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JUDICIAL ATTITUDES TOWARD CONFRONTING ATTORNEY MISCONDUCT: A VIEW FROM THE REPORTED DECISIONS

*Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone**

I. INTRODUCTION

Over the last 20 years, a rich body of literature has emerged to describe the increasingly complex system of lawyer regulation in the United States.¹ Lawyers are regulated through norms of conduct established and enforced by the bar, judges in litigation, and administrative agencies; through substantive laws that apply to lawyers, malpractice standards, best practices imposed by insurance companies, and more. While the judge's role has been explored through the lens of particular subject areas (such as conflicts of interest) or through an analysis of the court's power to sanction, we still have much to learn about judicial attitudes and approaches toward the judge's own role in regulating attorney conduct.² The goal of this article is to study the

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1. See generally Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003); Symposium, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

2. See Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 32 WAKE FOREST L. REV. 621 (1997). "Judges write rules of procedure and professional responsibility, and lawyers and non-lawyers alike look to judges for models of integrity, civility and professionalism. Still, the profession, the bench, and the academy have largely failed to articulate a clear judicial role." *Id.* at 622. See generally Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 56 FORDHAM L. REV. 71 (1996); John M. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95 (1982); Fred C.

available data from the Code of Judicial Conduct and federal and state court opinions to glean a richer understanding of how judges construct their individual and institutional role in this web of attorney regulation.

We begin with a premise that judges are very important actors in legal ethics. State Supreme Court justices are empowered to regulate the profession and serve as the gatekeepers in issuing licenses to practice law.³ State Supreme Court justices take this structural role very seriously and see themselves as important not just in running the disciplinary apparatus, but also in establishing aspirational norms of professionalism.⁴ This article explores the more specific role of *individual* trial and appellate court judges in addressing and establishing norms of conduct for lawyers in litigation.⁵

It is important to understand how judges construct their role in regulating attorney conduct because judges are the primary regulators of litigation conduct. While much of the litigation action occurs outside the courtroom, judges set the norms for that out-of-court litigation conduct through the signals that they send and the sanctions they impose for conduct that occurs during pretrial conferences, discovery motions, and other pre- and post-trial activity.⁶

Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003).

3. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.1 (1986). Most state supreme courts fulfill this role by delegating the specific authority to state bar associations (in states with an integrated bar) or through a separate agency. See generally Barton, *supra* note 1, at 1249.

4. See, e.g., CONFERENCE OF CHIEF JUSTICES, NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999) available at <http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html>. See also E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1, 4 (2002).

Our objective [in Ethics 2000 revision of Model Rules of Professional Conduct] was also to resist the temptation to preach aspirationally about “best practices” or professionalism concepts. Valuable as the profession might find such guidance, sermonizing about best practices would not have—and should not be misperceived as having—a regulatory dimension. There are other vehicles for accomplishing that noble objective [such as the Conference of Chief Justices’ National Action Plan on Professionalism].

Id.

5. One would anticipate that this structural role in regulating the legal profession would potentially influence a state supreme court justice’s vision of the judge’s role in regulating attorney conduct during litigation. As discussed in detail in Part IV *infra*, we could not discern a significantly different attitude toward regulating attorney conduct in state court opinions. Those differences may exist, but they were not strongly evident in the written opinions.

6. While it appears that actual trials are on the decline, lawsuits continue to be filed in a robust fashion in the United States. See generally Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142-43 (2002) (describing decline of the civil trial); Chris Guthrie, *Procedural Justice and the Paucity of Trials*, 2002 J. DISP. RESOL. 127, 128-29

Judges have a panoply of procedural and substantive rules to address attorney conduct issues that arise in litigation. For example, in federal courts judges may rely on Rule 11 and Rule 37 of the Federal Rules of Civil Procedure, as well as various discovery rules, to establish norms of conduct and impose sanctions.⁷ Judges can supplement these rules with their own creative responses using the court's inherent power, a subject addressed in greater detail below.⁸ State judges have a similar variety of rules and inherent powers.⁹ These rules and the inherent power doctrine give judges the *power* to regulate attorney conduct, but we do not fully understand what motivates a judge to use these powers.¹⁰ What visions do judges hold of the court's role in the mosaic of regulating attorney conduct? Judicial motivation is typically studied to understand why a judge decides cases in a certain way.¹¹ Penetrating judicial motivation when regulating attorney conduct can be particularly challenging. We can envision several possible motivations. Judges are likely to be very concerned about the limits of their power or other aspects of their institutional role. Efficiency concerns are likely to be a

(2002). Courts have the ability to sanction out-of-court conduct. *See infra* Part III and *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (upholding federal court authority to sanction conduct, including conduct that occurred outside the courtroom).

7. For an excellent development of the rule-based sanctions, see GREGORY P. JOSEPH, *THE FEDERAL LAW OF LITIGATION ABUSE* (3d ed. 2000).

8. *See* JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, *THE FEDERAL LAW OF ATTORNEY CONDUCT*, MOORE'S FEDERAL PRACTICE § 807 (3d ed. 2004) [hereinafter MCMORROW & COQUILLETTE]; Zacharias & Green, *supra* note 2, at 1342-51.

9. *See infra* Part IV.A.

10. *See* Shepard, *supra* note 2, at 621 ("Judges strive to do justice, but we reveal little about how we function."). *See generally* Mareen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 S.M.U. L. REV. 493 (1997).

11. Most empirical work on judicial behavior has focused on the United States Supreme Court. *See* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 621 (2000). More recent studies have examined the behavior of trial court judges, typically federal court judges. *See, e.g.*, Orley Ashenfelter, Theodore Eisenberg, & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 258-60 (1995) (studying dockets in three federal trial courts that randomly assign judges, authors found little evidence that the characteristics of the judges or political party of the appointing president was a significant predictor of judicial decisions); Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 130 (1993) (describing empirical research on the behavior of women decision-makers). *See generally* Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (studying federal lower court decisions which analyzed the constitutionality of federal criminal sentencing guidelines).

dominant factor.¹² In states with an elected judiciary, election pressures are perceived to influence a judge's actions on the bench.¹³ Judges may be concerned about collegiality among the judges on their court and/or for one's reputation as a fair-minded judge.¹⁴ Judges may also be cognizant and protective of the reputation of the attorney whose conduct is being questioned.¹⁵ These concerns may be very hard to ascertain from written opinions, particularly since the very concerns of efficiency, collegiality and reputation may encourage a judge to be silent or do nothing. We would predict that the process of writing itself would reveal slower and more reflective thought processes, rather than the immediate, often reactive, response of a judge in the course of litigation.¹⁶ Consequently, we would anticipate that the written record leaves a trail from which we can discern a partial, and potentially distorted, picture of judicial attitudes toward regulating attorney conduct in litigation.

While there is obviously no single vision of the judicial role in legal ethics, what we have discovered are glimpses of attitudes. One needs to examine the cases for what the courts say, what conduct they choose to

12. See generally Herbert Jacob, *The Governance of Trial Judges*, 31 LAW & SOC'Y REV. 3 (1997). See also Zacharias & Green, *supra* note 2, at 1360 ("efficient allocation of judicial resources militates in favor of district courts confining themselves to adjudicating questions of professional misconduct that can be resolved without resort to an independent fact-finding mechanism.").

13. See generally Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667 (2001).

14. See generally *In re Voorhees*, 739 S.W.2d 178, 187 (Mo. 1987) (discussing that without Canon 3B(3) judges may be tempted to avoid "rocking the boat," but not "every failure to inform about well-publicized misbehavior of a fellow judge" is misconduct); Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct By Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 780 (1997) ("Understandably, what judge would want the reputation of a snitch?"); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (summarizing theories of influences on judicial decision making); Schauer, *supra* note 11, at 620-21. Reputation is a multifaceted subject, a full exploration of which is well beyond the scope of this article. Reputation concerns may include a desire to avoid controversy if the judge is subject to reelection, a desire for influence in the legal academy, a desire for influence in the local or state bar, and the like. Reputation may have the more genial goal of serving as confirmation that the judge is actually a fair-minded and fair-acting arbiter.

15. Judges may agree with Justice Stevens' factual assessment that "[d]espite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part & dissenting in part).

16. Cf. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 514 (2001) ("An ethical judge must demand of herself that she identify and understand her own biases and how they affect her reaction to a case. Writing opinions has an important role in this effort."); Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 754 (2003).

sanction, and the nature of the sanction imposed. We have found a handful of reported decisions touching on the Code of Judicial Conduct and a larger body of federal and state court cases discussing, often indirectly, the judge's role in regulating attorney conduct. The picture that emerges from the *reported* decisions in both state and federal courts is a desire to maintain the integrity of the judicial process and a concern for the efficiency and fairness in the proceeding before the court. Concern for the integrity of the legal profession as an independent concern appears to play a lesser role in judges' attitudes, at least as reflected in the reported decisions. There is an obvious connection between the legal profession and the judicial system, but regulating attorney conduct is derivative or secondary to the larger goals of a fair and efficient legal proceeding. This picture of judicial attitudes toward confronting attorney misconduct appears to reflect a seasoned and thoughtful assessment of the institutional capabilities of judges.

As often happens with in depth research, the more we learn, the less we know. This research suggests that the reported decisions cannot answer some of the most compelling questions about judicial attitudes toward legal ethics. The reported decisions do not provide a systematic and reliable picture, beyond anecdotes, of the ethical issues that arise in the courtroom. They do not provide a well-developed description of the informal mechanisms used by judges to address ethical issues in their courtrooms or reveal why judges exercise their significant drafting power to sometimes comment on attorney conduct in written opinions and other times choose to deal with the conduct issues informally. These issues await a more in depth empirical study.¹⁷

II. THE JUDGE'S ETHICAL OBLIGATION TO ADDRESS ATTORNEY CONDUCT ISSUES IN THE COURTROOM— THE CODE OF JUDICIAL CONDUCT

A. Overview of Judicial Ethics Obligation

It is well acknowledged that judges "are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested

17. In the interests of full disclosure, Judith McMorrow is in the midst of an "access study," interviewing ten to fifteen judges to identify judicial attitudes toward regulating attorney conduct. The authors hope to undertake a much more rigorous study to explore the issues identified in this article.

with the public trust.”¹⁸ It is less clear, however, whether that heightened standard includes a heightened obligation to address attorney ethics issues. One can envision a judge’s role ranging from a benign observer to an active participant in attorney regulation.

The Model Code of Judicial Conduct, which serves as the template for disciplinary norms for state judges and for the applicable code of conduct for federal judges, begins with the overarching obligation to uphold the integrity and independence of the judiciary.¹⁹ This duty drives from the judiciary’s central role in our legal system.²⁰ Canon 3 makes clear that the judge’s judicial duties “take precedence over all the judge’s other activities.”²¹ The 1972 version of the Code divided the judge’s core functions into adjudicative and administrative functions, the latter of which included a provision that judges should address judicial and attorney misconduct.²² Canon 3 of the 1990 version of the Code sharpened the focus of the judge’s ethical responsibilities by dividing the judge’s judicial duties into three core functions: adjudicative responsibilities (3B), administrative responsibilities (3C) and disciplinary responsibilities (3D).²³

18. JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 1.01 (3d ed. 2000) (citing *In re Piper*, 534 P.2d 159, 164 (Or. 1975)) [hereinafter SHAMAN]. See *Hayes v. Alabama Court of the Judiciary*, 437 So. 2d 1276, 1278 (Ala. 1983); *In re La Motte*, 341 So. 2d 513, 517 (Fla. 1977); *In re Troy*, 306 N.E.2d 203, 235 (Mass. 1973); Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 960 n.35 (1996); David Cleveland & Jason Masimore, *The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates, and Other Judicial Figures*, 14 GEO. J. LEGAL ETHICS 1037, 1044-45 (2001).

19. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990); CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, available at <http://www.uscourts.gov/guide/vol2/ch1.html>. See generally Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55 (2000). Federal judges are subject to sanction for engaging in conduct “prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a) (2004). This statute is not intended to enforce the Code of Judicial Conduct, which functions as aspirational as to federal judges. *In re Charge of Judicial Misconduct*, 62 F.3d 320, 322-23 (9th Cir. 1995) (“This is not to say the Canons are not important. They are. As a judiciary, we should do all we can to educate and motivate judges to achieve the aspirational goals of the Canons. But the judicial misconduct procedures were not meant to be nor are they designed to enforce those goals.”); *In re Charge of Judicial Misconduct*, 91 F.3d 1416, 1418 (10th Cir. 1996).

20. See MODEL CODE OF JUDICIAL CONDUCT Pmb1. (1990) (“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”)

21. *Id.* at Canon 3A.

22. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972).

23. See MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990). The Canon 3 admonition that “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently,” provides five

While both the 1972 and 1990 versions of the Model Code of Judicial Conduct envision disciplinary responsibilities as one aspect of the judge's role, the content of those responsibilities has not been thoroughly delineated. Canon 3B(3) of the 1972 ABA Model Code of Judicial Conduct identified the judge's disciplinary responsibilities to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."²⁴ Some states edited the language to expand on the obligation, but the language obviously leaves ample room for interpretation. The 1972 version did not distinguish between degrees of misconduct and did not expressly address what constitutes "appropriate disciplinary measures" and when disciplinary action would be appropriate.²⁵

The 1990 Code offered somewhat better guidance by acknowledging the obligation to address misconduct of judges and lawyers. As to lawyers, Canon 3D(2) of the 1990 Code provides that:

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.²⁶

The commentary offered one slender paragraph of additional insight. "Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body."²⁷ This commentary makes clear that reporting to the bar is not the exclusive sanction for misconduct.²⁸ Section 3D(3)

categories of responsibility of a judge: judicial duties in general, adjudicative responsibilities, administrative responsibilities, disciplinary responsibilities and disqualification. *Id.* See also Cleveland & Masimore, *supra* note 18, at 1039-40; Brian Holland, *The Code of Judicial Conduct and the Model Rules of Professional Conduct: A Comparison of Ethical Codes for Judges and Lawyers*, 2 GEO. J. LEGAL ETHICS 725, 732-33 (1989).

24. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(3) (1972).

25. Alex Rothrock, *Ex Parte Communications with a Tribunal: From Both Sides*, 29 COLO. LAW. 55, 60 (2000).

26. The term "knowledge" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The term "appropriate authority" "denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported." MODEL CODE OF JUDICIAL CONDUCT Terminology (1990).

27. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(2) cmt. (1990).

28. See Abramson, *supra* note 14, 761-62.

reinforces the idea that disciplinary actions, including appropriate response and reporting, are part of the judicial duties and provides that disciplinary activities are absolutely privileged.²⁹

B. Informal Approaches: Appropriate Action

Section 3D divides the judge's obligation into formal and informal approaches. Information about a violation of the applicable rules of conduct triggers only the suggestive language that the judge "should take appropriate action." This language essentially punts to judicial discretion. The option to act ("should") and the flexible response ("appropriate action") are so open-ended as to offer no meaningful guidance to judges as to the judge's *ethical* obligation. State courts occasionally cite 3D as support for a duty to address attorney misconduct.³⁰ Federal courts also occasionally look to the comparable provision of the Code of Conduct for United States Judges to justify their decisions concerning alleged attorney misconduct.³¹ While the commentary to the Code of Conduct for United States Judges suggests direct communication and other direct action, these same actions are typically authorized by the rules of court and the judge's flexible inherent powers. The Code of Conduct for United States Judges may

29. See MODEL CODE OF JUDICIAL CONDUCT Canon 3D(3) (1990) ("Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.").

30. Cf. *Couch v. Private Diagnostic Clinic*, 554 S.E.2d 356, 362 (N.C. Ct. App. 2001) ("inherent authority encompasses not only the power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct") (citing *In re Hunoval*, 247 S.E.2d 230, 233 (N.C. 1977)).

31. See, e.g., *Cobell v. Norton*, 212 F.R.D. 14, 23-24 (D.D.C. 2002) (holding that "because not every violation of the ethics rules deserves punishment, there remains the question as to whether this matter warrants a referral to the Disciplinary Panel for further proceedings" but referral to the District Court's Committee on Grievances is appropriate in this case because counsel was aware that contact with class members was questionable but did not seek advance approval by stating, "[i]n the face of such misconduct, it would be an act of negligence for this Court to stand idly by."). The Code of Conduct for United States Judges was adopted by the Judicial Conference of the United States in 1973 and has been updated periodically. See *United States v. Microsoft Corp.*, 253 F.3d 34, 111 (D.C. Cir. 2001). The Code of Conduct for United States Judges still uses the older 3B(3) formulation that "[a] judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." CODE OF CONDUCT FOR UNITED STATES JUDGES, available at <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Aug. 28, 2004).

also provide independent justification to explore ethical violations of court officers.³²

The very openness of this Canon 3D(2) language suggests that a response to professional violations might constitute “best practices” for a judge and be wise use of the judge’s discretion.³³ It is not evident, however, that it rises to the level of an *ethical* obligation. The openness and looseness of the language is likely one reason why some states elected to drop this language from their state versions of the Model Code and instead included only the second, mandatory reporting as part of judicial ethics obligation.³⁴ Some states that have dropped this unguided discretionary language for less significant professional lapses for lawyers, however, have retained parallel language as it applies to judges.³⁵ In those jurisdictions, judges have a heightened ethical obligation to respond to professional violations of judges than lawyers.

