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The Purpose of Lawyer Discipline

Fred C. Zacharias

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THE PURPOSES OF LAWYER DISCIPLINE

FRED C. ZACHARIAS*

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INTRODUCTION

Courts that have analyzed professional discipline typically have characterized its purpose as "protecting the public."¹ This Article will make two simple points. First, the characterization is simplistic and, as a result, masks a variety of functions that discipline might actually serve. Second, identifying the purposes of discipline more

1. *E.g.*, *In re Brady*, 923 P.2d 836, 840 (Ariz. 1996); *In re Merrill*, 875 P.2d 128, 131 (Ariz. 1994); *Rosenthal v. State Bar*, 738 P.2d 740, 742-43 (Cal. 1987); *In re Gadda*, 4 Cal. St. Bar Ct. 416 (2002); *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994); *In re Hein*, 516 A.2d 1105, 1107 (N.J. 1986); *In re Light*, 615 N.W.2d 164, 167 (S.D. 2000); *Discipline of Hopewell*, 507 N.W.2d 911, 916 (S.D. 1993). Some courts refer only to this broad purpose, while others refer to it in conjunction with specific purposes, such as maintaining public confidence in the profession and deterrence. *See, e.g.*, *In re Kersting*, 726 P.2d 587, 595 (Ariz. 1986) ("[T]he purpose of bar discipline is not to punish the lawyer but to deter others and protect the public."); *In re Agostini*, 632 A.2d 80, 81 (Del. 1993) ("Disciplinary proceedings serve: to protect the public; to foster public confidence in the Bar; to preserve the integrity of the profession; and to deter other lawyers"); *In re Abrams*, 689 A.2d 6, 12 (D.C. 1996) ("Disciplinary sanctions are designed to maintain the integrity of the profession, to protect the public and the courts, and to deter other attorneys from engaging in similar misconduct."); *Fla. Bar v. Pellegrini*, 714 So. 2d 448, 453 (Fla. 1998) ("A bar disciplinary action ... must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct." (quoting *Fla. Bar v. Lawless*, 640 So. 2d 1098, 1100 (Fla. 1994))); *In re Waldron*, 790 S.W.2d 456, 457 (Mo. 1990) ("[T]he purpose of disciplinary proceedings is to protect the public and maintain the integrity of the legal profession"); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991) ("The purpose of sanctions is not punishment. Rather they are intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar."); *In re McLendon*, 845 P.2d 1006, 1012 (Wash. 1993) (recognizing purposes of deterrence and public confidence in addition to public protection); *In re Espedal*, 514 P.2d 518, 520 (Wash. 1973) (en banc) (emphasizing punishment, deterrence, and "restor[ing] and maintain[ing] respect for the honor and dignity of the profession"). In either event, the result is the same. The reliance on a broad "protect the public" rationale serves to lump together all the possible goals professional discipline can serve. *See Benjamin Hoorn Barton, Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 436 (2001) (arguing that the goal of "protection of the public from substandard practitioners ... alone cannot justify regulation of lawyers"); Carol J. Miller, Annotation, *Bar Admission on Reinstatement of Attorney as Affected by Alcoholism or Alcohol Abuse*, 39 A.L.R. 4th 567, 569 (1985) (collecting cases stating that the goal of attorney discipline is to protect the public and maintain integrity of the profession). A few courts, however, have attempted to distinguish among the rationales. *See, e.g.*, *Discipline of Kumbera*, 588 P.2d 1167, 1169 (Wash. 1979) (noting that "citation of [the] purposes does not determine the discipline appropriate to a particular case").

precisely would help rulemakers and disciplinary agencies² achieve more consistent, and better, results.³

In order to analyze what protecting the public means, it is important to acknowledge four possible orientations that disciplinary agencies might take in imposing sanctions. They might focus on clients and sanctions that serve client interests. They might focus on offending lawyers, in order to determine the lawyers' qualifications to continue practicing. A broad alternative would be to focus on the profession as a whole, to decide which sanctions will best encourage competence and ethical behavior throughout the bar. Finally, the disciplinary agencies might focus on the disciplinary process, in an effort to shore up the impact of professional standards in guiding lawyer behavior.

The results that professional regulators reach will vary, depending on the orientation that they emphasize. Although alternative emphases are justifiable in particular cases, it is important for the regulators to clarify their overall perspective. Differences in approach affect both consistency in judgments and the practical impact of discipline on the public and the bar. In the long run, rulemakers, disciplinary prosecutors, and reviewing courts all need to be able to consult principles of discipline in order to carry out their functions effectively.

Consider, for example, how a disciplinary agency might address theft of client funds by an alcoholic lawyer.⁴ Let us accept, for

2. The broad term "disciplinary agency" refers to the overarching bar organization responsible for professional discipline, the disciplinary prosecutors, and the administrative or judicial courts that arbitrate and review claims of misconduct.

3. The problem of inconsistency in verdicts by disciplinary bodies has long been a subject of concern. See, e.g., AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986) [hereinafter ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS] (developing so-called standards for discipline); AMERICAN BAR ASSOCIATION, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979) (suggesting changes in procedures relating to disciplinary proceedings); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter ABA SPECIAL COMMITTEE] (sharply criticizing the state of discipline throughout the U.S. jurisdictions); see also Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 6 (1998) (analyzing the ABA Standards for Imposing Lawyer Sanctions and concluding that they fail in significantly reducing the problem of inconsistent decision making).

4. E.g., *Harford v. State Bar*, 801 P.2d 317, 321-22 (Cal. 1990); *Hein*, 516 A.2d at 1108; *In re Eads*, 734 P.2d 340, 348 (Or. 1987).

purposes of argument, the factual premises urged by proponents of leniency:⁵ alcoholism is a disease;⁶ many lawyers suffer from

5. There is a broad body of literature regarding alcoholism in the profession, stemming from studies and anecdotal reports regarding the prevalence of alcohol abuse. *See, e.g.,* Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 3 (1995) (finding that almost 70% of lawyers are likely to have an alcohol problem at some time during their career); G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 113-14 (1992) [hereinafter Benjamin et al., *Lawyer Assistance Programs*] (reporting study showing that one-third of attorneys suffer from depression, alcohol, or cocaine abuse); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 240-41 (1990) (finding 18% of Washington lawyers to be "problem drinkers" and suggesting the existence of similar numbers in Arizona); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (offering statistics suggesting that alcoholism is present significantly more often in professional groups than in the general population); John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268 (1992) (reporting that 10% of lawyers are alcoholics and another 2% to 3% are addicted to other substances); Matthew J. Madalo, *Ethics Year in Review*, 42 SANTA CLARA L. REV. 1291, 1294 (2002) (estimating that approximately 28% of all attorneys in California suffer from alcohol or substance abuse problems); Jennifer L. Reichert, *Lawyers and Substance Abuse*, TRIAL, June 2000, at 76 (noting the prediction of the ABA's Commission on Lawyer Assistance Programs that "over 56,000 ABA members will have a lifetime alcohol dependency disorder; over 30,000 will have a lifetime drug disorder"). Some commentators have advocated lawyer assistance programs and leniency in the disciplinary process. *See, e.g.,* Richard M. Marano, *Appropriate Discipline for the Attorney-Addict*, 68 CONN. B.J. 368, 370 (1994) ("A policy of helping attorneys overcome their substance abuse would be furthered by allowing a mitigation of attorney discipline on a showing of good-faith attempts by the attorney in question to rid himself of his dependency."). Others have responded negatively to such proposals. *See, e.g.,* Bloom & Wallinger, *supra*, at 1427 ("[T]he states should abandon the availability of alcoholism as a mitigating factor in lawyer discipline cases."); Timothy G. Bartlett, Note, *In re Johnson and In re Jeffries: Just Say No to a Double Standard for State's Attorneys in South Dakota*, 40 S.D. L. REV. 262, 296 (1995) ("Leniency has no place in disciplinary proceedings involving attorneys ... who have inflicted serious harm upon the public and demonstrated an unfitness to continue in the practice of law."); Janine C. Ogando, Note, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 481-84 (1991) (arguing for strict sanctions against alcoholic or drug-addicted attorneys); Blane Workie, Note, *Chemical Dependency and the Legal Profession: Should Addiction to Drugs and Alcohol Ward Off Heavy Discipline?*, 9 GEO. J. LEGAL ETHICS 1357, 1376 (1996) (advocating that the use of drug and alcohol addiction as a mitigating factor should be limited to situations in which "the attorney is addicted to a legal substance and his addiction results only in the neglect of client matters and not more egregious behavior").

6. *See, e.g.,* Bloom & Wallinger, *supra* note 5, at 1410 ("Alcoholism is a contagious disease with a remarkably high recovery rate.") (footnote omitted); Nathaniel S. Currall, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 741-43 (1999) (discussing alcohol as a disease affecting the legal profession); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (noting that addictive illnesses such as alcoholism

it;⁷ and many lawyers will not seek or accept treatment if they expect to be punished for their disability once it becomes public.⁸ Let us also assume that a particular lawyer can show some link between his alcoholism and misconduct⁹ and that the lawyer subsequently has successfully completed a course of treatment and rehabilitation.¹⁰ How should the disciplinary agency take these considerations into account?

If punishment is the key, the lawyer's alcoholism and rehabilitation are irrelevant. The theft of funds is a serious offense. Specific and general deterrence¹¹ warrant a severe sanction in order to protect future clients of this and other lawyers.¹² That is largely the

"render attorneys unable to practice law in compliance with the Disciplinary Rules of Professional Conduct"; see also Workie, *supra* note 5, at 1358 (arguing that the "stigma attached to dependency on alcohol has diminished as society has grown to accept the medical view of alcoholism as an illness rather than a moral failing").

7. See, e.g., Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 266 (1997) (discussing statistics showing a prevalence of alcoholism in the legal profession); see also authorities cited *supra* note 5.

8. See, e.g., Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L.J. 1263, 1264 n.4 (1993) (noting that many incentives work to keep the disease of chemical dependency and alcoholism hidden); cf. Bloom & Wallinger, *supra* note 5, at 1415 (noting that attorneys' decisions not to report drug-induced inadequate work are a major barrier to an effective regulatory system).

9. See, e.g., Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Hohenadel, 634 N.W.2d 652, 656-67 (Iowa 2001) (holding that a lawyer's neglect and misrepresentation were attributable to a long battle with alcoholism); Att'y Grievance Comm'n v. Garfield, 797 A.2d 757, 766 (Md. 2002) (concluding that the accused attorney "provided clear and convincing evidence, through the testimony of his witnesses, that he suffered from a drug addiction and that his escalating addiction caused [his professional failure]"); *In re Piemonte*, 732 N.Y.S.2d 796, 796 (App. Div. 2001) (finding that an accused attorney's addiction to alcohol and cocaine affected his judgment and warranted mitigation); *State ex rel. Okla. Bar Ass'n v. Donnelly*, 848 P.2d 543, 548 n.21 (Okla. 1992) ("When alcoholism is tendered as a mitigating factor there must be some causal relationship between one's alcoholic affliction and the professional misconduct charged.").

10. See, e.g., *In re Lanford*, 396 S.E.2d 228, 228 (Ga. 1990) (holding that mitigation was proper where the accused attorney admitted addiction, sought treatment, and withdrew from his law practice when charged with drug offenses); *Fla. Bar v. Jahn*, 509 So. 2d 285, 287 (Fla. 1987) (noting the "exemplary efforts" of an addicted attorney to free himself of his chemical dependency, which the court considered to be a mitigating factor); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Ruth, 636 N.W.2d 86, 89 (Iowa 2001) ("In mitigation of sanctions in this case, we consider that [the attorney] has made great strides in his battle with alcoholism.").

11. Specific deterrence focuses on the likelihood that this lawyer will commit future misconduct, while general deterrence focuses on the likelihood of similar misconduct by other lawyers. Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 121 (1994).

12. See, e.g., Att'y Grievance Comm'n v. Dunietz, 795 A.2d 706, 712 (Md. 2002) (finding

approach taken by the criminal law in assessing the intoxication defense.¹³

From a regulatory perspective, on the other hand, if the lawyer truly is rehabilitated and the cause of his misconduct is eliminated, the disciplinary agency has no basis for finding the lawyer incompetent. Nor is the lawyer likely to commit similar misconduct in the future.¹⁴ Recognizing that rehabilitation will lessen or eliminate discipline may serve to encourage other alcoholic lawyers to seek treatment, which indirectly serves the interests of their future clients and the legal system generally.

As discussed below, there are pros and cons to either emphasis. For the most part, however, courts and disciplinary agencies have used the purported goal of "protecting the public" as a cure-all justification that enables them to avoid serious consideration of the costs and benefits of imposing discipline. Even states that rely upon

no "circumstances to mitigate or extenuate his neglect"); *Att'y Grievance Comm'n v. Wallace*, 793 A.2d 535, 545 (Md. 2002) (finding disbarment was required by "the volume and severity of the complaints"); *In re Samborski*, 644 N.W.2d 402, 408 (Minn. 2002) (holding that a lawyer's misappropriation of client funds, neglect and failure to communicate with the client compelled disbarment); *In re Zauber*, 583 A.2d 1140, 1144 (N.J. 1991) ("[D]rug addiction, whether to legal or illegal drugs, may not mitigate serious ethical infractions such as misappropriation or crimes involving dishonesty, fraud, deceit, or misrepresentation."); *see also Workie, supra* note 5, at 1373 (arguing that "[s]ome offenses are so serious that courts should not consider abuse of alcohol or legal drugs as a mitigating factor").

13. *See, e.g., People v. Langworthy*, 331 N.W.2d 171, 172 (Mich. 1982) ("Every jurisdiction in this country recognizes the general principle that voluntary intoxication is not any excuse for crime.") (footnote omitted); *Commonwealth v. Graves*, 334 A.2d 661, 663 (Pa. 1975) (rejecting an intoxication defense where the intoxication itself was voluntary).

14. *See, e.g., In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (promulgating a rule that alcoholism is a mitigating factor to be considered in disciplinary cases); *Fla. Bar v. Marcus*, 616 So. 2d 975, 977 (Fla. 1993) (recognizing cocaine addiction and rehabilitation as mitigating factors); *Lanford*, 396 S.E.2d at 228 (holding that mitigation was proper where the accused attorney admitted addiction, sought treatment, and withdrew from law practice); *Att'y Grievance Comm'n v. Mandel*, 557 A.2d 1329, 1331 (Md. 1989) (recognizing "addiction to drugs as a mitigating factor when the addiction is 'to a substantial degree responsible for the conduct of the attorney'" (quoting *Att'y Grievance Comm'n v. Northstein*, 480 A.2d 807, 816 (Md. 1984))); *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982) (requiring an attorney to satisfy a five-part test in order to mitigate sanctions for professional misconduct with alcoholism); *In re Willis*, 552 A.2d 979, 984 (N.J. 1989) (recognizing an attorney's recovery from addiction to alcohol and legally prescribed drugs as a mitigating factor); *Office of Disciplinary Counsel v. Braun*, 553 A.2d 894, 895-96 (Pa. 1989) (holding that alcohol or drug abuse is not a defense to a petition for discipline but may be considered as a mitigating factor in determining appropriate discipline); *In re Walker*, 254 N.W.2d 452, 457 (S.D. 1977) (recognizing an attorney's rehabilitation from alcohol addiction as a mitigating factor).

ABA standards for discipline¹⁵ find themselves implementing guidelines that provide "limitless flexibility"¹⁶ when identifying appropriate sanctions and assigning values to aggravating and mitigating factors.¹⁷ The standards, though they note the multiple purposes of discipline, do little to guide disciplinary regulators in analyzing and choosing among potentially inconsistent goals.¹⁸

Part I of this Article distinguishes the theory of professional discipline of lawyers from the theories underlying criminal prosecutions. Part II identifies the various possible stratagems for approaching discipline. Part III analyzes their potential impact by discussing their application to generic types of misconduct. Finally, Part IV discusses the ramifications of this analysis for rulemakers and other regulators. The Article, in sum, attempts to clarify the conflicting considerations in a way that will prompt courts and disciplinary agencies to address the issues more coherently.

I. DISTINCTIONS BETWEEN PROFESSIONAL DISCIPLINE AND CRIMINAL PROSECUTIONS

Many of the issues this Article addresses have counterparts in criminal law theory. There is a vast literature addressing the purposes of criminal law¹⁹ and the inconsistencies that arise when

15. The most serious attempt to focus state disciplinary proceedings is the American Bar Association's 1986 *STANDARDS FOR IMPOSING LAWYER SANCTIONS*, *supra* note 3. See also James Duke Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 ARIZ. ST. L.J. 91 (1987) (discussing the *ABA Standards for Imposing Lawyer Sanctions*).

16. Levin, *supra* note 3, at 39 (analyzing the *ABA Standards for Imposing Lawyer Sanctions*).

17. Although several states depend on the *ABA Standards for Imposing Lawyer Sanctions*, the *Standards* have not been implemented systematically. Levin, *supra* note 3, at 33-34 (identifying the approaches of the different American jurisdictions).

18. The approach of the *Standards for Imposing Lawyer Sanctions* of providing specific sentencing guidelines (perhaps based implicitly on one or another goal), but then authorizing vast departures from the guidelines based on equitable factors fails to address the systemic issues raised in this Article. As a practical matter, the *Standards* do little more than provide a laundry list of sentencing considerations for disciplinary courts to consider on a case-by-case basis. See Levin, *supra* note 3, at 38-39 (arguing that the *Standards* are "conceptually flawed, confusing, and unworkably vague"). Because the *Standards* focus exclusively on the ultimate disciplinary decisions, they also do not acknowledge the possibility that different bar regulators may need to emphasize different goals. See *id.* at 39 (acknowledging that the *Standards* "prescribe some sanctions that do not adequately protect the public").

19. The starting point for modern discussions of the purposes of criminal punishment is section 1.02 of the Model Penal Code, which describes the primary purposes of criminal law as retribution, control of the dangerous, and deterrence. It refers to rehabilitation as a goal of sentencing. MODEL PENAL CODE § 1.02(1)-(2) (2001).

courts simultaneously attempt to implement the goals of punishment, deterrence, incapacitation of defendants, and rehabilitation.²⁰ Much of that literature is directed towards identifying one overriding theory of criminal sanctions,²¹ but some commentators accept the existence of multiple goals and focus on mitigating the tensions that multiplicity may cause.²² Professional regulators facing similar issues in the context of lawyer discipline can fruitfully advert to that scholarship.

The existence of this body of work, however, raises a fair set of preliminary questions for this Article. Is what follows simply a repetition of criminal theory scholarship? More importantly, given the depth of that scholarship, why bother addressing the issues that this Article has identified?

There are two answers. First, quite simply, the lessons of criminal theory have not penetrated the professional responsibility

20. See generally LEO KATZ ET AL., *FOUNDATIONS OF CRIMINAL LAW* 60-142 (1999) (excerpting various works representing different theories of punishment); Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 19-20 (1987) ("Conflicts arise because each purpose requires consideration of different criteria").

21. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 414 (1978) (arguing that supposedly different goals of criminal law can be conceptualized as all falling under the rubric of crime prevention or "social protection"); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 33 (1997) (urging a retributive justification for criminal law); Richard A. Posner, *An Economic Theory of The Criminal Law*, 85 COLUM. L. REV. 1193, 1194 (1985) (arguing an efficiency theory of criminal law); see also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* §§ 2.03-04 (1995) (discussing the debate among the conflicting theories of punishment).

22. The Model Penal Code's early commentary suggests, without elaboration, that when multiple goals of criminal law conflict, they should simply be harmonized. MODEL PENAL CODE § 1.02 cmt. at 2 (Tentative Draft No. 2, 1954); see also DRESSLER, *supra* note 21, § 2.05 (discussing the rationales for "mixed theories of punishment"); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 308 (2d ed. 1960) (advocating an "inclusive theory of punishment"); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 28-53 (1968) (prioritizing different goals of criminal punishment, but recognizing them all); WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.5, at 31 (4th ed. 2003) (noting the "difficult problem ... [of] what the priority and relationship of the several aims should be") (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958)); Stanley A. Cohen, *An Introduction to the Theory, Justifications, and Modern Manifestations of Criminal Punishment*, 27 MCGILL L.J. 73, 81 (1981) (suggesting a balancing of competing interests); Joel John Rawls, *Punishment*, in JOEL FEINBERG & HYMAN GROSS, *PHILOSOPHY OF LAW* 557 (1975) (arguing that all the theories of criminal sanctions have some role to play); Andrew von Hirsch, *Hybrid Principles in Allocating Sanctions: A Response to Professor Robinson*, 82 NW. U. L. REV. 64, 69 (1987) (discussing the viability of a mixed theory of criminal punishment); Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1961) (arguing the relative significance of all the competing interests); cf. MOORE, *supra* note 21, at 24 (discussing and questioning theorists who "vie[w] criminal law as identified by its distinctive sanctions [and] hold a mixed view as to its functions"); Robinson, *supra* note 20, at 22 (noting the problems of conflicting policies and articulating a "hybrid distributive principle").

field. Professional responsibility scholars have not addressed the issues. Disciplinary proceedings occur, for the most part, secretly²³ and without any apparent effort on the part of disciplinary prosecutors to follow policies patterned after any particular theory of sanctions. Disciplinary courts likewise have made little effort to analyze the issues in the terms of the criminal law, preferring instead to treat professional responsibility issues as *sui generis*²⁴ and resolvable by resort to the generalized "protect the public" rationale.

More importantly, although the theories of criminal punishment have much to teach us, the professional responsibility context is different in significant respects. For example, the role of retribution in lawyer discipline is questionable. Unlike most criminal laws, the disciplinary rules typically are established and enforced for reasons other than identifying immoral conduct or actors.²⁵ Lawyers often violate professional rules not because of any moral failing but simply because of a lack of competence. One reasonable view of discipline, therefore, is that its function is to assure competence rather than to lay blame. When punishment or vengeance are called for, they should be accomplished through parallel criminal or civil proceedings.

Equally important, disciplinary regulators ordinarily act without the mandates that legislatures provide criminal prosecutors and

23. A few states are revisiting the issue of secrecy in individual cases. *See, e.g.*, Steven C. Krane, *Mid-term Letter*, 73 N.Y. ST. B.J. 5, 8 (2002) (referring to a proposal by a New York Special Committee to "lift the veil of secrecy covering attorney disciplinary proceedings in New York State, at least at the point at which formal charges have been filed"); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 113 (1999) (discussing Ohio, Oregon, and New Hampshire reforms); Michael Spake, *Public Access to Physician and Attorney Disciplinary Proceedings*, 21 J. NAT'L ASS'N ADMIN. L. JUDGES 289, 310 (2001) (referring to Oregon's open disciplinary system). Typically, however, most states that open disciplinary proceedings limit themselves to proceedings that occur after probable cause has been found. *See, e.g.*, Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey Under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 368 (1997) (discussing New Jersey reforms); Spake, *supra*, at 310 (referring to Florida and West Virginia experiments).

