawyer's sanction properly protects the public." Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 463 (1991). For example, lawyers who control client trust funds, but who have sanctions arising out of misuse or misappropriation of such funds, would constitute the type of discipline that needs a relatively full-blown disclosure in the lawyer's various forms of advertising. *Id.*

196. The large firm—indeed, the multi-national law firm—has significant problems with its letterhead. Already, certain disclosures are required of those firm lawyers who are *not* licensed to practice in a jurisdiction where the firm has an office. Moreover, space limitations and print size (probably combined with some ego needs) have moved many large firms away from the all-encompassing letterhead and into a more personalized form of stationery that designates only the name of the firm and also the identity of the particular lawyer who is sending the letter. In this latter instance, it would seem very easy to target the information regarding disciplinary matters on the particular attorney who is using this method of communication. *See* WOLFRAM, *supra* note 49, at 785.

were disciplined? Using asterisks and footnotes to indicate those attorneys who have been disciplined, just as bar admissions are now indicated, is one possibility.[197] Another option is requiring disclosure only on those firm letterheads that are actually used by the offending attorney in any of his communications. The trend in many firms is to eliminate the all-inclusive letterheads and move toward an individualized firm letterhead for each attorney. In such case, the disclosure can be pinpointed rather easily with a requirement that all letters issued by the disciplined attorney must carry the disclosure.

Business cards also seem readily amenable to disclosure information, since in most instances the business cards are personalized to the partner or associate in the firm who is carrying and distributing the card. Thus, a rule could require that all business cards used by the disciplined attorney carry the disclosure information on the back—or even on an allonge[198] if necessary for space reasons. The extent of the disclosure, as with letterheads, could be tailored to the circumstances.

Office signage presents one of the most complex issues among the near non-discretionary communications. The dispositions could range from outright removal of all signage during suspension or disbarment, to a posted general warning coupled with notices of whom to contact for further data, to taking no action. The severity of the penalty would be a function of the severity of the attorney misconduct.

Martindale-Hubbell and similar attorney listings, congested as they sometimes are, could develop a new code-key for various classifications of disciplinary matters or carry brief statements regarding the nature and duration of the sanctions. Because courts and disciplinary bodies may vary widely in their disclosure requirements, Martindale-Hubbell and other such listings might approach the matter by offering a choice between a standardized code-key for sanctions or a statement indicating where information can be obtained. Dropping the sanctioned lawyer or firm altogether, though possible, does not seem desirable.

C. Special Considerations: Discretionary Communications

Print and broadcast advertising, direct mail campaigns, and event sponsorships are readily amenable to disclosure rules. Most such promo-

197. Attached as Exhibit B is a redacted form of an actual letterhead. This was a letter of notification of availability to render legal services sent to many citizens in the Houston, Texas area. Please note the extensive use of small, bold type for the several lines of footnotes discussing the attributes of the firm's two lawyers. It is submitted that since the use of such footnote material is available for purposes of promotional language, it could be readily adapted to contain a required statement pertaining to any disciplinary sanctions that may have been visited upon the firm or the attorney signing the letter.

198. *See* Bergmann v. Puhl, 217 N.W. 746, 748 (Wis. 1928).

tions are dated, transitory, or easily edited. Some economic costs—even waste—may be incurred, with the sanctioned attorney bearing some added burdens if his promotional activities, prior to the disciplinary determination, have been wide-ranging. If a firm has prepaid a lifetime sponsorship of a civic event, for example, it may have to forego all acknowledgments of such sponsorship or append appropriate disclosures thereto. Durable goods such as coffee mugs and other promotional trinkets present a unique difficulty when used for lawyer advertising. Certainly all advertising trinkets purchased following a sanction should carry such disclosure information. In the tiny Ohio town where coffee mugs carry advertising for local judges and attorneys,[199] it might be costly and onerous to try to recall all of the mugs and remove the advertising or put the necessary disclosure information on them. Presumably, if the nature of the sanction was egregious enough and the disclosure was intended to carry forward for a substantial number of years, the lawyer may well be required to recall durables.[200]

Monetary and other burdens on a disciplined attorney sometimes seem onerous.[201] Such costs, however, are the price the profession must require of its members for the continuing good of the legal system.

VIII. TOWARD A NEW TRADITION

> *No lawyer, and no client, can be indifferent to the disciplinary enforcement system. If the process is performed sensibly and quickly it will provide for lawyers and clients alike a needed service to assure honorable and effective delivery of legal services. If the disciplinary process does not meet that standard, a disaffected public is likely to impose limits upon the process . . . . Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.*
>
> Robert B. McKay (1990)[202]

Deep anxiety exists in the bench and bar over the way in which law as an institution is currently viewed. Ample evidence exists that the institution is falling into disrespute and coming to be viewed with increasing hostility.[203] However, American lawyers claim a history of distinction and pub-

199. *See supra* note 34 and accompanying text.