C. *Judicial Ethics Obligation to Report to the Bar*

The second prong of the judge’s “disciplinary responsibilities” as to lawyers requires that a judge with knowledge “that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.”³⁶ This language parallels the mandatory reporting obligation of lawyers.³⁷ This language appears to have been included in state versions of the Code of Judicial Conduct with somewhat less controversy than similar language in the lawyer’s code, suggesting that the judge’s obligation to report was seen on an instinctive level as more compelling—or at least causing less collateral damage—than a lawyer’s obligation.³⁸ It is important to note

32. See *Granholt v. Pub. Serv. Comm’n*, 625 N.W.2d 16, 21 (Mich. Ct. App. 2000) (“Pursuant to our independent responsibility to supervise the ethical conduct of our court officers, this Court has raised and now addresses the issue whether the Attorney General’s dual roles in this case as both the party appellant and as counsel for appellee PSC constitute an impermissible conflict of interest.”).

33. This insight came through discussions with two members of the committee that proposed the most recent Massachusetts Code of Judicial Conduct.

34. See, e.g., MASS. CODE OF JUDICIAL CONDUCT, Canon 3D(1) (2003).

35. See *id.* at Canon 3D(2).

36. Forty-nine states, the District of Columbia, and the Federal Judicial Conference use either the 1972 or the 1990 versions of the ABA Code of Judicial Conduct as the template for their applicable Codes, with some local tailoring. SHAMAN, *supra* note 18, at § 1.01.

37. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (2002); see also Abramson, *supra* note 14, at 763-66.

38. The lawyer’s duty to report has generated a good deal of discussion. See, e.g., Bruce A. Campbell, *To Squeal or not to Squeal: A Thinking Lawyer’s Guide to Reporting Lawyer*

that since most judges are also lawyers, judges might also be required to report knowledge of misconduct under the applicable rules for lawyers.³⁹

Professor Leslie W. Abramson's authoritative article on the reporting obligation of judges canvasses the subtle modifications that some states have made to Canon 3B(3) of the 1972 version of the Code and Canon 3D of the 1990 Code.⁴⁰ Within the subtle variations in language, some general conclusions can be drawn. The obligation to address at least the most egregious misconduct, by reporting to the appropriate disciplinary body, makes clear that judges should not confine their role to *ad hoc* treatment of misconduct issues that occur in proceedings before them.⁴¹ On the other hand, this duty to report does not necessarily convert judges into gatekeepers or police monitors charged with minding the conduct of attorneys or the legal profession.⁴²

Misconduct, 1 FLA. COASTAL L. J. 265, 292 n.10 (1999). See generally Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003); Gerard E. Lynch, *The Lawyer As Informer*, 1986 DUKE L.J. 491 (1986); Douglas R. Richmond, *Associates as Snitches and Rats*, 43 WAYNE L. REV. 1819 (1997); Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977 (1988); Nikki A. Ott & Heather F. Newton, Comment, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 17 GEO. J. LEGAL ETHICS 747 (2003). Cf. Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinventing Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555 (2001). Mandatory reporting by judges has received fewer critiques. Prof. Leslie Abramson expresses concern that the judge's duty to report judges and other lawyers serves as a threat to judicial independence. See Abramson, *supra* note 14, at 752.

39. It is generally assumed that the obligation under the Rules of Professional Conduct to report attorney misconduct applies equally to both lawyers and judges. See MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. (2003); MODEL CODE OF PROF'L RESPONSIBILITY PmbI. and Preliminary Statement (1980) (indicating that the Disciplinary Rules apply to lawyers regardless of professional capacity); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 581 (4th ed. 1999) (explaining that judges as lawyers are bound by both Rule 8.3 of Model Rules of Professional Conduct and Canon 3(D)(2) of Judicial Code of Conduct to report lawyer misconduct); Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1190 (1988).

40. See Abramson, *supra* note 14, at 760-62.

41. Cf. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 5 (1986) (quoted in Abramson, *supra* note 14, at 754) (the ABA Committee has criticized judges for taking the position that "there is no such need [to initiate the disciplinary process] and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means."). Cf. *Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 382 (Ohio 1987) (referring to Canon 3B(3), the court stated that "we hasten to approve and encourage courts throughout this state in their efforts to halt unprofessional conduct and meet their responsibilities in reporting violations of the Code").

42. See, e.g., *Fravel v. Haughey*, 727 So. 2d 1033, 1036-37 (Fla. Dist. Ct. App. 1999) (rejecting reversal of judgment below based on violation of the Rules Regulating the Florida Bar by the prevailing party because "a direct independent undertaking of this policing role would go well beyond the requirements of Canon 3(D)2 [sic] of the Code of Judicial Conduct . . . and create a

The obligation to report has been grounded in a variety of policy justifications, including an obligation to the system of justice as a whole,⁴³ and as a means to avoid misconduct, misuse or neglect of duty.⁴⁴ The ethical obligation of the judiciary to report violations of the attorney professional conduct rules that raise a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects clearly links the judge as a feeder of information to the bar disciplinary apparatus.⁴⁵

There is ample reason to think that judges do not embrace this reporting role as a central part of the judicial duties, but rather as a subsidiary function. Judges are not a significant source of reporting misconduct to the bar disciplinary apparatus.⁴⁶ Courts occasionally reveal the challenges of reporting misconduct. As with lawyers, the human connection makes it "difficult" for trial judges to report "lawyers with whom they have to work on a day to day basis."⁴⁷ There is a lurking sense that futility plays a role for some judges. A judge on the Florida Court of Appeals recently expressed his frustration with amazing candor:

While in light of [the lawyer's] egregious conduct, we feel duty bound by Canon 3D(2), Code of Judicial Conduct hereby to report him to the Florida Bar, we have no illusions that this will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer's conduct in litigation . . . none has resulted in the public imposition of any discipline—not even a reprimand—whatever Speaking for himself alone, the present writer has grown tired of felling trees in the

demand for significant increases in judicial resources."); *In re J.B.K.*, 931 S.W.2d 581, 584-85 (Tex. Ct. App. 1996) ("[w]e hasten to add that we are not merely the gatekeepers who monitor and patrol the conduct of members of the Bar.").

43. See, e.g., *In re J.B.K.*, 931 S.W.2d at 584 (noting that Canon 3D required reporting an impermissible ex parte contact; the court also used inherent power to order the attorney to appear before the court).

44. See *In re Voorhees*, 739 S.W.2d at 186.

45. See Abramson, *supra* note 14, at 780 ("[T]he responsibility to communicate unprofessional behavior becomes all the more compelling when one considers that judges comprise the one group that is most likely to observe or receive information regarding others' misconduct.").

46. See Levy, *supra* note 2, at 105-06.

47. *State v. Wade*, 839 A.2d 559, 565 (Vt. 2003) (Johnson, J., concurring) (overturning the trial court's motion to dismiss a criminal case as sanction for the State's pattern of neglect and misconduct in discovery matters; conviction reinstated because of lack of prejudice; matter referred to bar).

empty ethical forest which seems so much a part of the professional landscape in this area. Perhaps the time has come to apply instead the rule of conservation of judicial resources which teaches that a court should not require a useless act, even of itself.⁴⁸

It is difficult to discern from reported decisions how judges reach the decision to report a lawyer to the bar. The seriousness of the violation is obviously an important factor.⁴⁹ Where the judge identifies the attorney as a repeat actor, a single act in the current litigation may reflect a pattern justifying a report to the appropriate disciplinary authority.⁵⁰ Judges react most sharply to circumstances in which the lawyer's failure made the underlying proceeding inefficient or unfair, or where court-based sanctions will not stop the conduct. For example, courts have reported attorneys to the bar or the federal court's relevant committee for engaging in *ex parte* contact,⁵¹ failing to disclose a material fact of the settlement to the court,⁵² making statements to the

48. *Johnnides v. Amoco Oil Co.*, 778 So. 2d 443, 445 n.2 (Fla. Dist. Ct. App. 2001) (citing over ten cases in which referrals had been made). There was more to the judge's frustration:

In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years. . . . Perhaps the ultimate example of the Bar's attitude toward the problem is the case of Harvey Hyman, who was the subject of three separate complaints by this court to the Bar . . . but who avoided any sanction by entering a diversion program which consisted entirely of the arduous requirement of attending a day-long seminar on trial ethics.

Id.

49. Prof. Abramson identifies three factors in the judicial determination of what action is appropriate: "(1) the judge's level of certainty that a violation has occurred; (2) the risk of unfairness in the trial if a judge does not take immediate action; and (3) whether the judge is sitting in a state or federal court." Abramson, *supra* note 14, at 775.

50. *See, e.g.*, *United States v. Acosta*, 111 F. Supp. 2d 1082, 1096-97 (E.D. Wis. 2000) (holding that because the prosecutor's conduct was "not egregious, highly improper, or unconscionable," a sanction pursuant to Model Rule of Professional Conduct 3B(3) was not appropriate); *United States v. Hernandez-Ocampo*, No. 92-101711, 1993 U.S. App. LEXIS 2696, at *11-13 (9th Cir. Feb. 2, 1993) (reporting misconduct of an attorney who, in an earlier case, rendered ineffective assistance of counsel for conceding that there was no reasonable doubt as to the factual issues in dispute, and, in the present case, conceded his client's technical guilt). *Cf. In re Eicher*, 661 N.W.2d 354, 370 (S.D. 2003) (holding that the failure of judges in individual cases to report charges of attorney misconduct to the bar did not indicate that charges lacked merit, particularly where each judge "only had one incident before them" and the present court had "the benefit of an extensive record with multiple complaints . . . showing similar inappropriate conduct.").

51. *See In re J.B.K.*, 931 S.W.2d at 584.

52. *See* *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 401-02 (Haw. 1996) ("By bringing and defending an appeal on a case that was actually moot, it appears that counsel for AIG and Vicente may have violated HRCF Rule 3.1 by 'wasting the time and limited resources of this court [and] having denied availability of the court's resources to deserving litigants[.]'"); *Gum v. Dudley*, 505

press,⁵³ misconduct that sabotaged the trial,⁵⁴ lying under oath,⁵⁵ inappropriate contact with class members,⁵⁶ and neglect.⁵⁷ Federal courts have the ability to refer serious misconduct to their own disciplinary apparatus or to the state body.⁵⁸ Federal courts are more likely to refer to the state body when the misconduct did not happen in front of the federal court.⁵⁹

Courts will sometimes hasten to add that they are not making findings of fact when reporting a colorable claim of serious misconduct.⁶⁰ State supreme courts might be inclined to avoid factual determinations because they may find the same issue returning to the court in its capacity as head of the bar disciplinary apparatus.⁶¹

Criminal cases provide particularly interesting issues in addressing attorney misconduct because a case-based remedy may not stop the conduct. A full development of the complex issues of regulating attorney conduct in criminal cases is beyond the scope of this article.⁶² It is

S.E.2d 391, 405 (W. Va. 1997) (although defense counsel's failure to disclose to the plaintiff that a settlement agreement had been reached between two co-defendants did not justify new trial, the matter was reported to Office of Disciplinary Counsel).

53. See *Tozzolina v. County of Orange*, No. 91-56370, 1993 U.S. App. LEXIS 17572, at *6-8 (9th Cir. Jul. 8, 1993).

54. See *Quinones v. State*, 766 So. 2d 1165, 1172 n.8 (Fla. Dist. Ct. App. 2000); *United States ex rel. Crist v. Lane*, 577 F. Supp. 504, 510, 512 n.16 (N.D. Ill. 1983) (sending its opinion to Illinois Supreme Court Attorney Registration and Disciplinary Commission where prosecutor's outrageous and inflammatory conduct denied petitioner a fair trial).

55. See *Leo's Gulf Liquors v. Lakhani*, 802 So. 2d 337, 343 (Fla. Dist. Ct. App. 2001).

56. See *Cobell v. Norton*, 212 F.R.D. 14, 23-24 (D.D.C. 2002).

57. See *Covington v. Smith*, 582 S.E.2d 756, 771-72 (W. Va. 2003).

58. See Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 59 (1993).

59. See, e.g., *United States ex rel. Crist v. Lane*, 577 F. Supp. 504, 512 (N.D. Ill. 1983) ("Were this the record of a federal criminal trial in this Court (fortunately a non-existent possibility, given the quality of our United States Attorney's office), the case would clearly call for reference to our own lawyer disciplinary system. In light of this Court's duty under Code of Judicial Conduct Canon 3B(3) and Code DR 1-103(A), and given the cumulative impact of the same prosecutor's conduct in *Shepard*, a copy of this opinion is being sent to the Illinois Supreme Court Attorney Registration and Disciplinary Commission.").

60. See *In re J.B.K.*, 931 S.W.2d 581, 584-85 (Tex. Ct. App. 1996).

61. Interview with former head of State Supreme Court, (June 16, 2003) (notes on file with J. McMorrow).

62. This subject is well-developed in the literature. See, e.g., R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 361 (2000); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 497-99 (1996); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 77-91 (1995); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55

sufficient for our purposes to note that courts occasionally find that while the defense counsel or prosecutor's conduct does not violate constitutional requirements, it merits reporting to the appropriate disciplinary authority.⁶³ More often than not, however, the reported decisions analyzing whether there was ineffective assistance of counsel or prosecutorial misconduct are silent on whether serious misconduct was reported to the bar.⁶⁴

While sending a copy of the court's opinion to the bar disciplinary apparatus appears to be the most common method of public referral, there is no logical or structural reason why referrals to the appropriate disciplinary body must occur in a reported decision. Referrals might be taking place far more often than the reported decisions indicate. This suggests, once again, that the reported decisions provide only a partial understanding of the interaction between judges and the formal bar apparatus.⁶⁵

While cases that cite the Code of Judicial Conduct offer us some insights, the absence of significant reference to the Code of Judicial

VAND. L. REV. 381, 384-85 (2002); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 225-43 (2000).

63. For reporting of defense counsel, see, e.g., *United States v. Hernandez-Ocampo*, CA. No. 92-1017, 1993 U.S. App. LEXIS 2696, at *13 (9th Cir. Feb. 2, 1993); *United States v. Swanson*, 943 F.2d 1070, 1076 (9th Cir. 1991) (reversing conviction for ineffective assistance of counsel and referring a copy of the opinion to State Bar of Arizona). For reporting of prosecutors, see, e.g., *Tozzolina v. County of Orange*, No. 91-56370, 1993 U.S. App. LEXIS 17572, at *7-8 (9th Cir. July 8, 1993); *United States v. Starusko*, 729 F.2d 256, 265 (3d Cir. 1984) (affirming conviction but referring prosecutor for disciplinary action); *Suarez v. State*, 481 So. 2d 1201, 1206 (Fla. 1985) (stating that disciplinary sanction rather than suppression of defendant's statement was the appropriate remedy for prosecutor's unethical conduct); *State v. Hohman*, 420 A.2d 852, 855 (Vt. 1980) (affirming conviction but referring to bar).

To bring an ineffective assistance of counsel claim before the Board of Immigration Appeals, the applicant must explain whether a report of the ethical or legal violation has been made with the appropriate authorities. See *In re Lozada*, 19 I. & N. Dec. 637, 637 (BIA 1988); see also *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000) (noting that the INS reporting obligation was not sacrosanct, particularly where misconduct is egregious).

64. See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (ineffective assistance of counsel; no reference to reporting wrongdoing to bar); *Miller v. Pate*, 386 U.S. 1 (1967) (knowing use of false testimony by prosecutor; no reference to reporting wrongdoing to bar).

65. At least one state supreme court has interpreted the confidentiality requirements of disciplinary matters as a reason to limit public referrals in opinions only for matters that involve direct misconduct that is the subject of the court's opinion. See, e.g., *State v. Wade*, 839 A.2d 559, 562 (Vt. 2003) ("While any justice or judge can, of course, refer a complaint against a lawyer to the Professional Responsibility Board, we regret that the concurrence has ignored the requirements of confidentiality set forth in our Administrative Order No. 9, Rule 12, and has done so in the public forum of a Supreme Court decision."). The concurrence argued that confidentiality was meant to apply only to disciplinary actions after the complaint was filed. *Id.* at 565.

Conduct is perhaps more compelling. As addressed in detail below, judges address attorney conduct issues on a daily basis. Even in the face of egregious conduct, judges often do not see the need to cite the Code of Judicial Conduct to justify the decision to sanction the attorney or report to the relevant bar disciplinary body. We can infer that a visceral understanding of the judge's role and the importance of controlling the proceeding before the judge provides ample independent justification for responding to attorney misconduct. The Code of Judicial Conduct simply does not give us sufficient understanding of what motivates a judge to respond to ethical issues that arise in the courtroom. The next step is to explore what judges do in their courtrooms.