24. *See, e.g.*, *In re Curtis*, No. 02-C-15210 2003 Calif. Op. LEXIS 4, *10 (St. B. Ct. Sept. 17, 2003) ("[A]ttorney disciplinary proceedings are unique. They are neither purely civil, criminal or even administrative in nature.").

25. *Cf.* GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 35 (1998):

[T]he primary purpose of criminal punishment cannot be social protection (as in the cases of deportation, disbarment, and impeachment) but must be to express a connection between the offender's suffering a punishment and the victim's suffering the crime. The search for a conceptual account of punishment leads invariably, it seems, to the inclusions of elements of the state's motive and retributivist thinking.

courts, both regarding the blameworthiness of particular conduct and the range of punishment that is appropriate.²⁶ This consideration cuts in several directions. On the one hand, courts enforcing criminal laws arguably do not need to be as careful as disciplinary courts in identifying the goals they are implementing, because the legislatures already have set constraints. On the other hand, the absence of legislative guidance may make it more difficult for professional regulators to identify an overriding disciplinary policy. The point, simply, is that good reasons exist for the professional regulators to address the issues from an alternative perspective.

The bottom line is that, while some of the analysis that follows may sound familiar to practitioners of criminal law theory, this Article will neither reinvent the wheel nor rehash the substance of criminal law scholarship. The following pages develop, in more detail, differences between the professional responsibility and criminal law contexts, to clarify why independent analysis of the issues is appropriate. Subsequent parts of the Article advert to similarities in criminal law only when consideration of the parallels directly furthers the discussion.

A. Core Distinctions

Professional discipline of lawyers is a form of administrative regulation. It is a follow-up to lawyer licensing—the mechanism by which the initial grant of a license is reevaluated.²⁷ Sanctions other than disbarment may be imposed through disciplinary proceedings, but these, with few exceptions, are limited to sanctions that are lesser-included forms of punishment and that are designed to shape the individual lawyer's future conduct.²⁸ For example, lawyer sanctions include suspension, reprimands, and educational requirements.²⁹ Fines, restitution, and imaginative penalties, such as

26. Legislatures limit courts' ability to punish and guide courts through legislative penalty schemes and sentencing guidelines. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 722 (2002) (explaining how legislative guidelines decrease judges' discretion and increase sentencing uniformity).

27. See discussion *infra* Part II.B.

28. A reprimand or suspension might be seen as retributive in nature. See *In re Espedal*, 514 P.2d 518, 520 (Wash. 1973) (en banc) (calling lawyer discipline "punishment"). But since these sanctions typically are imposed as a way to avoid disbarring an attorney, they more realistically should be characterized as educational tools designed to warn the lawyer that he needs to reform his approach in the future.

29. E.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 3.5.1, at 118 (practitioner's ed. 1986) ("Under modern disciplinary systems, several scaled sanctions are available, ranging from the least severe sanction of a private informal admonition through private reprimand, public reprimand or censure, and suspension and concluding with the most severe sanction,

entity liability³⁰ and public service requirements,³¹ typically are not within the power of disciplinary agencies to impose.³²

These characteristics are consequences of the broad philosophical sense that professional discipline differs from criminal punishment, most notably in the functions it serves.³³ Criminal law purports to set specific standards for moral behavior that the legislature expects to be followed and enforced.³⁴ Although some professional rules set similar standards—such as rules forbidding illegal conduct

disbarment.") (citing *Office of Disciplinary Counsel v. Walker*, 469 Pa. 432, 568 n.7 (1976)); Levin, *supra* note 3, at 9 ("Private sanctions ... are imposed almost twice as often as any other type of sanction [and] [l]awyers often receive several private admonitions before they receive any public discipline.") (footnotes omitted); *see also id.* at 24 ("Requirements that lawyers take a professional responsibility course or pass a professional responsibility examination are also justified on the theory that a lawyer's attitudes and behaviors can be changed if the lawyer receives appropriate instruction.") (footnote omitted).

30. *See, e.g.*, Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 313-14 (1994) (noting that the extension of disciplinary reach to law firms is relatively new and that a monetary sanction on a firm "would constitute a further departure from traditional disciplinary philosophy"); *cf.* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1372-73 & nn.242-44 (1995) ("Not all professional rules are readily applied against an institution.... [E]ntity responsibility means little unless accompanied by changes in the tools of discipline, because disciplinary authorities are unlikely to impose draconian sanctions (such as suspension or disbarment) on entire firms.") (footnotes omitted).

31. *Cf.* Retta A. Miller & Kimberly O'D. Thompson, "Death Penalty" Sanctions: *When to Get Them and How to Keep Them*, 46 BAYLOR L. REV. 737, 781-82 (1994) (noting that in Texas, "the ordering of community service is available as an Damoclean discovery sanction against either a litigant or its attorney"); Albert L. Vreeland, II, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 653 (1991) (noting the ABA's rejection of the position that attorneys can be compelled to supply pro bono services in criminal cases" and arguing that "[e]ssential to the notion of public service is that pro bono work is *given* by the attorney, not *compelled* by the court on pain of sanction").

32. A few jurisdictions have begun to experiment with a broader and more imaginative remedial scheme. *See generally* Levin, *supra* note 3, at 24-28 nn.111-30 (citing authorities reflecting innovative sanctions, including participation in diversion programs, special educational requirements, and submission to bar counsel monitoring). In some jurisdictions, disciplinary courts are deemed to have authority to require restitution, not only as a condition of reinstatement, but also as a sanction independent of disbarment. *E.g.*, *In re Reno*, 609 P.2d 704, 707-08 (Mont. 1980); *In re Millard*, 295 N.W.2d 352, 353 (Wis. 1980). A very limited number of jurisdictions also recognize occasional fining authority. *E.g.*, *In re Reed*, 369 A.2d 686, 690 (Del. 1977); *In re Hanratty*, 277 N.W.2d 373, 376 (Minn. 1979).

33. Of course, in addressing individual cases, disciplinary prosecutors and reviewing courts may implement some of the same considerations that criminal prosecutors and sentencing courts implement.

34. Admittedly, a legislature may not expect each statute to be enforced fully. Few statutes are. There are, however, a variety of possible enforcement policies, ranging from strict to highly selective enforcement, all of which acknowledge and respect the legislative judgment that the prohibited conduct is (almost universally) improper and punishable.

by lawyers³⁵ or theft from clients³⁶—others have decidedly different goals. Some professional rules are purely hortatory in nature, sending a signal about general aspirations for lawyer behavior but leaving implementation to lawyer discretion and good will.³⁷ Other rules are designed to encourage a particular type of *client* conduct, rather than a particular type of lawyer conduct.³⁸ Yet others serve a function of setting norms that enhance communication among lawyers or that facilitate transactions in the court system.³⁹ Some simply serve the image of the profession.⁴⁰

As a practical matter, the professional disciplinary system also does not operate in a fashion parallel to the criminal law. For both resource and theoretical reasons, the disciplinary system relies upon criminal law and civil remedies to provide supplemental implementation of its goals. The professional discipline machinery is an instrument of administrative regulation of law practice that, to a great extent, leaves the extraction of vengeance, punishment, and sometimes deterrence to the alternative mechanisms.⁴¹

The differences between the criminal law and the professional disciplinary system suggest that, while criminal prosecutors typically pursue criminal punishment in the manner best designed to implement the legislators' moral judgments, disciplinary agencies must approach violations of the professional rules mindful of other factors. The professional codes represent a series of compromises that are based partially on moral and client protection considerations and partially on systemic and other practical considerations

35. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (prohibiting attorney participation in unlawful conduct).

36. *E.g.*, *id.* R. 1.15 (regulating client trust accounts).

37. Some rules require prosecutors to "do justice." *Id.* R. 3.8 cmt. (stating that a prosecutor is responsible for being a "minister of justice"). See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46-49 (1991) (discussing the problems of relying on a hortatory "do justice" provision).

38. For example, attorney-client confidentiality rules are designed to inspire trust on the part of clients, even at the cost of having lawyers keep secrets that should be disclosed if one considered only ordinary moral factors.

39. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 231 (1993) (discussing the fraternal function of professional rules) (citing Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1250 (1991)). These rules often are practical in nature, and are not necessarily grounded in moral judgments about good behavior. For a discussion of the fraternal functions of professional rules, see Zacharias, *supra*, at 265-74.

40. See Zacharias, *supra* note 39, at 281.

41. See FLETCHER, *supra* note 25, at 35 (distinguishing criminal punishment from "social protection" remedies such as disbarment). Although some sanctions short of disbarment take a punitive form, such as suspensions and reprimands, they serve primarily to guide future lawyer behavior. See *supra* note 28 and accompanying text. Their retributive effects typically are incidental and simply supplement punishments available through other means.

relating to how we hope practicing lawyers will operate. The codes rely heavily on the exercise of moral discretion by individual lawyers, both to carry out the codes' vague mandates and to adjust their conduct for a variety of situations that seem to be covered equally by particular rules.⁴² The main goal of disciplinary prosecutions, therefore, is not simply to implement legislative moral judgments, but rather to assure that lawyers exercise their discretion in an acceptable way and that lawyers unwilling to exercise discretion appropriately, or incapable of doing so, are controlled.

The conception of professional discipline as administrative, rather than criminal, in nature has significant theoretical force. First, it often is inappropriate to think of the goals of disciplinary prosecutions in the same terms as the retributive, incapacitating, reform, or deterrent goals traditionally associated with criminal prosecutions.⁴³ Disciplinary agencies, as administrators of a compromise scheme of practical regulation, need to adopt orientations that focus on whom or what the regulation is seeking to protect and on maximizing or accommodating tensions among the targets' interests in an efficient (but perhaps impure) way.⁴⁴ Mercy, vengeance, and punishment have a smaller role to play in the administrative regulation of lawyers than in the criminal scheme.⁴⁵

42. See *supra* note 37.

43. See, e.g., TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 1-39 (1969) (discussing, inter alia, retributive justifications); LAFAVE, *supra* note 22, § 1.5, at 25-31 (identifying the theories of criminal punishment); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 224 (Sanford H. Kadish et al. eds., 1973) (discussing deterrence theory); Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POL. SCI. 226, 226 (1959) (offering a rehabilitation model); Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 187, 187 (Alfred Blumstein et al. eds., 1978) (discussing the deterrence and incapacitation rationales); Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784 (discussing modern acceptance of retributive justifications); Herbert L. Packer, *The Practical Limits of Deterrence*, in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 102, 102-07 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) (analyzing the concepts of rehabilitation, deterrence, and retribution); Nigel Walker, *The Efficacy and Morality of Deterrents*, 1979 CRIM. L. REV. 129, 139-41 (justifying deterrence theory).

44. See *infra* Parts II, IV.

45. Many cases disavow any punitive goal of discipline. *E.g.*, *In re Wiederholt*, 24 P.3d 1219, 1223 (Alaska 2001); *In re Fioramonti*, 859 P.2d 1315, 1320 (Ariz. 1993); *In re Rivkind*, 791 P.2d 1037, 1042 (Ariz. 1990); *Fletcher v. Comm'n on Judicial Performance*, 968 P.2d 958, 989 (Cal. 1998); *In re Howard*, 721 N.E.2d 1126, 1132 (Ill. 1999); *State Bar v. Claiborne*, 756 P.2d 464, 473 (Nev. 1988); *In re Zamora*, 21 P.3d 30, 33 (N.M. 2001). Thus, for example, the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 3, § 2.10, assert that the purpose of lawyer discipline is "not punishment." See also Cameron, *supra* note 15, at 97

The importance of specific and general deterrence also may vary, depending on the goals of particular code provisions.

The limited range of sanctions available to disciplinary agencies and the increased flexibility accorded disciplinary regulators implementing those limited sanctions⁴⁶ confirm that society attributes different significance to professional code violations than to criminal law violations. Criminal courts can impose a variety of sanctions that accomplish the goals of criminal punishment, but the sentencing judges are instructed on what levels of sanction are appropriate;⁴⁷ disciplinary courts have flexibility in deciding when to impose meaningful punishment.⁴⁸ This difference in emphasis reflects the notion that criminal punishment is society's primary constraint upon violations of law, while professional regulation is only one of many equally important constraints on lawyer behavior. As a consequence, society is more intent on assuring that criminal courts implement the goals the legislatures set forth. Disciplinary courts, in contrast, have leeway to decide on the necessity of imposing sanctions, in light of alternative mechanisms for accomplishing the rulemakers' goals.

That is not to say that, for example, potential criminal wrongdoers are never deterred by other forms of regulation, such as the likelihood of civil lawsuits. Yet we generally assume that the threat of criminal prosecution is the, or one of the, most significant deterrents. The same is not true with respect to professional standards, which frequently depend on the enforcement of extra-code constraints to supply deterrent or punitive effects.⁴⁹ The drafters seem to have drafted some code provisions with the specific expectation that the provisions will not be enforced, but that other constraints—including the possibility of criminal punishment and

("Lawyer discipline ... is not meant to punish; rather, its purpose is to protect clients, the public, the courts, and the legal profession.").

It goes too far to suggest, as some of the above authorities have, that professional discipline never has a retributive function. *See supra* note 45 and accompanying text. Discipline is sometimes the only realistic remedy for victims of lawyer misconduct, either because the stake involved does not justify civil action or because the alternative remedial mechanisms defer to professional regulators in such matters. In general, however, it is fair to conclude that discipline has more of an administrative than a punitive function.

46. *See supra* note 28 and accompanying text.

47. Criminal sentencing is constrained by upper and lower limits on the length of incarceration courts may impose and through sentencing guidelines.

48. *See supra* notes 16-18 and accompanying text.

49. *See Zacharias, supra* note 39, at 233 & n.33 (discussing the reasons why code drafters rely on extra-code constraints in writing professional rules, and giving examples of such reliance).

civil lawsuits—will provide incentives for compliance.⁵⁰ This approach towards enforcement of the code *ex ante* cannot help but affect the attitudes of disciplinary prosecutors and reviewing courts in implementing sanctions *post hoc*.

Four significant practical considerations also distinguish the way disciplinary and criminal prosecutions proceed. First, as this Article will discuss presently, professional discipline tends to take place in secret.⁵¹ Secrecy in disciplinary proceedings increases the possibility of erroneous policymaking by disciplinary prosecutors and reviewing courts and the possibility of factual errors. The pertinent agencies may, as a consequence, see fit to limit the scope of their own decisions.

Second, in part because of this secrecy, the public is less familiar with professional codes and the process of professional discipline than with the criminal law.⁵² The public thus is more likely to misunderstand the purposes of lawyer regulation and draw inaccurate inferences from particular decisions.⁵³ Disciplinary agencies consequently may be particularly concerned with the effect of their decisions on the public psyche.

Third, the professional discipline of lawyers presents a phenomenon that, while perhaps not unique, certainly is unusual. The actors implementing the disciplinary process—the rulemakers, the prosecutors, and the reviewing judges—ordinarily are all lawyers,⁵⁴ members of the same guild as the accused. This has numerous consequences. On the one hand, the discipliners have the requisite expertise to understand the conduct of the accused.⁵⁵ On the other hand, the discipliners may be more sympathetic to the pressures accused lawyers face and more concerned than criminal prosecutors

50. *See id.* at 237.

51. *See infra* notes 178, 214 and accompanying text.

52. *Cf.* Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1011 (2002) [hereinafter Zacharias, *What Lawyers Do*] (arguing that secrecy of disciplinary agency decisions precludes public scrutiny).

53. *See id.* at 1008 (“[B]y not explaining why nonenforcement occurs, disciplinary authorities leave the matter to potentially dangerous public speculation.”).

54. In a few jurisdictions, some participation by nonlawyers has been incorporated into the disciplinary process. *See, e.g.*, Developments in the Law, *Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1600 & n.140 (1994) [hereinafter *Lawyers' Responsibilities*] (noting that “lay participation in attorney discipline is on the rise across the nation”); *see also* CAL. BUS. & PROF. CODE § 6086.65 (West 2003) (requiring lay participation in the Executive Committee of State Bar Court). *But cf.* 1993 Cal. Stat. 5615, 5615-16 (repealed 1995) (calling for lay membership in State Bar Court in Review Department).

55. *Lawyers' Responsibilities*, *supra* note 54, at 1599 (stating lawyer-only disciplinary agencies reflect “the notion that only lawyers possess the expertise necessary to regulate other lawyers”).

usually are about damaging the reputations of the targets of their investigations.⁵⁶ Perhaps most significantly, the concept of lawyers regulating lawyers may offend the public, or skew its evaluation of the fairness of the disciplinary process.⁵⁷ The latter possibility may lead disciplinary agencies either to limit their goals, so as to avoid criticism for failing to achieve broader goals, or to place special emphasis on the public response to their decisions.

Fourth, and perhaps more controversially, lawyers may react to the potential for discipline differently than putative criminal defendants react to the potential for prosecution. Criminal law deterrence theory, in contrast to professional discipline deterrence theory, relies heavily on the prediction that putative criminals will adjust their behavior significantly according to the likelihood of penalties.⁵⁸ Although lawyers may engage in some cost-benefit analysis in comparing the extent of probable punishment with the benefits of engaging in prohibited conduct, lawyers are most likely to behave a certain way according to whether they will be punished at all. For lawyers, the key is the damage to reputation and peer admiration that any discipline will produce. Thus, a lawyer's sense that particular conduct will not result in discipline may encourage him to violate the codes, but a lawyer who believes that disciplinary prosecution actually will result may not distinguish between prosecutions likely to produce heavy sanctions (such as disbarment) and prosecutions involving lesser penalties.⁵⁹

56. See *infra* text accompanying notes 245-47.

57. Thus, in highly publicized cases in which the disciplinary process absolves lawyers from sanction on the basis that they acted appropriately as advocates, citizens who blame the lawyer for the result of the case often attribute the disciplinary decision to in-bred regulation. See, e.g., Videotape: Ethics on Trial (Greater Washington Educational Telecommunications Ass'n 1986) (discussing *In re Armani*, 371 N.Y.S.2d 563, 566-67 (County Ct. 1975), and showing the parents of one murder victim describing the disciplinary decision absolving defendant's lawyer as reflecting "lawyers protecting lawyers").

58. See *supra* note 19.

59. There is another way of analyzing the likely distinctive reactions of lawyers, as a class. Arguably, unlike in criminal law, the issues of culpability (i.e., conviction for wrongful behavior) and appropriate punishment merge, because lawyers are most concerned with avoiding any assignment of blame. When we think of professional discipline, we usually think globally of the combination of conviction and punishment as constituting "discipline." See WOLFRAM, *supra* note 29, § 3.5.1 at 118 ("In practice, findings of violation and sanction are almost certainly interdependent in a number of ways."). When disciplinary courts decide the issue, they may not be able to draw the same clear lines as criminal courts between finding misconduct and exercising sentencing discretion. The inability to do so has particular impact in situations in which lawyers violate the professional codes for moral reasons. See *infra* Part III.D. Simply showing mercy postconviction (i.e., leniency in applying sanctions) may not accommodate the conflicting considerations properly.

For purposes of this Article, the distinctions between professional discipline and criminal prosecution are significant because they suggest that disciplinary prosecutors and reviewing courts will approach their work differently—with different attitudes and goals—than criminal prosecutors and sentencing courts. Some of the considerations that this Article discusses may affect actors in the criminal process in the same way, but that will not always be the case. In assessing how disciplinary agencies go about their task of “protecting the public,” this Article therefore will focus on what that task might entail in the particular context of professional discipline, rather than on the parallel goal of protecting the public through the criminal process.

B. A Caveat About Criminal Law Theory

In one sense, the above discussion of distinctions between the criminal law and professional discipline contexts ducks a core issue. The best of modern criminal law scholarship focuses on justifying the criminal law,⁶⁰ both as a moral concept⁶¹ and as a discipline that is unique and distinct from other aspects of law.⁶² In describing professional regulation as “administrative” in nature,⁶³ this Article has suggested that professional regulation must be implemented and evaluated functionally, in terms of how well it achieves the compromises and practical goals the underlying rules embody.⁶⁴ Issues concerning the moral underpinnings of professional regulation and discipline thus fall beyond the Article’s scope. At the same time, in suggesting that disciplinary agencies must advert to an underlying sense of what their goals are, an element of these issues inevitably is drawn into the calculus.

60. See, e.g., KATZ ET AL., *supra* note 20, at 4 (asking how “the law justifies] state blame and punishment generally and the doctrines of the criminal law specifically”); MOORE, *supra* note 21, at 30 (focusing on the issue of “why we punish”); cf. DRESSLER, *supra* note 21, § 2.01, at 7 (“The penal theories ... provide the intellectual foundations for evaluating the fairness and coherence of our criminal laws.”).

61. See, e.g., Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1443-44 (2001) (discussing the importance of identifying a moral justification for the criminal law’s moral norms).

62. See, e.g., Michael S. Moore, *A Theory of Criminal Law Theories*, 10 TEL AVIV U. STUD. L. 115, 136 (1990) (arguing that “[c]riminal law is an area of law only because it serves some distinctive good that we honor as its function”); Robinson, *supra* note 61, at 1432 (arguing preventive detention, while perhaps laudable, is misguided insofar as it uses “the criminal justice system as the vehicle to achieve [its] goal”).

63. See *supra* notes 27-32 and accompanying text.

64. See *supra* notes 43-45 and accompanying text.

The hesitation to dwell on the moral justification for professional regulation derives from a practical concern. This Article's overriding enterprise is to provide insights that will help scholars and disciplinary regulators recognize weaknesses in the prevailing approaches to discipline. Focusing too heavily on developing an overarching philosophical rationale for the disciplinary process would undermine that goal, because regulators start from the proposition that no such justification is necessary. Insofar as lawyer discipline represents a narrow field of regulation that implements practical licensing goals, it may not merit the same extensive normative analysis as criminal law's judgments about the nature of blameworthy or punishable behavior.

In short, in the terms of the criminal law theory, there simply may not be the same imperative to identify lawyer regulation as a "functional kind"—a unique and specially justifiable area of law.⁶⁵ Professional responsibility is a field in which courts apply multiple purposes,⁶⁶ and courts and scholars accept it as such.⁶⁷ This theoretical imprecision causes messiness in how the professional regulators operate—even the type of messiness that this Article questions in challenging the reviewing courts' use of the "protecting the public" rationale. But the prevailing wisdom seems to be that society can live with the resulting uncertainty.