200. In the event that the disciplinary violations were egregious enough and the person was disbarred, the orders sometimes require that all lawyer signage must be promptly removed. *See* Piller, *supra* note 7, at A26. By extension, the power exists to require that capital items other than signs carrying information that the individual is a practicing lawyer must also be taken out of public circulation pursuant to a court order.

201. Disciplined attorneys often bear the costs associated with the discipline process. *See id.* (assessing disbarred attorney $48,000 for state bar association's attorneys' fees).

202. MCKAY REPORT, *supra* note 8, at iii.

203. *See supra* note 8.

lic-mindedness not equaled, perhaps, by any other group within society. The works of lawyers and judges over the years share a much deserved, but ill-recognized, claim to respect.[204] Yet, as the winds of change blow across America during the closing years of this century, there has been a growing sense of urgency among leaders of the bench and bar that the deteriorating image of the profession must be addressed.[205] The stakes may indeed be higher than merely the image and internal self-respect of those who are involved in the legal system. As trust in other institutions of society continues to erode,[206] the decline of law as one of the principal institutions of a disintegrating culture could result in a harm that reaches far beyond the mere success or failure of the legal profession.

A. *Crisis of Confidence*

By the mid-1980s, the legal profession itself recognized the profoundly serious crisis of public confidence.[207] Accordingly, the leadership of the American Bar Association in 1989 created the Commission on Evaluation of Disciplinary Enforcement (the McKay Commission), with the late Professor Robert B. McKay as chair. Pursuant to its charge,[208] the McKay

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204. A relative of one of the co-authors is a highly successful electrical engineer-businessman who finally stopped all references to "ambulance chasers" and "mouthpieces" when challenged to name the engineers who had designed the United States Constitution, or had steered the ship of state through global wars, depression, and social upheavals.

205. *See* Schier, *supra* note 79, at 16.

> The American Bar Association announced in November [1992] that it would make improving the image of the profession a key goal nationwide during the next few years. . . .
>
> While lawyers tend to agree that the public's image of the profession is poor—improving image consistently appears as a top concern in surveys of attorneys—the profession is less united on what the public actually thinks about lawyers, how the negative perceptions about lawyers developed and what, if anything, should be done to combat those negative images.

Id.

206. Other important social institutions—including Congress, the media, the church, and schools—are similarly viewed. *See, e.g.*, ABEL, *supra* note 79, at 163-64.

207. *See* Gary A. Hengstler, *Vox Populi*, A.B.A. J., Sept., 1993, at 60; *see also supra* note 8 (citing media reporting of lawyer misconduct and describing the reaction from various sources within the legal community to the poor public image of the legal profession).

Professor Burnele Powell of the University of North Carolina School of Law, Chair of the ABA Committee on Professional Discipline, sees the legal profession as going through a "crisis of confidence" in part because of a lost focus upon what lawyers believe they should expect of themselves. He sees a new focus on the "other regarding" rather than "self regarding" as the key to a renewed level of professionalism that both touches and practices "ordinary morality." Burnele Powell, The John Turner Professionalism Lecture, South Texas College of Law (March 10, 1993). One method for lawyers to become "other regarding" as a profession is to empower their client-consumers with information through lawyer advertising that not only promotes the advertiser but also discloses serious negative information.

208. The Board of Governors charged the [McKay Commission] to:

- study the current functioning of professional discipline systems;

Commission's exhaustive study and research resulted in some important findings and a series of recommendations.[209]

Secrecy in lawyer disciplinary matters was found to be the major source of public distrust.[210] The public appears to view secrecy as the way in which the profession covers up misdeeds and protects it own; *suppressio veri, suggestio falsi*,[211] or as the McKay Commission put it:

> The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. . . . The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary it is a source of great antipathy toward the profession.[212]

The McKay Commission also found that the public was greatly concerned about what seemed to be a lawyer discipline process that was overly technical and did little to address most of the complaints that were levied.

> It is clear that tens of thousands of clients alleging legitimate grounds for dissatisfaction with their lawyer's conduct are being turned away because the conduct alleged would not be a violation of disciplinary rules. The disciplinary system was not designed to address complaints about the quality of lawyers' services or fee disputes. Yet in all but a few states it is the only regulatory body available to complainants.[213]

Those tens of thousands of clients referred to in the McKay Report, and the tens of thousands who remained silent because of the experiences of their neighbors, feel betrayed by the concept of self-regulation.[214] The regula-

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- examine the recommendations of the original Special Committee on Evaluation of Disciplinary Enforcement (1970 Clark Committee) and the results of subsequent reform efforts;
- conduct original research, surveys and regional hearings;
- evaluate the state of disciplinary enforcement; and
- formulate recommendations for action.