III. FEDERAL COURTS' ATTITUDES TOWARD ATTORNEY MISCONDUCT

A. *Overview of Judicial Attitudes Reflected in Federal Court Opinions*

Through written opinions judges reveal both their vision of the judiciary's role in regulating attorney conduct and their vision of appropriate attorney conduct.⁶⁶ Admittedly there are limitations to attempting to glean from the pages of the Federal Reporter the attitudes and views of the judiciary. Written opinions provide only a one-dimensional view of the federal courts' attitude towards attorney misconduct. Despite these limitations, a review of both federal district and appellate decisions reveals that judges do not perceive their role in regulating attorney conduct as an ethical mandate; nor do they appear to consider it a necessary component of their judicial duties.⁶⁷

A survey of the federal case law shows that judges take a fairly practical and holistic approach to addressing attorney conduct. Federal courts are focused primarily on attorney conduct that affects the

66. The distinction between written opinions and published opinions is less significant with the increased access to electronic reporting. Because our goal is to discern judicial attitudes, we have treated written opinions designated as not for citation the same as traditionally published opinions. See generally Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004).

67. Because our focus is on discerning judicial attitudes toward regulating attorney conduct in litigation, we have not delved into the related issue of what rules of professional conduct apply in federal court practice. For a fuller background on this subject, see 28 U.S.C. § 530B (2000) (known as the McDade Amendment, this section directs federal courts to apply state ethics rules to prosecutors in federal court); MCMORROW & COQUILLETTE, *supra* note 8, at § 807; Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 521-23 (1996); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 340 (1994).

litigation process and the integrity of the judicial system. Federal judges do *not* perceive themselves as responsible for regulatory oversight of the legal profession.⁶⁸ A court's choice of sanctions appears to track this broad focus. The type and severity of the sanction often corresponds with the judge's perception of whether and how much the attorney's behavior affected the integrity of the judicial system. One theme that runs consistently through the opinions is that judges believe and communicate, either implicitly or explicitly, that an attorney's primary responsibility is to the proper functioning of the system. The cases suggest that the concept of "officer of the court" is alive and well in federal court practice.⁶⁹

B. The Power to Regulate

It is axiomatic that a federal court has the ability to supervise the conduct of attorneys who appear before it.⁷⁰ Early in the federal court's evolution, the Supreme Court recognized that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."⁷¹ The Court later acknowledged that these powers included a court's ability to discipline attorneys who appear before it.⁷² A court's ability to discipline attorneys derives not just from its inherent powers,⁷³ but also from various statutory

68. Professors Fred C. Zacharias and Bruce A. Green offer a rich analysis of the federal court authority to regulate lawyers, giving an apt subtitle of "A Practice in Search of a Theory." See generally Zacharias & Green, *supra* note 2. How judges act—the practice—appears to be as much or more the product of the judge's vision of his or her judicial role than a measured analysis of the judge's power to sanction attorneys.

69. See generally *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1173 (10th Cir. 2003) ("This is justified because attorney misconduct both implicates the attorney's fitness to function as an officer of the court and triggers the court's responsibility to protect the public from unscrupulous or unqualified practitioners."); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990) ("Because lawyers are officers of the court which granted admission, such courts are necessarily vested with the authority, within certain limits, to impose reasonable sanctions for lawyer misconduct."); *Canon v. Loyola Univ. of Chicago*, 676 F. Supp. 823, 830 (N.D. Ill. 1987) ("Attorneys are officers of the court, and their first duty is to the administration of justice.").

70. See generally *MCMORROW & COUILLETTE*, *supra* note 8, at § 807. See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

71. *Anderson v. Dunn*, 19 U.S. 204, 227 (1821).

72. See *Ex Parte Burr*, 22 U.S. 529, 531 (1824).

73. See *Chambers*, 501 U.S. at 43. For a thorough discussion of the various sources of power to regulate attorney conduct in federal court practice, see generally Zacharias & Green, *supra* note 2.

provisions,⁷⁴ the Federal Rules of Civil Procedure,⁷⁵ and the district courts' local rules.⁷⁶ Some commentators have even suggested that federal courts might have broad, independent authority to regulate attorneys.⁷⁷

While there is no doubt that federal courts have the power to discipline attorney misconduct, it is less clear whether, when, or how a court will use its power. District courts have described the ability to supervise attorney conduct as a "duty" or a "fundamental responsibility."⁷⁸ One district court, relying on *Ex Parte Burr*, concluded that "[c]ourts are required mandatorily to exercise this duty to preserve judicial decorum and to enforce the respectability of the legal profession."⁷⁹ While the courts use mandatory language when they describe their power to act, it is readily apparent that courts perceive their ability to sanction attorney misconduct as a discretionary tool rather than an obligatory role.

Courts have expressed differing views on what role a federal court plays in regulating attorney conduct. The Second and Fifth Circuits' decisions defining the role of the federal judiciary in regulating attorney conduct illustrate the contrasting philosophies. The Second Circuit has taken the position that "[t]he business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it."⁸⁰ Under the Second Circuit's reasoning, ethical issues that surface during the course of litigation are better addressed by the

74. See, e.g., 28 U.S.C. § 1927 (2004).

75. See, e.g., FED. R. CIV. P. 11; FED. R. CIV. P. 37(b); FED. R. APP. P. 46. Rule 11 of the Federal Rules of Civil Procedure is an example of a procedural rule that incorporates an ethical mandate and gives it force. See generally Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. REV. 959 (1991).

76. See, e.g., M.D. ALA. U.S.D.C. LOCAL R. 83.1; D. ARK. U.S.D.C. LOCAL R. 4; D.D.C. U.S.D.C. LOCAL R. 16.2.

77. See generally Zacharias & Green, *supra* note 2.

78. *Black v. Missouri*, 492 F. Supp. 848, 862 (W.D. Mo. 1980) (quoting *Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp.*, 357 F. Supp. 905, 908 (W.D. Pa. 1973); see also *Blue Cross and Blue Shield of N.J. v. Phillip*, 53 F. Supp. 2d 338, 344-45 (E.D.N.Y. 1999) (commenting that it is the responsibility of the court to ensure that the standards of ethics remain high); *Terrebone, Ltd. of Cal. v. Murray*, 1 F. Supp. 2d 1050, 1054 (E.D. Cal. 1998)

79. *United States v. Anonymous*, 215 F. Supp. 111, 113 (E.D. Tenn. 1963); see also, *Black*, 492 F. Supp. at 859 (noting that "[a] fundamental responsibility of any trial court is the supervision of attorneys who appear and practice before it."); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 382 (S.D. Tex. 1969) (recognizing courts have a duty "to supervise the conduct of the attorneys appearing before it and from its obligation to see that it and the legal system do not fall into disrepute").

80. *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976).

“comprehensive disciplinary machinery of the state and federal bar, . . . or possibly by legislation.”⁸¹ In contrast, the Fifth Circuit has “squarely rejected this hands-off approach,” instead holding that district courts are “obliged to take measures against unethical conduct occurring in connection with any proceeding before it.”⁸² According to the Fifth Circuit “it is not clear that the vitality of state enforcement is relevant to the judicial duty of the federal courts to clean its own house.”⁸³

As these two approaches aptly illustrate, the appellate decisions suggest that there is significant uncertainty about a federal judge’s role in regulating attorney misconduct. The philosophical differences, however, are not as sharp in practice. District courts, even those within the two circuits, appear to have adopted a hybrid approach—focusing their attention on conduct that sullies the underlying litigation and judicial system but relying primarily on their own power to sanction attorney misconduct rather than the available state enforcement mechanisms.⁸⁴ Courts are concerned primarily with whether an attorney’s behavior taints the judicial process and by implication the system as a whole.⁸⁵ Preservation of popular faith with the judicial system is the court’s foremost consideration.⁸⁶ As the Fourth Circuit observed, “As soon as the process falters . . . the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.”⁸⁷ As a result, courts are willing to act *sua sponte*, identifying attorney behavior that may have an adverse affect on the proceedings.⁸⁸ The power to regulate emanates not from ethical

81. *Armstrong v. McAlpin*, 625 F.2d 433, 446 (2d Cir. 1980) (citing *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)).

82. *In re Am. Airlines*, 972 F.2d 605, 611 (5th Cir. 1992) (quoting *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1992)).

83. *Id.*

84. *See, e.g., MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998) (noting that a district court judge may deal directly with an ethical violation or refer it to the committee on grievance, or both); *MacDraw v. Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253, 1262 (2d Cir. 1996) (stating that “a district court need not hesitate to impose penalties for unreasonable conduct and acts of bad faith.”); *NASCO, Inc. v. Calcasieu Television and Radio, Inc.* 124 F.R.D. 120, 146 (W.D. La. 1989) (using inherent powers to sanction an attorney and sending a copy of the opinion to the Board of Bar Overseers in Massachusetts and Louisiana).

85. *See Giardina v. Ruth U. Fertil, Inc.*, 110 Civ. A. 00-1674, 2001 WL 1628597, at *3 (E.D. La. Dec. 17, 2001); *United States v. Schaffer Equip. Co.*, 11 F.3d 450, 458-59 (4th Cir. 1993); *Telectronics Propriety, Ltd. v. Medtronic, Inc.* 836 F.2d 1332, 1336 (Fed. Cir. 1988).

86. *See, e.g., United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988); *IBM Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978); *United States v. Scozzafava*, 833 F. Supp. 203, 210 (W.D.N.Y. 1993); *Koch v. Koch, Indus.*, 798 F. Supp. 1525, 1530 n.2 (D. Kan. 1992).

87. *Schaffer Equip. Co.*, 11 F.3d at 457.

88. *See, e.g., Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003); *Tapers v. Local 530 of*

mandates but from the general duty to preserve the integrity of the system.⁸⁹

Despite the Second Circuit's suggestion, federal courts relatively rarely rely on the state disciplinary system to regulate attorney misconduct in their courts.⁹⁰ A court is more likely to refer an attorney to an internal disciplinary committee for investigation and oversight.⁹¹ A federal judge's decision to refer to the federal court's disciplinary committee rather than to the state's disciplinary committee may reflect the view expressed by the Fifth Circuit that federal courts are responsible for cleaning their own house.⁹² In addition, both federal district courts and federal appellate courts have their own admission requirements, informal and formal rules of conduct, and an inherent power to sanction. Moreover, a referral to a disciplinary committee, whether internal or at the state level, is just one of many tools available to a federal judge. Indeed, a review of the written opinions reveals that federal courts rely less on referral and more on the variety of creative sanctions they have devised to address attorney misconduct.⁹³

But in the end, *whether* a court confronts attorney misconduct and *how* it responds to the behavior is largely left to the individual court's

Operative Plasterers & Cement Masons, No. 93-CV-154 (JG), 1996 WL 1088933, at *4 (E.D.N.Y. Oct. 24, 1996); *In re Chou-Chen Chemicals, Inc.*, 31 B.R. 842, 851 n.35 (Bankr. W.D. Ky 1983) ("The court should *sua sponte* raise ethical problems involving danger to a just, speedy, and inexpensive remedy."). *See also* FED. R. CIV. P. 11(c)(1)(B) (authorizing the court to act *sua sponte* in imposing sanctions when it finds attorney misconduct).

89. *See* *Gadda v. Ashcroft*, 363 F.3d 861, 872-73 (9th Cir. 2004); *Schaffer Equip. Co.*, 11 F.3d at 458 (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)); *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486, 489 (S.D.N.Y. 1976).

90. Courts appear to rely on a state disciplinary mechanism when (1) they do not have the ability to refer to a court's disciplinary committee because the attorney is not a member of the bar; or (2) the behavior is perceived as exceptionally egregious. Federal courts are more likely to refer to a state disciplinary apparatus where the conduct under review occurred in state court. *See, e.g.*, *United States ex rel. Crist v. Lane*, 577 F. Supp. 504, 512 n.16 (N.D. Ill. 1983) ("Were this the record of a federal criminal trial in this Court (fortunately a non-existent possibility, given the quality of our United States Attorney's office), the case would clearly call for reference to our own lawyer disciplinary system. In light of this Court's duty under the Code of Judicial Conduct Canon 3B(3) and Code DR 1-103(A), and given the cumulative impact of the same prosecutor's conduct in *Shepard*, a copy of this opinion is being sent to the Illinois Supreme Court Attorney Registration and Disciplinary Commission.").

91. *See, e.g.*, *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 441 (D. Md. 2002); *Higginbotham v. KCS Intern., Inc.*, 202 F.R.D. 444, 460 (D. Md. 2001).

92. *See, e.g.*, *Ausherman*, 212 F. Supp. 2d at 441 (stating that the Court is required to "refer this matter to this Court's disciplinary committee.").

93. *See infra* Part III.E.

discretion.⁹⁴ Thus, while the power to regulate is beyond peradventure, it is not at all clear *what* will be regulated. An attorney is not insulated from sanctions simply because he or she follows the rules of professional conduct. While courts certainly employ the ethical rules established by the profession as benchmarks, the rules do not establish an exclusive list of sanctionable conduct nor do they provide insight on appropriate sanctions. While an attorney's ethical violation certainly impugns the integrity of the system, other conduct can be seen as undermining the judicial process and system without being labeled unethical.

C. *What Conduct District Courts Are Regulating*

At the forefront of judicial opinions addressing attorney misconduct is the court's concern with conduct that undermines the integrity of the judicial system,⁹⁵ the public's confidence in its proper functioning,⁹⁶ and—coming in a more distant third—the integrity of the bar.⁹⁷ As a result, courts will sanction attorneys for, among other things, making misleading statements to the court⁹⁸ or opposing attorneys,⁹⁹ refusing or repeatedly failing to follow court orders,¹⁰⁰ including scheduling

94. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990) (recognizing that appellate courts should apply a deferential standard of review to district court decisions to sanction); *Gadda*, 363 F.3d at 873; *Ausherman*, 212 F. Supp. 2d at 444.

95. See, e.g., *United States v. Taleo*, 222 F.3d 1133, 1138 (9th Cir. 2000); *Douglas v. DynMcDermott Petro. Op. Co.*, 144 F.3d 364, 370 (5th Cir. 1998); *Lasar v. Ford Motor Co.*, 239 F. Supp. 2d 1022, 1031 (D. Mont. 2003); *Tec Air, Inc. v. Nippondenso Mfg. USA, Inc.*, No. 91C 4488, 1999 WL 965418, at *2 (N.D. Ill. Sept. 30, 1999); *Kirschner v. Zoning Bd. Of Appeals*, 159 F.R.D. 391, 399 (E.D.N.Y. 1995).

96. See *Black v. Mo.*, 492 F. Supp. 848, 873 (W.D. Mo. 1980). See also *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996); *Ayus v. TotalRenal Care, Inc.*, 48 F. Supp. 2d 714, 718 (S.D. Tex. 1999); *Pendleton v. Cent. N.M. Corr. Facility*, 184 F.R.D. 637, 641 (D.N.M. 1999) (implying that the misconduct in question contributes to the public's perception of the way the judicial system functions).

97. See, e.g., *In re Morrissey*, 305 F.3d 211, 225 (4th Cir. 2002); *Douglas*, 144 F.3d at 370; *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965); *In re Haley*, 60 F. Supp. 2d 926, 927 (E.D. Ark. 1999).

98. See *Lasar*, 239 F. Supp. at 1033.

99. See *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 446 (D. Md. 2002); *Brown v. County of Genesee*, 694 F. Supp. 250, 251-52 (E.D. Mich. 1987); *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983).

100. See *Hawkins v. AT&T Corp.*, No. SA-02-CA-0166-RF, 2003 WL 22736525, at *2 (W.D. Tex. Nov. 12, 2003); *Grine v. Coombs*, 214 F.R.D. 312, 369 (W.D. Pa. 2003).

orders,¹⁰¹ and exhibiting a lack of civility.¹⁰² Almost without exception, courts emphasize a lawyer's duty to the judicial system as a whole when imposing sanctions.¹⁰³

Courts will sanction conduct that occurs at any point in the litigation process—both inside and outside of the courtroom.¹⁰⁴ The court's focus is not *where* the conduct occurred but how the behavior is affecting the judicial process and the fair administration of justice.¹⁰⁵ Outside the courtroom, discovery disputes and misleading settlement negotiations often raise the ire of the courts. Courts appear to address attorney misconduct most frequently during the course of discovery when attorneys are vying for tactical advantage.¹⁰⁶ Courts are most likely to sanction discovery disputes after they have consumed an inordinate amount of court resources and have required repeated court interventions.¹⁰⁷ In addition, courts have little tolerance for behavior

101. See *Bagby v. Attorney General of N.Y.*, No. 02 Civ. 4663 (JSRDF), 2004 WL 324896, at *2-3 (S.D.N.Y. Feb. 20, 2004); *Santos Sanchez v. Hosp. Menonita de Cayey, Inc.*, 218 F.R.D. 12, 14-15 (D.P.R. 2003).