That does not mean that the regulators are in the right, nor that they could not implement the mixed purposes more effectively. Identifying a theoretical baseline against which appropriate discipline can be judged would help regulators delineate appropriate action. This Article encourages disciplinary agencies to move in that direction, but does so by discussing the issues based on the regulators' own world view rather than through the development of a new theoretical construct. By highlighting the flaws of the status quo, the Article also invites regulators and scholars to define their terms.

II. ORIENTATIONS TOWARDS DISCIPLINE

What does "protecting the public" mean in the context of professional discipline? Ideally, one would hope that protecting the

65. Cf., e.g., Moore, *supra* note 62, at 136 (stating the criminal law is functionally unique in that it serves "some distinctive good").

66. For authorities advocating and challenging the acceptability of implementing mixed purposes in criminal law, see *supra* notes 21-22.

67. See *supra* notes 19-22 and accompanying text.

public would entail preventing lawyer conduct that harms the public.⁶⁸ By definition, however, professional discipline occurs after-the-fact. To the extent professional discipline prevents misconduct, it does so only by: (1) removing the license of lawyers who are likely to engage in additional bad behavior, (2) making sure that the causes of the lawyer's likely misconduct are removed, or (3) deterring other lawyers.⁶⁹

If deterrence is the key, one would expect disciplinary agencies to consider systematically what types of prosecutions and what imposition of discipline are likely to command the attention of lawyers who themselves are not immediately subject to discipline. Yet as a practical matter, when disciplinary prosecutors speak of their work, they rarely emphasize the question of how cases affect the public generally; they tend to focus on individual cases, their own ability to respond to individual complaints, and the need to assure fairness to specific lawyer-respondents.⁷⁰

The following sections identify a series of possible orientations that prosecutors and disciplining courts might adopt. These orientations involve factors that sentencing courts already consider in the criminal context. The orientations differ, however, in that they do not focus exclusively upon the traditional theoretical foundations of criminal sanctions.⁷¹ They reflect a series of regulatory approaches, each of which might be justified as public protection. Some of the orientations seem less concerned than others with the specific elimination of public harms—thereby suggesting that disciplinary agencies emphasizing these orientations might be more concerned with other purposes of discipline.

68. Cf. KATZ ET AL., *supra* note 20, at 104 (arguing that, even under a "mixed purpose" theory of criminal punishment, "[i]t will not do ... to return to the common but sloppy analysis that blithely asserts that deterrence, reform, incapacitation, and retribution are all part of the justification of punishment, and simply leave it at that").

69. In some situations, the potential for discipline may encourage accused lawyers to make restitution. Often, however, a disciplinary agency has no power to order compensation. See *supra* note 32.

70. Because disciplinary prosecutors rarely describe their attitudes in published work, the only sources for these conclusions are anecdotal evidence from observations of prosecutors speaking at lawyer conferences. A recent example was a panel of prosecutors at the 28th National Conference on Professional Responsibility, entitled "Proactive Investigations, Fairness and Trial Procedure in Discipline Proceedings," held in Vancouver, British Columbia on June 1, 2002. Although the organizers of the convention asked the panelists to address proactive investigations, including their use to protect the public, the discussions focused almost exclusively on assuring fairness to lawyers being investigated in proactive investigations.

71. Namely, retribution, incapacitation, and deterrence.

A. Client-Centered Orientations

On one level, protecting the public is a client-centered notion. Nevertheless, even if that is correct, the question of which clients should be protected looms large. Arguably, a disciplinary agency that identifies misconduct that a lawyer has committed at a client's expense should seek to remedy the injury the client has suffered.

One might take a broader view, however. Perhaps the agency should take steps to protect the lawyer's other existing clients, for example by warning them of the misconduct that has been uncovered. Or the agency might seek to protect future clients by suspending the lawyer or requiring rehabilitation or education that could prevent recurrence of the misconduct.

The parallels with criminal law are clear. Sentencing courts may sanction a defendant with a mind to extracting vengeance for the defendant's victim, incapacitating the defendant from injuring future victims, rehabilitating the defendant in a way that protects future victims, or—as in the context of registered sex offenders—labeling the defendant in a way that warns future victims of the defendant's susceptibility towards wrongful conduct.

In one sense, however, the legal ethics context seems different, even within the client/victim orientation. With some exceptions, criminal courts focus on the particular crime, or the particular type of crime, that the defendant has committed. The courts gear forward-looking penalties toward protecting future victims of crimes of that type. Disciplining agencies, because they are administering a licensing regime, can take a broader view. They may rely upon any code violation as an indicator of "bad character" that justifies the administrative death penalty of disbarment.⁷² In the same vein, even though legislators and code drafters sometimes limit the forms of punishment disciplinary agencies may impose,⁷³ they ordinarily do not limit the extent of the possible punishment (e.g., by circumscribing the allowable sentences or through sentencing guidelines). In implementing the client protection orientation,

72. See *In re Sarelas*, 360 F. Supp. 794, 799 (N.D. Ill. 1973) ("The prime condition for continued membership in the bar is maintenance of the high moral character expected from all of its members."); see also Bruce A. Green & Fred C. Zacharias, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory?*, 56 VAND. L. REV. (forthcoming 2003) (discussing the character rationale for professional regulation); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496-502 (1985) (describing the inconsistent process and use of character requirements by state bars).

73. See *supra* note 26 and accompanying text.

disciplinary agencies have more leeway to impose a full range of punishment than do criminal courts.

As in criminal sentencing, a client-oriented approach to protecting the public need not be confined to the offending lawyer's conduct. The disciplinary agency might seek to protect other lawyers' clients by imposing sanctions on this lawyer that will deter misconduct by others. Alternatively, the agency could serve clients in ways other than deterring or remedying misconduct, for example by imposing punishment that serves the clients' desires for vengeance.

B. Lawyer-Centered Orientations

Instead of focusing on the effect of a lawyer's conduct on current and future clients, ethics regulators might seek to evaluate the lawyer himself and consider how the lawyer's future practice will affect clients or the legal system. Under this approach, competence may be the key: Is the lawyer capable of representing clients honestly and well? Alternatively, a disciplinary agency might look at the root causes of the lawyer's misconduct and determine whether those causes are likely to produce further misconduct. Because both of these approaches look to the future, they can lead a disciplinary agency to emphasize the issue of whether rehabilitation of the lawyer is possible. The rehabilitative model, of course, is a common element of criminal sentencing, but has become a disfavored model in recent years.⁷⁴

C. Profession-Centered Orientations

Disciplinary agencies can attempt to protect the public by emphasizing factors other than the actual or potential injuries to clients. They may, for example, see their function as assuring the competence of lawyers generally. Achieving this function may depend on assessing the competence of the offending lawyer and setting standards that guide or deter other lawyers in their practices. It may also involve shoring up the ability of lawyers, in general, to do their jobs well by maintaining the image of lawyers

74. See, e.g., FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 1-2, 7-10 (1981) (analyzing modern criminal law's de-emphasis of rehabilitation); KATZ ET AL., *supra* note 20, at 113 (noting "the decline in the acceptance of the rehabilitative ideal").

in a way that enhances public trust in the profession and attorney-client relationships.⁷⁵

Maintaining the quality of the legal profession also requires disciplinary agencies to maintain professional standards as a credible threat. Thus, the regulators may see as one of the functions inherent in protecting the public a teaching function—warning lawyers that transgressions will not be countenanced.

D. Process-Centered Orientations

There are both practical and policy reasons why disciplinary agencies might implement discipline with a view toward the effect of their decisions on the disciplinary process itself. Resource considerations may drive particular decisions. Imposing serious sanctions on particular defendants may, for example, embroil a disciplinary agency in costly and time-consuming appeals that would detract from its ability to police other misconduct.⁷⁶

75. Thus, for example, rules regulating legal advertising and misconduct that do not bear directly on legal practice are justified on the basis that for clients to trust lawyers, confide in them, and appreciate their counsel, lawyers must *seem* trustworthy. See Zacharias, *supra* note 39, at 270-72 (discussing image-enhancing rules); see also *In re Roth*, 658 A.2d 1264, 1272 (N.J. 1994) (stating that preserving confidence in the legal profession is the main purpose of discipline); *In re Wilson*, 409 A.2d 1153, 1155 (N.J. 1979) (“[T]he principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers”).

76. Resource considerations seem to affect disciplinary prosecutors more than criminal prosecutors, perhaps because the baseline of resources available to disciplinary agencies (and, thus, available to reallocate based on the misconduct that lawyers commit) tends to be much lower. As a consequence, disciplinary agencies hesitate to enforce rules that might entrench upon the authority of prosecutorial agencies and which those agencies might therefore challenge. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 760 (2001) [hereinafter Zacharias, *Professional Discipline of Prosecutors*] (discussing reasons for which disciplinary agencies avoid disciplining prosecutors). Disciplinary agencies, for example, seem to have avoided prosecuting many violations of legal advertising rules, in part because doing so might embroil them in further constitutional litigation. See Zacharias, *What Lawyers Do*, *supra* note 52, at 1003-04 (discussing the underenforcement of legal advertising rules). The hesitation to pursue resource-intensive prosecutions also helps explain the apparent preference of disciplinary agencies to sanction solo practitioners and small law firms, rather than pursuing violations by large firms. See, e.g., SHARON TISHER ET AL., BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 103 (1977) (“[T]he vast majority of lawyers investigated and punished ... practice alone or in two or three person firms”); James Evans, *Lawyers at Risk*, CAL. LAW., Oct. 1989, at 45, 46-47 (noting that approximately fifty percent of California’s disciplined lawyers are solo practitioners with limited resources to fight discipline); Levin, *supra* note 3, at 62 n.275 (1998) (“Solo practitioners, who are on the bottom of the lawyer status ladder, are ... disciplined more often than lawyers who work in other practice settings.”); see also ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 41 (Prelim. Draft, Jan. 15, 1970) (“The majority of complaints submitted to disciplinary agencies concern the single or small-firm,

Similarly, the regulators may need to take into account the message their decisions send. If the professional standards are to protect the public from lawyer misconduct, they must appear to be enforceable and likely to be enforced.⁷⁷ Purely hortatory rules or rules likely to be underenforced have their place,⁷⁸ but alone they will have little deterrent effect on attorneys.⁷⁹

The regulators also may base decisions on considerations related to the disciplinary process (rather than the actual need to punish or deter in order to maintain lawyer competence) because of a desire to maintain the public's confidence in the process.⁸⁰ On one level, this confidence is important because it encourages the public to report violations. On another, it may protect clients by encouraging them to trust, and therefore cooperate with, their own lawyers.

III. THE IMPACT OF THE DIFFERENT ORIENTATIONS

Let us consider nine possible goals of discipline that have been alluded to above: (1) remedying an injured party's or the legal system's injury; (2) punishing a miscreant lawyer for past misconduct; (3) disabling the lawyer from committing future misconduct; (4) deterring future misconduct by the lawyer; (5) encouraging rehabilitation of the lawyer; (6) deterring future misconduct by other lawyers; (7) enhancing the image of the profession and the way the profession practices law; (8) protecting the integrity of the disciplinary process; and (9) balancing client protection and mercy to lawyers. These goals all can be viewed as consistent with the overriding theme of protection of the public. The emphasis a court or disciplinary agency places on each can affect the resolution of particular cases. To illustrate this phenomenon, the following

low-income practitioner." *But see* Sharon Lerman, *No Bias Found Against Solos*, CAL. ST. B.J., Aug. 2001, available at <http://www.calBar.ca.gov/calBar/2cbj/01aug/page12-1.htm> (reporting on a "[s]tudy showing that a lack of support and managerial skills, rather than built-in bias against independent attorneys" leads to the seemingly disproportionate number of disciplinary actions against solo practitioners and small-firm lawyers).

77. *See* Zacharias, *What Lawyers Do*, *supra* note 52, at 1005-06 (discussing the potential effects of nonenforcement or underenforcement of the professional codes).

78. *See* Zacharias, *supra* note 39, at 237 (explaining the functions of hortatory rules and noting that they work best when there are extra-code constraints that serve to restrain the offending conduct).

79. That is not to say underenforced rules are utterly without effect in guiding the behavior of well-intentioned lawyers. *Id.* at 257-74.

80. *See, e.g., In re Hein*, 516 A.2d 1105, 1108 (N.J. 1986) (stating that the court's "primary concern must remain protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar"); Bloom & Wallinger, *supra* note 5, at 1418 (discussing judicial emphasis on maintaining "public confidence").

sections analyze how regulators might react to different categories of misconduct.

A. Misconduct Arising from a Lawyer's Personality Defect

Lawyers, like other human beings, suffer from mental and character disorders that sometimes cause them to engage in professional misconduct.⁸¹ Greed can lead to theft. Natural dishonesty leads to misrepresentation and deceit. Sexual tendencies (including sexual deviance) may lead a lawyer to deal with clients on a less than professional basis.⁸² Psychological disorders can cause other misbehavior.⁸³

For purposes of illustration, let us again consider the personal weakness that has been the focus of the most attention by the bar: chemical dependency on drugs or alcohol.⁸⁴ At one level, agencies disciplining a lawyer with a history of substance abuse confront the same tension between the ideals of rehabilitation and incapacitation as criminal prosecution agencies. Criminal diversion programs and probationary requirements of participation in rehabilitation programs, like mitigation of punishment in the lawyer disciplinary process, represent instrumental compromises based on mercy and the hope that the benefits of rehabilitation will outweigh the costs

81. See Fred C. Zacharias, *The Humanization of Lawyers*, 2002 PROF. LAW. 9, 10 (2003) (discussing the increasing recognition that lawyers suffer from the same failings and disorders as laypersons).

82. Many articles discuss the problem of lawyers engaging in sexual relationships with clients. See, e.g., Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131, 135-71 (1998) (surveying state regulation of sexual conduct with clients); William D. Langford, Jr., Note, *Criminalizing Attorney-Client Sexual Relations: Toward Substantive Enforcement*, 73 TEX. L. REV. 1223, 1234 (1995) (arguing for alternative forms of regulation); Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 FORDHAM L. REV. 5, 55 (1993) (comparing the regulation of lawyers and psychiatrists); Yael Levy, Note, *Attorneys, Clients and Sex: Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL ETHICS 649, 662-63 (1992) (suggesting that sexual relations between attorney and client are a private matter); see also authorities cited in Zacharias, *supra* note 81, at 11-14 nn.18-22.

83. See, e.g., *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994) (citing a lawyer's emotional problems as a mitigating factor); *In re McLendon*, 845 P.2d 1006, 1011-12 (Wash. 1993) (treating bipolar disease as a mitigating factor in a disciplinary matter arising from misuse of client funds); cf. *In re Floyd*, 468 S.E.2d 302, 304 (S.C. 1996) (declining to allow evidence of a lawyer's depression to mitigate discipline on the basis that the serious nature of the offense alone justified discipline).

84. See, e.g., Currall, *supra* note 6, at 742 (viewing alcoholism as a moral weakness); see also authorities cited *supra* notes 5-8; Todd Goren & Bethany Smith, *Depression as a Mitigating Factor in Lawyer Discipline*, 14 GEO. J. LEGAL ETHICS 1081, 1081 (2001) (noting that "[w]hether alcoholism and drug addiction should be mitigating factors in attorney disciplinary proceedings has been thoroughly debated").

of forgoing a retributive penalty.⁸⁵ There are, however, additional considerations that apply mainly in the professional responsibility context.

Typically, when a disciplinary agency becomes involved in an addicted lawyer's case, the lawyer has manifested his addiction through behavior that can be classified as professional misconduct—for example, stealing from clients or missing court appearances.⁸⁶ As in criminal law, the decision of whether to impose sanctions initially is a decision of whether to sanction the separate misconduct.⁸⁷ Yet the regulator's actual concern may be the addiction itself, both in how it affects the lawyer's competence and how it affects the image of the bar.⁸⁸ In theory, the addiction—quite apart from the separate acts of misconduct—may be of sufficient importance to the professional regulators to warrant regulation.⁸⁹

85. Cf. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds. 1970) (explaining criminal law instrumentally, as reflecting a determination that the benefits of condemning and incapacitating a defendant outweigh the costs to the defendant and his family).

86. See, e.g., *Stanley v. State Bar*, 788 P.2d 697, 698 (Cal. 1990) (stating that drug and alcohol abuse contributed to the accused lawyer's misappropriation of client funds, crimes of moral turpitude, and abandonment of clients); *In re Tenner v. State Bar*, 617 P.2d 486, 488 (Cal. 1980) (recognizing alcohol as a major factor contributing to the accused lawyer's misappropriation of client funds, forgery, and misrepresentations to clients and the State Bar); *In re Kersey*, 520 A.2d 321, 327-28 (D.C. 1987) (noting that alcoholism played a significant role in twenty-four violations of the Code of Professional Responsibility over a two-year period); *In re Steinhoff*, 553 A.2d 1349, 1351-52 (N.J. 1989) (noting that cocaine addiction led to the accused lawyer's misappropriation of client funds); see also Bloom & Wallinger, *supra* note 5, at 1409 (discussing the relationship between substance abuse in the legal profession and lawyer misconduct); authorities cited *supra* note 9.

87. Cf. *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (forbidding criminal punishment for the "status" of narcotic addiction, "unaccompanied by culpable acts").

88. See, e.g., *Waysman v. State Bar*, 714 P.2d 1239, 1243 (Cal. 1986) ("[P]etitioner's conduct demands some discipline to protect both the public confidence in the legal system and to maintain rigorous professional standards."); see also *In re Calhoun*, 492 S.E.2d 514, 515 (Ga. 1997) (disbarring a chemically addicted lawyer "to protect the public from improprieties that injure the public's trust in the attorney-client relationship"); *In re Anderson*, 956 P.2d 1330, 1331-32 (Kan. 1998) (suspending a lawyer because his alcohol abuse led to incompetent client representation); Curall, *supra* note 6, at 741 ("Alcoholism affects attorneys to such a degree that they are often unable to carry on their practice competently or comply with th[e] codes.").

89. Traditionally, disciplinary agencies have viewed themselves as lacking the authority to sanction an addicted lawyer unless the lawyer violates an obligation to a client. See ABA SPECIAL COMMITTEE, *supra* note 3, at 110-11 (discussing the prevailing view that disciplinary agencies lack jurisdiction over "a lawyer who is notoriously unfit to practice law, because of psychiatric problems, senility, [and] alcoholism ... [when n]o offense [has] been committed thus far"). In theory, however, supervision of lawyer competence obliges disciplinary agencies to "protect the public from attorneys who are not fit to practice law." Workie, *supra* note 5, at 1358; cf. *State ex rel. Okla. Bar Ass'n v. Armstrong*, 791 P.2d 815, 818 (Okla. 1990) ("Discipline as severe as disbarment may be the appropriate measure to protect the public when a lawyer is found to have a drug and/or alcohol problem which impairs the lawyer's

The distinction between the emphases of professional regulators and criminal law enforcement personnel, of course, is only a matter of degree. Criminal prosecutors and sentencing courts, too, are sometimes more concerned with a defendant's infirmity than with the specific crime he has committed. However, disciplinary agencies that see themselves as implementing the administrative function of safeguarding the public from flawed lawyers are far more likely to focus on the substance abuse instead of the acts of misconduct.

Moreover, although legal issues of intoxication do arise in the criminal context,⁹⁰ the distinct nature of the professional regulators influences the way they address issues relating to substance abuse. The bar comprises a variety of regulators, each of whom are preoccupied less with enforcing legislative judgments regarding what conduct is culpable and more with implementing regulatory concerns about the effect of the conduct (and of the punishment) upon lawyers, clients, and the system of providing legal services.⁹¹ As discussed below,⁹² these multiple regulators all operate under the aegis of a single bar organization but possess different agendas.

To make matters more complicated, as in criminal proceedings, the parties to disciplinary proceedings will frame the issue of addiction in various ways. The offending lawyer can offer addiction as a mitigating factor, or even as an excuse to the charged offense.⁹³ The addiction calls culpability—the mens rea aspect of the charge—into question.⁹⁴ To the extent the lawyer has rehabilitated himself

competence as an attorney.”); Bartlett, *supra* note 5, at 288 (“When an attorney admits to extensive drug abuse, by his own acts creating the potential for grievous harm and evincing his unfitness to practice law, the court should immediately remove that attorney from a position through which he could cause that harm.”). For the most part, regulators have implemented that obligation by waiting for some violation to occur, however minor, and then addressing the effect of chemical addiction on the lawyer’s overall ability to practice.

90. See LAFAYE, *supra* note 22, § 4.10 (discussing the relationship between intoxication and mens rea, and rules against the introduction of evidence relating to voluntary intoxication).

91. Of course, similar considerations may play a role in criminal sentencing decisions. In the disciplinary/regulatory context, however, issues of culpability and appropriate sanctions are more intertwined.

92. See *infra* notes 100-10 and accompanying text.

93. See authorities cited *supra* notes 9-10; cf. *In re Sherman*, 363 P.2d 390, 392 (1961) (recognizing “[m]ental irresponsibility” as a complete defense to discipline, “(1) if such conduct was the result or the consequence of mental incompetency; and (2) if the mental condition ... has been cured ... [with] little or no likelihood of a recurrence”).

94. See, e.g., *In re Driscoll*, 423 N.E.2d 873, 874 (Ill. 1979) (stating that alcoholism “in rare cases ... might so change the character of the misconduct or so distort the attorney’s state of mind as to provide a complete excuse”); *In re Hein*, 516 A.2d 1105, 1107 (N.J. 1986) (“There may be circumstances in which an attorney’s loss of competency, comprehension, or will may be of such magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful.”); Bloom & Wallinger, *supra* note 5, at 1418 (framing the

through treatment, the future need to protect the public and the justifications for questioning his competence are lessened.⁹⁵

In contrast, disciplinary prosecutors reasonably can characterize substance abuse as independent grounds for strong punishment—even disbarment.⁹⁶ Addiction affects the lawyer's judgment, reliability, and ultimately the likelihood that he will represent clients competently.⁹⁷ Leniency on addiction grounds sends a signal

intoxication issue in terms of voluntariness); Ogando, *supra* note 5, at 476 ("Alcoholics and drug addicts have at some point made a conscious and voluntary decision to consume alcohol or to take drugs. The voluntary nature of their actions distinguishes them from mentally ill lawyers who have taken no voluntary steps towards the resulting incompetency.") (footnotes omitted); cf. *In re Rentel*, 729 P.2d 615, 619-20 (1986) (rejecting an attorney's claim that alcoholism and drug addiction robbed him of volition, on the basis that the initial decision to use alcohol and drugs was voluntary).