MCKAY REPORT, *supra* note 8, at app. B.

209. *See id.*

210. *Id.* at 33.

211. "The supression [sic] of truth is equivalent to the suggestion of what is false." WILLIAM C. BURTON, LEGAL THESAURUS 169 (2d ed. 1992).

212. MCKAY REPORT, *supra* note 8, at 33.

213. *Id.* at 11.

214. To gauge the level of dissatisfaction, one need look no further than the literature disseminated by Help Abolish Legal Tyranny (HALT): An Organization of Americans for Legal Reform. HALT was started in 1978 by two Rhodes scholars and has now grown into a lobbying group with more than 150,000 members. One of the group's recent studies concludes as follows:

> The nation's attorney-discipline agencies and procedures remain in critical need of change. As Richard Abel, a University of California at Los Angeles legal scholar, has reported, the state of discipline nationally is a "travesty" in which:

tory body does not help unless the behavior falls within a narrow window of unethical behavior; the only other option to an aggrieved client is an expensive and lengthy malpractice action. Very likely, the public wishes to feel empowered to either protect itself or to have an effective regulatory process.[215]

The McKay Commission recommendations are a serious attempt at assuaging public concerns about lawyer discipline. Recommendations are directed at several areas and include:[216]

- the need to increase public confidence in the disciplinary system;[217]
- the need for preventive measures;
- the need to improve interstate enforcement; and

"Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another." (footnote omitted).

HALT, ATTORNEY DISCIPLINE NATIONAL SURVEY AND REPORT 43 (1990). HALT recognizes that many of the reforms it recommends have been endorsed by the ABA in adopting the McKay Report, but observes that, after years of attempts at reform, disciplinary officials have made no significant improvement. This is, HALT asserts, because "none have addressed the fundamental conflict of interest inherent in self-regulation." *Id.*

215. HALT, *supra* note 214, at 43, states that the public needs a mechanism to: "Help resolve disputes. Get compensation for any injury. Deter misconduct. Warn consumers about potential misconduct. Remove serious incompetents and wrongdoers from practice." *Id.*

216. MCKAY REPORT, *supra* note 8, at XV-XX. The report contains other recommendations including:

- the need to expand regulation to protect the public and assist lawyers;
- the need to strengthen regulation of the profession by the judiciary;
- the need for direct and exclusive judicial control of lawyer discipline;
- the need to expedite the disciplinary process;
- the need to provide adequate resources; and
- the need to fully implement essential provisions of the Model Rules for Lawyer Disciplinary Enforcement.

Id. at 14-22.

Recommendations 3 and 4 envision a broader scope of public protection through competent agencies dealing with lawyer discipline, a client protection fund, mandatory arbitration of fee disputes, voluntary arbitration of lawyer malpractice claims and their disputes, mediation, lawyer practice assistance, lawyer substance abuse counseling, and a public assistance central intake office. *Id.* at 24-30.

Recommendations 5 and 6 recognize the "basic principles of checks and balances and of separation of powers." These recommendations further acknowledge that a "lawyer can appropriately serve the profession as an elected bar official and as an appointed disciplinary adjudicator—but not simultaneously." *Id.* at 48-61.

Recommendations 9-12 contemplate dealing with minor misconduct in an expedited manner while maintaining a more traditional process for more serious problems.

217. *Id.* at 33. This recommendation reflects the core public concern regarding secrecy. It contemplates that all records of the lawyer disciplinary agency (except work product of disciplinary counsel) should be available to the public—provided a determination has been made that probable cause exists to believe misconduct occurred. It is this proviso that may still rankle organizations such as HALT. *See supra* note 214.

- the need for immediate action.[218]

The McKay Commission's recommendations are clearly aimed at improving the real and perceived flaws of the current disciplinary system. Implementation must effectively deal not only with the seriousness of current public disenchantment, but must also deal with the urgency of the public's desire to be in a position to protect itself in the first instance. The goals of the ABA in adopting the McKay Commission's recommendations and the desires of the public for a better system move in the same direction.[219]

The report calls for new and creative solutions to help overcome the crisis.[220] The suggestion of a new tradition espousing disclosure advertising flows along the same path and is designed to assist the profession in stemming the crisis of confidence by introducing true visibility to the system.