102. See *Mruz v. Caring, Inc.*, 166 F. Supp. 2d 61, 64-65 (D.N.J. 2001); *In re First City Bankcorp. of Tex., Inc.*, 270 B.R. 807, 813 (N.D. Tex. 2001); *Saldana v. Kmart Corp.*, 84 F. Supp. 2d 629, 639 (D.V.I. 1999).

103. See *United States v. Schaffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993) ("The general duty of candor and truth thus takes its shape from the larger object of preserving the integrity of the judicial system."); *In re Grievance Comm. of United States Dist. Ct.*, 847 F.2d 57, 62 (2d Cir. 1988)(observing that "most code provisions [] obligate an attorney to take affirmative measures to preserve the integrity of the judicial system"); *Schmude ex rel. Schmude v. Sheahan*, No. 00 C4580, 2004 WL 1045798, at *22 (N.D. Ill. May 4, 2004) ("Lawyers therefore are responsible . . . for maintaining public confidence in the system of justice by acting competently . . ."); *Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 524 (E.D. Pa. 1999) (noting the duty of candor "takes its shape from the larger object of preserving the integrity of the judicial system").

104. See *In re Morrissey*, 305 F.3d 211, 216 (4th Cir. 2002) (affirming district court decision to disbar attorney for conduct that occurred while his license to practice was suspended); *Ausherman*, 212 F. Supp. 2d at 443; *Higginbotham v. KCS Int'l, Inc.*, 202 F.R.D. 444, 445 (D. Md. 2001).

105. Courts are even willing to sanction attorney conduct that effects the integrity of the litigation when an attorney never makes an appearance in the case. In *Pumphrey v. K.W. Thompson Tool Company*, 62 F.3d 1128 (9th Cir. 1995), the Ninth Circuit set aside a jury verdict because of the conduct of an in-house corporate counsel who participated in the trial but never made an appearance, was not admitted pro hac vice, and did not file any documents as an officer of the court. *Id.* at 1131-32.

106. See *Cunningham v. Hamilton County*, 527 U.S. 198, 210-11 (1999) (Kennedy, J., concurring) ("Delays and abuses in discovery are the source of widespread injustice . . . Trial courts must have the capacity to ensure prompt compliance with their orders, especially when attorneys attempt to abuse the discovery process to gain a tactical advantage.") The Supreme Court recently held that allowing an immediate appeal of Rule 37 sanctions would undermine the purpose of the rule which was "designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process." *Id.* at 208.

107. See *Abou-Sakher v. McCoy*, No. 98-6704, 2000 WL 1562839, at *2 (6th Cir. Oct. 11, 2000); *Keams v. Wood Motors, Inc.*, No. 96-1314, 1997 WL 18817, at *1 (Fed. Cir. Jan. 17, 1997);

during discovery that is aggressive rather than adversarial.¹⁰⁸ But discovery disputes are not the only target of court review. An attorney's conduct in settlement negotiations will also be scrutinized.¹⁰⁹ Specifically, courts will admonish and sanction attorneys for their lack of candor during settlement talks.¹¹⁰ As one court aptly noted "[i]t is just as damaging to the integrity of our adversary system for an attorney knowingly to make a false statement of material fact to an opposing counsel during settlement negotiations, as it is to lie to a lawyer or the judge in court."¹¹¹

A recurring theme throughout the opinions is the federal court's concern for the proper allocation of judicial resources. Federal courts readily sanction conduct that is perceived as wasting judicial resources.¹¹² Courts cite to two primary reasons for these sanctions. First, often an attorney's failure to comply with defined time constraints—especially if compliance must be compelled by the court—is perceived as undermining the integrity of the system.¹¹³ The connection between the waste of judicial resources and the integrity of the system is most readily revealed in a court's response to discovery delays.¹¹⁴ Courts perceive an attorney's dilatory tactics in discovery as an attempt to obfuscate the truth—the very thing the judicial system is

Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1539-42 (11th Cir. 1993) (describing the district court's repeated interventions and orders to compel discovery before imposing sanctions).

108. See *Parker v. Pepsi-Cola General Bottlers, Inc.*, 249 F. Supp. 2d 1006, 1013 (N.D. Ill. 2003) ("As we have emphasized before, the boundaries of ethical responsibilities must not be trampled by aggressive lawyering. This Court cannot condone discovery abuses and violations of our Rules of Professional Responsibility and Local Rules by turning a blind eye to practices that undermine the cases before us and the judicial system as a whole."); *Higginbotham*, 202 F.R.D. at 446 (sanctioning attorneys for conduct during depositions that was uncivil, "purely retaliatory, entirely knowing and purposeful and thus utterly out-of-bounds"); *Saldana v. K-MART Corp.*, 84 F. Supp. 2d 629, 638 (D.V.I. 1999) (sanctioning attorney for her abrasive conduct toward opposing counsel including the use of profanity during telephone calls).

109. See *Ausherman*, 212 F. Supp. 2d at 443-44.

110. See *id.*; see also *Pendleton v. Central N.M. Corr. Facility*, 184 F.R.D. 637, 641 (D.N.M. 1999).

111. *Ausherman*, 212 F. Supp. 2d at 444.

112. See *Durham v. Lewis*, No. 98-1761, 1998 WL 846890, at *3 (7th Cir. Nov. 17, 1998); *Williams v. State*, No. C 00-1461-EDL, 2003 WL 151533, at *2 (N.D. Cal. Jan. 14, 2003); *Fla. Software Sys., Inc. v. Columbia/HCA Healthcare Corp.*, 90 F. Supp. 2d 1333, 1337-38 (M.D. Fla. 2000); *Beers v. GM Corp.*, No. 97-CV-482 (NPM/DNH), 1999 WL 325378, at *4 (N.D.N.Y. May 17, 1999).

113. See *Saudi v. Valmet-Appleton*, 219 F.R.D. 128, 134 (E.D. Wis. 2003); *Brown v. Iowa*, 152 F.R.D. 168, 177 (S.D. Ia. 1993).

114. See *Malautea v. Suzuki Motor Corp.*, 987 F.2d 1536, 1546 (11th Cir. 1993).

meant to promote.¹¹⁵ Second, the efficiency of the system is seen as inextricably linked to the public's confidence in it. More than one court has noted that the delays and adversarial foot-dragging is "exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar is currently trying to reverse."¹¹⁶

The court's role as guardian of judicial resources creates a significant question about the court's optimal role in regulating attorney conduct.¹¹⁷ There is significant tension between the costs in judicial resources related to overseeing attorney conduct and the costs related to taking a "hands off approach." A judge's decision about the level of his or her involvement in discovery disputes illustrates the tension inherent in trying to define the parameters of the court's role as overseer. On the one hand, a judge may take a more active approach and encourage attorneys to seek the court's guidance if they reach an impasse in discovery. While this approach may result in a more expedited discovery process, it also may result in the judge spending judicial resources presiding over subsidiary and often unnecessary disputes. On the other hand, a judge may take a "hands off approach," requiring attorneys to grapple with discovery issues without court guidance. While this approach leaves the judge free to attend to other court business, it raises the possibility that significant resources will be spent as attorneys struggle to resolve discovery issues without court intervention. The latter approach contains an additional hidden cost for the judicial system. In instances when the case involves parties with unequal financial resources, the court's unwillingness to address attorney misconduct early in the process may interfere with the proper functioning of the judicial

115. *See id.* at 1546-47.

116. *Pendleton*, 184 F.R.D. at 641; *see also* *Geiserman v. MacDonald*, 893 F.2d 787, 792 (5th Cir. 1990) ("Delays [in litigation] are a particularly abhorrent feature of today's trial practice. They increase the cost of litigation, to the detriment of the parties enmeshed in it; they are one factor causing disrespect for lawyers and the judicial process; and they fuel the increasing resort to means of non-judicial dispute resolution. Adherence to reasonable deadlines is critical to restoring integrity in court proceedings.").

117. *See Hill v. Norfolk and W. Ry. Co.*, 814 F.2d 1192, 1207 (7th Cir. 1987) (Parsons, J., concurring in part & dissenting in part) ("Strong judicial management is a potential threat to the adversary system as it has existed for hundreds of years because it calls for a significant change in the power relationship between judges and lawyers and in their respective functions. Indeed, there are risks in imposing a meaningful duty on attorneys to act in the interests of the judicial system, rather than exclusively in that of their clients, and in placing enforcement of that duty in the hands of the judges, whose primary concern could well become efficiency rather than justice itself.").

system.¹¹⁸ District court judges must consider these hidden costs when they consider their role in addressing attorney misconduct.

D. *What Appellate Courts Are Regulating*

Appellate courts have three distinct roles in regulating attorney conduct. First, appellate courts review a district court's decision whether to sanction and what sanction to impose. Second, appellate courts may independently evaluate the district court record and impose sanctions. Third, appellate courts recognize a separate and distinct duty to regulate attorney misconduct that occurs at the appellate level.¹¹⁹

Regardless of their role, appellate courts, like district courts, are primarily concerned with the integrity of the judicial system and the fair and efficient administration of justice. Appellate courts, however, appear to address attorney misconduct in a broader context. District court judges primarily focus on how the attorney's conduct affected the litigation before the court, with a secondary focus on how that conduct affects the judicial system as a whole. In contrast, appellate courts are more likely to view attorney misconduct through a broader systemic lens—assessing the impact the attorney's behavior on the integrity of the judicial system.

1. Appellate Courts' Review of District Court Sanctions

In theory, appellate courts review district courts' sanctions under an abuse of discretion standard.¹²⁰ The standard is lenient because, as appellate courts recognize, district courts are primarily responsible for the supervision of the attorneys practicing before them.¹²¹ In practice, however, appellate courts appear to adopt a two-tiered approach to reviewing district court decisions. The first tier addresses the decision to

118. See generally Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2204-05 (1989) (discussing costs of litigation and noting that in survey of 1000 judges, "abusive discovery was rated highest among the reasons for the high cost of litigation"); see also Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367-68 (11th Cir. 1997) (noting that "discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes").

119. See MCMORROW & COUILLETTE, *supra* note 8, at § 803.01 (discussing FED. R. APP. P. 46 as a tool for regulating attorney conduct before appellate courts).

120. See *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 510 (6th Cir. 2002). But see *In re Am. Airlines*, 972 F.2d 605, 609 (5th Cir. 1992) (stating "a district court's ruling upon a motion to disqualify is not a matter of discretion.").

121. See *Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996); *Gas-A-Tron of Ariz. v. Union Oil Co. of Cal.*, 534 F.2d 1322, 1325 (9th Cir. 1976).

sanction and is reviewed under an abuse of discretion standard. The second tier addresses the sanction imposed and a different, and perhaps more stringent, standard of review is applied.¹²² One court described its second-tier review as determining whether the sanction imposed was “just.”¹²³ While the majority of district court responses to attorney misconduct are affirmed, appellate courts have reversed district court decisions to sanction,¹²⁴ and in rare cases, not to sanction.¹²⁵

The appellate courts’ two-tiered approach to reviewing district court decisions appears to reflect the different perspectives of the two courts. Appellate courts recognize that the district court judge is in the best position to decide whether a sanction is warranted.¹²⁶ District court judges have observed the attorney’s behavior and the impact of that behavior on the litigation process. But the decision *whether* to sanction is distinct from the decision *how* to sanction. As will be discussed more fully in Part E of this section, the type of sanction imposed is often a reflection of whether the attorney’s misconduct challenged the proper functioning of the underlying litigation or whether the misconduct undermined the integrity of the system as a whole.

Because appellate courts view the type of sanction imposed through a broader systemic lens, they are more likely to scrutinize the type of sanction imposed to determine whether it accurately reflects the egregiousness of the conduct.¹²⁷ Appellate courts, removed from the fray and intensity of the trial process, caution district courts to use restraint when exercising their power to regulate attorney conduct and to

122. See *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1543 (11th Cir. 1993).

123. *Id.*

124. See *Gas-A-Tron*, 536 F.2d at 1325 (reversing a district court decision to disqualify an attorney); *In re Coord. Pretrial Proceedings in Petroleum Prods. Litig.*, 658 F.2d 1355, 1362 (9th Cir. 1981); *Bd. of Educ. of N.Y. v. Nyquist*, 590 F.2d 1241, 1250 (2d Cir. 1979).

125. See *Erickson*, 87 F.3d at 303-304; *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 885 (5th Cir. 1988).

126. See *Kelly v. Golden*, 352 F.3d 344, 352 (8th Cir. 2003) (noting that the district court is in a better position to decide what sanctions are appropriate for the misconduct); *Motorola Inc. v. Interdigital Technology Corp.*, 121 F.3d 1461, 1468 (Fed Cir. 1997) (“The trial judge is better able to assess the conduct of parties appearing before it than is this court. Questions of misconduct often involve the tone and tenor of advocacy, rather than the literal words of the advocate. In such instances, a cold printed record cannot fully convey the aspects of conduct that a trial court might find egregious. Thus, this court is careful to avoid substituting its assessment of facts for those of the judge who experienced them firsthand.”); *Estate of Solis-Rivera v. United States*, 993 F.2d 1, 3 (1st Cir.1993) (“A district court, which has direct and continuous contact with attorneys, is best able to judge in the first instance whether an attorney’s misconduct is sufficiently egregious to warrant the ‘death knell’ of a lawsuit, or whether some lesser sanction would be more appropriate.”); *Blue v. United States Dep’t of the Army*, 914 F.2d 525, 538 (4th Cir. 1990).

127. See *United States v. Schaffer Equip. Co.*, 11 F.3d 450, 463 (4th Cir. 1993).

narrowly tailor the sanctions imposed.¹²⁸ The severity of the sanction must match the perceived egregiousness of the conduct.¹²⁹ Although rules and statutes outlining appropriate conduct and possible sanctions are often written in broad language, a district court's discretion in imposing a sanction is not unbridled.¹³⁰ So while a district court's decision *to* sanction is reviewed with deference, the decision *how* to sanction appears to receive more scrutiny.

2. Appellate Court's Response to Attorney Misconduct

Beyond the review of district court sanctions, appellate courts acknowledge that they too have a responsibility to supervise attorney conduct and, consistent with that recognition, take an active role in regulating attorney conduct.¹³¹ When addressing attorney conduct, the appellate court uses the same systemic approach that influences their review of district court decisions. The appellate courts evince a willingness to sanction attorney conduct that occurs before the appellate courts as well as behavior that occurred but was not caught or recognized in the district courts.¹³² Under this rubric, appellate courts are not only addressing conduct that affects the appellate process but also conduct that was perceived as affecting the litigation process below.¹³³ Like district courts, appellate courts are willing to raise *sua sponte* the

128. See *id.* (affirming the imposition of sanctions, but vacating the type); see also *Webb v. District of Columbia*, 146 F.3d 964, 976 (D.C. Cir. 1998) (same); *Doyle v. Murray*, 938 F.2d 33, 35 (4th Cir. 1991) (same).

129. See *Richardson v. Boddie-Noell Enter. Inc.*, No. 03-1011, 2003 WL 22429534, at *4 (4th Cir. Oct. 27, 2003); see also *In re Snyder*, 472 U.S. 634, 646-47 (1985) (reversing an appellate court's suspension of an attorney for a harsh and ill-mannered letter criticizing the court's administration).

130. See *Richardson*, 2003 WL 22429534, at *4 (comparing the broad language in Federal Rule of Civil Procedure 41(b) allowing a court to dismiss a case for failure to comply with a rules of procedure with conduct appropriate to necessitate dismissal); *Berry v. Cigna/RSI-Cigna*, 975 F.2d 1188, 1191 (5th Cir. 1992) (stating that a district court must expressly determine that a lesser sanction would not deter conduct or the record must show that the district court employed a lesser sanction that proved to be futile).

131. See *Fla. Breckenridge, Inc. v. Solvay Pharm., Inc.*, No. 98-4606, 1999 WL 292667, at *4 (11th Cir. May 11, 1999); *In re Beck*, 902 F.2d 5, 7 (7th Cir. 1990) ("It is an important part of the judicial office to ensure competence and dedication of the bar, as well as its adherence to ethical standards."); see also FED. R. CIV. P. 46(b) (allowing for discipline if an attorney is "guilty of conduct unbecoming a member of the court's bar").

132. See, e.g., *V.I. Hous. Auth. v. David*, 823 F.2d 764, 767 (3d Cir. 1987) (sanctioning an attorney when, on appeal, it was discovered he made misrepresentations to the district court).