95. See, e.g., *In re Leardo*, 805 P.2d 948, 959 (Cal. 1991) (concluding that suspension was not warranted because of "extenuating factors of mitigation ... and the fact that [petitioner] is [no longer] a threat to either the legal profession or the public"); *Baker v. State Bar*, 781 P.2d 1344, 1354 n.7 (Cal. 1989) ("In the individual case, the circumstances in which the misconduct occurred or subsequent efforts by the attorney to correct the condition that precipitated the misconduct may demonstrate that the misconduct will not likely recur. In such cases, protection of the public may not require the [ordinarily recommended statutory] sanction"); *Twohy v. State Bar*, 769 P.2d 976, 982 (Cal. 1989) ("To [protect the public], when an attorney asserts ... that his history of misconduct stems from drug addiction, [he] must prove that the risk of continued substance abuse causing future acts of misconduct is virtually nonexistent."); see also Earle B. Wilson, *Alcoholism: A Mitigating Factor in the Disciplinary Process*, 31 HOW. L.J. 355, 361 (1988) ("A showing of recovery by an attorney indicates that he is once again fit to practice as a lawyer."); cf. *In re Kumbera*, 588 P.2d 1167, 1170 (Wash. 1979) (stating that respondent's "willingness to rectify the damage caused by the ... temporary mental aberrations for which the respondent has sought treatment" may mitigate the level of discipline required by the court, yet still protect the public).

96. This characterization supports disciplinary sanctions based on a lawyer's conviction of drug possession without any showing of harm to a particular client. See, e.g., *In re Payne*, 494 N.E.2d 1283, 1284-85 (Ind. 1986) (disbarring attorney who possessed and used marijuana and cocaine); *In re Moore*, 453 N.E.2d 971, 973-75 (Ind. 1983) (ordering the disbarment of a deputy prosecuting attorney for possession of marijuana); *In re Kaufman*, 518 A.2d 185, 187 (N.J. 1986) (imposing six-month suspension on an attorney convicted of two separate drug possession crimes within a four-month period); *In re Gibson*, 393 S.E.2d 184, 184 (S.C. 1990) (holding that possession of cocaine and heroin warrants disbarment); *In re Brende*, 366 N.W.2d 500, 500 (S.D. 1985) (holding that possession and use of cocaine warranted a 180-day suspension); *In re Parker*, 269 N.W.2d 779, 781 (S.D. 1978) (disbarring an attorney for the distribution of marijuana); cf. *In re Hickey*, 788 P.2d 684, 688 (Cal. 1990) (noting that when "an attorney's alcoholism has led him to engage in violent criminal conduct, the State Bar need not wait until the attorney injures a client or neglects his legal duties before it may impose a discipline to ensure the protection of the public"); *In re Orlando*, 517 A.2d 139, 142-43 (N.J. 1986) (suspending an attorney who pleaded guilty to possession of cocaine until he again demonstrates fitness to practice law).

97. See, e.g., Bloom & Wallinger, *supra* note 5, at 1409 (noting that an attorney who has a problem with alcohol or drugs is likely to use client funds to support his habit); Heil, *supra* note 8, at 1264-65 (arguing that addicted attorneys cannot practice law in compliance with the professional rules of conduct); Marano, *supra* note 5, at 368 ("Drug abuse ... can result in ... missed filing deadlines, failure to advise clients of legal proceedings, failure to appear in court for scheduled hearings and/or trials, unauthorized use of clients' funds ... and, in

to other lawyers that professional misconduct will be countenanced if an excuse for it can be found. Treating chemically addicted lawyers as persons deserving beneficent attention—particularly when the addiction is to an unlawful substance—negatively affects the image of lawyers as a whole and the public's perception of disciplinary agencies' willingness and ability to deal with subpar lawyers.⁹⁸

Aggrieved clients, in turn, ordinarily care less about the nature of the lawyer's disorder than the damage done to them. The lawyer's future clients, in contrast, should be concerned mostly with whether his addiction has been cured. Clients of other lawyers are most affected by the signal that any decision sends—both in terms of justifying misconduct to their lawyers and in terms of encouraging their lawyers, if addicted, to seek help before their addiction affects the representation they provide.

The disciplinary court needs to consider all of these factors, and more. It must try to reach a fair verdict that treats professional misconduct seriously and fosters respect for professional standards and discipline, but that also assures the competence of this and other lawyers who need treatment. Emphasizing punishment over rehabilitation may cause lawyers generally to hide their addiction and thus to avoid seeking the help that could prevent future misconduct.⁹⁹

general, inattention to the work entrusted to the attorney by clients."); Ogando, *supra* note 5, at 474 (arguing that "[a]ddiction adversely affects a lawyer's clients and the profession").

98. See, e.g., Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 153 (1991) (describing the unwillingness of the Michigan Attorney Grievance Commission to "[follow] through on rehabilitation proposals [regarding substance abuse situations] to avoid being criticized [as] assisting impaired attorneys"); Workie, *supra* note 5, at 1372 ("[T]he public's distrust of attorneys, and the legal profession in general, is heightened by the imposition of lenient sanctions for attorney misconduct [even if stemming from addiction]."); cf. Warren E. Burger, *The Decline of Professionalism*, Remarks from the Twenty-Third Annual John F. Sonnett Memorial Lecture delivered at Fordham University School of Law (Jan. 23, 1995), in 63 FORDHAM L. REV. 949, 950 (1995) (explaining that the failure to discipline attorney misconduct appropriately has led to a "decline in the public esteem of lawyers"); Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 482 (1997) (arguing, with respect to the intoxication defense in criminal law, that "the magnitude of an offense should be measured from the objective perspective of the community [rather than] the subjective perspective of the offender"); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1556 (2002) ("The inadequacy of professional oversight structures cannot help but contribute to public distrust; over two-thirds of Americans lack confidence in the integrity of lawyers or in their disciplinary system.").

99. Cf. *Florida Bar v. Jahn*, 509 So. 2d 285, 287 (Fla. 1987) ("An attorney with a chemical dependency problem, whether the drug of his choice is legal such as alcohol, or illegal such as cocaine, should be encouraged to seek treatment to rid himself of the dependency."); Workie, *supra* note 5, at 1363 (noting that "[b]efore the creation of [Lawyer Assistance

The conflicting considerations lead to a series of contradictions that are magnified in professional regulation because, often, several regulators—all operating at the direction of a unified bar—are empowered to address the same subject matter. Many bar associations, for example, have developed substance abuse programs to help lawyers confront their addiction.¹⁰⁰ The justifications for these programs include the right of lawyers, as human beings, to receive help and the benefits of treatment in preventing future misconduct or incompetence.¹⁰¹ In order to be effective, however, substance abuse programs need to enlist the cooperation of addicted lawyers¹⁰²—something that is difficult to obtain without assuring

Programs], many attorneys did not participate in treatment programs ... [for fear] they might see their clients" at Alcoholics Anonymous meetings).

100. See, e.g., *In re Zamora*, 21 P.3d 30, 32 (N.M. 2001) (discussing the State Bar of New Mexico's institution of an assistance program for attorneys suffering from alcohol and drug dependency in 1986); Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics That We Can Learn On the Road*, 15 GEO. J. LEGAL ETHICS 95, 102 n.19 (2001) (discussing the Alabama Lawyer Assistance Program); Bloom & Wallinger, *supra* note 5, at 1424 (discussing Washington's Lawyer Assistance Program); Carol R. Bonebrake, *Kansas Lawyers Assistance Program—Why You Should Care!*, J. KAN. B. ASS'N, Aug. 2001, at 6-7 (discussing Kansas' lawyer assistance program); Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477, 1487 (2002) (describing the Indiana Supreme Court's establishment of the Judges and Lawyers Assistance Program (JLAP) in 1997); Madalo, *supra* note 5, at 1295 (discussing California's Attorney Diversion and Assistance Program); Charles H. Oates, *A New Twist for an Olde Code: Examining Virginia's New Rules of Professional Conduct*, 14 REGENT U. L. REV. 97, 135 (2001) (discussing the Virginia Bar Association's Committee on Substance Abuse); Zacharias, *supra* note 81, at 12 n.19, 26 n.88 (identifying various lawyer assistance programs); *Offering Support to Lawyers and Judges*, WYO. LAW., June 2001, at 25 (describing a lawyer assistance program in Wyoming); cf. Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 180 (2001) (noting that "Lawyer Assistance Programs ... have been established in every state"); Levin, *supra* note 3, at 25 n.117 (discussing Florida's regime where "attorneys accused of personal use of controlled substances will be advised of the existence of Florida Lawyers' Assistance, Inc.").

101. See, e.g., Benjamin et al., *Lawyer Assistance Programs*, *supra* note 5, at 121 (asserting that lawyers will be more willing to seek assistance if they know that other lawyers suffer from a similar affliction); Workie, *supra* note 5, at 1363 (noting that the goal of lawyer assistance programs is "to encourage impaired lawyers to seek and receive help before they harm their clients and before impairment leads to disciplinary action"); cf. Stephanie B. Goldberg, *Drawing the Line: When Is an Ex-Coke Addict Fit to Practice Law?*, A.B.A. J., Feb. 1990, at 49, 52 (indicating that the greatest resource in lawyers' assistance programs is the support and friendship former addicts offer addicted attorneys).

102. See, e.g., Currall, *supra* note 6, at 744 (discussing disincentives for lawyers to seek help for substance abuse disorders); Heil, *supra* note 8, at 1278 ("Uninformed attitudes encourage afflicted attorneys to keep their disease hidden, thereby creating a significant impediment to the identification and treatment of impaired lawyers."); cf. *In re Hein*, 516 A.2d 1105, 1108 (N.J. 1986) ("[D]ependent attorneys become skilled at deception, not only of others, but of themselves."); Bartlett, *supra* note 5, at 287 (noting that "dependent attorneys develop barriers to the detection of their problem" which "prevent others from helping attorneys cope with their dependency before the detrimental effects of drug abuse manifest themselves").

the lawyers a measure of confidentiality.¹⁰³ This confidentiality may lead to bar participation in hiding professional misconduct that the lawyer may have committed under the influence of addictive substances.¹⁰⁴

At the same time—and often under the purview of the same bar associations that offer substance abuse programs for lawyers—disciplinary prosecutors may seek the removal of addicted lawyers' licenses on the grounds that addiction affects competence¹⁰⁵ or that particular misconduct committed by the lawyer merits disbarment.¹⁰⁶ The resulting case law is confused. The reviewing courts simply have not focused on a single goal of discipline, or priorities among conflicting goals, that would enable them to determine how chemical dependency should factor into disciplinary decisions. The decisions seem haphazard in their results—some recognizing chemical dependency as a mitigating factor,¹⁰⁷ some treating it as an aggravating factor,¹⁰⁸ others focusing on rehabilita

103. See, e.g., Allan, *supra* note 7, at 275 ("It is important that an individual who seeks or receives aid through [a lawyer assistance program] know that he or she can do so with the guarantee of confidentiality."); Bloom & Wallinger, *supra* note 5, at 1425 (referring to confidentiality in the Washington lawyer assistance program); Goldberg, *supra* note 101, at 49, 52 (noting that rehabilitation subsequent to conviction for a drug-related offense is not the answer and suggesting a confidential program of treatment and counseling prior to proceedings before a disciplinary board); Oates, *supra* note 100, at 135 n.160 ("[P]roviding for ... confidentiality encourages lawyers and judges to seek needed treatment; otherwise, lawyers and judges may hesitate to seek assistance."); L.J. Pendlebury, *D.C. Bar Gropes with Novel "Cocaine Defense,"* LEGAL TIMES, Aug. 1, 1988, at 8 (explaining that "increasing trust in [the] effectiveness and confidentiality" of lawyer counseling programs is one reason more lawyers are seeking help).

104. In other words, in providing assistance to addicted lawyers, administrators of bar programs may well learn of prior misconduct by an addicted lawyer, or a weakness on the part of the lawyer, that may hurt his clients in the future. To the extent the administrators maintain confidentiality by not warning clients, they may contribute to the clients' injuries.

105. See, e.g., *In re Strange*, 366 N.W.2d 495, 498 (S.D. 1985) (Henderson, J., concurring) (noting that although attorney's drug use may not have manifested itself in harm to clients, the "severely damaging effects" of cocaine abuse would eventually produce adverse consequences); cf. Ogando, *supra* note 5, at 461 n.22 ("Addiction may affect the attorney's professional competence in a number of ways ranging from lax research skills to decreased ability to accurately assess the worth of a settlement offer."); Workie, *supra* note 5, at 1358 ("Attorneys who [cannot] control their use of alcohol or drugs because of the disease of addiction disserve their clients."); see also *supra* note 96.

106. See *supra* note 86.

107. See, e.g., *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987) ("To fail to consider alcoholism as a mitigating factor would be to defy both scientific information and common sense."); *Nebraska ex rel. Neb. State Bar Ass'n v. Barrett*, 501 N.W.2d 716, 716 (Neb. 1993) (treating alcoholism as a mitigating factor); see also Bloom & Wallinger, *supra* note 5, at 1410 ("In some jurisdictions, alcoholism serves as a mitigating factor"); Currall, *supra* note 6, at 747 ("[M]ost jurisdictions treat alcohol abuse as a mitigating factor"); authorities cited *supra* notes 9-10.

108. See, e.g., *In re Howard*, 765 A.2d 39, 43-44 (Del. 2000) (relying upon defendant

tion,¹⁰⁹ and yet others ignoring the ramifications of the lawyer's addiction altogether.¹¹⁰

attorney's "pattern of misconduct by using illegal drugs ... [and] engag[ing] in illegal conduct by using controlled substances"); *In re Funk*, 742 A.2d 851, 853-54 (Del. 1999) (treating an attorney's consumption of alcohol in a motor vehicle and possession of marijuana as aggravating factors); *In re Makin*, 698 N.E.2d 767, 768 (Ind. 1998) ("Aggravating the respondent's misconduct was the devious intricacy of his scheme to procure prescription drugs."); *In re Jones*, 843 P.2d 709, 713 (Kan. 1992) ("[A]ddiction to a substance that is unlawful to purchase, possess, or use should not be a mitigating factor in disciplinary cases and should be considered as an aggravating factor if that addiction is not itself charged as a basis for discipline."); *In re Stein*, 483 A.2d 109, 117 (N.J. 1984) (holding that use of illegal substances is an aggravating factor because it involves the commission of a crime); *In re Discipline of Jeffries*, 500 N.W.2d 220, 226 (S.D. 1993) (characterizing chemical dependency as an aggravating circumstance); *In re Walker*, 254 N.W.2d 452, 457 (S.D. 1977) (rejecting alcoholism as a defense but finding rehabilitation to be relevant to the likelihood of renewed misconduct); *In re Disciplinary Proceedings Against Penn*, 548 N.W.2d 526, 527 (Wis. 1996) (considering the "aggravating factor of Attorney Penn's position of chief law enforcement official in the county and the fact that his use of illegal drugs frequently occurred in the company of persons subject to prosecution by his office for non-drug criminal offenses"); see also Goldberg, *supra* note 101, at 50 ("[D]rug use ought to be an aggravating factor in disciplinary violations....") (internal quotes omitted).

109. See, e.g., *Howard v. State Bar*, 793 P.2d 62, 66 (Cal. 1990) (placing the burden on petitioner "to demonstrate the kind of totally effective rehabilitation that would justify relief from or substantial reduction of discipline"); *In re Billings*, 787 P.2d 617, 622 (Cal. 1990) ("[E]vidence of alcohol abuse at the time of [misconduct] ... coupled with evidence that the abuse was addictive in nature and causally contributed to the misconduct ... [and] a meaningful and sustained period of successful rehabilitation ... should be considered as a factor in mitigation of disciplinary sanctions."); *Att'y Grievance Comm'n v. Gilbert*, 739 A.2d 1, 5 (Md. 1999) ("[W]e have long recognized ... that rehabilitative efforts by an attorney may mitigate the severity of misconduct not warranting disbarment."); *State ex rel. Okla. Bar Ass'n v. Giger*, 37 P.3d 856, 863 (Okla. 2001) ("[I]t is a lawyer's recognition that an illness (or its treatment) is having (or has had) an adverse effect on the discharge of that lawyer's professional responsibilities, together with his (or her) cooperation in modulating medical treatment, that merits consideration as mitigation."); see also Wilson, *supra* note 95, at 361 ("[R]ehabilitation from [alcoholism] will be a significant factor in imposing discipline The concern of the court in establishing the rehabilitation requirement is to ensure as much as possible that there is some assurance the alcoholic will not revert to his old ways."); cf. *Twohy v. State Bar*, 769 P.2d 976, 983 (Cal. 1989) ("[I]ncomplete or short-term efforts at rehabilitation" are not factors to be considered in mitigation, absent "evidence that a 'long-standing addiction is permanently under control,' or demonstration of 'a meaningful and sustained period of successful rehabilitation'") (citations omitted).

110. See, e.g., *Twohy*, 769 P.2d at 982 (declining to acknowledge cocaine addiction as a mitigating factor); *In re Soininen*, 783 A.2d 619, 622 (D.C. 2001) (noting that mitigation of the sanction for violation of attorney disciplinary rules is not available in cases involving addiction to illegal drugs); *Att'y Grievance Comm'n v. Kenney*, 664 A.2d 854, 862 (Md. 1995) ("[A]bsent truly compelling circumstances, alcoholism will not be permitted to mitigate where an attorney commits a violation of ethical or legal rules which would ordinarily warrant disbarment."); *In re Hein*, 516 A.2d 1105, 1108 (N.J. 1986) (refusing to consider alcoholism as a mitigating factor when lawyer's misconduct consisted of the misappropriation of client funds); *In re Eads*, 734 P.2d 340, 348 (Or. 1987) ("In cases where disbarment is the norm, we hold that drug or alcohol dependency will not reduce th[e] sanction."); see also Bloom & Wallinger, *supra* note 5, at 1410 (noting jurisdictions that have rejected a mitigation approach); Larry Cunningham, *When Lawyers Break the Law: How the District of Columbia Court of Appeals Disciplines Members of the Bar Who Commit Crimes*, 6 UDC/DCSL L. REV.

B. Violations Involving Misinterpretations of the Rules

Criminal regulation, far more than the professional regulation of lawyers, is based on notions of fault. Criminal regulation usually, though not always, punishes intentional misconduct.¹¹¹ The core of criminal prosecutions is to determine what level of retribution the culpable conduct deserves.

The lawyer codes, in contrast, provide a range of general standards for a variety of practice situations that usually call upon lawyers to interpret the rules. When lawyers violate the codes, their conduct often represents simple negligence, or less. The professional regulators implementing the administrative guidelines must consider whether the need to protect the public justifies sanctions for reasons other than blameworthiness on the lawyer's part.¹¹²

Consider a few violations of the professional rules that are occasioned by a lawyer's honest misinterpretation of the rules. For example:

1. Lawyer A interprets the local ethics code provision governing trust accounts¹¹³ as forbidding him to place a client's assets in an interest bearing account.¹¹⁴ In fact, deposit into a relatively safe

9, 29 (2001) (noting that "[t]he D.C. Court of Appeals does not consider alcoholism—or any other mitigating factor—in moral turpitude proceedings," but may do so when "moral turpitude is not found").

111. In substantive criminal law, "intentional" traditionally has been used to mean both (1) "purposeful," in that the actor consciously desires the result, whether or not that result is likely to occur; and (2) with knowledge "that [the] result is practically certain to follow," whether or not the actor desires the result. LAFAVE, *supra* note 22, § 3.5, at 229-30. The two categories often are treated as signifying similar culpability, but are distinguished from mere negligence. See MODEL PENAL CODE, § 2.02 cmt. at 234 (1985) ("[T]his distinction is inconsequential for most purposes of liability ... [b]ut there are areas where the discrimination is required"). Under the Model Penal Code's framework, one acts "purposely" when one has a "conscious object ... to cause such a result," and "knowingly" if one is "aware that it is practically certain that his conduct will cause such a result." *Id.* §2.02(2)(a)(i), (b)(ii).

112. Negligence, of course, is a form of blameworthy conduct, but is of a different nature than the blameworthy conduct that criminal law typically focuses upon. See Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 329-32 (1996) (discussing "the two kinds of culpability and the two kinds of justice").

113. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15 (2002); CAL. RULES OF PROF'L CONDUCT R. 4-100 (1989); D.C. RULES OF PROF'L CONDUCT, R. 1.15 (1990); N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.46 (1999).

114. Most trust account rules are silent on this subject, but lawyers historically have hesitated to use interest-bearing accounts because they technically bear some risk. The advent of money market funds, however, has virtually eliminated this risk. See RONALD D. ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 16-6 (2003 ed.) (noting the historic practice of using non-interest bearing accounts in lawyer trust

money market account is permissible.¹¹⁵ Because the amount in question is large, the client loses substantial money as a result.

2. Lawyer *B* accepts a case when he should have declined it under the professional rules because he was likely to become a witness.¹¹⁶ Lawyer *B* subsequently is disqualified from the case, resulting in significant unnecessary legal fees for the client in bringing a new lawyer up to speed.

3. Lawyer *C* satisfies the letter of the conflict of interest rules, obtaining a waiver of a conflict of interest from the client.¹¹⁷ A better interpretation of the rules would have been that the lawyer should have recognized that the waiver was not in the client's interest and should have advised the client not to retain him.¹¹⁸

In each of these scenarios, the client is injured by the lawyer's violation. In the second and third cases, the lawyer's conduct may have been motivated by self-interest, but the lawyer did not knowingly violate the rules.

The notion that ignorance of the law is no excuse is well-established in criminal law. In the famous case of *Hopkins v. State*,¹¹⁹ the court imposed criminal punishment even though the state's attorney had advised the defendant that his conduct was not

funds); cf. Frederick Miller et al., *Ethics & Professionalism: Attorney Trust Accounts & Law Office Record Keeping for New York Lawyers*, 2002, at 58 (PLI N.Y. Practice Skills Course, Handbook Series, 2002) (stating that the majority of escrow accounts containing multiple funds are kept in non-interest bearing accounts due to the difficulty of calculating interest).

115. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 159 (1998) (describing Texas' requirements with regard to placement of trust funds in interest-bearing accounts); *In re Petition for Disciplinary Action Against Westby*, 639 N.W.2d 358, 368 (Minn. 2002) (noting Minnesota's requirement that trust funds be placed in an interest-bearing account); see also CAL. BUS. & PROF. CODE § 6211(b) (West 2002) (suggesting that a non-IOLTA trust account must be interest-bearing, with the interest earned on the account payable to the clients); N.Y. JUD. LAW § 497 (2002) (according lawyers discretion to determine whether client funds should be deposited in interest-bearing bank accounts); Miller et al., *supra* note 114, at 13-14, 58 (supporting the use of interest-bearing trust accounts).

116. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.7 (2002) (setting forth criteria for deciding when a lawyer should accept representation if he may become a witness).

117. The California rules, for example, seem to insulate all conflict-related decisions by lawyers so long as the lawyer has obtained an informed waiver from the client. E.g., CAL. RULES OF PROF'L CONDUCT R. 3-310 (1989). The ABA model codes are deferential to waivers as well. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(a), (b) (2002).

118. Arguably, lawyers have a fiduciary obligation to clients when obtaining waivers and, therefore, owe a duty to advise them against making a waiver when doing so is against their best interest. See Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 432-33 (1998) (discussing the duties of lawyers in obtaining waivers of conflicts of interest).

119. 69 A.2d 456 (Md. 1950).

proscribed.¹²⁰ At least one commentator has suggested that “the right approach is to inquire whether the action as perceived by the actor is less wrong than the action actually committed.”¹²¹ The Model Penal Code has taken the view that ignorance of the law is excusable only when the defendant’s conduct is based on an “official interpretation” of the law.¹²²

The problem in the professional responsibility context is twofold. First, there is no meaningful mechanism for lawyers to obtain official interpretations of the law.¹²³ Second, the codes themselves, in many instances, are designed to give lawyers discretion to interpret the rules and apply them flexibly to different situations.¹²⁴ Often, these interpretations depend on predictions regarding how the representation is likely to unfold.¹²⁵ In a very real sense, the codes thus make lawyers the initial “official interpreters” of many of the rules. It seems unfair to apply a strict standard of compliance when a reviewing court determines after the fact that a lawyer’s interpretation or prediction was improper. The baseline assumption that noncompliance establishes fault is particularly inappropriate for disciplinary rules that themselves implement prophylactic client protections and therefore prohibit conduct that lawyers may not intuitively identify as blameworthy.¹²⁶

What approach by the disciplinary agency would best protect the public? The answer may not necessarily lie in determining whether the lawyer’s interpretation of the rules was fully justified. For a disciplinary regulator who takes a lawyer-centered approach, the key is to determine the competence of the lawyer in question. A simple misinterpretation of the rules does not automatically render a lawyer incompetent.¹²⁷ On the other hand, if a lawyer’s misinter-

120. *Id.* at 460.

121. FLETCHER, *supra* note 25, at 150.

122. MODEL PENAL CODE § 2.04(3)(b) (2001).

123. Some jurisdictions provide bar “hotline” advice and ethics committee decisions, but both of these ordinarily state that they are advisory and nonbinding and that the recipients are bound to make their own determination of the correct interpretation of the codes.

124. *See* Zacharias, *supra* note 39, at 245 (noting code provisions intentionally left nonspecific).

125. For example, in the second hypothetical scenario, the lawyer must predict whether he is likely to become a witness.

126. Conflict of interest rules, for example, make lawyers avoid some types of representation that they believe they could handle well and which the client wishes the lawyer to undertake. Trust account rules require safekeeping and accounting procedures that apply whether or not there is any realistic risk that a particular lawyer will misappropriate or mishandle client funds. *See supra* notes 114-15, 117-18.

127. In other words, the lawyer who failed to obtain interest for his client’s funds or who inadvertently agreed to represent a client in a case in which he later is disqualified will not necessarily represent clients ineffectively in future cases.

pretation of a rule resulted from inadequate familiarity with the rules, it may suggest either a need for additional education about the professional standards or may reflect an inability to understand and internalize legal ethics requirements. Factual inquiry into these issues should help frame the regulator's response.¹²⁸

In the latter two hypothetical scenarios, a factual inquiry may reveal that the lawyer allowed his personal interest in being retained to color his interpretation of the rules. These facts would raise the issue of the lawyer's character. The lawyer may be fully competent and, with a warning, could make himself fully familiar with the professional rules. But his willingness to abide by the rules when they are inconsistent with his own welfare is questionable.

An agency might resolve this quandary by continuing to focus on the likelihood of recurrent misconduct by this lawyer. Under the scenario just outlined, however, the lawyer-centered approach seems less consistent with protecting the public than a more client-oriented approach. When a lawyer's misinterpretation of a professional rule is completely inadvertent, educating the lawyer seems sufficient to protect future clients of the lawyer. Deterrence of other lawyers is unlikely to result from punishing the inadvertent offender.¹²⁹ When, in contrast, self-interest or character flaws contribute to the lawyer's misinterpretation of a rule, it becomes more reasonable to consider whether the lawyer should be prevented from practicing further or to consider whether other lawyers could be prevented from similar selfish orientations to the codes through imposition of punishment in this case.

What if, though, the disciplining court finds that—while self-interest may have been a motivating factor—the primary cause of the violations was ambiguity in the rules. To the extent the court perceives its function as maintaining standards that all lawyers can and will follow, the particular lawyer's competency and likelihood of recidivism become of relatively minor concern. The court may correct the ambiguity by writing an opinion that clarifies the import of the rule. That alone, however, does not guarantee compliance because lawyers reading the opinion may interpret it as a practical device by which the court simply has avoided punishing the lawyer in question. Depending on how reasonable the lawyer's interpreta-

128. In the first circumstance, for example, retraining or further education regarding professional responsibility might correct the lawyer's failings. In the second circumstance, the lawyer's inability may reflect a fundamental incapacity for dealing with legal issues that bodes ill for the lawyer's qualifications to continue practicing.

129. Although there are exceptions, lawyers can do little to avoid inadvertent errors, so warning them about the potential for sanctions is unlikely to change their behavior.

tion of the rule was, establishing the credibility of the revised standard may require the court to enforce the standard through punishment as well.

Process-centered considerations may even militate in favor of punishing the offending lawyer more than he otherwise would deserve, given his limited culpability and the ambiguity in the rule. In the trust account case, for instance, it may be important for the disciplinary agency to make an example of the lawyer, for two reasons. First, violations of trust account rules already make up a large portion of disciplinary cases and thus consume a large part of the resources of disciplinary agencies.¹³⁰ To the extent especially harsh and public punishment serves to tip other lawyers' cost-benefit analyses in favor of complying with trust account rules, that outcome may free up disciplinary resources to devote to other violations.

Of course, how far courts should go to punish persons of limited blameworthiness in order to deter conduct by others has long been a matter of debate among criminal law scholars.¹³¹ This issue is of prime importance within criminal law theory because blameworthiness rests at the foundation of criminal punishment. Arguably, however, disciplinary courts that perceive themselves as regulating an industry and seeking to assure competence throughout the industry without focusing on lawyers' fault are more justified in adopting a perspective that emphasizes deterrence.

The second reason for making an example of an offending lawyer is that strict enforcement may encourage clients to trust lawyers more. Thus, in the conflict of interest case, making a public statement in a disciplinary decision that lawyers must provide waiver advice with the interests of clients in mind may encourage clients to discuss the subject more freely with their lawyers. Establishing this principle ultimately will result in better representation.¹³² Again, the relative emphasis the disciplining agency

130. See, e.g., Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process — 1982 to 1991: An Empirical Study, Critique and Recommendations for Change*, 62 U. CIN. L. REV. 947, 970 (1994) (finding mishandling or misappropriation of funds to be a major category of misconduct for which courts have sanctioned attorneys in Ohio); Ellen R. Peck, *Lawyers Handling of Funds and Other Property*, 1996-97, at 205 (PLI Litig. & Admin. Practice Course, Handbook Series No. 4-555) (noting that trust account violations are the second most frequent grounds for complaint to the California State Bar and one of the most frequent causes of discipline of California's lawyers).

131. See, e.g., KATZ ET AL., *supra* note 20, at 74, 75 (delineating the debate).

132. Presumably, the more comfortable clients feel in discussing matters with their attorneys, the better the trust and cooperation between them will develop. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358-59 (1989) (noting that the traditional justifications for strict confidentiality rules include improving the attorney-client

places on the lawyer's interests, client protection, and the educational function of sanctions will help determine the level of sanctions that should be imposed.

C. Violations Involving a Dispute Over the Legitimacy of Particular Rules

How can disciplinary agencies and courts best protect the public when a lawyer's violation of the professional rules is intentional, but undertaken because of the lawyer's belief that the rule is unlawful and wrong? Numerous examples of such violations exist. Federal prosecutors, for example, have violated or challenged two sets of recent rules directed at prosecutors—those limiting prosecutors' ability to subpoena lawyers¹³³ and those forbidding communications with represented persons.¹³⁴ The prosecutors have claimed that these rules exceed the powers of the bar and entrench on executive prerogatives.¹³⁵ Civil attorneys likewise have challenged

relationship and enhancing the quality of legal representation).

133. See, e.g., *Stern v. United States Dist. Ct.*, 214 F.3d 4, 7, 21 (1st Cir. 2000) (overruling a federal district court's adoption of a local rule restricting the issuance of grand jury subpoenas to attorneys); *United States v. Colo. Sup. Ct.*, 189 F.3d 1281, 1283 (10th Cir. 1999) (upholding a state ethics rule forbidding attorney subpoenas); *Whitehouse v. United States Dist. Ct.*, F.3d 1349, 1351-52, 1366 (1st Cir. 1995) (upholding federal court rule following state rule limiting attorney-subpoenas); *Baylson v. Disciplinary Bd.*, 975 F.2d 102, 112 (3d Cir. 1992) (rejecting the district court's authority to adopt rule requiring federal prosecutors to obtain judicial approval prior to serving a grand jury subpoena on an attorney); *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (per curiam) (en banc) (upholding a decision by a federal district court to adopt a state rule limiting attorney subpoenas). The many commentators that have discussed these cases include Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 294-95, 310 n.60, 370-75, 382 (1992); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 438-51 (2002) (analyzing the claims of federal prosecutors that they should be insulated from state and federal judicial regulation); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 918-19 nn.4-5, 923 n.22, 942 n.97 (1992).

134. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (requiring prosecutorial compliance with California's no-contacts rule); *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir. 1990) (limiting a no-contacts rule to post-investigative stages of prosecutions); *United States v. Hammad*, 846 F.2d 854, 857-59 (2d Cir. 1988), modified, 858 F.2d 834 (2d Cir. 1988), remodified, 902 F.2d 1062 (2d Cir. 1988) (applying a no-contacts rule to federal prosecutors); *In re John Doe, Esq.*, 801 F. Supp. 478, 479-81 (D.N.M. 1992) (involving discipline of a federal prosecutor for violation of a state no-contacts rule); see also 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, 466-82 (1996) (discussing the Department of Justice efforts to exempt itself from no-contacts rules); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors; Or, Who Should Regulate the Regulators*, 65 FORDHAM L. REV. 429, 429-30 nn.1-7 (1996) (providing authorities).

135. See, e.g., Green & Zacharias, *supra* note 133; Zacharias, *supra* note 133, at 918

a variety of code provisions, including rules governing extrajudicial statements,¹³⁶ legal advertising,¹³⁷ and solicitation of clients.¹³⁸

On the surface, again, one might draw an analogy to criminal conduct committed in order to satisfy judicial requirements for challenging a criminal law. Both the criminal law and the professional rule being violated reflect lawmaker decisions that the conduct in question is punishable. But there the analogy breaks down. The legislature's criminal law decision suggests that some punishment (within a broad range) is appropriate for the culpable conduct. The goal of the professional rule may be something other than identifying punishable conduct. The disciplinary agency ultimately must mesh the finding of "culpability" with its separate regulatory function of assuring a competent legal profession,

(discussing attorney-subpoena rules and analyzing the criticism that they "interfer[e] with valid law enforcement interests"); Zacharias, *supra* note 134, at 431-46 (discussing Department of Justice claims of authority to regulate the ethics of its own lawyers).

136. See, e.g., *Hirschkop v. Snead*, 594 F.2d 356, 361-63 (4th Cir. 1979) (challenging the constitutionality of the Virginia State Bar's implementation of its gag rule); cf. *United States v. Cutler*, 58 F.3d 825, 828 (2d Cir. 1995) (challenging on constitutional grounds a contempt citation for violation of a federal district court's local gag rule); *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 247 (7th Cir. 1975) (reviewing a class action challenging the constitutionality of the Northern District of Illinois gag rule).

137. See, e.g., *Peel v. Att'y Registration and Disciplinary Comm'n*, 496 U.S. 91, 97-98, 110-11 (1990) (invalidating a general prohibition against lawyers advertising their "specialist" status with regard to particular practice areas); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629-30, 646-47 (1985) (allowing some legal advertising in local newspapers); *In re R.M.J.*, 455 U.S. 191, 206-07 (1982) (invalidating a blanket prohibition of potentially misleading advertising); *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (holding that truthful advertising of routine legal services is constitutionally protected).

138. See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35 (1995) (upholding a thirty-day moratorium on lawyer solicitations after accidents); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 478-80 (1988) (allowing direct-mail advertising when "truthful and nondeceptive"); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 448-49, 468 (1978) (upholding the application of a state ban on in-person solicitation against a lawyer's constitutional challenge); *In re Primus*, 436 U.S. 412, 422-23, 438-39 (1978) (upholding the right of a non-profit organization to engage in solicitation for the purpose of advancing civil liberties objectives or personal political beliefs). Other rules that have been challenged on constitutional grounds include rules against criticizing judges and conflict of interest standards that interfere with the ability of multiple criminal defendants to use the same lawyer. See, e.g., *In re Sawyer*, 360 U.S. 622, 635-36 (1959) (holding that a lawyer had not acted improperly in criticizing a judge's error in post-trial interviews with a juror); *In re Grand Jury Proceedings, Appeal of John Doe*, 859 F.2d 1021, 1022-23 (1st Cir. 1988) (challenging an order that a lawyer withdraw from representing two defendants who wished to stonewall the grand jury); *United States v. Flanagan*, 679 F.2d 1072, 1075-76 (3d Cir. 1982) (appealing the disqualification of counsel for joint defendants who waived the conflict for tactical reasons), *rev'd on other grounds sub nom. Flanagan v. United States*, 465 U.S. 259 (1984) (holding the district court's pretrial disqualification not immediately appealable); *In re Special Grand Jury and Att'y Gimble*, 480 F. Supp. 174, 178-80 (E.D. Wis. 1979) (rejecting the disqualification of a lawyer representing multiple defendants); *In re Raggio*, 487 P.2d 499, 499-500 (Nev. 1971) (challenging the constitutionality of discipline imposed on a lawyer for publicly criticizing a judicial decision).

including the competence of this lawyer and other lawyers in the future.

Here, again, the orientation and goals of the bar regulators cannot help but determine the regulator's responses to the misconduct. In some of the above examples, the lawyers who violated the rules did so for the precise purpose of, in their minds, protecting clients or the public. Their decisions to risk sanctions for professional misconduct were a by-product of acting competently—going the extra mile for their clients. The disciplined federal prosecutors, for example, sought to ensure the public's ability to investigate and prosecute crimes.¹³⁹ Lawyers who challenged gag¹⁴⁰ and advertising¹⁴¹ rules often did so because those rules limited clients' rights

139. See, e.g., *United States v. Colo. Sup. Ct.* 189 F.3d 1281, 1283 (10th Cir. 1999) (challenging a Colorado rule restricting the ability of federal prosecutors to subpoena attorneys to compel evidence about a past or present client in criminal proceedings); *John Doe*, 801 F. Supp. at 478-81 (involving a challenge to a state's right to discipline a federal prosecutor for violating a state no-contacts rule); *In re* Petition of Almond, 603 A.2d 1087, 1088 (R.I. 1992) (reviewing a petition to the state supreme court to waive an ethics rule that required prosecutors to obtain judicial approval before subpoenaing attorneys to compel evidence about a past or present client).

140. See, e.g., *Gentile v. State Bar*, 501 U.S. 1030, 1042 (1991) (involving a lawyer's challenge to discipline based on the claim that the lawyer's "primary motivation was the concern that, unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors"); *Hirschkop*, 594 F.2d at 361-63 (challenging a state rule prohibiting all comment on pending legal matters on the grounds that it violated attorneys' and clients' First Amendment rights); *Chi. Council of Lawyers*, 522 F.2d at 247, 250 (class action suit challenging a state gag rule on the grounds that it unconstitutionally restricted defendants' rights to publicly disseminate and receive information on pending litigation); *United States v. Lehder-Rivas*, 667 F. Supp. 827, 828-29 (M.D. Fla. 1987), *aff'd* 955 F.2d 1510 (11th Cir. 1992) (challenging a temporary restraining order prohibiting a defendant and attorneys from contacting potential jury members on the grounds that it interfered with defendant's right to free speech and his right to prepare an effective defense); cf. *United States v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993) (challenging a gag order banning all public commentary related to the pending case as being unconstitutionally overbroad). For discussions of the arguments against gag rules, see, for example, Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 879-81, 897-933 (1990) (discussing First Amendment implications of regulations on lawyer speech); Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494 (1993) (discussing First Amendment issues relating to trial publicity rules); Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1351-65, 1886-99 (1993) (discussing First Amendment implications of regulating lawyer speech); Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995) (discussing appropriate balancing of the countervailing client and systemic interests); Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1419-24 (1990) (discussing First Amendment issues relating to gag orders).

141. See, e.g., *Zauderer*, 471 U.S. at 634, 642-43 (arguing that bans on advertising fees and specific legal services undermine consumers' ability to obtain representation); *R.M.J.*, 455 U.S. at 203-04 (arguing that the state cannot prohibit truthful yet *potentially* misleading

and undermined clients' ability to receive high quality representation. Disciplinary agencies thus could not justifiably have imposed sanctions simply by reciting the "protect the public" rationale.

Under a client-oriented or lawyer-oriented approach to discipline, a court reviewing cases in which lawyers challenge rules for the benefit of clients needs to evaluate whether the lawyers' conduct reflected incompetence, disserved clients, or illustrated a tendency to represent clients inadequately. Sanctions in many of these cases might be hard to justify. In the advertising context, for example, the U.S. Supreme Court has stated directly that the "public" may benefit from a finding that particular prohibitions on advertising are unconstitutional.¹⁴²

Potential sanctions might be evaluated differently under profession-centered or process-centered rationales. Excusing rule violations, even well-intended rule violations, undermines the professional codes as a credible threat.¹⁴³ It also risks sending the public a message that the professional standards will not be enforced when an accused lawyer offers an arguable excuse for a violation.¹⁴⁴ Thus, a disciplinary prosecutor or reviewing court may feel bound to press sanctions in order to maintain the guiding and image-preserving force of the rules, until told by higher authorities that the rules are illegitimate.

Process considerations may militate in the opposite direction as well. To the extent that a disciplinary agency anticipates that continuing legal challenges to particular types of rules may prevail, as in the case of continuing challenges to advertising and solicitation rules, the regulators must balance competing considerations.

advertising when there is no proof of a substantial state interest in limiting potential clients' access to the information); cf. *Peel*, 496 U.S. at 97-98, 110-11 (rejecting a state prohibition against lawyer advertising of "specialist" status). Indeed, the Supreme Court ultimately struck down basic legal advertising prohibitions on the ground that legal advertising benefits the public by expanding information and options available to consumers of legal services. See *Bates*, 433 U.S. at 374 ("But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers.").

142. *Bates*, 433 U.S. at 376-77 (explaining that advertising helps people find a suitable lawyer, and that a ban on legal advertising "likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable").

143. See Zacharias, *What Lawyers Do*, *supra* note 52, at 1006 (explaining, in the context of disciplinary rules regulating lawyer advertising, that substantial underenforcement breeds disrespect for professional regulation and may encourage lawyers to bend or violate other professional rules).

144. See *id.* at 1008-09 (explaining that nonenforcement of advertising rules without a public explanation may lead to public misunderstanding of the bar and the principle of self-regulation).

Attempting to enforce the rules may consume significant resources that could be used to address undisputed misconduct. Appearing to abdicate enforcement, however, sends a signal that lawyers are free to violate the rule in question¹⁴⁵ and may weaken the moral force of the codes in other contexts as well.¹⁴⁶

D. Violations Driven by a Conscious Moral Dilemma

A related category of potential rule violations is conduct that a lawyer undertakes because a rule requires him to act, in his view, immorally. In criminal law, the ordinary assumption is that the legislature has made a judgment that violating a law contradicts the majority's moral standards, even though an individual defendant does not share them.¹⁴⁷ That is not necessarily the case with professional regulation, in which many rules are written for practical and systemic reasons that may be morally agnostic.¹⁴⁸ Indeed, the rules sometimes depend upon lawyers to exercise discretion and upon enforcement agencies to excuse violations in circumstances in which compliance would lead to reprehensible results.¹⁴⁹

145. See *id.* at 1005-06 (discussing the effects of underenforcing or not enforcing explicit professional rules).

146. *Id.* at 1006-07.

147. Of course, there are exceptions. Some criminal laws reflect bright-line rules which society might prefer to be violated under some circumstances, but into which society does not dare write exceptions. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 53-54 (2001) (discussing the reality that no matter how well a rule is crafted, "a general, determinate rule can never achieve the perfection of accurate case-by-case decision-making").

148. See Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 *RUTGERS L. REV.* 191, 194 (2001) (describing how legal ethics standards often differ from pronouncements of moral behavior in that they simply express practical considerations important to the operation of the legal system that lawyers should take into account when reaching moral decisions).

149. See, e.g., Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 *FORDHAM L. REV.* 1307, 1312 (1998) (urging the exercise of prosecutorial discretion by disciplinary authorities with respect to rule-violative lawyer decisions based on religious conscience); Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 *FORDHAM L. REV.* 1253, 1259 (1998) (arguing that, under some circumstances, disciplinary agencies should "exempt" lawyers who violate rules for bona fide religious and moral reasons); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 *IOWA L. REV.* 901, 952 (1995) (arguing that "the ABA should revise its Standards for Imposing Lawyer Sanctions and officially approve disciplinary leniency by specifically including reasonable moral justification for misconduct as a mitigating factor") (footnote omitted); cf. Zacharias, *supra* note 148, at 218-19 (discussing cases involving lawyers' conscientious violation of the professional rules and arguing that lawyers should implement such objection in a way that allows regulators to react).