B. Disclosure Advertising as a Down Payment Toward Restoring Credibility

Certainly the instant proposal for visibility of discipline is not a remedy for systemic distortions. Fundamentally, the rooting out and curing of ethical problems and any systemic flaws in the enforcement of disciplinary rules will be neither improved nor damaged by disclosure advertising. Corruption, bias, and abuse of codes of lawyer conduct and judicial ethics will not be abolished by a system of disclosure advertising. Disclosure advertising can, however, become another tool in the hands of those who investigate and enforce the various codes and disciplinary rules.

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218. McKAY REPORT, *supra* note 8, at xix-xx. Although there is no specific recommendation respecting the need for immediacy, it is a pervasive, unspoken message throughout the report which is introduced by observations that "[s]ome practices must change immediately if regulation is to remain under the judiciary. The public views lawyer discipline as too slow, too secret, too soft, and too self-regulated." *Id.*

219. *See supra* note 216.

220. *Lawyer Discipline Hearings*, 76 A.B.A. J., Jan., 1990, at 109. The chairman of the McKay Commission acknowledged that creative but pragmatic solutions need to be found.

> The mission of the Commission is no less than to move the system of lawyer discipline into a future only now beginning to be recognized. The solutions projected must be creative, yet pragmatic enough to meet the needs of the new century, which is scarcely further removed than around history's corner.

McKAY REPORT, *supra* note 8, at xi. The instant proposal is a new approach to old problems.

IX. CONCLUSION

[A profession] without the means of some change is without the means of its conservation.

Edmund Burke[221]

In 1977, the American bench and bar discarded a longstanding tradition and embarked upon a new era in attorney advertising. Another new tradition—true visibility of discipline—is now in order. This new tradition is not novel, however, as it inheres in the historic nature of attorney-client relationships. Classic principles of the attorney's fiduciary obligations to each client, and indeed to prospective clients, provide the moral predicate for such a change.[222]

The public, as consumers of legal services, should view a dedicated effort by the legal system to render disciplinary results functionally visible as a heightened mark of renewed professionalism. Client-consumers could then view themselves not as a group disadvantaged by lawyer advertising coupled with a functionally invisible system of discipline, but rather as a client group to whom the highest professional obligations are owed. Attorney professionalism would come to be seen as revealing to the public those things that may discredit individual members of the bar as well as those things that credit them—an extension of the highest of fiduciary principles.[223]

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221. Paraphrased from Edmund Burke's famous observation in *Reflections on the Revolution in France*. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.M. Duet 1971) (1790).

222. The concepts of trust embodied in the core principles of the attorney-client relationship have far-reaching implications for the role of disclosure advertising in the changing rituals by which that relationship is established. Unlike the sale of cabbages, pick-up trucks, or insurance annuities, the usual marketplace ethos does not control. As Justice Cardozo tellingly observed about fiduciary relationships generally:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Moreover, a genuine believer in adversarial practice who elevates "client service above almost all other moral considerations" (as Professor Monroe Freedman is asserted to do in his ethical hierarchy) would be likely to conclude that the client as consumer of the lawyer's services deserves a full disclosure of the lawyer's merits and demerits. *See* Teresa Stanton Collett, *Understanding Freedman's Ethics*, 33 ARIZ. L. REV. 455, 456-62 (1991). In any event, Professor Freedman has noted without criticism the Supreme Court's dicta in *Bates* and *Zauderer* calling for lawyer advertising to sufficiently inform client-consumers, even through "inclusion of clarifying information in such advertisements." MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 245, 248 (1990).

223. Visibility as a new guiding belief, an ethos if you will, accentuates the profession's concern for, and empathy with, the consuming public. Moreover, such an ethos appears to complement many other systemic changes now under discussion. The instant proposal for disclosure advertising also has the fiscal advantage of not requiring public resources. By definition, the cost

If the bar becomes the first of our core institutions to commit itself seriously to such disciplinary visibility, its leadership mantle may be restored. Visibility might become an energizing principle. As such, it may aid not only in rebuilding the professional credibility of our legal institutions, but it might also help to mold a new tradition that other actors could come to emulate in a re-ordering and information-driven marketplace.

Moving voluntarily toward a new tradition—an ethos of disciplinary visibility—should provide evidence of the bar's renewed devotion to its better angels of integrity and professionalism. Even the most cynical, business-driven lawyer, however, should recognize that restoring consumer confidence in our legal institutions also has positive long-term business benefits.[224] A legal profession that empowers the public as client-consumers to make informed and responsible choices is a *profession*, not a mere retail commodity—a profession reaffirming its honorable, socially responsible past.