133. See, e.g., *Top Entm't, Inc. v. Ortega*, 285 F.3d 115, 118 (1st Cir. 2002) (making an independent assessment that the original complaint violated Rule 11 of the Federal Rules of Civil Procedure).

propriety of sanctions.¹³⁴ Consistent with their systemic approach, even if a motion for sanctions is brought by the opposing attorney, appellate courts will look beyond the motion and investigate an attorney's history of misconduct.¹³⁵

Like the district courts, appellate courts are extremely sensitive to conduct that wastes judicial resources¹³⁶ and they have little tolerance for attorneys who abuse the appellate process.¹³⁷ It is commonly recognized that a court should discipline attorneys who harass their opponents and waste judicial resources by abusing the legal process.¹³⁸ Federal Rule of Appellate Procedure 38 provides the basis for "penalizing this waste of appellate resources,"¹³⁹ and it is frequently cited to support sanctions imposed at the appellate level. The waste of appellate resources encompasses a broad array of conduct from filing a groundless appeal¹⁴⁰ to failing to properly cite to the record in an appellate brief.¹⁴¹ Like the district courts, appellate courts link the protection of judicial resources to both the integrity of the system and the public's confidence in it.¹⁴² Courts cite to the mounting federal case loads and the growing public dissatisfaction with the costs and delays of litigation as the basis for sanctions designed to discourage groundless

134. See *Coghlan v. Starkey*, 852 F.2d 806, 807-08 (5th Cir. 1988) (per curiam).

135. See *In re Bagdade*, 334 F.3d 568, 571 (7th Cir. 2003) (per curiam) ("Bagdade's conduct led the appellees to seek sanctions, which in turn led us to inquire whether he had been sanctioned before.").

136. See *Jenkins v. Tatem*, 795 F.2d 112, 113 (D.C. Cir. 1986) (commenting that due to the "back log" of cases pending appellate review "the parties' paper vendetta in this court is particularly inexcusable because of the heavy volume of legitimate business in this court.").

137. See *Coghlan*, 852 F.2d, at 809 (stating that a frivolous appeal is an unjustified consumption of appellate resources); *Bank of Canton, Ltd v. Republic Nat'l Bank*, 636 F.2d 30, 31 (2d Cir. 1980) (commenting that the "appeal is so completely frivolous as to render its prosecution an abuse of appellate process").

138. See *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 341 (2d Cir. 1999).

139. See *Coghlan*, 852 F.2d at 815; see, e.g., *Duran v. N.M. Dep't of Labor*, No. 01-2329, 2002 WL 1462861, at *3 (10th Cir. July 9, 2002); *Carmon v. Lubrizol Corp.*, 177 F.3d 791, 793 (5th Cir. 1994); *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991); *Schiff v. United States*, No. 90-5025, 1990 WL 120619, at *2 (Fed. Cir. 1990).

140. See *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 118 (2d Cir. 2000); *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 676 (6th Cir. 1999).

141. See *Day v. N. Ind. Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir. 1999) (commenting that the purposes of the Federal Rule of Appellate Procedure 28(a)(6) was to provide pinpoint citations so judges could readily find the facts).

142. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997) ("Allowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system.").

litigation.¹⁴³ As one court stated “[t]he courts—public, tax-supported institutions—cannot be used to vent spleen or passion amongst feuding parties and members of the bar.”¹⁴⁴

*E. The Federal Courts' Use of Sanctions
to Address Attorney Misconduct*

What is most revealing about a judge's attitude toward attorney misconduct is what sanction he or she imposes on an offending attorney. Why one judge chooses to impose one sanction when confronted with certain behavior and another judge, confronted with similar behavior, chooses another sanction, or no sanction at all, is unclear from a review of written opinions. The varying results probably have as much to do with the circumstances of each case as they do with the particular judge's views on attorney conduct and his or her role in regulating it, the history of the litigation, the reputation of the attorney and innumerable other factors not obvious on the face of the opinion.

Although it is difficult to establish a clear definition of what type of sanction will be used and when, several patterns do emerge. A judge's choice of sanction often reflects the judge's perception of the impact of the conduct on the underlying litigation as well as the integrity of the judicial system: the broader the impact, the harsher the sanction. If an attorney's conduct is perceived as adversarial excess that merely affected the current litigation, a “lighter” sanction will be imposed. In those instances, courts will impose a sanction designed to make the other side whole such as the payment of costs and fees. In contrast, if the attorney's conduct is viewed as undermining the integrity of the judicial system as a whole then a court will impose more severe and often multiple sanctions.

Federal courts are armed with a large arsenal of possible sanctions designed to protect both the litigation process and the broader judicial system. Sanctions can be loosely defined by two broad categories: traditional sanctions and informal sanctions. Traditional sanctions are often rule-based and encompass the long-established responses to attorney misconduct such as the assessment of fees and costs, disqualification, and referral to a disciplinary committee, which can

143. See *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1139 (D.C. Cir. 1986) (per curiam); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291 (5th Cir. 1983); *Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists*, 802 F.2d 247, 255 (2d Cir. 1975).

144. *Jenkins v. Tatum*, 795 F.2d 112, 113 (D.C. Cir. 1986).

suspend or disbar the attorney from the particular federal court's bar. These sanctions are designed primarily to ensure the integrity of the system and regulate conduct before the court.

In contrast, informal sanctions are not rooted in rules or statutes, nor are they recognized as "official" responses to attorney conduct. Informal sanctions include a court's decision to issue an opinion, naming the recalcitrant attorney, outlining his or her misdeeds in detail, and describing the court's disappointment and outrage. Informal sanctions do not employ the state or federal disciplinary machinery or rely on disciplinary mechanisms described in rules or statutes. Instead they combine the power of the written word with the importance of an attorney's reputation to impress upon an attorney (and the bar) the gravity of the conduct. And unlike traditional sanctions, informal sanctions are more efficient because they do not entail an adherence to due process requirements.

While traditional sanctions provide federal courts an avenue for addressing and deterring attorney misconduct, informal sanctions allow courts to reveal to the bar their vision of attorney conduct. Unlike traditional sanctions, which require a court to defend its action based on the conduct before it, informal sanctions allow a court to speak more broadly—a podium—about an attorney's responsibility to the system. *Pendleton v. Central New Mexico Correctional Facility*¹⁴⁵ provides a recent illustration. The court in *Pendleton* lacked a traditional basis for sanctions but observed "the conduct of Plaintiff's counsel deserves mention."¹⁴⁶ The court went on to express a common sentiment:

Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while trying to solve our client's problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end.¹⁴⁷

145. 184 F.R.D. 637 (D.N.M. 1999).

146. *Id.* at 641.

147. *Id.*; see also *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir 1993) ("The discovery rules in particular were intended to promote the search for truth that is the heart of our judicial system. However, the success with which the rules are applied towards this search for truth greatly depends on the professionalism and integrity of the attorneys involved. Therefore, it is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of 'the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.'").

While traditional sanctions and informal sanctions are often used in tandem, it is through informal sanctions that courts communicate directly with the attorneys¹⁴⁸ and the bar.¹⁴⁹ Courts attempt to describe and establish norms of conduct and to guide the bar's behavior.¹⁵⁰ Because courts are speaking directly to the bar, informal sanctions offer a window into the federal bench's attitude toward attorney misconduct. Again and again, courts emphasize through informal sanctions that an attorney's foremost obligation is to the judicial system.¹⁵¹ Sanctions are frequently assessed when attorneys fail to maintain this perspective.¹⁵²

F. Final Comments on Federal Court Judicial Attitudes Toward Regulating Attorney Conduct

By looking at what judges do—the sanctions imposed—when confronted with attorney conduct and the language they use in imposing those sanctions, we see a picture of judges who are not aggressively seeking to regulate the legal profession as a whole. The concerns for the legal profession are derivative of the dominant concern for the integrity of the judicial proceeding in front of the judge. Within that narrower context, judges reflect an often deep concern for misconduct, both because it harms the integrity of the proceeding and adversely affects the legal profession. While this conclusion may seem obvious, it reflects at

148. See *Lasar v. Ford Motor Co.*, 239 F. Supp. 2d 1022, 1034 (D. Mont. 2003) (“[Sutter’s] actions were contemptuous, necessitated a mistrial, and caused undue expense and delay to Lasar, his counsel, the witnesses, and the Court. In trying to defend his actions, he has been dishonest, misleading, and evasive. In short, he is not the type of attorney that should be practicing in this Court. At some point, Lawrence Sutter needs to reflect on what he does, and what it is he should do. The law has no room for frustrated advocates, motivated by an attitude to win at any cost, who are intent to take matters in their own hands, without regard to the rules or orders of the Court.”).

149. See *United States v. Martin*, 195 F.3d 961, 969-70 (7th Cir. 1999) (“We do not think formal disciplinary action required [sic] in the circumstances, but we take this opportunity to remind the bar of its duty to avoid needless duplication in the briefing of multiple-party appeals.”); *Zal v. Stepe*, 968 F.2d 924, 928 (9th Cir. 1992) (“During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it nor for the misconceptions manifest in this case.”).

150. See *Fla. Breckenridge, Inc. v. Solvay Pharms., Inc.*, No. 98-4606, 1999 WL 292667, at *4 (11th Cir. May 11, 1999) (“Unfortunately, we must remind these attorneys that they are officers of the court. As such, they ‘owe duties of complete candor and primary loyalty to the court before which they practice.’ These duties are never subservient to a lawyer’s duty to advocate zealously for his or her client. In this case, the attorneys for both parties have frustrated the system of justice, which depends on their candor and loyalty to the court, because they wanted to avoid an unpleasant truth about their clients’ conduct. ‘In short, they have sold out to the client.’” (citations omitted)).

151. See *infra* Part IV.

152. See *In re Sealed Appellant*, 194 F.3d 666, 674 (5th Cir. 1999).

least one reason why federal courts have not pushed for the federalization of legal ethics or the creation of federal rules of attorney conduct.¹⁵³

IV. STATE COURT ATTITUDES TOWARD ATTORNEY MISCONDUCT

A. *Theoretical Difference Between Federal and State Courts*

If we are rightly concerned that the published opinions from federal courts offer only a partial picture of judicial attitudes, this concern is exacerbated at the state level because opinions of state trial courts are often unpublished. Consequently, we were required to rely largely on state appellate court opinions, removing us one step from the trial court judges who most often are the ones confronting directly the alleged misconduct. In addition, we were dealing with a much larger body of cases and the inevitable problem of generalizing from a wide range of published opinions.

We initially theorized that there would be differences between how federal and state court judges view their responsibility in regulating attorney conduct. State courts traditionally have supervisory responsibility over the legal profession within their states.¹⁵⁴ Because of their position within the state legal system and their role in promulgating rules of professional responsibility, state judges are more closely associated with the state bar and the state attorney conduct apparatus than are their federal counterparts. This formal responsibility over the legal profession would suggest that state judges would exercise greater vigilance over the conduct of attorneys to whom the courts have given permission to practice.¹⁵⁵

Our research, however, has not discerned any major differences, and, in fact, highlights parallel concerns among federal and state court judges. Despite some differences in particular views and actions, in

153. This lack of a push by federal judges to create a comprehensive ethics code may explain why court opinions do not provide a clear or coherent vision of the source of power to regulate attorney conduct. *See generally* Zacharias & Green, *supra* note 2.

154. *See infra* Part IV.B.

155. In *State v. Wade*, 839 A.2d 559, 566 (Vt. 2003), Justice Johnson, in his concurring opinion, expressed that, because of the state supreme court's ultimate responsibility under the state constitution to oversee the ethical conduct of attorneys and the court's role in promulgating the rules of ethics for attorneys, the court must be "'particularly vigilant' when reviewing cases where an attorney's conduct raises a substantial question about whether that conduct conforms to the rules of ethics we have promulgated to protect the public."

general the larger philosophical concerns regarding the judge's role in regulating attorney conduct appear to be very similar, namely ensuring fair, just and efficient proceedings and maintaining the integrity of the judicial system. State courts may be somewhat more likely to refer to upholding the honor of the legal profession. State court opinions reviewed include much of the same, broad philosophical language as the federal court opinions described in the previous section. Moreover, the nature and extent of sanction levied on an offending attorney often depends on the perceived impact of the behavior on the underlying proceedings and the integrity of the judicial system as a whole. It is important to note, however, that regulation of attorney conduct is very case-specific and fact-intensive. As the discussion below suggests, state courts can vary considerably in their actions and views not only across jurisdictions but also, more surprisingly, even within a particular jurisdiction.

B. The Power and Duty to Regulate in State Court Practice

As in the federal court system, it is clear that state courts have the authority to supervise the conduct of lawyers who appear before them. In most states, if not all, the state's supreme court is the ultimate arbiter of attorney regulation and discipline.¹⁵⁶ The source of a state supreme court's authority is often the state constitution itself,¹⁵⁷ or otherwise derived from case law.¹⁵⁸

Although many opinions cite to the state supreme court's exclusive authority to discipline attorneys for misconduct, the power to regulate and oversee attorney conduct has been well-established to be within the auspices of any state court, including state trial courts that are entrusted with the duty to preserve an impartial forum, protect the litigation

156. See Barton, *supra* note 1, at 1185.

157. See, e.g., *Pantori, Inc. v. Stephenson*, 384 So. 2d 1357, 1358-59 (Fla. Dist. Ct. App. 1980) (finding that the state constitution gave the Florida Supreme Court the power to discipline attorneys); *Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 382 (Ohio 1987) (citing the state constitution as a source of authority to regulate attorney conduct); *Wade*, 839 A.2d at 565 (Johnson, J. concurring) (noting that the duty to oversee the ethics of attorneys admitted to practice arose from the Constitution).

158. See, e.g., *In re Discipline of Stanton*, 446 N.W.2d 33, 42 (S.D. 1989) (noting that "[t]he ultimate decision for discipline of members of the State Bar rests with this court."); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001) (stating that the court is responsible for enforcing and upholding the standards of professional responsibility); see also *In re Laprath*, 670 N.W.2d 41, 55 (S.D. 2003) ("The final determination for the appropriate discipline of a member of the State Bar rests firmly with the wisdom of this Court.").

process and maintain courtroom order and decorum.¹⁵⁹ As the Florida Supreme Court observed, “who better than judges, who have daily interaction with attorneys, to keep a proverbial finger on the pulse of attorney conduct?”¹⁶⁰ Court rules are occasionally referenced as the source of such authority.¹⁶¹ More often, however, opinions refer to long tradition and case law establishing an inherent power necessary for the proper and efficient administration of justice.¹⁶² Some courts even cite federal court cases as support for the inherent authority possessed by all courts.¹⁶³ In addition, as noted in Part II, courts have referred to the

159. See, e.g., *Pantori, Inc.*, 384 So. 2d at 1359 (Fla. Dist. Ct. App. 1980) (finding that although the state supreme court has the exclusive power to discipline attorneys, the trial court has the authority to initiate appropriate disciplinary action and, to preserve an impartial forum, could constitutionally remove an attorney from a case given sufficient facts); *Spivey v. Bender*, 601 N.E.2d 56, 58 (Ohio Ct. App. 1991) (“While the Supreme Court exercises exclusive jurisdiction over admission to the practice of law and discipline of persons so admitted, a trial court retains the ‘authority and duty to see to the ethical conduct of attorneys in proceedings before it.’”) (quoting *Hahn v. Boeing Co.*, 621 P.2d 1263, 1266 (Wash. 1980)).

160. *5-H Corp. v. Padavano*, 708 So. 2d 244, 247 n.8 (Fla. 1997); see also *Quinones v. State*, 766 So. 2d 1165, 1172 n.9 (Fla. Dist. Ct. App. 2000).

161. See, e.g., *Lipin v. Bender*, 644 N.E.2d 1300, 1303 (N.Y. 1994) (Without addressing the question as to whether the trial court had inherent authority to punish attorneys for “intolerable behavior that, unredressed, threatens the entire litigation process,” the New York Court of Appeals pointed to the trial court’s authority under the procedural rules of court, in that case the rule governing the subject of protective orders that “confers broad discretion upon a court to fashion appropriate remedies both where abuses are threatened . . . and where they have already occurred.”); *R&R Energies v. Mother Earth Industries Indus., Inc.*, 936 P.2d 1068, 1080 (Utah 1997) (referencing to authority under Rule 11 of the Utah Rules of Civil Procedure).

162. See, e.g., *Avelino-Wright v. Wright*, 742 N.E.2d 578, 582 (Mass. App. Ct. 2001) (citing *New England Novelty Co. v. Sandberg*, 54 N.E.2d 915, 917 (Mass. 1944), the Massachusetts Appeals Court acknowledged, “[t]here is no question that both the power to sanction and the power of contempt are derived from the same source, namely the inherent power of a court to do what is necessary to secure the administration of justice.”); *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 368 (Mich. Ct. App. 2002) (citing a case as far back as 1850, the Michigan Court of Appeals underscored the state’s “long tradition of judicial oversight of the ethical conduct of its court officers”); *Sullivan County Reg’l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 757 (N.H. 1996) (citing case law, the court emphasized that the courts of New Hampshire are the “primary regulators of attorney conduct”); *Couch v. Private Diagnostic Clinic*, 554 S.E.2d 356, 362 (N.C. Ct. App. 2001) (citing several cases, the North Carolina Court of Appeals reaffirmed the trial court’s “inherent authority to do all things that are reasonably necessary for the proper administration of justice,” a power that “is essential to the court’s existence and the orderly and efficient administration of justice” and includes the authority to address attorney conduct, which “is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety”) (citations and internal quotations omitted); see also *Mentor Lagoons, Inc.*, 510 N.E.2d at 382. *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001).