The most prominent example is the lawyer who breaches a confidentiality obligation that forbids disclosure of a client's intention to kill a third party.¹⁵⁰ Less extreme examples exist as well.¹⁵¹ In these situations, the lawyer does not act from an intention to garner personal advantage. He is able to comprehend the professional mandates and concedes their legality. Ethical or religious considerations drive him to disobey, however, in a way that most other lawyers would not.¹⁵² The question for disciplinary agencies is how to react to this well-intentioned yet prohibited conduct.

The answer, again, depends on the goals or postures that the disciplinary agency emphasizes. In the confidentiality example, "protecting the public" is a peculiar rationale to emphasize, because in the individual case the public probably is better served by the lawyer's violation—which saved a life—than by the protection of the client's interest in having a future crime hidden. To the extent the professional rules and enforcement of the rules can be justified, the disciplinary agency and reviewing court must assess how systemic interests in maintaining the violated rule (here, strict confidentiality) factor into the various purposes of discipline.

Depending upon the particular moral question at issue, adopting a client-centered approach may force the disciplinary agency to confront the distinction between protecting the lawyer's current client, his future clients, and the clients of other lawyers. In the confidentiality hypothetical, the client's interests simply may not

150. Although most professional rules would allow disclosure of confidences by lawyers who know that their client will presently injure someone seriously, others do not. *See, e.g.*, San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1 (1990) (interpreting California's recently amended confidentiality rule as forbidding attorney disclosure of a client's intent to inflict serious bodily harm or death upon another person); Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1995) (analyzing California's former confidentiality rule and the San Diego opinion interpreting it strictly).

A more frequent, but less dramatic example of this situation would be the lawyer who breaches confidentiality to prevent a financial fraud upon a third person. Again, some states might allow disclosure, but others would not. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1983) (allowing disclosure only to prevent reasonably certain death or substantial bodily harm, to secure legal advice about compliance with these rules, to establish claims or defenses in cases of conflict between lawyer and client, and to comply with another law or court order).

151. *See, e.g.*, Zacharias, *supra* note 148, at 196-99 (analyzing a series of hypotheticals in which a lawyer might have legitimate moral or religious objections to following the professional codes).

152. It is important to note that lawyers differ in their moral and religious orientations, and in the degree that they are willing to accept systemic considerations as overriding personal ethics. *See id.* at 197 (discussing the relationship between lawyers' religious beliefs and systemic principles incorporated into professional standards).

justify protection. In other moral dilemma situations, the lawyer actually is making a choice to favor another person's interests—other clients', other lawyers' clients', or non-clients'—over those of his own client. The regulator whose prime concern in guiding lawyer behavior is client protection therefore may also need to determine which client's interests should trump.¹⁵³

The issue is no more determinate if the regulator focuses on the question of whether this lawyer is competent to represent clients now or in the future. The rule violation does not call into question the lawyer's skills, but rather his willingness to sublimate his personal ethics to the professional rules. Depending on the circumstances, the lawyer's conduct may suggest a maverick mentality that will lead the lawyer to commit other violations in the future to his clients' and the legal system's detriment. That will not always be the case, however, because the moral dilemma the lawyer faced may have been so extreme that it is unlikely to recur.¹⁵⁴ Moreover, lawyers know that, in a marketplace replete with lawyers willing to place their clients' interests first, their practices are unlikely to withstand multiple violations.¹⁵⁵

In short, when one considers the nine possible goals of discipline listed earlier,¹⁵⁶ the first five become hard to administer the moment the regulators concede that the lawyer's conduct, though violative of the rules, may have been morally justified.¹⁵⁷ The need to remedy client injuries, punish misconduct, or prevent or deter future misconduct by the lawyer almost by definition becomes uncertain. Sanctions, if justifiable, must be anchored in the other, profession-centered and process-centered rationales.

153. I do not mean to suggest by the above analysis that the lawyer who violates a code provision for arguably legitimate moral reasons always will be exonerated. The regulators may disagree with the lawyer's moral assessment, decide that systemic or other interests trump the lawyer's, or decide that the lawyer simply has no business introducing personal morality into the situation. *See, e.g.*, Green, *supra* note 149, at 1308-12 (describing various responses a disciplinary agency may make to a lawyer's disobedience of professional standards based on a moral objection). On the other hand, the lawyer's good faith may sometimes justify regulators in viewing the lawyer more sympathetically when imposing sanctions.

154. As, for example, in the confidentiality example in which the client expresses a plausible threat to kill another person. *See supra* note 150 and accompanying text.

155. *See* Zacharias, *supra* note 148, at 210-16 (discussing the effects of morals-driven rule violations on the offending lawyers).

156. *See supra* text accompanying p. 698.

157. However, as noted above, this frequently will not be the regulators' position. *See, e.g.*, Green, *supra* note 149, at 1311 (describing how courts have been inclined not to exempt lawyers from professional disciplinary rules because of the lawyers' religious or moral objections).

Thus, for example, one can posit that strict enforcement of the confidentiality rules is important, even in a counterintuitive situation like the murderous client's, because enforcement establishes a bright-line rule that will assure confidentiality, and thus the competence of lawyers, in other situations.¹⁵⁸ Strict enforcement may enhance public trust in the profession and attorney-client relationships in general.¹⁵⁹ It may strengthen the sense that the rules, in general, are enforced.

Other profession-centered considerations suggest the opposite result. A reviewing agency may determine that the public image of the profession requires leniency, lest the public believe the bar countenances and serves evil conduct by clients. To the extent professional standards require immoral conduct, they may encourage lawyers to treat the standards with less respect. Perhaps most importantly, by sending a signal that disciplinary agencies will take ethical considerations into account in individual cases, leniency encourages lawyers to engage in moral introspection in applying rules that generally serve the public good, but which can lead to undesirable results in individual cases.¹⁶⁰

E. Intentional Self-Serving Violations

One of the reasons reviewing courts have been able to get away with relying on the catch-all "protect the public" rationale is that most disciplinary cases involve intentional rule violations that lawyers commit either because of sloth and incompetence¹⁶¹ or in order to benefit themselves. Trust account violations, failure to communicate with clients, and failure to pursue client claims make up the bulk of disciplinary complaints.¹⁶² In these types of cases, any one of the orientations or rationales for imposing sanctions can justify punishment. Sympathy for the lawyer is at its nadir. The measure of the appropriate sanction, however, may still depend on the purpose of imposing discipline in the first instance.

158. This may have been the rationale for the decision of the ethics committee in the San Diego County Bar Association opinion discussed *supra* note 150.

159. *See, e.g., Zacharias, supra* note 132, at 358-61 (discussing the justifications for strict attorney-client confidentiality rules).

160. *Cf. ALEXANDER & SHERWIN, supra* note 147, ch. IV (discussing the countervailing considerations in implementing bright-line rules that might produce seemingly inappropriate or immoral results versus providing exceptions to take situational ethics into account which might, in application, undermine the benefits of the rules).

161. *Cf. Commonwealth v. Twiggs*, 331 A.2d 440, 443 (Pa. 1975) ("If ... counsel's failure ... was the result of sloth or lack of awareness of the available alternatives, then his assistance was ineffective.").

162. *See* authorities cited *supra* note 130.

Consider, for example, a lawyer who misappropriates client funds in order to pay his own bills, fully intending to make up the difference when the client becomes entitled to the money.¹⁶³

Punishment is appropriate to protect this client or the lawyer's future clients, to deter other lawyers, and to maintain the sanctity of the professional standards and the image of the profession. But to what extent is it appropriate for the regulators to consider the lawyer's reasons for acting, his competence, his character, and the degree to which full prosecution really is necessary to deter other lawyers?

If the purpose of imposing discipline is simply to protect the aggrieved client from this lawyer and, perhaps, to protect this lawyer's other clients, the personal characteristics of the lawyer are irrelevant.¹⁶⁴ He has little claim to sympathy, for he has intentionally violated the rules to serve his own interests over the client's.¹⁶⁵ He has exhibited a proclivity towards taking the professional standards lightly. His clients are best protected by the removal of his license.¹⁶⁶

If, on the other hand, the primary purpose of discipline is to prevent future misconduct by this lawyer, the reasons for his

163. See, e.g., *In re Warhaftig*, 524 A.2d 398, 399-400 (N.J. 1987) (disbarring a lawyer who borrowed funds because of a cash-flow problem arising from his wife's treatment for cancer and his son's need for psychiatric treatment).

164. Cf. *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994) (taking "into account the ... absence of any dishonest or selfish motive").

165. See *Att'y Grievance Comm'n v. Vanderlinde*, 773 A.2d 463, 486 (Md. 2001) ("[T]he vast majority [of lawyers in strained financial circumstances] do not resort to the commission of crimes. Of those that do, and get caught, severe penalties are normally imposed.").

166. See, e.g., *In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002) ("Disbarment is the usual discipline for misappropriation of client funds unless the attorney presents clear and convincing evidence of substantial mitigating circumstances that show the attorney did not intentionally convert the funds."); *In re Crowley*, 519 A.2d 361, 363 (N.J. 1987) (recognizing the direct relationship between a lawyer's unethical behavior and alcoholism, but nevertheless automatically disbarring the attorney); *In re Wilson*, 409 A.2d 1153, 1154 (N.J. 1979) (promulgating a bright-line disbarment rule for attorneys who have knowingly misappropriated client funds); see also Melissa E. Nirenberg, Note, *Reconsidering the Wilson Doctrine: Should New Jersey Continue to Automatically and Permanently Disbar Attorneys Who Have Misappropriated Funds?*, 51 RUTGERS L. REV. 713, 715 (1999) (asserting that "New Jersey is the only state that will not consider mitigating circumstances in this context and also disbars for life"). In many jurisdictions criminal convictions for felonies, including theft and conversion, give rise to automatic disbarment. See Rhonda Richardsen Cavedes, Note, *Remnants of an Attorney Disciplinary Sanction: Which Jurisdictions Impose Automatic Disbarment? What Offenses Warrant the Imposition of an Automatic Disciplinary Sanction?*, 26 J. LEGAL PROF. 195, 195-96 (2002) (cataloguing automatic discipline jurisdictions); see also Abraham Abramovsky, *A Case Against Automatic Disbarment*, 13 HASTINGS CONST. L.Q. 415, 417 (1986) (arguing against automatic disbarment for felony convictions); Michael A. Gentile & Sarah Diane McShea, *Automatic Disbarment: A Convicted Felon's Just Desserts*, 13 HASTINGS CONST. L.Q. 433, 435 (1986) (advocating automatic disbarment for felony convictions).

conduct become relevant. To the extent the causes can be removed¹⁶⁷ and the lawyer is adequately skilled, the issue of likely recurrence becomes one of character.

By definition, deterrence of similar misconduct by other lawyers is always maximized by the imposition of extreme punishment.¹⁶⁸ Interestingly, though, the more frequently that similar cases have arisen, have been prosecuted, and have led to severe punishment, the less likely it is that one more prosecution or disbarment will add to deterrence. In other words, lawyers who are likely to be influenced in their own conduct by disciplinary decisions already will have received the message. At least in the short term,¹⁶⁹ the rules have been shown to pose a credible threat. Moreover, the public image of lawyers might not be affected by leniency towards a single lawyer if the public already has learned that many lawyers commit similar offenses and have been punished for it.¹⁷⁰ From a process perspective, disciplinary resources might be better devoted to enforcing other rules that lawyers might be more tempted to violate.¹⁷¹

A lawyer-centered orientation, of course, would require the regulators to consider all the personal characteristics of the offender in order to determine his competence and how his punishment may influence other lawyers. If the offender can demonstrate that he can perform competently and ethically in the future, the seriousness of the offense arguably does not automatically require his suspension. How strict punishment or leniency would affect the competence of other lawyers, again, is an open question.

167. Of course, there will always be a question of whether the causes can be removed with certainty. Thus, for example, the rehabilitation of an addict or alcoholic, even with a good prognosis from the treating physician, cannot assure that the addicted or alcoholic lawyer will not resume his substance abuse sometime in the future.

168. *Cf. Wilson*, 409 A.2d at 1157-58 (requiring disbarment for misappropriation of client funds on the basis that preserving confidence in the legal system overrides any countervailing concerns).

169. In the long term, a decrease in prosecutions may affect deterrence, because potential rule violators will take into account the reduced possibility that they will be prosecuted. As noted earlier, however, lawyers may be an unusual class of defendants who are more influenced by the existence of any realistic possibility of prosecution than by a nuanced evaluation of how likely prosecution is or how extensive the punishment will be. *See supra* notes 58-59 and accompanying text.

170. That is not to say the public necessarily will approve of the lawyer's conduct or that of the discipliners, but rather that the public already will have reached its conclusions based on independent evidence.

171. *See Fred C. Zacharias, Reform or Professional Responsibility As Usual: Whither the Institutions of Regulation and Discipline*, 2003 U. ILL. L. REV. (forthcoming 2003) (manuscript on file with author) (discussing opportunity costs of pursuing particular types of disciplinary cases).

F. Public Versus Private Violations

One factor that potentially should influence disciplinary prosecutors in screening cases and reviewing courts in assessing punishment is the public or private nature of a lawyer's misconduct. If the regulators are concerned only with protecting this lawyer's clients or assessing his competence, then the visibility of the violation is irrelevant. In contrast, to the extent that deterrence, image, and process considerations are part of the regulators' focus, the context in which the violation occurred becomes important.¹⁷²

Compare, for example, similar violations by two different lawyers: (1) the withholding of information in discovery by a civil lawyer in a small personal injury case; and (2) the withholding of information by a prosecutor in a murder case that is covered thoroughly by the media. In the absence of additional information, the two lawyers are equivalent in terms of their culpability, competence, and the risk that they will harm the interests of their present and future clients. Yet the action, or inaction, of the disciplinary agency will be publicized in the second case, but not the first. This can have serious ramifications both for the deterrent effect of any decision and for the conclusions the profession and the public will draw about the professional standards.

These considerations are equally pertinent to criminal prosecutions. But they are more significant in the professional responsibility context because a considerable amount of lawyer misconduct is, by its nature, public; for example, violations of the rules against legal advertising¹⁷³ or speaking to the press in the course of litigation.¹⁷⁴ Lawyers and the public inevitably become aware that this misconduct occurs. They see misleading advertisements in the print and television media and they hear the public statements of litigators. To the extent that they perceive that disciplinary agencies fail to address these violations, for whatever reasons, they both lose respect for the professional standards and dismiss disciplinary enforcement as a credible threat.¹⁷⁵

172. See Zacharias, *Professional Discipline of Prosecutors*, *supra* note 76, at 768-69 (discussing the importance of pursuing public violations by prosecutors); Zacharias, *What Lawyers Do*, *supra* note 52, at 1019-20 (discussing the effects of not prosecuting visible misconduct).

173. See generally Zacharias, *What Lawyers Do*, *supra* note 52 (analyzing the enforcement of visible advertising rule violations).

174. E.g., MODEL RULES OF PROF'L CONDUCT R. 3.6. (2002); Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1637-41 (1996) (discussing violations of the rules against extrajudicial statements); see also *supra* note 140.

175. See Zacharias, *What Lawyers Do*, *supra* note 52, at 1008-09 (discussing the effects of

Moreover, more so than in the criminal context,¹⁷⁶ the public has a somewhat naive belief that disciplinary authorities can and should prosecute all serious misconduct. The failure to prosecute visible violations of the rules undermines trust in the disciplinary system. In the above example of prosecutorial misconduct, it may also lead to a belief that a double standard exists with respect to the enforcement of prosecutorial ethics.¹⁷⁷

Of course, whether disciplinary agencies should treat lawyers who commit visible violations more severely than lawyers who commit the same level of misconduct privately is a difficult policy question. The resolution depends largely on normative policies, the goals of discipline, and the priorities of disciplinary agencies. By failing to identify their goals and priorities expressly, and by masking any decisions they do make under a "protect the public" rationale, disciplinary agencies simultaneously insulate the decisions from review and open them to inevitable criticism.

IV. THE CONSEQUENCES OF ACKNOWLEDGING THE VARYING PURPOSES OF DISCIPLINE

The above analysis reveals the shortcomings of acting as if disciplinary decisions can be justified based on a single rationale. In a sense, however, noting these shortcomings merely poses the question. All of the various possible rationales are valid. Multiple, potentially inconsistent rationales often seem applicable in the same case. Even if we concede that it is simplistic to justify particular decisions on the basis of a "protect the public" orientation, that does not tell us how disciplinary prosecutors and reviewing courts should approach cases.

underenforcement of advertising rules on clients and observers of the bar).

176. In the criminal context, the public has been educated somewhat about resource limitations, the need for prosecutorial discretion, and the limits of the criminal justice system. Because the public knows less about professional regulation and because professional discipline takes place in secret, no similar understanding exists. The effect is magnified by the fact that the bar often holds out the existence of professional codes as a reason for not imposing other types of regulation on lawyers. See, e.g., MODEL RULES OF PROF'L CONDUCT, Preamble (1983) ("The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."); *id.* at 11 ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."). This suggests to the public that the codes are routinely and fully enforced.

177. See Zacharias, *Professional Discipline of Prosecutors*, *supra* note 76, at 773 ("Abdication of enforcement also contributes to a public sense that a double standard exists.") (footnote omitted).

Nor is an easy answer possible without a full debate on the appropriate priorities of professional regulators. At this stage, we can at best make preliminary judgments and encourage regulators to make decisions in a way that subjects them to public oversight.¹⁷⁸ Increased transparency in decision making invites review and debate, which in turn produces input that can help shape future decision making.¹⁷⁹ Such dialogue has been ongoing with respect to the criminal law, yet absent in the context of professional discipline.¹⁸⁰

This section of the Article attempts to open the debate. It first suggests some general principles that professional regulators might follow in assessing cases and in determining their overall approaches to the disciplinary process. There are two parts to the issue: (1) how disciplinary cases should be decided; and (2) how that determination fits into the policies of rulemaking and allocating bar resources. The Article then offers some observations concerning the ramifications of its analysis for particular participants in the process: rulemakers, disciplinary prosecutors, other bar regulators, and reviewing courts.

178. As discussed in Zacharias, *What Lawyers Do*, *supra* note 52, at 1020, disciplinary policies tend to be made in secret; *see also* Levin, *supra* note 3, at 6-7 (discussing vague, often unarticulated standards used by state decision makers when imposing discipline); Paula A. Monopoli, *Legal Ethics & Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEGAL ETHICS 423, 424 (1997) ("Historically, lawyer discipline has been conducted behind closed doors."). Individual cases typically are encumbered by confidentiality rules. Disciplinary organizations have not been forthcoming with even general statistics concerning the types of violations that they have discovered and prosecuted.

179. In other words, to the extent that the discipliners make their policies, decision making, or even statistics public, other regulators (e.g., rulemakers, legislators, and criminal prosecutors), the media, and the public will be able to react.

180. For example, the establishment of the federal sentencing guidelines, their frequent amendment following public comment, and the academic attention to the changes has served to produce a vibrant discussion of appropriate priorities in criminal sanctions. *See, e.g.*, Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant's Gender and Ethnicity on Length of Imprisonment Under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER RACE & JUST. 39, 41 (2002) (discussing the conditioning effect of race, gender and ethnicity on sentencing under the Federal Sentencing Guidelines); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991) (analyzing the shift from individualized to aggregated sentences); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 557-61 (1992) (analyzing the plea bargain process under the Federal Sentencing Guidelines and providing suggestions for improvement); Charles J. Ogletree, Jr., *The Death of Discretion?: Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939-40 (1988) (criticizing the guidelines for failure to address issues such as "individual characteristics" of defendants and the "problem of racial disparity in sentencing").

A. *The Option of Limiting Bar Activities*

One might take the position that, in light of the sometimes contradictory goals of discipline and other bar regulatory efforts, the bar should reassess itself and reduce its activities. Thus, for example, the bar might follow the modern criminal law model and focus largely on incapacitation of miscreant lawyers and deterrence of misconduct¹⁸¹—both by limiting the legitimate goals of disciplinary prosecutors and reviewing courts and by eliminating lawyer assistance programs that emphasize rehabilitation. Alternatively, the bar might take the probably realistic view that what it does best is to assist lawyers and that what the public trusts least is its efforts to regulate lawyers. On this view, the bar should defer to civil and criminal law, as well as outside regulation, to enforce rules against lawyer misbehavior.¹⁸² Concomitantly, it should concentrate its efforts on providing educational and rehabilitative services.

To the extent that controlling lawyer conduct and servicing lawyer needs truly are incompatible, the above approaches have some appeal. As already discussed, however, the two functions are not ordinarily, or necessarily, in complete tension.¹⁸³

The option of reconstructing professional regulation according to a criminal law model is plausible. One certainly could rewrite the professional codes to mirror criminal law on a smaller scale and enforce specialized (and presumably more specific) prohibitions for lawyers. One should not, however, underestimate the radical character of that approach. It is not consistent with the present goals of lawyer regulation.¹⁸⁴ Moreover, under such a regime, the benefits of separating the professional standards from ordinary criminal laws or of continuing to involve lawyer-regulators in evaluating lawyer conduct would no longer be clear.

The alternative of abandoning the field of lawyer regulation makes somewhat more sense. But it ignores the valid recognition by the current professional codes that, once one sets aside clear instances of misconduct (such as stealing client funds), many

181. See, e.g., ALLEN, *supra* note 74, at 60-85 (discussing the future of the "rehabilitative ideal"); Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1224-25 (2002) (discussing the rise and fall of the "rehabilitative ideal" from the 1930s through the 1970s).

182. Cf. Zacharias, *supra* note 81, at 168 (urging bar regulators to emphasize and defer more to outside regulation of lawyers).

183. See *supra* notes 99-101 and accompanying text (discussing the argument that providing assistance to addicted lawyers serves clients better than emphasizing punishment).

184. See, e.g., ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 2.1 cmt. (1991) (suggesting that punishment is not an appropriate goal of discipline).

situations addressed by the professional rules demand flexibility in regulation that is not possible under a criminal law model.¹⁸⁵ Moreover, by leaving the regulation of the legal system in the hands of politicians, society would risk dramatic changes in professional rules geared to what is popular rather than what is systemically justified.¹⁸⁶

As a practical matter, bar regulators may in future years come to rely more heavily on extra-code constraints and outside regulators to constrain lawyer misconduct.¹⁸⁷ This Article's analysis, however, suggests that lawyer regulation is conflicted more because of complexity in the nature of the conduct being regulated than because of an inherent inability of the bar to regulate capably. The solution is not for the regulators to alter or abandon the field, but rather to acknowledge the complexity of the field and to avoid masking the conflicts that arise.