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would be borne in each instance by the problem attorney, not by the public nor by those lawyers whose professionalism is a part of the solution.

224. The fictional network chairman, Philip Carlton, in Ferrer and Morgan's screenplay of *The Great Man* cynically summarized a certain view of the marketplace that some, unfortunately, may hold today: "Integrity and crusading sell products too and that, after all, is our primary business." THE GREAT MAN (Universal Int'l 1956).

EXHIBIT A

PROPOSED GUIDING PRINCIPLES

These moderate proposed requirements for disclosure advertising are premised upon the welfare of present and future clients, not the welfare of the violator. Accordingly, principles of client-consumer protection inherent in Disclosure Advertising mandate certain notions illustrated herein:

1. **Cumulative Disclosure—Content**

   Upon any sanction being imposed presently, the required disclosures would include *all* past sanctions in the violator's history as a lawyer.

2. **Cumulative Scope and Duration**

   A. **Repeat Violators—Same Sanctions:** The scope *and* the duration of required disclosure should both escalate with repeated sanctions of the same type.

   B. **Repeat Violators—Mixed Sanctions:**
      (1) Whenever a violator has a history of previous sanctions of differing types, the scope of the required disclosure should be that for the sanction of the most severe magnitude.
      (2) The duration also should be cumulative, representing the sum total of all the individual durations required for each of the sanctions previously imposed during the violator's history as a lawyer.

EXHIBIT A (CONT'D.)

DISCLOSURE ADVERTISING: PROPOSED SANCTIONS GUIDELINE

Sanction Imposed*	First Sanction	Second Sanction	Third Sanction	Fourth Sanction	Fifth Sanction
Rehabilitative Suspension	**	A	B	D	E
Private Reprimand	A	B	C	D	G
Public Reprimand	A	B	D	E	G
Probation	B	B	D	E	G
Probation w/ Conditions	B	C	E	F	G
Interim Suspension	B	C	E	F	G
Suspension					
1-6 mos	B	C	E	F	G
7-12 mos	C	D	E	F	G
13-36 mos	C	D	E	F	G
37 or more	C	D	F	G	G
Disbarment	D	F	G	G	G

* Description of sanctions generally follows ABA Joint Committee on Professional Standards model "Standards for Imposing Lawyer Sanctions" (as amended, February, 1992).

** In the interest of encouraging attorneys with substance abuse problems to voluntarily seek treatment and assistance, no adverse consequences should flow therefrom.

Disclosure Key:

Scope of Disclosure	Duration
A—no disclosure required	N/A
B—disclosure on all discretionary communications	2 years
C—disclosure as in B above + all listings	2 years
D—disclosure as in C above + letterheads	3 years
E—disclosure as in D above + business cards	4 years
F—disclosure as in E above + office signage	5 years
G—dislosure as in F above	indefinitely

EXHIBIT B

* * *

ATTORNEY AT LAW

* * *

Free Consultation

HOUSTON, TEXAS 77098
(713)

*****CAR-RT-SORT***
* * *
1303 San Jacinto Street #232
Houston, Texas 77002-7013

Dear Mr. * *

Have you been injured? Have your rights been violated? If you or a loved one have been injured in an accident or because of the carelessness of another person or company, you should consult an attorney immediately.

If your legal rights or personal dignity have been violated, you owe it to yourself to take quick action to protect those precious rights.

At this law firm, we help people who have been injured in an accident, or have an insurance claim that is being unfairly denied. We also help people whose rights have been violated in their place of employment, or in the course of consumer transactions.

We practice law in the following areas:

Traffic Accidents	*Insurance Denials:*	*Rights of the Disabled*
Wrongful Death Cases	*-Health-Life*	*Termination of Employment*
Serious Personal Injuries	*-Fire-Disability*	*for filing Worker's Comp.*
Serious Job Injuries	*Consumer Rights*	*Senior Citizens Rights*
Slip & Fall	*Medical Malpractice*	*Discrimination*

We also handle other cases involving personal injuries, mental anguish or economic loss. We will give personal attention to your case.

It will be a pleasure to assist you, even if you just have a legal question. Please call us at * * * * * LAWS).

Sincerely,

* * * *

P.S. Be sure and save the enclosed business card and call us.

* * * Licensed State Bar of Texas; Masters in International Law; Member American Bar Association; American Trial Lawyer's Association; Houston Bar Association. Not Board Certified by State Board of Legal Specialization. * * * Licensed State Bar of Texas; Member American Bar Association; American Trial Lawyer's Association; Texas Trial Lawyer's Association; Houston Bar Association. Not Board Certified by State Board of Legal Specialization. Mr. * and Mr. * are responsible for all cases in above areas.