163. For example, in *Couch*, 554 S.E.2d at 363, the North Carolina Court of Appeals rested much of its authority not only on prior state cases but on the seminal Supreme Court case of *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The North Carolina court placed much stock in the

state's code of judicial conduct as further, often additional, support for this authority.¹⁶⁴

This power to regulate and oversee includes the power to sanction.¹⁶⁵ Efficiency and fairness is the dominant theme sounded by a large number of state court opinions. The Supreme Court of North Carolina's approach is illustrative:

There is no question that a Superior Court, as part of its inherent powers to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.¹⁶⁶

Practically speaking, "[t]he basic purpose of the trial court is to afford litigants an impartial forum in which their complaints and defenses may be presented, heard and decided with fairness."¹⁶⁷

The power to sanction, however, is not absolute, and appellate courts have reviewed sanctions (and in some instances overturned them) for abuse of discretion,¹⁶⁸ reasonableness,¹⁶⁹ appropriateness of fit to the

United States Supreme Court's reaffirmation that "all courts have inherent authority to punish lawyers for . . . disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Couch*, 554 S.E.2d at 363 (quoting *Chambers*, 501 U.S. at 44); see also *Sullivan County Reg'l Refuse Disposal Dist.*, 686 A.2d at 757-58 (citing, among others, the Fifth Circuit Court of Appeals' hands-on approach and rejecting the Second Circuit's more restrained approach).

164. See *Evans & Luptak, PLC*, 650 N.W.2d at 368 (noting that the long tradition of judicial oversight of attorney conduct "is consistent with the Michigan Code of Judicial Conduct Canon 3(B)(3)"); *Mentor Lagoons, Inc.*, 510 N.E.2d at 383 ("Indeed we hasten to approve and encourage courts throughout this state in their efforts to halt unprofessional conduct and meet their responsibilities in reporting violations of the Code."); see also *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 402 (Haw. 1996); *Granholt v. Pub. Serv. Comm'n*, 625 N.W.2d 16, 21 (Mich. Ct. App. 2000); *Spivey v. Bender*, 601 N.E.2d 56, 59 (Ohio Ct. App. 1991) *State v. Wade*, 839 A.2d 559, 563 (Vt. 2003) (Johnson, J., concurring).

165. See, e.g., *Avelino-Wright*, 742 N.E.2d at 5 (holding that trial courts can sanction attorneys for disobedience of court order or for conduct which disrespects the authority of the court or obstructs the underlying legal proceedings); *Byrnes v. Baca*, 54 P.3d 996, 1002-03 (N.M. Ct. App. 2002) (affirming the trial judge's authority to hold in contempt or to sanction attorneys); *R&R Energies*, 936 P.2d at 1080-81 (finding that Rule 11 gives trial court authority to impose sanctions against an attorney whose dilatory tactics through entire litigation were improper and oppressive).

166. *Couch*, 554 S.E.2d at 363.

167. *Pantori, Inc. v. Stephenson*, 384 So. 2d 1357, 1359 (Fla. Dist. Ct. App. 1980).

168. See, e.g., *State v. Harris*, 616 A.2d 288, 291 (Del. 1992) (trial judge's action must be "within the realm of sound judicial discretion"); *Quinones v. State*, 766 So. 2d 1165, 1171-72 (Fla. Dist. Ct. App. 2000) (taking all circumstances into consideration, trial court must exercise "sound discretion" and is to be given great deference); *Couch*, 554 S.E.2d at 362 (finding that the abuse of discretion standard is well-established); *Spivey*, 601 N.E.2d at 61 (finding that the trial court abused its discretion by sanctioning the attorney); *R&R Energies*, 936 P.2d at 1080-81 (appellate court will

alleged misconduct,¹⁷⁰ and/or lack of due process.¹⁷¹ As with federal courts, while the decision to sanction is given wide deference, the severity of the sanction often receives more rigorous review. The analysis is extremely fact-intensive and conducted on a case-by-case basis, but overall, appellate courts generally defer to the judgments of their trial court counterparts.¹⁷² Nevertheless, some jurisdictions grant more deference to trial courts than do others.¹⁷³

Possessing the authority to regulate may be one thing; however, embracing the duty to regulate and exercising that authority may be yet another. Once again, reviewing court decisions may provide some insight into the attitudes and perceptions of judges with respect to the perceived duty to regulate. As one court stated, the inherent authority courts have “encompasses not only the ‘power but also the duty to

affirm trial court’s sanctions against an attorney absent abuse of discretion); *Gum v. Dudley*, 505 S.E.2d 391, 404 (W. Va. 1997) (holding sanctions for violations of general duty of candor are reviewed for an abuse of discretion); *see also Covington v. Smith*, 582 S.E.2d 756, 762-63 (W. Va. 2003).

169. *See, e.g., Couch*, 554 S.E.2d at 363 (noting that a trial court has “authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it” (emphasis added)).

170. *See, e.g., Avelino-Wright*, 742 N.E.2d at 583 (noting that when imposing monetary sanctions, the trial court may impose sanctions in whatever amount it “considers reasonably related to any squandering of judicial resources or needless legal expenses incurred”); *Byrnes v. Baca*, 54 P.3d 996, 1007-08 (N.M. Ct. App. 2002) (holding that sanctions should fit the misconduct and whatever action the court takes should be supported by findings of fact); *R&R Energies*, 936 P.2d at 1080-81 (finding that the sanction imposed by the trial court fit the requirements of this particular case).

171. *See, e.g., Avelino-Wright*, 742 N.E.2d at 582 (finding that the trial court must provide sufficient hearing on the matter for attorney to respond to the charges levied against her); *Clark v. Clark*, 716 N.E.2d 144, 154 (Mass. App. Ct. 1999) (court must provide an attorney with fair notice, the opportunity to be heard, and complete basis for particular sanction given); *Byrnes*, 54 P.3d at 1005-06 (lack of sufficient notice given prior to suspending attorney).

172. As one court suggested, the trial judge is in the best position to observe the jurors, witnesses and attorneys in order to assess attorney conduct and its impact. *See Quinones*, 766 So. 2d at 1172 n.9.

173. *See Quinones*, 766 So. 2d at 1172 n.9, *cf. Couch*, 554 S.E.2d at 367 (In a matter where an attorney lied to the court about her previous disciplinary history, revocation of the attorney’s pro hac vice status in all North Carolina cases, suspension of that status for one year, and the court’s decision to report attorney to state bars in other jurisdictions was upheld.); *see also Quinones* 766 So. 2d at 1171-72 (court’s order of mistrial affirmed where defense counsel’s conduct undermined fairness of trial). *Compare Pantori, Inc. v. Stephenson*, 384 So. 2d 1357, 1359 (Fla. Dist. Ct. App. 1980) (holding that where respondent’s attorneys formerly represented the petitioner in a related subject matter, trial court could disqualify the attorney from case), *with Spivey*, 601 N.E.2d at 58-59 (although trial court has broad discretion in determining whether to disqualify counsel, it must exercise that discretion wisely and only if attorney misconduct taints proceedings, even where attorneys’ former representation of opposing party may result in appearance of impropriety), *and Harris*, 616 A.2d at 292-93 (trial court abused discretion when it dismissed indictment on the basis of prosecutor’s failure to prosecute and comply with court’s scheduling orders).

discipline attorneys, who are officers of the court, for unprofessional conduct.”¹⁷⁴ Other courts sometimes refer to the duty as an ethical one under the appropriate canons.¹⁷⁵ Although most courts may agree that a duty does in fact exist to some degree, some courts appear to be more reluctant than others to assume an active duty.¹⁷⁶

The federal court debate discussed in Part III.C on whether to take a hands-off or more active approach in regulating attorney conduct has percolated over to a few state courts. As we had theorized, two of the courts that have most directly addressed that debate have rejected the Second Circuit’s more restrained approach that leaves the enforcement of ethics codes to the bar’s existing disciplinary machinery, and instead favor the Fifth Circuit’s more proactive stance.¹⁷⁷ In fact, the New Hampshire Supreme Court, in accepting the role as general overseer of lawyer ethics, stated in no uncertain terms:

174. *Couch*, 554 S.E.2d at 362 (quoting *In re Hunoval*, 247 S.E.2d 230, 233 (N.C. 1977)).

175. See *In re Eicher*, 661 N.W.2d 354, 370 (S.D. 2003) (finding that where the trial judge receives information indicating substantial likelihood that a lawyer has committed a violation of the code of professional responsibility, “simple communication with the lawyer satisfies the judge’s ethical duty”); *Covington v. Smith*, 582 S.E.2d 756, 772 (W. Va. 2003) (holding that the court has a duty under judicial canon 3D(2) to refer matters of attorney misconduct, here neglect of case, to the Office of Disciplinary Counsel); cf. *In re Laprath*, 670 N.W.2d 41, 63 (S.D. 2003) (“Among the administrative responsibilities imposed on a judge in Canon 3, therefore, is that of taking or initiating appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. Thus, a judge exposes himself or herself to the disciplinary action for failure to report the misconduct of other judges or attorneys to attorney disciplinary bodies and judicial conduct commissions.”).

176. Compare *R&R Energies*, 936 P.2d at 1081 (Zimmerman, C.J., concurring) (“The only way that the public’s misperception of the vast majority of honest, conscientious, and ethical lawyers will ever be corrected is if individual judges and lawyers are willing to overcome a natural resistance to being perceived as troublemakers and vigorously fulfill their sworn duty to refer to disciplinary counsel lawyers who evidence patterns of improper and oppressive litigation tactics.”), and *Sullivan County Reg’l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 757 (N.H. 1996) (“It would be inconsistent with this court’s supervisory role to relegate the Rules of Professional Conduct to the status of guidelines, to be enforced only when the trial process may be sullied.”), with *Fravel v. Haughey*, 727 So. 2d 1033, 1036-37 (Fla. Dist. Ct. App. 1999) (court refuses to undertake a direct, independent policing role), *State v. Wade*, 839 A.2d 559, 561-62 (Vt. 2003) (finding that the trial court abused its discretion by dismissing the defendant’s conviction where discovery violations by the prosecutor did not prejudice the defendant), and *Spivey*, 601 N.E.2d at 58-59 (“[T]he law requires the [court’s] discretion to be exercised wisely The issue arising from the application of [lawyers’ ethical] . . . standards cannot be resolved in a vacuum, and the ethical rules should not be blindly applied without consideration of relative hardships.”); see also *Wade*, 839 A.2d at 565 (Vt. 2003) (Johnson, J. concurring) (recognizing that it is difficult for trial judges to make complaints against lawyers with whom they must work on a daily basis).

177. See *Sullivan County Reg’l Refuse Disposal Dist.*, 686 A.2d at 757; *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001).

[The Second Circuit's] approach has been rejected by a majority of the courts that have considered the issue, and we reject it today. . . . The courts of this State are the primary regulators of attorney conduct. . . . It would be inconsistent with this court's supervisory role to relegate the Rules of Professional Conduct to the status of guidelines, to be enforced only when the trial process may be sullied.¹⁷⁸

Such language reinforces the expectation that state courts would tend to be more vigilant and active regulators than their federal counterparts. As with the federal courts, the practice does not seem to follow the rhetoric. Despite its claim that the majority of courts have rejected the more restrained approach, the New Hampshire court cites but a few supporting cases and, more importantly, only one state case. Moreover, the language in the opinions of other state cases indicate a less-than-enthusiastic attitude towards judicial regulation of attorney conduct, especially if it requires vacating or reversing verdicts upon a determination that the attorney for the prevailing party had violated rules of professional responsibility.¹⁷⁹ Overall, taking a broader view of all the cases leads to the conclusion that state courts, like their federal counterparts, generally take a more hybrid approach towards regulating attorney conduct, primarily addressing egregious conduct that threatens the entire litigation process and undermines the judicial system.

How appellate courts treat a trial court's failure to act upon allegations of serious misconduct also provides some insight into how judges in a particular jurisdiction view judicial regulation of attorney conduct. For example, appellate courts on occasion have used strong language to admonish a trial court judge for not taking action when confronted with egregious misbehavior.¹⁸⁰ In other cases, despite serious

178. *Sullivan County Reg'l Refuse Disposal Dist.*, 686 A.2d at 757 (citations omitted).

179. *See, e.g., Fravel*, 727 So. 2d at 1037 (finding that where underlying proceedings were not tainted by misconduct, taking an active, "policing role would go well beyond the requirements of Canon 3D(2) of the Code of Judicial Conduct . . . and create a demand for significant increases in judicial resources").

180. *See, e.g., Badalamenti v. William Beaumont Hospital-Troy*, 602 N.W.2d 854, 861-62 (Mich. Ct. App. 1999) ("Unfortunately, the record makes it abundantly clear that although the trial court recognized the impropriety of the conduct of plaintiff's lead trial counsel, the court was either unwilling or unable to control counsel's conduct. . . . Particularly disturbing to this Court is that in response to defendants' postjudgment motion for a new trial based on the misconduct of plaintiff's lead trial counsel, the trial court acknowledged that it 'had great problems with the conduct of counsel during the trial' and could not 'condone many things that happened during this trial,' . . . but the trial court then declined to even rule on the claim of misconduct. . . . The trial court has a duty to assure that the parties before it receive a fair trial. The court in this case did not fulfill this duty and left it to this Court to grant defendants the relief to which they are entitled."(citations omitted)); *see also State v. Rivera*, 514 S.E.2d 720, 723 (N.C. 1999) (regarding disparaging comments made by

allegations of attorney misconduct, appellate courts have concluded that the trial court's inaction and failure to report the matter to the appropriate state bar was not subject to appellate review.¹⁸¹ As with federal circuit courts, state appellate courts have felt obligated to take action, for example by initiating a referral to the state bar disciplinary authority,¹⁸² remanding the matter to the trial court to determine the appropriate sanction,¹⁸³ or even setting aside a large jury verdict.¹⁸⁴ Indeed, at least one appellate judge has suggested that it may be more appropriate, or at least easier, for an appellate court than a trial court to refer an attorney to the appropriate authorities.¹⁸⁵

C. *Rationale for State Court Actions Regulating Attorney Conduct*

Many of the rationales espoused by state courts when regulating attorney conduct are the same as those emphasized by their federal court counterparts. Often, state courts provide multiple reasons to support their decision to sanction or report an attorney. First and foremost, courts are primarily concerned with providing a fair, efficient, and impartial forum for disputes. Courts abhor conduct that interferes with and taints the

prosecutor against opposing counsel, state supreme court concluded that "the trial court's comments were not enough" and admonished trial courts to take seriously their duty to make sure that the mandates of the rules are strictly complied with in all cases and to impose appropriate sanctions if they are not); *Gum v. Dudley*, 505 S.E.2d 391, 403 (W. Va. 1997) (In addressing the trial court's failure to consider an attorney's general duty of candor, the court states, "[w]henver a duty is imposed it must be accompanied by an appropriate remedy or sanction for a violation of the duty. Not to provide a remedy or sanction renders the duty meaningless.").

181. See, e.g., *Theriault v. J.S. & G. Asphalt, Inc.*, 617 So. 2d 437, 438 (Fla. Dist. Ct. App. 1993) ("[W]e do not believe the trial court's failure to report this matter to the Florida Bar is subject to appellate review.").

182. See *Quinones v. State*, 766 So. 2d 1165, 1172 (Fla. Dist. Ct. App. 2000); *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 402 (Haw. 1996); *R&R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1081-82 (Utah 1997) (Zimmerman, C.J. concurring); *Wade*, 839 A.2d at 562-66 (Johnson, J. concurring); *Covington v. Smith*, 582 S.E.2d 756, 772 (W. Va. 2003); *Gum*, 505 S.E.2d at 405.

183. See *Gum*, 505 S.E.2d at 405 (remanding the matter of an attorney's conduct to the trial court for appropriate consideration after finding that the trial court failed to address the issue of the attorney's general duty of candor to the court regarding a settlement agreement).

184. See *Badalamenti*, 602 N.W.2d at 856 (\$15 million verdict set aside).

185. See *Wade*, 839 A.2d at 565 (Johnson, J., concurring) ("Indeed, we recognize that it is difficult for trial judges to make complaints to the Professional Responsibility Program against lawyers with whom they have to work on a day to day basis. That neither defense counsel nor the trial judge here chose to make the referral does not mean that this Court should also decline to do so. We are more removed from the working relationship between district court judges and the attorneys practicing before them. I am, therefore, referring this matter to the Professional Responsibility Program for further investigation and appropriate action.").

underlying proceedings.¹⁸⁶ Related to that concern, they want to maintain civility, courtroom order and decorum, and protect the interests of all litigants.¹⁸⁷ Towards those ends, courts will sanction or report attorneys for, among other things, ignoring the court's evidentiary rulings, making improper and highly prejudicial remarks during trial, behaving uncivilly, engaging in conduct intended to divert the jurors' attention from the merits of the case, and abusing the discovery process in a way that threatens the fairness of the entire litigation process.