B. Appropriate Priorities for Reviewing Courts, Disciplinary Prosecutors, and Bar Organizations and the Need to Confront Differences in Priorities

In the criminal law context, the failure of legislatures or courts to identify a single function of criminal punishment frees sentencing courts to make policy by picking and choosing from among the competing rationales in individual cases.¹⁸⁸ As Andrew Ashworth has pointed out, one option for resisting unfettered judicial discretion is to declare a single rationale.¹⁸⁹ An alternative is "to declare a primary rationale, and to provide that in certain types of case[s] one or another rationale might be given priority."¹⁹⁰

185. In other words, the multiplicity of situations lawyers face and the fact-sensitive nature of the "ethical" decisions they must make requires regulation to depend largely on lawyer discretion more than standard criminal law, and its emphasis on enforceable rules, allows.

186. For example, one can imagine that the debate concerning confidentiality and representation of guilty criminal defendants would be much different among elected legislators than among lawyer rulemakers.

187. See Zacharias, *supra* note 171 (predicting a shift in emphasis towards increased reliance on outside regulation).

188. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 602-03 (1981) (arguing that the competing criminal law doctrines facilitate hidden interpretive agendas of the courts); Robinson, *supra* note 20, at 21 (noting the cynic's suspicion that the reference to multiple purposes of criminal punishment is "a convenient means of rationalizing results for which the decision maker has another, undisclosed reason") (footnote omitted).

189. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 60, 61 (2d ed. 1995).

190. *Id.* at 61; see also John Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J.L. & PSYCHIATRY 103 (1982) (arguing for a hybrid

Arguably, disciplinary agencies should adopt the latter approach, identifying as their primary priority that function or functions which are uniquely theirs to implement.

For example, courts reviewing disciplinary cases control only one thing: the outcome for the particular offender and client. Their decisions may affect other lawyers and clients, the image of the profession, and the meaning and impact of the professional standards. The extent of that effect, however, depends on decisions by other participants in the process as well, including how many similar cases are brought, how well the decisions are publicized, and how consistently prosecutors and other courts apply the resulting rule of law.¹⁹¹

Reviewing courts also represent the primary, and virtually the only, post-admission mechanism for overseeing the licensing of lawyers.¹⁹² Other forms of regulation influence the professional behavior of lawyers, including the marketplace, malpractice law, criminal regulation, and (for some lawyers) peer or administrative supervision.¹⁹³ Individual clients often can obtain redress for their injuries through civil litigation. Professional discipline, however, is the process through which the public is assured that the profession, in general, operates under meaningful and enforceable standards. A satisfactory process reinforces the public's ability to use and trust lawyers.¹⁹⁴

These considerations suggest one justifiable, though not inexorably correct,¹⁹⁵ policy position for reviewing courts: Before attempting

model prioritizing the goals of incapacitation and retribution); Robinson, *supra* note 20, at 20-21 (discussing a priority approach).

191. For example, the deterrent effect of a particular sanction may depend as much on how frequently or automatically the targets perceive that punishment is imposed as on the severity of the punishment.

192. Of course, courts operating outside the disciplinary hierarchy might also become relevant in the post-admission sanction process to the extent those courts become involved in deciding constitutional or other legal challenges to the validity of the rules or the process of punishment.

193. See Zacharias, *supra* note 39, at 233 (discussing the relevance of extra-code constraints to the operation of professional rules).

194. Cf. *In re Howard*, 765 A.2d 39, 45 (Del. 2000) ("[I]t is beyond question that public confidence in the integrity of the legal profession, which is the foundation of our entire system of justice, is undermined when any lawyer engages in illegal conduct").

195. As a logical matter, the fact that a particular reviewing court controls one factor exclusively does not necessarily mean that that factor is the most important factor for the court to consider. It does not necessarily justify a court in prioritizing that factor to the exclusion of other considerations.

The court's unique relationship to the factor does, however, mean that if the court errs when considering it, the error cannot be rectified. It also means that no alternatives exist for implementing the factor. At a minimum, these realities justify the court in taking special care when evaluating the issues relating to the factor.

to implement broader social policies, reviewing courts should first seek to accomplish those tasks that are their unique prerogatives and functions. In setting priorities—or in defining what it means *for them* to protect the public—courts following this framework would need to emphasize the primacy of the administrative purposes of discipline: assuring the competence of the offending lawyer and assessing his claim to a continued license to practice.¹⁹⁶ The courts should be able to consider the effect of their decisions on the competence of other lawyers, for this too fits their mission of regulating the bar. That should be emphasized less, however, both because other means may be available for accomplishing deterrence and because the judicial decision cannot achieve the goal unilaterally.¹⁹⁷ In contrast, the courts should set a relatively high priority on assuring the public's faith in the lawyer-regulatory process, because only the courts are seen to implement that regulation.¹⁹⁸

Under this approach, appropriate priorities among the purposes of discipline emerge, at least within the context of deciding individual cases. Reviewing courts would need to take a largely lawyer-centered approach—in the sense that assessing the accused lawyer's continuing competence becomes key—and, secondarily, should emphasize in a realistic way¹⁹⁹ the public's faith

196. See Barton, *supra* note 1, at 486-88 (arguing that disciplinary systems that predominantly use entry regulation should focus more on conduct regulation); Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 712-13 (1981) (discussing the failure of disciplinary systems to respond to client grievances as a means of regulating incompetence).

197. One might take the position that, with respect to some types of code offenses, professional discipline is the *only* effective deterrent or mechanism for encouraging lawyers to satisfy the codes' hortatory standards. That will rarely be the case because, at a minimum, market forces and peer pressure often encourage suitable behavior and the potential for civil liability often deters conduct that harms clients. Nevertheless, in circumstances in which the disciplinary process is especially important in promoting deterrence, the reviewing courts have better reason to emphasize this goal.

Likewise, professional discipline occasionally may represent the only avenue through which victims of lawyer misconduct will perceive that any retribution has been administered. See *supra* note 44. These cases present a stronger argument for imposing punishment for punishment's sake. See MOORE, *supra* note 21, at 33 ("My own theory is that criminal law is a functional kind whose function is to attain retributive justice."). More frequently, however, alternative remedies exist and disciplinary regulators can properly deemphasize the retributive rationale.

198. For example, in *In re Brown*, 910 P.2d 631, 634 (Ariz. 1996), the court had to decide whether to impose sanctions upon an attorney who had already agreed to leave practice voluntarily. Although the attorney posed no further threat to clients, the court worried that the failure to impose a severe sanction might result in lawyer "indifference to the disciplinary process" and thereby "undermine the profession's efforts at self-regulation."

199. By "realistic," I mean to propose an analytic focus on how a decision is likely to influence observers in practice, rather than a general assertion of the claim that the decision will protect the public.

in a disciplinary process that enforces the rules effectively. Only once these priorities are fully considered should the courts evaluate how their decisions can be tailored to serving other functions.²⁰⁰

Implicit in the above conclusions is the reality that priorities appropriate for reviewing courts once cases are presented are not necessarily priorities appropriate for other actors in the disciplinary process. Like criminal prosecutors, disciplinary prosecutors have primary control over aspects of the lawyer-regulatory machinery that courts do not have. They therefore may need to emphasize other policies. Disciplinary prosecutors, for example, ultimately decide which cases are prosecuted.²⁰¹ Although the public probably takes its signals from how individual, highly publicized cases are decided,²⁰² the profession is likely to be influenced more by the frequency and regularity of prosecutions, which in turn determines the risk that particular types of conduct will lead to sanctions.²⁰³

Prosecutors thus may need to emphasize profession-centered concerns more than courts, for the prosecutors have monopoly control over how lawyers will perceive the disciplinary process. Because prosecutors' cumulative decisions of which offenses to prosecute ultimately are a primary measure of the deterrent effect of particular professional rules,²⁰⁴ prosecutors should consider this factor directly in setting disciplinary policies. In establishing

200. As discussed *supra* note 195, this Article does not take a hard and fast position that a court universally must prefer one policy over others, though it does recommend prioritization in the order in which policies are considered. This hesitance is the result of several factors. First, it may be impossible to set fixed priorities given the range of unanticipated issues courts will face. Second, and more to the point, even though it may be possible to establish presumptive priorities, defining those priorities is a complicated policy question that should not be resolved until after a full discussion and debate. This Article does not purport to have the answer to the question, but rather aims to spur the necessary dialogue on how priorities should be set.

201. They may not only decline to prosecute, but they may also base their decisions on voluntary responses by the accused lawyer, including participation in training or rehabilitation programs, rectification of the wrong, or simply avoidance of further misconduct.

202. The public's only real source of information is media reporting, which occurs haphazardly and only in notorious or highly publicized cases.

203. Although lawyers may not be familiar with the details of all discipline cases, some decisions are published, others are abstracted in local legal newspapers and bar magazines, and still others become the subject of gossip within the profession. Lawyers thus form impressions about whether, how often, and in what types of cases disciplinary agencies pursue sanctions. These impressions may have a substantial influence on how lawyers respond to or respect particular rules. *See Zacharias, What Lawyers Do*, *supra* note 52, at 1005-06 (analyzing the effects of the failure to enforce legal advertising and other rules on a lawyer's decision whether to violate the rules).

204. Other factors may include the existence and effect of extra-code constraints, lawyers' personal and economic incentives to violate particular rules, and how the rules fit the lawyers' own sense of what conduct is appropriate.

policies, they inevitably must incorporate some process orientation, because their decisions to emphasize particular offenses will have resource-allocation effects that impact upon the effectiveness of a profession-centered policy of prosecution.²⁰⁵ The key for prosecutors is to remember that the public effect of prosecutions typically is determined by controlling the overall pattern of prosecutorial decisions regarding categories of offenses, rather than simply by reaching seemingly fair decisions in individual cases.

Likewise, the officers of bar organizations that both maintain the disciplinary process and support other regulatory programs need to set their priorities in yet a different way. From a bar association's perspective, some programs, such as substance abuse programs, are by definition lawyer-centered (though they may have incidental impact on client representation). Other programs, such as the disciplinary machinery, influence the public's impression of lawyers and lawyer regulation. Yet others, such as lawyer referral programs, are designed to grease the marketplace. The position the bar association takes with respect to its goals—its orientation and priorities—may differ within these programs.²⁰⁶

C. Ramifications for Rulemakers

Surprisingly, the process of parsing out the meaning of public protection in disciplinary cases may have its greatest impact on the initial drafters of the professional codes. Ethics codes serve even more purposes than disciplinary decisions.²⁰⁷ Some professional rules are hortatory in nature—not being intended or expected to be fully enforced, but rather serving as instruction or guidance for lawyers.²⁰⁸ Other rules serve a “fraternal” function, attempting to order relationships among lawyers and the courts and to facilitate communication.²⁰⁹ Still other rules are geared primarily toward

205. The relevant considerations for prosecutors may vary from context to context. Prosecuting one visible, highly publicized case may have a greater effect on the conduct of other lawyers than prosecuting numerous cases that are easier to bring to a successful conclusion. On the other hand, the regularity of prosecution for some kinds of offenses may also become known to lawyers and may significantly influence their behavior.

206. See Zacharias, *supra* note 171 (noting that the multiple goals may create a sense of schizophrenia among bar officials that they must confront).

207. These purposes are discussed in detail in Zacharias, *supra* note 39, at 225-39.

208. For example, rules requiring prosecutors to “serve justice” and lawyers to emphasize “loyalty” to their clients have meaning, but are too vague to be enforceable. They serve primarily as principles that well-intentioned lawyers are expected to keep in mind in planning their conduct and in determining the meaning of other rules.

209. By setting standards that inform lawyers how they are to behave with one another or with a court—for example, by never lying—the codes enable lawyers and judges to

maintaining the image of the bar.²¹⁰ Yet, for the most part, the codes do not identify the goals of particular rules, nor do rule-makers tend to make explicit their rationales in justifying specific formulations.

As disciplinary authorities begin to focus upon their own functions, code drafters will be confronted by the reality that the various regulatory agencies have multiple, sometimes inconsistent, priorities, and that some of these may conflict with or undermine²¹¹ the rulemakers' goals. Although the drafters are not in a position to control the orientation of other regulators, they are in a position to write the standards with a view to defining policies and with a view to facilitating the implementation of the rules' priorities.

Once the rulemakers start to take into account the actual process of discipline, four changes in their approach to drafting are likely to follow. First, they may consider more explicitly the enforceability of the rules. Second, they inevitably will need to consider whether they are willing to leave the choice of multiple priorities to the disciplinary agencies. To the extent the rulemakers wish to influence the disciplinary regulators' priorities, they will have to incorporate statements defining their own priorities within the rules themselves, or even incorporate suggestions regarding appropriate sanctions for particular situations. Third, recognizing that they cannot fully control the actions of the other regulators, rulemakers may see fit to adopt more self-enforcing rules to obviate the concern that their goals will be blunted by enforcement policies. Fourth, rulemakers may recognize the need for routine review of the rules, with a view to evaluating how the realities of enforcement have affected the rules' impact.

Consider professional rules that seem hortatory in nature; For example, prosecutors must "serve justice" and lawyers must "be loyal" to their clients. The drafters may have several conceptions in mind in adopting such provisions. Their concern may be to provide the affected lawyers broad guiding principles and to set standards

determine when they can rely upon one another.

210. Legal advertising prohibitions, in part, are designed to avoid a perception that lawyers are seedy businessmen, a perception that can interfere with the ability of lawyers to develop efficient relationships with their clients.

211. There is a difference between regulatory actions that conflict with and those that undermine the rulemakers' goals. Consider, for example, the possibility that rulemakers adopt a legal advertising rule with the full expectation that it will be enforced. The disciplinary agency may undermine that expectation by not pursuing cases on the basis that they are likely to result in constitutional challenges that are not worth the resources to defend against. In contrast, the discipliners may instead decide not to enforce the rule directly because they believe that legal advertising benefits consumers, a policy decision that conflicts directly with the rulemakers' views.

for lawyers that will appeal to the public. The drafters may not expect much enforcement of the standards because they are subject to different interpretations. Or, the drafters thereafter may expect minimal enforcement, limited to dramatic and obvious cases in which the principles have been clearly violated. Alternatively, the drafters may expect enforcement based on common law interpretations developed by disciplinary courts over time that define the concrete meaning of the principles. Finally, the drafters may actually anticipate full enforcement based on some special conceptualization of the regulated lawyers that the drafters themselves have in mind.

As written, the standards provide no clues to the drafters' intent. All four approaches have something to be said for them. As a practical matter, in the absence of signals in the rules, the disciplinary prosecutors and courts are likely to implement them based on their own policy concerns and priorities.

The moment that the rulemakers focus on issues of enforcement, however, several realities become evident. The vagueness of the provisions makes them difficult to enforce and thus may cause disciplinary prosecutors to avoid filing complaints. If nonenforcement is the will of the code drafters, it may be prudent to state that expectation in the rules or comments, because the provisions potentially can be made enforceable through the decision making of reviewing courts.²¹²

To the extent the rulemakers wish to leave the scope and reach of the provisions to the alternative regulators, they can remain silent, but need to recognize two consequences. First, as when legislators leave criminal sentencing to the unfettered discretion of sentencing judges,²¹³ the resulting impact of the rules may diverge from the rulemakers' own conceptualizations. Second, the policy decisions of disciplinary prosecutors (e.g., in deciding not to enforce a provision), and, to some extent, the decisions of reviewing courts (e.g., in dismissing cases and issuing private admonitions) will not be subject to public oversight or appellate review.²¹⁴ Accordingly, to

212. In other words, reviewing courts may flesh out and make more concrete the meaning of the vague terms in the rules on a case-by-case basis.

213. See ASHWORTH, *supra* note 189, at 60 ("Freedom to select from among the various [sentencing] rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts.").

214. See generally Guttenberg, *supra* note 130, at 954 (noting that the "quality of disciplinary process" is affected because investigation of attorney misconduct in Ohio is cloaked in secrecy"); Zacharias, *What Lawyers Do*, *supra* note 52, at 1009-12 (discussing the ramifications of secrecy in the professional disciplinary process). Of course, public dissatisfaction with the disciplinary process may, on occasion, lead to review or reform commissions, but these commissions ordinarily issue one-time reports, rather than exercise

the extent the code drafters wish to assure either some direction in discipline or the possibility of overturning disciplinary policies when the public would be dissatisfied with the result, the drafters should incorporate more specificity into the code.

How can the rulemakers affect discipline? We have already noted the possibility of stating policies or priorities in the rules themselves.²¹⁵ In addition, increasing specificity in the rules sends a signal that certain actions will not be countenanced and makes enforcement of violations easier.²¹⁶ Under some circumstances, rules even can be written in a self-executing manner. Requiring written notifications from lawyers to clients regarding the consequences of conflicts of interest, for example,²¹⁷ helps foster loyalty by forcing lawyers to address the issue with their clients. Directly forbidding particular public prosecutorial conduct²¹⁸ can make it more difficult for prosecutors to transgress the general "justice" principle.²¹⁹

ongoing policy review. *But cf.* Ambrosio & McLaughlin, *supra* note 23, at 379 (discussing New Jersey's establishment of a "Disciplinary Oversight Committee" with limited ongoing jurisdiction to review financial aspects of the disciplinary process).

215. *See supra* note 211 and accompanying text.

216. As a rule, the clearer a provision and the more specific the elements of prohibition, the more transparent violations will become. *See Zacharias, supra* note 39, at 245-47 (analyzing the relationship between the specificity and the enforceability of professional rules).

217. Compare MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983) (omitting a requirement for written disclosures or written consent regarding conflicts of interest), with MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) (requiring written consent of client to proceed when there is a conflict of interest), and CAL. RULES OF PROF'L CONDUCT R. 3-310 (1992) (requiring written disclosures of conflicts of interest to the client). *See also* Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 933-34 (2002) (discussing the Ethics 2000 Commission's inclusion of writing requirements for fee and waiver agreements to respond to the complaint that lawyers do not adequately communicate with their clients); E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1, 6 (2002) (noting that "Ethics 2000 has placed significant emphasis on communication and writing requirements"); Zacharias, *supra* note 30, at 1366-70 (proposing the use of writing requirements and increased communication with clients as a means of enhancing enforcement of the professional standards).

218. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002) (prohibiting extrajudicial statements by prosecutors and others, except with respect to limited information). When a rule is explicit, prosecutors dare violate it only if they are confident the rule will not be enforced or are prepared to challenge the lawfulness of the rule when they are disciplined. *See Zacharias, Professional Discipline of Prosecutors, supra* note 76, at 772-73 (discussing the consequences of failing to enforce public code violations by prosecutors, including the fostering of disrespect for codes and creation of a "double standard").

219. Unlike in private litigation, prosecutorial misconduct tends to be the subject of media attention and also is likely to be used by defense attorneys pursuing a vigorous defense to justify constitutional claims on behalf of defendants. Such violations therefore are likely to become public.

This Article does not propose amendments to specific code provisions, because the correctness of the professional standards is not this Article's focus. For current purposes, it suffices to highlight the relevance of identifying the purposes of discipline to optimal implementation of the rules. Once the rulemakers recognize the options for disciplinary agencies, they will come to understand better the effect of varying drafting approaches on the ultimate impact of the codes.

D. Ramifications for Disciplinary Prosecutors and Bar Agencies

We have already noted the potential inconsistency between the goals of programs developed by the bar, the goals of disciplinary prosecutors, and the goals of reviewing courts.²²⁰ For the most part, the conflict has been neither noticed nor addressed.²²¹ It can have negative consequences in confusing the various regulators about their own missions and in suggesting to them that considerations valid for other regulators are valid for them as well. This may undermine the achievement of the regulators' functions.

1. The Need to Identify the Goals of Different Programs

One important ramification of this Article's message is that the regulators need to acknowledge the potential inconsistencies. Bar organizations promoting substance abuse or lawyer education programs, for example, should recognize that they are seeking to further goals that parallel, but may not be identical to, those of the disciplinary process. Both lawyer assistance programs and disciplinary prosecutions ultimately may seek to improve the quality of the bar, but they do so in very different ways²²² and, perhaps, for different reasons.²²³

Several responses to these tensions are possible. This Article has already rejected the most obvious: abandoning all bar programs that are inconsistent with the goals of punishing misconduct or

220. See *supra* notes 99-110 and accompanying text.

221. Cf. Zacharias, *supra* note 171 (identifying the conflict).

222. Lawyer assistance programs seek to help lawyers or improve the quality of lawyer performance in a constructive way, while discipline seeks to maintain competence by constraining lawyers or by threatening them with punishment or suspension. See Bloom & Wallinger, *supra* note 5, at 1410 ("recommend[ing] adoption of a new approach designed to ensure that lawyers with alcohol problems are identified and offered help *before* harm has occurred").

223. The difference is not always stark. In essence, however, lawyer assistance programs seek to assist lawyers directly (and clients indirectly), while discipline typically focuses on the clients first.

abandoning professional discipline in favor of outside regulation.²²⁴ Once the discrepancies among different bar projects are acknowledged, however, it becomes possible to set boundaries for the proponents and administrators of the different undertakings. Thus, in the substance abuse example, it makes sense to delineate the divergent functions of the bar in helping and prosecuting lawyers. Confidentiality regarding participation in rehabilitation programs makes sense when the lawyer seeks assistance on his own, but less so when the bar intervenes due to a report of substance abuse that has damaged, or is damaging, clients. In the latter event, the clients should at least have the opportunity to have the reports result in an assessment of the lawyer's competence.

Perhaps the clearest illustration of this dichotomy involves bar hotline programs through which lawyers confronting ethical dilemmas are encouraged to seek guidance from bar representatives on how to act.²²⁵ Should the lawyers' telephone calls be dealt with anonymously or confidentially,²²⁶ or should they be recorded for use in disciplinary proceedings in the event a telephoning lawyer admits to having acted improperly or acts improperly in the future?²²⁷ Allowing reporting of the lawyer who discusses his improper conduct and allowing disciplinary prosecutors to employ the calls will create a strong disincentive against lawyer use of the hotline programs—a result which may increase lawyer misconduct. On the other hand, to the extent a bar representative knows that a lawyer has committed misconduct or has disregarded advice to follow the codes, there is reason to impose discipline on the offending lawyer. In short, the functions of the bar's hotline and disciplinary machinery simply are different.

However the bar ultimately decides, as a matter of public policy, to administer the two programs, it is important for the bar to recognize that the programs in some respects have inconsistent

224. *See supra* Part IV.A.

225. Such hotline programs are maintained, for example, both by the California State Bar and by subsidiary county bar associations like San Diego's.

226. The bar organization has various ways to avoid a need to report the substance of hotline calls. It can promise confidentiality. It can encourage a telephoning lawyer to withhold his identity and to propound his dilemma in hypothetical terms. Or it can simply warn the lawyer of the possibility that his information will be relayed to disciplinary prosecutors, thus leaving it to the lawyer to edit his own comments so as to avoid inculcating himself.

227. It is important to note that hotline calls may involve discussions about rule-violative conduct that a lawyer has already commenced. If the bar's telephone representative is a lawyer, he may have an obligation under the professional rules to report knowledge of another lawyer's misconduct. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.3 (2002) (requiring members of the bar to report certain violations of the rules by other lawyers).

goals—educating lawyers, providing advice, preventing misconduct and imposing punishment. Only by confronting the differences openly can the relevant bar agencies determine how the administrators of the programs should act.

Moreover, if the failure of the bar to move against lawyers after receiving reports or evidence of misconduct (e.g., through hotline or substance abuse programs) becomes publicized, it can affect the public image of the bar and of the bar's enforcement of professional standards. The separation of the various bar undertakings therefore should be emphasized to the lay community in advance. In other words, it is important to educate the public about the fact that different bar programs proceed on their own tracks—that discipline is one track that is pursued vigorously when misconduct is reported, while education and treatment are forward-looking tracks from which lawyers may benefit without fear of reprisal. Public acknowledgment of the separation among the programs can help the administrators conceptualize their functions better and potentially mute some of the public's distrust when the bar seems lax in punishing lawyers for apparent misbehavior.²²⁸

Sometimes, of course, it will be difficult to maintain strict separation. Most states' ethics codes, for example, require lawyers and judges to report professional misconduct. To the extent a lawyer's colleagues seek intervention by the bar to deal with the lawyer's personal problems, such as substance abuse, the bar's treatment of their reports as the equivalent of opening a disciplinary file undermines the incentive to report. Conversely, converting the colleagues' reports to confidential communications not usable for purposes of discipline is inconsistent with the thrust of the professional codes' reporting requirements.

At present, neither the makers nor the recipients of the reports have a clear idea of the consequences of reporting. A perfect delineation between disciplinary reports and requests for assistance may not exist, but it is possible to set standards that apprise the various actors of the consequences of their conduct, which in turn will identify those further obligations that each actor may have.²²⁹

228. Cf. *In re McLendon*, 845 P.2d 1006, 1013 (Wash. 1993) (distinguishing the purposes of discipline and noting that "[t]he public's education regarding the successful alleviation of the symptoms of [the attorney's] bipolar disorder will maintain the public's confidence in our bar").

229. A few jurisdictions have established some relatively clear rules regarding the obligations of persons who receive evidence of misconduct in the course of administering a substance abuse program. See, e.g., N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-103(a)(2) (2003) (exempting from lawyer-reporting requirements information concerning misconduct obtained "in the lawyer's capacity as a member of a bona fide lawyer assistance ... program").

Before the administrators of bar programs can adopt such principles, however, they must identify the precise functions of the various bar programs and determine explicitly how they are intended to mesh with the disciplinary process.

Disciplinary prosecutors likewise need to identify their functions and goals more precisely than they have in the past. The identification of the programmatic functions just discussed should help prosecutors separate in their own minds the relationship between the treatment and rehabilitation functions of the bar and the prosecutors' own disciplinary functions. Even within the latter, we have already noted that prosecutors act for a variety of reasons, some practical (such as the allocation of resources), some relating to the vindication of particular disciplinary goals in an individual case (e.g., is this lawyer competent?), and some recognizing notions of procedural fairness to lawyers.

When considering notions such as resource allocation and the impact of particular prosecutions on cumulative deterrence, the prosecutors make public policy decisions.²³⁰ These are different in nature than routine prosecutorial decisions regarding the best result in individual cases. Only by consciously differentiating the various goals and effects of their decisions can the prosecutors implement their functions coherently.

Resource and deterrence assessments, for example, seem to require a balance of considerations that individual prosecutors should not make without input from other prosecutors and supervisors. They cannot implement deterrence without a joint office effort. Moreover, the prosecutors' decisions may represent public policy choices that should be reviewable, and potentially alterable.²³¹ When made in the confines of confidential individual cases, no oversight is possible.²³²

In contrast, an office often cannot unilaterally decide to emphasize other prosecutorial goals, because they may not be unilaterally within its control. The responsibility for implementing some goals is shared by reviewing courts.²³³ This interconnection may dictate how an individual prosecutor ought to discuss a matter with the judge. If, for example, the prosecutor's priorities differ from those of the court, it behooves the prosecutor to make that difference

230. See *supra* Part IV.B.

231. See Zacharias, *Professional Discipline of Prosecutors*, *supra* note 76, at 755-65 (identifying arguable policies implicit in the decision not to discipline prosecutors frequently).

232. See Zacharias, *What Lawyers Do*, *supra* note 52, at 1009-12 (discussing pitfalls of secret decision making by disciplinary agencies).

233. See *supra* notes 188-200 and accompanying text.

explicit, rather than leading the court to believe that he shares the court's goals. A dialogue of this type often occurs naturally, but the conversation can become confused if the court and the prosecutor discuss the matter in global "protect the public" terms rather than first identifying the true goals and priorities that they are emphasizing.

2. The Need to Make Judgments About How Best to Protect the Public

The policies of disciplinary agencies may be explicit or implicit. They may be promulgated formally, or may simply be implemented through a course of practice. Agency supervisors may set policies, or the policies may be determined by prosecutors acting individually or through conscious parallelism.

This Article's analysis suggests that whoever makes these policy decisions should pursue specific judgments about how best to protect the public, rather than relying on ad hoc, case-by-case decision making. For the most part, policymaking by disciplinary agencies, if conscious, has occurred behind closed doors. A casual reading of the case law suggests that, as a matter of practice, prosecutors focus mainly on individual cases, deciding only whether they involve serious misconduct and how difficult or expensive they will be to prosecute.²³⁴ More emphasis is needed on a categorical approach to discipline—an evaluation of which types of prosecutions will best serve the priorities that the prosecutorial agency sets for itself.

It is important for a disciplinary agency to view deterrence realistically. The norm, for example, is for prosecutors to emphasize violations of trust account rules in their caseloads because these are (1) most easily discoverable through random auditing procedures²³⁵

234. One example is the failure of disciplinary agencies to enforce clear violations of legal advertising rules. One likely explanation for this practice, expressed by an Arizona Bar Counsel at a recent conference, is that disciplinary prosecutors anticipate that advertising cases will result in extended constitutional litigation and that, when compared to other violations, the misconduct in question does not justify the expenditure of resources for such litigation. Comments of Lynda C. Shely at a conference entitled "The Future Structure and Regulation of Law Practice" (Arizona College of Law, Feb. 22, 2002).

235. Many states require lawyers to subject their trust accounts to auditing procedures. See, e.g., DEL. RULES OF PROF'L CONDUCT R. 1.15(e) (2002) ("A lawyer's financial books and records must be subject to examination by the auditor"); WASH. CT. R. 11.1(c) ("The Board and its chairperson shall have the full authority to examine, investigate and audit the books and records of any LPO"); see also STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 167 (1999) (noting that random audit programs exist, or are authorized, in Delaware, Iowa, Nebraska, New Hampshire, New Jersey, New York

or client complaints,²³⁶ (2) concrete and easily provable, and (3) serious breaches of trust. In reality, however, lawyers already are well aware that misappropriating client funds is wrong.²³⁷ Lawyers know that they are subject to audits and are likely to be prosecuted if violations are discovered. The deterrent effect of prosecuting additional trust fund cases therefore may be minimal.

In contrast, when rule violations that are visible or well-known go unsanctioned,²³⁸ such failure to prosecute undermines the professional standard as a credible threat. It encourages other lawyers to violate the particular standard²³⁹ or the codes as a whole.²⁴⁰ Visibly unsanctioned violations also may affect the public's trust in the disciplinary system.

These categories are not mutually exclusive. Even within the trust account cases, for example, the failure to prosecute clear and obvious violations may affect public confidence in the codes. The more visible the violation, the more likely it is that this effect will occur.

The same problem of resource allocation, of course, exists in the criminal law. Police and criminal prosecutors inevitably downplay some types of crimes. In contrast to the professional discipline system, however, criminal prosecutors typically set priorities in a way that minimizes the suggestion that particular law violations are acceptable or that they never will be prosecuted. Nonenforcement policies ordinarily are kept secret.²⁴¹ Publicized

(1st and 2nd Departments), North Carolina, and Washington); WOLFRAM, *supra* note 29, at 182-83 ("Several states in recent years have inaugurated systems of spot audits that do not require probable cause."); Irene M. Ricci, *Client Trust Funds: How to Avoid Ethical Problems*, 11 GEO. J. LEGAL ETHICS 245, 246 (1998) (discussing random audits of trust accounts with reference to ABA recommendations and state rules that allow random audits).

236. When clients' own money is at issue, clients have an incentive to submit complaints to the bar. Bar investigations may encourage restitution or will, at a minimum, clarify the facts.

237. Indeed, to the extent any misappropriation of client funds is involved in the misconduct, the criminal law ordinarily outlaws the behavior. See *In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002) (noting that the accused lawyer's misappropriation constituted "criminal conduct" and that the discipliners "need not await a conviction to discipline an attorney for criminal acts").

238. See generally Zacharias, *What Lawyers Do*, *supra* note 52, at 997-1013 (identifying underenforced rules and examining the consequences of underenforcement).

239. The extent to which underenforcement will lead to more violations may depend on whether lawyers have incentives to commit violations and whether the conduct seems morally wrong to them. *Id.* at 1012.

240. *Id.* at 1006.

241. For example, criminal defense attorneys and potential defendants may know that there is a threshold quantity of drugs that must be in a defendant's possession before he will be prosecuted, but they may not know exactly what that threshold is. Cf. Ambrosio & McLaughlin, *supra* note 23, at 365 (noting one example in New Jersey where a review commission recommended, and ultimately achieved, the adoption of specific disciplinary

violations may be treated differently.²⁴² Even crimes that prosecutors do not target are prosecuted occasionally, so that some deterrent effect remains.²⁴³

These considerations suggest several guiding principles for how prosecutorial agencies might go about identifying categories of cases to target for prosecution. The seriousness of particular violations and resource conservation inevitably will play a role in the determination, as in the trust account context. Serious violations, however, may also be precisely those that the alternative remedial schemes, including criminal law, will address. It may be equally important for disciplinary prosecution agencies to avoid abdicating, or seeming to abdicate, enforcement of an entire, though perhaps less serious, type of misconduct. The more publicly visible particular misconduct is, the more damaging underenforcement can be.²⁴⁴

Hence, a portion of every disciplinary agency's resources should be devoted to proactive discipline. In other words, each agency should go beyond simply responding to client complaints. It should make an express determination of the types of prosecutions that would enhance deterrence, should target misconduct fitting within those categories, and should actively research sources that allude to²⁴⁵ or reveal²⁴⁶ visible violations of the rules. Of course, proactive investigation of lawyers against whom no complaint has been filed risks besmirching that lawyer's character. Proactive investigation therefore calls for sensitivity on the part of prosecutors. But this sensitivity should not be overdone;²⁴⁷ the same concern is evident with all criminal and administrative investigations and does not justify unduly constraining the prosecutorial function.

The above analysis of trust account cases suggests one other consideration for disciplinary policymaking. Numerous code violations are not enforced vigorously because they seem less significant than more damaging behavior such as misappropriation and

policies).

242. For example, when a public figure is implicated, some penalty (even if only a fine) may be imposed under circumstances in which the crime would not have been prosecuted were the defendant unknown. *See supra* note 205.

243. The best example of a crime that is enforced haphazardly is prostitution. *See, e.g.,* Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33, 53 (1993) ("Pimps are rarely arrested or convicted.").

244. *See supra* notes 201-03 and accompanying text.

245. One likely source is judicial opinions that refer to misconduct by attorneys. *See* Zacharias, *Professional Discipline of Prosecutors*, *supra* note 76, at 769 (urging disciplinary agencies to investigate prosecutorial misconduct identified in judicial opinions).

246. *See, e.g.,* Zacharias, *What Lawyers Do*, *supra* note 52, at 977-84 (identifying numerous yellow page advertisements that violated the governing rules).

247. *See supra* note 54 and accompanying text.

neglect. The failure to enforce a broad range of cases may undermine lawyers' fear of discipline, except with respect to extremely serious misconduct that most lawyers avoid. Disciplinary agencies should consider whether respect for the professional standards would be enhanced by diverting some resources from routinely enforced rules (e.g., trust account rules) to support a policy of random enforcement of other provisions.

Whatever the disciplinary agencies' conclusions, the need for express consideration of the purposes of discipline seems clear. Only by identifying and analyzing its goals can a disciplinary agency set priorities that will further those goals effectively.

3. The Need to Establish Policies in a Way That Facilitates Debate and Review

This Article already has alluded to the problem that occurs when disciplinary policies and priorities are adopted haphazardly²⁴⁸ or secretly.²⁴⁹ Although some priorities can only, or can best, be determined by disciplinary agencies, such as those relating to the allocation of prosecutorial resources, others represent public policy choices with which the public might disagree. In the ordinary criminal prosecution context, district attorneys' offices make similar decisions, but these decisions are constrained by the requirement that the head of the agency stand for reelection. To the extent the public determines that the priorities of a district attorney's office are wrong, the public can correct the priorities through the election process.

Not so with disciplinary agencies. They act almost entirely in secret. Little information, even raw data, is disseminated concerning the policies that the agencies pursue.²⁵⁰ Nor does any mandatory mechanism exist for reviewing those policies, even internally.

This has two ramifications. First, the obvious one: the train may be running amuck. The disciplinary agency may not be functioning properly at all. Second, and perhaps more significant: other actors who participate in, or conduct activities relevant to, the disciplinary process cannot know what the disciplinary agency actually is doing.

248. In other words, through decisions by disciplinary prosecutors made exclusively on a case-specific basis.

249. See *supra* note 214 and accompanying text (discussing policies made by disciplinary agencies behind closed doors).

250. See ABA SPECIAL COMMITTEE, *supra* note 3, at 2 (identifying the Commission's difficulty in obtaining information regarding statistics on and policies governing disciplinary proceedings); Zacharias, *What Lawyers Do*, *supra* note 52, at 1009-12 (discussing secrecy in disciplinary decision making).

Thus, for example, an alternative regulator—say, an administrative agency that might take jurisdiction over some lawyer activities—cannot know whether those activities are already a target for disciplinary enforcement and the alternative regulator will therefore have difficulty determining how to allocate its resources.²⁵¹ Likewise, professional rulemakers will have only a limited notion of whether the intent of the provisions they have drafted is being honored. Therefore, neither they nor the legislature are in a position to counteract disciplinary policies with which they disagree.

Any attempt to develop a rational disciplinary process should allow for some mechanism to correct mistakes. This Article does not take the position that all disciplinary agency determinations must be public or subject to review by external agencies. Indeed, as in the criminal context, the publication of some agency policies can undermine the policies themselves.²⁵² Nevertheless, one would expect that important agency positions that are not subject to public oversight would be made in a way permitting internal review.²⁵³

This Article's conclusion that disciplinary agencies should identify their goals, set priorities among those goals, and adopt mechanisms for assessing how best to achieve the goals assigns the agencies a clear public policymaking role. That authority should be accompanied by methods for assuring responsible implementation. Disciplinary agencies should establish and follow procedures for adopting policies that facilitate open debate and oversight. Ideally, public decision making is the best mechanism for inviting attention and assuring debate—and potential review—of agency decisions. In contexts in which the agency has valid reason to fear public participation, it should at least maintain a mechanism that affords the possibility of internal review that will take into account the public's interest in the agency's approach.

251. The potential synergy between professional regulation and extra-code constraints has been discussed elsewhere. See Zacharias, *supra* note 39, at 251-55. However, commentators have never focused on how administrators of different types of regulation should incorporate facts about the enforcement of alternative constraints into their own policymaking.

252. They may, for example, inform potential offenders about how to continue engaging in particular types or levels of misconduct in a way that will avoid prosecution. See Zacharias, *What Lawyers Do*, *supra* note 52, at 1021 n.222 (discussing the effects of publicizing prosecutorial policies).

253. See Barton, *supra* note 1, at 485 ("[L]awyer disciplinary systems should be altered to allow the greatest possible flow of information to the public.").

E. Ramifications for Reviewing Courts

This Article has already discussed appropriate judicial priorities and the centrality of particular goals to the functions of reviewing courts.²⁵⁴ The courts are different from the other regulators, however, in the sense that they inevitably will have to consider the whole basket of purposes relevant to professional discipline. They will be pushed by the parties to focus on prosecutorial goals, on the one hand, and fairness to lawyers, on the other, including those profession-oriented factors that might be significant in the implementation of bar programs other than discipline.²⁵⁵ The courts' role in interpreting the codes also encompasses a need to assess and remain faithful to the concerns of the initial rulemakers. More than the other regulators, judges may need to balance inconsistent goals in order to decide cases.

This Article's analysis does not provide a blueprint for judicial review of disciplinary prosecutions. It does, however, highlight the need for active recognition by the courts of the varying purposes of discipline. The previous reliance on a subjective "protect the public" principle of adjudication fails to signal to rulemakers, lawyers, disciplinary authorities, and future courts what really counts. Focusing on the actual purposes of discipline should enable reviewing courts to develop a more helpful common law of discipline. It also will lead to greater consistency in the results.

Perhaps the greatest difficulty for reviewing courts in implementing the competing goals lies in determining how to incorporate process-centered concerns regarding the reaction of the public to particular disciplinary decisions. As Robert Post pointed out long ago, the public's view of the legal profession is complicated.²⁵⁶ The public dislikes and distrusts lawyers, but that is a perennial problem that is unlikely to be resolved by an individual disciplinary decision.²⁵⁷ Moreover, the public maintains misconceptions about the assigned role of lawyers²⁵⁸ and an unrealistic expectation that

254. See *supra* Part IV.B.

255. These factors include the rehabilitation, treatment, or education of lawyers.

256. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987).

257. Many of the reasons for which the public dislikes lawyers flow from precisely those characteristics that the public—and particularly clients—want and expect lawyers to exhibit when they use lawyers. *Id.* at 380-82. The public's negative perceptions, therefore, are not necessarily a result of attributes of lawyers that the public really would want changed. In other words, the dislike and distrust, in part, may be inherent in the nature of the legal profession.

258. In a recent, highly publicized child abduction/murder case in San Diego, for example, newspaper reports highlighted public outrage at the willingness of the defendant's lawyer

the disciplinary system is capable of discovering and severely punishing all professional misconduct.²⁵⁹ The public, in short, would probably be most satisfied by, and would gain the most faith in the process from, a strict liability rule requiring disbarment for all violations of the rules.

In factoring process considerations into their decisions, reviewing courts should not overemphasize them lest they overwhelm the other functions of professional discipline. The courts also must avoid the pitfall of relying on process concerns, cloaked in the term "protecting the public," to justify any punishment that the courts cannot justify on other grounds. When implementing the process goal of discipline, it is important for courts to parse cases carefully in an effort to determine why the proposed punishment on the particular facts before the court would benefit the image of the profession, the credibility of professional standards, or respect for the disciplinary process more than similar punishment in any other case. Alternatively, if the courts wish to adopt a strict liability rule—as some courts have in the context of misappropriation of client funds²⁶⁰—they should do so expressly so as to highlight that policy decision. That in turn enables the legislature and the professional rulemakers to offer an alternative approach.

CONCLUSION

This Article has illustrated some of the pitfalls in current approaches to professional discipline. Discipline serves a variety of functions. Whether, when, and how they each should be imple-

to try to prove the defendant's innocence at trial after offering a plea bargain in which he would help the prosecution locate the victim's body. See Logan Jenkins, *Calm Down, Now: Feldman Actually Was Serving Justice*, SAN DIEGO UNION-TRIB., Sept. 19, 2002, at NC2 (comparing public opinion about defense counsel's actions with that of a local district attorney); J. Harry Jones, *Plea Deal 'Minutes Away' When Body Found*, SAN DIEGO UNION-TRIB., Sept. 17, 2002, at A1 (detailing the circumstances surrounding the withdrawn plea offer in the David Westerfield case); Alex Roth, *Defense Attorneys Draw Public's Ire: Actions After Reported Plea Attempt Criticized*, SAN DIEGO UNION-TRIB., Sept. 18, 2002, at A1 (detailing the public's and defense attorneys' responses to the actions of Westerfield's counsel); Alex Roth, *Pretrial Plea Bargaining Can't Be Revealed to Jury*, SAN DIEGO UNION-TRIBUNE, Sept. 19, 2002, at A1 (responding to the public's questions about attorney conduct during the Westerfield trial by explaining the rules governing plea negotiations and their tactical use by defendants). The host of the television show *The O'Reilly Factor* voiced his disapproval of the Westerfield attorneys' conduct on his program and ultimately submitted an ethics complaint to the State Bar of California. See *The O'Reilly Factor* (Fox News Channel television broadcast, Sept. 19, 2002).

259. As a practical matter, disciplinary agencies have limited resources. See Zacharias, *What Lawyers Do*, *supra* note 52, at 974.

260. See authorities cited *supra* note 166.

mented presents difficult questions about which reasonable minds might differ. Reasonable minds, however, have not addressed the issues squarely, because the public dialogue has been sidetracked. By relying on a unitary "protect the public" rationale for discipline, regulators have managed to avoid entering the debate.

The failure to confront the core issues has had ramifications both for the development of the law surrounding professional discipline and for the bar's programmatic decisions. The resulting disciplinary case law has been inconsistent and the messages it has sent to prosecutors and the profession have been clouded as a result. The failure to focus on the purposes of discipline has caused disciplinary agencies throughout the United States to squander, or misdirect, their resources.

By highlighting these relatively simple but important points, this Article has sought to open a debate on the issues. It has, in Part IV, attempted to identify concrete ramifications of recognizing the problem for each of the pertinent sets of actors. Part IV also proposed possible concrete responses by those actors. No doubt, there is significant room for argument about the details: when discipline is appropriate, how prosecutorial agencies should act, how bar treatment and educational programs should interrelate with the disciplinary process. Whatever one's position on these broad subject matters may be, however, the starting point for discussing them must be to identify the goals the regulators should pursue and to consider how inconsistent goals might be accommodated or prioritized. This Article's analysis provides a first step towards shaping those deliberations.