Like the federal courts, state courts are also very concerned with conduct that undermines or erodes the integrity of the judicial system and the public's confidence in the legal system,¹⁸⁸ wastes judicial resources,¹⁸⁹ and dishonors the legal profession or otherwise adversely impacts the public's perception of the bar,¹⁹⁰ which are all very often

186. See, e.g., *Johnnides v. Amoco Oil Co.*, 778 So. 2d 443, 443 (Fla. Dist. Ct. App. 2001); *Quinones*, 766 So. 2d at 1171-72; *Badalamenti*, 602 N.W.2d at 861-62; *Lipin v. Bender*, 644 N.E.2d 1300, 1303 (N.Y. 1994); *Clinard v. Blackwood*, 46 S.W.3d 177, 187-88 (Tenn. 2001); *Wasielewski v. K Mart Corp.*, 891 S.W.2d 916, 918 (Tenn. Ct. App. 1994); *Lemons v. Commonwealth*, 420 S.E.2d 525, 528 (Va. Ct. App. 1992) (Benton, J., dissenting); see also *Fravel v. Haughey*, 727 So. 2d 1033, 1037 (Fla. Dist. Ct. App. 1999) (sanctions vacated where there was no evidence that misconduct tainted proceedings); *Bell v. Seabury*, 622 N.W.2d 347, 352 (Mich. Ct. App. 2000) (reversing the trial court's sanctions after finding that "there was no nexus between the misconduct" and the tainted proceedings); *infra* note 207.

187. See, e.g., *5-H Corp. v. Padovano*, 708 So. 2d 244, 246-47 (Fla. 1997); *Byrnes v. Baca*, 54 P.3d 996, 1007-08 (N.M. Ct. App. 2002); *Covington*, 582 S.E.2d at 762.

188. See *Johnson v. Johnson*, 948 S.W.2d 835, 840 (Tex. Ct. App. 1997) ("Confidence in our legal system is undermined when attorneys are allowed to assail a judge personally rather than addressing the legal issues at hand."); see, e.g., *Quinones*, 766 So. 2d 1165 at 1167 (sanctioning the attorney for disregarding court orders and rulings; making improper and prejudicial comments during proceedings; making derogatory and disparaging comments about judge and opposing counsel and witnesses; failing to disclose evidence pursuant to discovery rules); *Avelino-Wright v. Wright*, 742 N.E.2d 578, 581 (Mass. App. Ct. 2001) (noting that the attorney was "making a mockery" of the legal proceeding by directing client not to cooperate with GAL; challenging integrity of judges and appointed experts; exhibiting a lack of professionalism in advocacy; filing "vexatious and harassing motions"); see also *In re Discipline of Stanton*, 446 N.W.2d 33, 42 (S.D. 1989); *Clinard*, 46 S.W.3d at 182, 187.

189. See, e.g., *Avelino-Wright*, 742 N.E.2d at 582 (noting that any monetary award given in a case should correspond to the resources wasted as a result of the misconduct); *Clark v. Clark*, 716 N.E.2d 144, 151 (Mass. App. Ct. 1999) (impeding the efficient administration of justice by walking out of court on final day of trial); *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 401-02 (Haw. 1996) (failing to disclose to the court the material fact of settlement wastes time and limited resources of court and denies availability of courts to deserving litigants); *R&R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1081 (Utah 1997) (engaging in "dilatatory tactics" and filing pleadings that were not relevant or productive, with the sole purpose of harassing or causing unnecessary delay or needless increase in cost of litigation).

190. See *5-H Corp.*, 708 So. 2d at 246-47 (finding lack of professionalism, including making unfounded accusations of bias against judges and inappropriately attacking opposing counsel's arguments using expletives); *Attorney Grievance Comm'n v. Briscoe*, 745 A.2d 1037, 1043-44

inexorably linked to unprofessional conduct that threatens the fairness of the underlying proceeding. Occasionally, although less predominantly, state courts also refer to their role as overseer of lawyer ethics.¹⁹¹

Although the importance of controlling the proceedings before them and maintaining the integrity and efficiency of the legal system appear to provide the primary justifications for responding to attorney misconduct, state courts appear to cite to the Code of Judicial Conduct and compliance with the judicial canons more often than the federal courts do, and usually as a means to provide additional support to justify their action. Rarely is it the only justification for addressing misconduct. As discussed in Part II, whether the judicial code represents an ethical duty¹⁹² to address attorney misconduct or merely encourages action as

(Md. 2000) (inter alia, unlawfully representing a client while decertified; failing to appear in court; failing to produce records; commingling client funds); *In re Lapreth*, 670 N.W.2d 41, 64 (S.D. 2003) (providing incompetent legal services); *In re Stanton*, 446 N.W.2d at 36 (noting eight cases of misconduct, including, among others, ignorance of the law, lying to the court, and betraying client confidences); *Clinard*, 46 S.W.3d at 187; *R&R Energies*, 936 P.2d at 1081. In *State v. Rivera*, 514 S.E.2d 720, 723 (N.C. 1999), the Court lamented that,

We have viewed with concern the apparent decline in civility in our trial courts. This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to insure that the mandates of Rule 12 [of the General Rules of Practice for the Superior and District Courts] are strictly complied with in all cases and to impose appropriate sanctions if they are not.

191. See, e.g., *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 369 (Mich. Ct. App. 2002); *Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 757 (N.H. 1996); *State v. Wade*, 839 A.2d 559, 565-66 (Vt. 2003) (Johnson, J., concurring).

192. See, e.g., *Quinones v. State*, 766 So. 2d 1165, 1172 (Fla. Dist. Ct. App. 2000) (noting that Canon D of the Code of Judicial Conduct requires a judge to take an appropriate action when aware of attorney misconduct); *Couch v. Private Diagnostic Clinic*, 554 S.E.2d 356, 362 (N.C. Ct. App. 2001) (stating that Canon 3(B)(3) of the North Carolina Code of Judicial Conduct imposes a duty on the court to discipline attorneys for unprofessional conduct); *In re Lapreth*, 670 N.W.2d 41, 63-64 (S.D. 2003) (noting that Canon 3 of the Code of Judicial Conduct requires that judges take or initiate appropriate disciplinary measures); *Covington v. Smith*, 582 S.E.2d 756, 772 (W. Va. 2003) (finding that it was the court's obligation to refer the attorney misconduct to the Office of Disciplinary Counsel); see also *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 402 (Haw. 1996) (explaining that Hawaii's Supreme Court was "compelled to refer the record of this case to the [Office of Disciplinary Counsel] for its review and appropriate action" as a result of attorney's probable violation of rules of professional conduct); *Johnson v. Johnson*, 948 S.W.2d 835, 841 (Tex. Ct. App. 1997) (noting that the court is bound by Canon 3D(2) to inform state bar of attorney misconduct); *Gonzalez v. State*, 768 S.W.2d 471, 473 (Tex. Ct. App. 1989) (stating that the Code of Judicial Conduct requires judge to initiate disciplinary action in the case of prosecutorial misconduct).

good judicial practice¹⁹³ remains a question. Citation to the Code of Judicial Conduct as a justification for action is sometimes noncommittal.¹⁹⁴ Nevertheless, state courts occasionally do cite to Canon 3, particularly to support a referral to the state bar disciplinary apparatus.¹⁹⁵

D. Imposing Sanctions to Address Attorney Misconduct

The sanctions imposed by state courts on attorneys range widely and, as in the federal courts, may include fines, assessment of fees and costs, disqualification, referral to state bar, and public reprimand.¹⁹⁶ Often, more than one of these sanctions will apply.¹⁹⁷ As with federal

193. See, e.g., *Bell v. Seabury*, 622 N.W.2d 347, 352 (Mich. Ct. App. 2000) (noting that under Michigan Code of Judicial Conduct a judge observes attorney misconduct he *may* pursue disciplinary action); *Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 382 (Ohio 1987) (encouraging courts to stop unprofessional conduct by reporting violations as indicated under Canon 3B(3) of the Code of Judicial Conduct); see also *State v. Wade*, 839 A.2d 559, at 565-66 (Vt. 2003) (Johnson, J. concurrence).

194. See, e.g., *5-H Corp.*, 708 So. 2d at 246-47 (Citing Canon 3D(2) as additional support for the decision to report an attorney to the state bar, the court refers to reporting to the Florida Bar any professional misconduct of a fellow attorney as an *obligation*; however, the court later goes on to *actively encourage* such reporting.); see also *R&R Energies*, 936 P.2d at 1081-82 (Zimmerman, C.J., concurring).

195. Note that all the matters in footnotes 191-93 *supra*, are cases in which the courts discussed referring attorney misconduct to the appropriate state bar disciplinary authorities. In fact, in one case, in addition to levying sanctions against the attorney within the state of North Carolina, the court reported the attorney to the bars of two other states where she practiced. See *Couch*, 544 S.E.2d at 367. For further discussion regarding judicial ethical obligations, refer to text accompanying footnotes 36-37, *supra* Part II.C. on "Judicial Ethics Obligation to Report to the Bar."

196. See, e.g., *Couch*, 544 S.E.2d at 359-60 (Depending on the circumstances, "[s]anctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment.") (citing *In re Robinson*, 247 S.E.2d 241, 244 (N.C. Ct. App. 1978)); *Gum v. Dudley*, 505 S.E.2d 391, 404 (W. Va. 1997) (Sanctions for violating general duty of candor include but are not limited to: "(1) ordering disclosure of information not disclosed, (2) granting a continuance, (3) holding counsel in contempt, (4) precluding a party from calling a witness, offering evidence, or raising a defense, (5) dismissal of a case, (6) declaring a mistrial, (7) imposing attorney's fees and litigation costs, or (8) granting a new trial.").

197. See *Couch*, 544 S.E.2d at 360 (Because attorney in initial proceedings improperly characterized veracity of opposing counsel and defense witnesses during closing argument and then during hearings on sanctions for misconduct lied to court and failed to disclose previous disciplinary action, sanctions included, among other things, revocation of current *pro hac vice* status in North Carolina, suspension of practicing in the state for one year, attendance at continuing legal education classes, attachment of copy of court's order to any motion to appear *pro hac vice* in North Carolina for the next five years, referrals by copy of court's order to New York and Florida bars where she is

judges, state court judges also have a wide range of informal sanctions at their disposal. For example, they may use their considerable drafting powers to publicize the misconduct and send a message¹⁹⁸ or, more minimally, rely simply on communicating their concerns informally with the lawyer.¹⁹⁹

As in the federal courts, particular sanctions given in state courts are likely due to a number of factors, including the specific circumstances of each case, the type of misconduct being addressed, the judge's own views on whether and how to address attorney behavior, the history of the litigation and the particular stage in which the alleged misconduct occurred, and the reputation of the attorney.²⁰⁰

Courts apply sanctions with a variety of purposes in mind. For example, in some instances, sanctions may be designed simply to punish, while in others they are also used "to compensate the aggrieved litigant for the actual loss incurred by the misconduct of the offending party."²⁰¹ Courts may use sanctions as a means of deterrence²⁰² or to protect the public from incompetent and unprofessional attorneys.²⁰³

Regardless of how active a court wants to be in regulating attorney misconduct, courts generally appear to perceive that the most appropriate remedy is one that focuses on the culpable attorney and not

licensed to practice, imposition of reasonable attorney fees, censure, and requirement that she report the court's order of sanctions as an order of discipline when required to do so.).

198. See *id.* at 671 (publicizing misconduct can have a serious, intended effect on an attorney's reputation); see also *Att'y Grievance Comm'n v. Briscoe*, 745 A.2d 1037, 1044 (Md. 2000) (sanctions may be used to "demonstrate[] to members of the legal profession the type of conduct that will not be tolerated."); *5-H Corp.*, 708 So. 2d at 246 n.7 ("It is our hope that by publishing this opinion and thereby making public the offending and demeaning exchanges between these particular attorneys, that the entire bar will benefit.") (quoting *Fla. Bar v. Martocci*, 699 So. 2d 1357, 1360 (Fla. 1997)).

199. See, e.g., *In re Eicher*, 661 N.W. 2d 354, 370 (S.D. 2003) (noting that in circumstances where the second clause of Canon 3D(2) is not invoked to require reporting, "[s]imple communication with the lawyer satisfies the judge's ethical duty" to take appropriate action).

200. See, e.g., *Gum*, 505 S.E.2d at 404 ("Our review of the cases involving sanctions for violating the general duty of candor, illustrate to us that there is no one sanction that fits all situations. The facts of each case must be considered to establish an appropriate sanction. We recognize that a violation . . . may occur at any stage of the litigation process. As a result, the particular litigation stage at which the violation occurred will play a strong role in determining an appropriate sanction.").

201. *Avelino-Wright v. Wright*, 742 N.E.2d 578, 582 (Mass. App. Ct. 2001).

202. See, e.g., *Briscoe*, 745 A.2d at 1044 (By imposing the ultimate sanction of disbarment, "the public interest is served when sanctions designed to effect general and specific deterrence are imposed on an attorney who violates the disciplinary rules.").

203. See, e.g., *In re Laprath*, 670 N.W.2d 41, 66 (S.D. 2003).

on the parties to the underlying litigation.²⁰⁴ They believe that the litigants should neither unduly benefit from²⁰⁵ nor have to pay for an attorney's misbehavior.²⁰⁶ This is particularly true where the misconduct has no adverse impact on the underlying proceedings.²⁰⁷ Where the offensive conduct in fact tainted the litigation and undermined the fairness of the trial, however, courts are willing to levy sanctions that go beyond disciplining the attorney and impact the outcome of the case, including vacating a verdict or even dismissing a criminal conviction.²⁰⁸

204. *See, e.g., State v. Harris*, 616 A.2d 288, 291-92 (Del. 1992) (citing direction from U.S. Supreme Court precedent, the Delaware Supreme Court found dismissal of criminal action an inappropriate remedy for prosecutorial misconduct in the absence of any prejudice to the defendant; instead, courts should "impose a sanction, such as reprimand, disciplinary referral, or contempt, which focuses on the culpable individual."); *Suarez v. State*, 481 So. 2d 1201, 1206-07 (Fla. 1986) (finding that disciplinary sanction against prosecutor rather than suppression of defendant's voluntary statement was appropriate remedy for prosecutor's unethical conduct).

205. *See, e.g., Harris*, 616 A.2d at 291-92 (finding that the sanction given should target the offending attorney, in that case a prosecutor, "rather than granting a windfall to the unprejudiced defendant" (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988))).

206. *See, e.g., Fravel v. Haughey*, 727 So. 2d 1033, 1036 (Fla. Dist. Ct. App. 1999) (finding that where the process was not tainted by improper prejudicial remarks of plaintiff's attorney, the court is unwilling to punish litigants for the unethical comments of their lawyers; instead, the more appropriate remedy should be referral of the attorney to the Bar); *Clark v. Clark*, 716 N.E.2d 144, 152 (Mass. App. Ct. 1999) (reminding trial judges that they should "avoid punishing a litigant for his attorney's errors, when less drastic measures are available"); *Covington v. Smith*, 582 S.E.2d 756, 773-74 (W. Va. 2003) (Starcher, C.J., concurring) (encouraging courts to hesitate to punish innocent litigants for the "positive misconduct" of their attorneys).

207. *See Fravel*, 727 So. 2d at 1036; *Covington*, 582 S.E.2d at 773-74; *see also Bell v. Seabury*, 622 N.W.2d 347, 351-52 (Mich. Ct. App. 2000) (reversing trial court's vacating arbitral award as a means to sanction the attorney who initially served as the mediator for both parties and then acted as one of the party's counsel during arbitration after mediation failed, appellate court underscored the lack of taint on proceedings); *Spivey v. Bender*, 601 N.E.2d 56, 59 (Ohio Ct. App. 1991) (In an apparent conflict of interest case, despite court's broad discretion in determining whether to disqualify counsel, "[d]isqualification . . . 'should ordinarily be granted only when a violation of the Canons of Professional Responsibility poses a significant risk of trial taint.'" (quoting *Glueck v. Jonathan Logan, Inc.* 653 F.2d 756, 748 (1981))); *State v. Wade*, 839 A.2d 559, 559 (Vt. 2003) (finding that the trial court's dismissal of a conviction as a means to sanction the state's attorney's office for an ongoing pattern of discovery abuse, was an abuse of discretion because the misconduct did not prejudice defendant). This seems to be especially true in criminal matters in which society, and in particular communities, have an important stake and whose safety and interests in ensuring that the guilty are punished should not be jeopardized because of prosecutorial misconduct. *See, e.g., Harris*, 616 A.2d at 292 (noting that the trial judge is responsible for safeguarding the public interest in the administration of criminal justice); *Gonzalez v. State*, 768 S.W.2d 471, 473 (Tex. Ct. App. 1989) (recognizing the public's concern that the guilty are punished).

208. *See, e.g., Quinones v. State*, 766 So. 2d 1165, 1167, 1171-72 (Fla. Dist. Ct. App. 2000) (granting of prosecutor's motion for mistrial upheld where defense counsel's "unethical" and "contumacious" conduct undermined the fairness of the trial making it impossible for either the state or the defendant to receive a fair trial); *Badalamenti v. William Beaumont Hospital-Troy*, 602

These broader sanctions demonstrate that, as in the federal realm, state courts are very concerned with running an efficient, fair, and impartial courtroom and avoiding any taint on the proceedings that renders the outcome suspect and unreliable.

Because of the varied and fact-intensive nature of these types of cases, it is very difficult to discern trends among state courts associating sanctions with particular types of conduct. It is clear, however, that when the court feels that an attorney is purposely squandering judicial resources, disrespecting the dignity of the court and proceedings, or employing tactics designed to delay the proceedings and compel the opposing party to incur needless expense, sanctions will likely include fines or attorneys' fees.²⁰⁹

In addition, as discussed above, where the misconduct taints the underlying proceedings, particularly in situations where an attorney prejudices a jury against one of the parties by, for example, introducing evidence in violation of court orders, making disparaging comments about the opposing side or their arguments or failing to disclose requested material information, courts generally will not hesitate to render sanctions that impact the course of the underlying proceedings.²¹⁰ These types of sanctions may include vacating criminal convictions, granting motions for mistrial, or setting aside jury verdicts.

N.W.2d 854, 856 (Mich. Ct. App. 1999) (finding that it was appropriate to set aside a verdict of \$15 million where plaintiff's counsel's misconduct denied defendant fair trial); *Wasielewski v. K Mart Corp.*, 891 S.W.2d 916, 917 (Tenn. Ct. App. 1994) (setting aside a verdict of \$1.5 million where attorney's conduct of raising evidence in contradiction to judge's rulings in motions in limine unfairly prejudiced jury against the defendant); *Lemons v. Commonwealth*, 420 S.E.2d 525, 526 (Va. Ct. App. 1992) (vacating and remanding a murder conviction as a result of prosecutor's failure to disclose important information as required).

209. See, e.g., *Avelino-Wright v. Wright*, 742 N.E.2d 578, 580-81 (Mass. App. Ct. 2001) (finding that reasonable attorney fees may be imposed, after sufficient due process, against attorney who directed her client not cooperate with GAL, challenged the integrity of the judge and appointed court experts, filed 88 frivolous motions with intent of harass opposing party); *Clark*, 716 N.E.2d at 150-51 (stating that reasonable attorney fees may be imposed where attorney made disparaging remarks towards opposing counsel and court and left trial on final day without permission); *R&R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1080-81 (Utah 1997) (finding that \$3500 in attorney fees was a reasonable sanction where attorney filed numerous pleadings with sole purpose of harassing or causing unnecessary delay or needless increase in litigation costs); see also *Byrnes v. Baca*, 54 P.3d 996, 1009 (N.M. Ct. App. 2002) (upholding trial judge's sanction of \$1000 fine against attorney where attorney disobeyed direct orders from the judge, incessantly disrupted proceedings, badgered opposing counsel and witnesses, and insulted judge's case management practices).

210. See related text and accompanying note 209.

Suspension²¹¹ and disbarment²¹² through the state disciplinary apparatus are reserved, generally, for the most egregious conduct, where the attorney demonstrates ignorance of the law or lacks professional competence.

State courts appear more inclined than their federal counterparts to refer misconduct to the state bar when an attorney's conduct appears to violate the rules of professional responsibility and places suspicion on an attorney's ability to practice law ethically. Although acknowledged as a practice judges resist,²¹³ state judges do occasionally refer attorney misconduct to the state bar. Trial judges may report misconduct by, for example, requesting a court clerk or opposing counsel to deliver a copy of the court's order or opinion to the state bar.²¹⁴ Appellate court judges may utilize their considerable drafting powers to articulate in very strong language why they believe the conduct was wrongful as part of the referral.²¹⁵ This allows the court to establish norms of conduct but leave the specifics of the sanction to the formal disciplinary apparatus.

211. *See, e.g., Couch v. Private Diagnostic Clinic*, 544 S.E.2d 356, 365 (N.C. Ct. App. 2001) (noting that in light of other possible sanctions available, the level of the attorney's misconduct required suspension); *see also Fla. Bar v. Kravitz*, 694 So. 2d 725, 726, 728-29 (Fla. 1997) (30-day suspension and requirement to attend continuing legal education courses for attorney who presented false evidence to court).

212. *See, e.g., Att'y Grievance Comm'n v. Briscoe*, 745 A.2d 1037, 1039, 1041, 1043, 1045 (Md. 2000) (holding disbarment warranted where attorney represented client in criminal matter while decertified, commingled client funds, and failed to produce requested records); *In re Laprath*, 670 N.W.2d 41, 54-55, 66 (S.D. 2003) (finding disbarment warranted where attorney lacks professional competency, is ignorant of law and professional rules, and is unable to comprehend the rules regarding when she is entitled to other people's money for fees); *In re Stanton*, 446 N.W.2d 33, 36-43 (S.D. 1989) (stating that disbarment is warranted where attorney demonstrates ignorance of law, employs unconscionable delay tactics, lies to court, and betrays client confidences).

213. *See R&R Energies*, 936 P.2d at 1081 (Utah 1997) (Zimmerman, C.J., concurring) (characterizing reluctance as "natural resistance to being perceived as troublemakers"); *State v. Wade*, 839 A.2d 559, 565 (Vt. 2003) (Johnson, J. concurring) (noting reluctance on the part of judges to report lawyers with whom they must work on a daily basis); *see also Fravel v. Haughey*, 727 So. 2d 1033, 1036 (Fla. Dist. Ct. App. 1999) (finding it "troubling that trial judges are reluctant to curb the abuse perpetrated by trial counsel in the area of improper comments made during closing arguments").

214. *See, e.g., Kravitz*, 694 So. 2d at 726 (noting that the trial judge instructed opposing counsel to deliver copy of contempt order to state bar); *Couch*, 554 S.E.2d at 360 (noting that the judge reported *pro hac vice* attorney to both state bars in which she was licensed to practice).

215. *See Quinones v. State*, 766 So. 2d 1165, 1172 n.8 (Fla. Dist. Ct. App. 2000); *R&R Energies*, 936 P.2d at 1081 (Zimmerman, C.J., concurring); *Wade*, 839 A.2d at 565-66 (Johnson, J., concurring); *Covington v. Smith*, 582 S.E.2d 756, 772 (W. Va. 2003); *Gum v. Dudley*, 505 S.E.2d 391, 405 (W. Va. 1997); *see also* *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 402 (Haw. 1996); *People v. Green*, 274 N.W.2d 448, 455 (Mich. 1979) (William, J., concurring and dissenting); *State v. Hohman*, 420 A.2d 852, 855 (Vt. 1980), *overruled by Jones v. Shea*, 532 A.2d 571 (Vt. 1987).

As discussed above, sanctions are subject to appellate review, usually pursuant to a relatively deferential standard such as “abuse of discretion.”²¹⁶ As noted above, while the decision to sanction is often upheld, the nature of the sanction appears to undergo more scrutiny. Courts must provide sufficient due process in determining the appropriate sanction, requiring at a minimum, fair notice, sufficient opportunity to be heard, and basis for the particular sanction levied.²¹⁷ Moreover, very importantly, the particular sanction imposed must be narrowly tailored to the specific misconduct at issue.²¹⁸ For example, although it is generally accepted that courts can assess a portion of attorneys’ fees as a sanction for misbehavior, the amount should be tailored to the judicial resources wasted or unnecessarily expended as a result of the misconduct.²¹⁹ This is true for other types of sanctions as well.²²⁰

Occasionally we came across cases illustrating the courts’ reluctance to impose traditional sanctions on an attorney for misconduct.²²¹ Despite strong dicta by which these courts criticize an attorney’s conduct, some cases fail to award sanctions even when actions of the attorney are clearly unethical²²² and unprofessional.²²³ A

216. See *supra* text accompanying note 168.

217. See *supra* text accompanying note 171.

218. See *supra* text accompanying note 170.

219. Compare *Avelino-Wright v. Wright*, 742 N.E.2d 578, 580 (Mass. App. Ct. 2001) (remanding to trial court to determine reasonableness of \$7,500 sanction where attorney, among other things, filed 88 frivolous motions), and *Clark v. Clark*, 716 N.E.2d 144, 151 (Mass. App. Ct. 1999) (holding \$14,000 excessive in light of attorney conduct, which consisted of disrespectful behavior and disparaging remarks during course of trial and leaving the courtroom without permission on the final day of trial), with *R&R Energies*, 936 P.2d at 1073, 1081 (finding sanction of \$3,500 in attorney fees reasonable where attorney disobeyed court discovery orders, filed numerous pleadings and motions regarding matters previously settled by the court and filed other motions simply to harass or cause unnecessary delays).

220. See, e.g., *Byrnes v. Baca*, 54 P.3d 996, 1007-08 (N.M. Ct. App. 2002) (affirming contempt order and \$1,000 fine against attorney who repeatedly ignored the court’s warnings and disobeyed direct orders of the judge by disrupting and interrupting hearing, but reversed trial court’s permanent suspension of attorney, finding that such a harsh sanction did not fit the particular facts of that case and leaving open altogether the question as to whether a trial court can even suspend an attorney indefinitely).

221. The extent of reluctance is difficult, if not impossible, to measure, because courts reluctant to address misconduct and impose sanctions most likely do not include such discussions in their opinions or orders. The only time such reluctance is addressed formally is when a court otherwise would sanction an attorney but for the particular circumstances of the case requiring them to refrain from acting.

222. See *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 373 (Mich. Ct. App. 2002).

223. See *Neshat v. County of San Bernardino*, 2003 Cal. App. Unpub. LEXIS 10646, at **26-27 (Cal. Ct. App. 2003).

court may decide not to award traditional sanctions against an attorney because of the lack of precedent or guidance regarding the conduct²²⁴ or because an attorney raises his or her First Amendment free speech rights²²⁵ or where the requested remedy would punish litigants for the unethical conduct of their lawyers, particularly in cases where the attorney's misconduct did not taint the proceedings.²²⁶

Reviewing opinions from various jurisdictions provides us with some insight into judicial attitudes about and frustrations with attorney misconduct and a court's responsibility as either a guardian of the system or a regulator of attorney behavior. As with the federal courts, state courts do not spend much time or rhetoric on explaining the basis of their power; they simply assert it.

V. CRITIQUE & CONCLUSION: WHAT WE DON'T KNOW

Judges control their courtrooms with an understanding that they have not just the power but some responsibility to regulate the conduct of attorneys that adversely affects the integrity of the judicial proceeding. This role corresponds to the court's institutional competence. Who better than the judge, who has often seen the conduct or the consequences of it, to address the underlying ethical issues to the extent that they have an impact on the administration of justice?²²⁷ The judicial emphasis in both federal and state courts on efficiency, fairness and assuring the integrity of the proceeding before the court emphasized this unique judicial competence. Courts appear interested in and willing to regulate attorney conduct primarily where the conduct is strongly

224. See *Evans*, 650 N.W.2d at 373 (finding that although referral fee agreement by which plaintiff-attorney would receive one-third of attorney fees realized in wrongful death action against his own client was clearly unethical and in violation of rules of professional conduct, trial court did not err in failing to award sanctions where no published opinion had ever ruled on the enforceability of such agreements).

225. Compare *Neshat*, 2003 Cal. App. Unpub. LEXIS 10646, at **22-26 (public defender who made inappropriate and disparaging sexual remarks against prosecutor protected by First Amendment) with *Notopoulos v. Statewide Grievance Comm.*, 2003 Conn. Super. LEXIS 2647, at *21 (Conn. Super. Ct. 2003) (“[T]he significant state interest in preserving public confidence in the judicial system outweighs the free speech rights of Notopoulos to make reckless accusations about the integrity of a probate judge.”).

226. See *supra* text accompanying notes 205-08.

227. See *Whitehouse v. United States Dist. Ct.*, 53 F.3d 1349, 1361 (1st Cir. 1995) (the district court judges “are in a position to observe the subpoena practices of attorneys appearing before them”).

relevant to the court's core function of adjudicating decisions.²²⁸ Both federal and state courts may have broader power to regulate attorneys, but they do not appear eager to embrace that power.

Inevitably courts also consider the relative institutional competence of the other enforcement systems.²²⁹ Formal disciplinary systems, such as the state disciplinary body and federal court committees, have the ability to provide the requisite due process and fact finding that might otherwise consume significant judicial resources. They have investigators to assist in fact finding. These formal systems can detect patterns that may not be discernible to an individual judge.

In this article we have explored written opinions, the traditional body of data available to those who study the legal profession, searching out topics such as conflicts of interest, confidentiality, and contact with represented persons and litigation misbehavior that goes beyond mere accidental violation of rules of procedure.²³⁰ From reading hundreds of cases on legal ethics, it is manifestly evident that a great many issues are not reflected in the *published* decisions. Only a small fraction of cases filed in federal and state court will ever result in a court decision, and even fewer of those result in written opinions that are reported and available for distribution.²³¹ Even with reported decisions, judges have a

228. The advocate witness rule, which generally prohibits a lawyer from serving as both advocate and witness, presents an interesting example of the intersection of fairness, efficiency and legal ethics. Most courts that have addressed the issue conclude that the legal ethics rules do not render the evidence inadmissible. When confronted with an advocate whose testimony is needed, the court typically puts the truth-seeking function of admitting the evidence as the paramount concern and uses procedural devices, including voluntary withdrawal or disqualification, to address the resulting ethical issue. *See Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 380-82 (Ohio 1987). *See generally* Judith A. McMorrow, *The Advocate As Witness: Understanding Culture, Context and Client*, 70 *FORDHAM L. REV.* 945 (2001).

229. *Cf. Bergeron ex rel Perez v. O'Neil*, 74 P.3d 952, 964 (Ariz. Ct. App. 2003) ("Although respondents may not view the avowal requirement coupled with the State Bar enforcement mechanism as a perfect or adequate remedy for alleged violations of Rule 10.2(b), it is the remedy our supreme court has chosen. Nothing in this record suggests that mechanism is ineffective, unworkable, or somehow 'insulates the rule's continued misuse' . . ."); *see also* Zacharias & Green, *supra* note 2, at 1374 ("federal judges exercising broad regulatory authority would be assuming functions which they have neither the expertise, information, nor the resources to fulfill").

230. *See generally* MCMORROW & COQUILLETTE, *supra* note 8; Green, *Conflicts of Interest in Litigation*, *supra* note 2.

231. *See generally* Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 *LAW & SOC'Y REV.* 869 (1999). *See also* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 *UCLA L. REV.* 1, 7 (1996); John Burrirt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 *HOFSTRA L. REV.* 865, 871 (1996). This phenomenon results in a significant selection bias "because published opinions are not a representative sampling of all cases." Ashenfelter, Eisenberg & Schwab, *supra* note 11, at 259.

great deal of discretion in deciding what to include in a written opinion. Because reported decisions generally focus on formal rule-based violations, ethical issues that are resolved through informal means or that are not addressed by clear rule violations are often not addressed.

We need a more systematic understanding of the range of judicial attitudes exhibited by judges in their courtrooms—the behavior that judges observe, and what action they take in response to those behaviors. We need a better understanding of why judges impose varying sanctions for similar behavior.²³² From this understanding of what judges do, we can develop a better understanding of how judges view the relationship between the law of lawyering and judicial ethics and the variables that appear to shape a judge's attitude (such as practice background, experience and philosophy of judging). This, in turn, can yield insights into judicial ethics, including the judge's ethical obligation to report misconduct, judicial temperament, civility, and best practices in rectifying imbalance in the quality of advocacy and pro se representation.

We can gain significant benefits from looking more carefully at the practices of judges. With a better understanding of judicial approaches to legal ethics, we can develop more effective collaborations with judges to reduce the incidents of unethical behavior by lawyers. Law professors who teach legal ethics would gain hard data on the ethical issues that arise in litigation, not merely the arguably distorted picture that arises from reported decisions.²³³ If we can teach our students just a little better, and if judges can guide lawyers just a little more, and if the bar and judges can work out a thoughtful allocation of responsibility, we might collectively improve litigation practice. We need more knowledge to achieve that goal.

232. See, e.g., MCMORROW & COUILLETTE, *supra* note 8, at §811.02[8] (varying sanctions for failure to cite directly contrary authority). See generally Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1 (1998); John D. Fabian and Brian Reinthaler, Comment, *An Examination of the Uniformity (or Lack Thereof) of Attorney Sanctions*, 14 GEO. J. LEGAL ETHICS 1059 (2001).

233. A comparison of federal and state judges could also provide sociologists of the legal profession with a stronger understanding of the varying experiences of federal and state courts, including insights into the existence of sub-communities of lawyers.
