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Private Sanctions, Public Harm?

Jon J. Lee*

The legal profession has a secret. In response to widespread public distrust in the profession’s ability to regulate itself, disciplinary authorities have undertaken modest efforts over the last several decades to make their activities more transparent. They have opened up their formal proceedings, publicized the identities of sanctioned attorneys, and shared information about their work online. But at the same time, most have quietly continued to resolve cases of ostensibly “minor” and “isolated” misconduct through private sanctions, keeping the identities of disciplined attorneys – and their misconduct – hidden from view.

This Article takes a comprehensive look at private sanctions to determine whether their continued use can be justified. It presents the results of an original empirical study on disciplinary systems throughout the country over the past twenty years, including five states that have revealed some details of their private sanctions. These data show that private sanctions are at times being imposed for misconduct that is anything but “minor” and on attorneys whose conduct is anything but “isolated.” Moreover, there is no persuasive evidence that private sanctions are having their intended deterrent effect or adequately protecting the public from the risk of future harm. Unless jurisdictions commit to greater transparency and can demonstrate that their private sanctions are being appropriately administered and are effective, they should not be able to continue disciplining attorneys behind closed doors.
INTRODUCTION

We are in the midst of a transparency reckoning. In the aftermath of the murder of George Floyd, law enforcement agencies across the
country are being prompted to share data on policing practices\(^1\) and to release body cam evidence to guard against racial bias and other misconduct.\(^2\) The federal government is under increasing pressure to implement ethics reforms following the alleged abuses of the Trump presidency, including mandating disclosures on the hiring of administration officials.\(^3\) At the same time, state and local governments are grappling with whether and how to share information about their activities.\(^4\) Although some of these issues have arisen in response to findings of misconduct,\(^5\) the clamor for open access has also been sparked by changes brought about by the coronavirus pandemic—now anyone with reliable internet access can virtually attend a council meeting or court hearing if the governmental entity provides such an option.\(^6\)

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This transparency push has extended beyond government agencies and officials. Colleges and universities are being required to provide information on sexual misconduct and hazing on campus, both of which traditionally have been swept under the rug. USA Gymnastics has been under fire for its handling of sexual abuse claims, together with the culture of silence that enabled the misconduct to continue. Beyond these high-profile events, organizations of all types are adopting measures that promote greater transparency—precisely because we have come to expect it.

How does the legal profession fare when it comes to transparency? Not well. While the imposition of lawyer discipline has become considerably more systemized and professionalized, states largely have resisted calls for a truly public disciplinary process. Even when an attorney has been disciplined publicly, information about the sanction is frequently difficult to find online.

provide online access to public meetings following virtual meetings during the coronavirus pandemic).


11. See Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 GEO. J. LEGAL ETHICS 1, 19 (2007) (noting that only three states treat lawyer disciplinary complaints as public record and that several states maintain confidentiality until a public sanction is imposed).
and does not include detail about the attorney’s misconduct. A prospective client is more likely to find helpful information about an attorney on a third-party lawyer rating website such as Avvo than from a state bar, and often it is the former that gives attorneys greater concern.

The American Bar Association ("ABA"), for its part, has recommended that jurisdictions share more with the public about lawyer discipline. Through the work of two successive committees tasked with evaluating disciplinary systems, the ABA highlighted the pervasive secrecy that surrounded the resolution of lawyer grievances throughout most of the twentieth century. Although the final recommendations of these committees were modest with respect to opening up proceedings and sharing information, they represented substantial departures from the ways that states had been conducting their work.

But even if states fully adopt the ABA’s recommendations, one feature would continue to provide an invisibility cloak to lawyers who commit misconduct: private sanctions. In 1970, the ABA recommended that disciplinary authorities have the power to impose private sanctions when lawyers commit “minor misconduct.” A private sanction is a disciplinary action informing the lawyer that they committed an ethical violation; it will be shared with the lawyer and usually the complainant, and a record of it will be maintained by the disciplinary authority and may be considered an aggravating circumstance in the event the lawyer

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12. Steven K. Berenson, Is It Time for Lawyer Profiles?, 70 FORDHAM L. REV. 645, 678–79 (2001) (indicating that discipline is often published in bar journals or newspapers, two outlets that prospective clients are unlikely to read). See generally Jacquelyn M. Desch, Attorney Discipline Online, 29 GEO. J. LEGAL ETHICS 921 (2016) (cataloging varying degrees of online access to disciplinary information in different states).


15. See Berenson, supra note 12, at 677–79.

16. AM. BAR ASS’N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF’T, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 92 (1970) [hereinafter CLARK REPORT].
were to engage in additional misconduct.\textsuperscript{17} But the disciplinary authority will neither publicize the private sanction nor disclose the sanction to the lawyer’s current clients.\textsuperscript{18} The continued use of private sanctions has been debated modestly,\textsuperscript{19} but the ABA continues to recommend private sanctions as a disciplinary tool in some contexts.\textsuperscript{20}

Professional responsibility scholars almost unquestionably assume that disciplinary systems should be opened up as broadly as possible, which necessarily would preclude the use of private sanctions.\textsuperscript{21} Perhaps not surprisingly, disciplinary authorities often make no mention of issuing private sanctions. And when these authorities do discuss their practice of issuing private sanctions, they often tout the effectiveness of private sanctions without providing evidentiary support.\textsuperscript{22}

This Article aims to shine a light into the darkness that surrounds lawyer private sanctions. Nearly all of the thirty-six states that impose private sanctions share little about them, but five states—Alabama, Delaware, Massachusetts, Vermont, and

\textsuperscript{17} Id. at 92, 94; \textit{see also} \textsc{Model Rules for Law. Disciplinary Enf’t r. 10.A(5)} (\textsc{Aba Ass’n} 2020) (describing the ABA’s recommendations on admonitions, a type of private sanction).

\textsuperscript{18} \textit{See} \textsc{Clark Report, supra} note 16, at 94 (limiting disclosure to complainant and attorney). \textit{See generally} Debra Moss Curtis, \textit{Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics}, 35 \textsc{J. Legal Prof.} 209 (2011) (describing sanctioning procedures and disclosures of information throughout the country).


\textsuperscript{20} \textit{See} \textsc{ABA CTR. FOR PRO. RESP., Annotated Standards for Imposing Lawyer Sanctions} 83–85 (Ellyn S. Rosen, ed., 2d ed. 2019) [hereinafter \textsc{Annotated Standards}] (identifying the circumstances when private sanctions are appropriate).

\textsuperscript{21} \textit{See, e.g.}, Levin, \textit{supra} note 11, 49–50 (arguing for broad transparency in disciplinary process); Bruce A. Green, \textit{Selectively Disciplining Advocates}, 54 \textsc{Conn. L. Rev.} 151, 192–94 (2022) (explaining the problems with the secrecy that surrounds lawyer discipline, including with the use of private sanctions, and advocating for increased transparency throughout the grievance process).

\textsuperscript{22} \textit{See, e.g.}, Martin Cole, \textit{The Value of Private Discipline}, 65 \textsc{Bench & Bar of Minn.}, 18, 18 (Nov. 2008) (noting that a committee had reviewed private sanctions in Minnesota and found that “private disciplinary options serve a valid purpose in the circumstances for which they were intended,” without additional detail).
Wisconsin—share considerable deidentified information on their use of private sanctions. Using national statistics on general sanctioning practices and the detailed information gleaned from these five states, this Article presents the results of the first published empirical study of private sanctions, providing a more complete and nuanced picture of the ways in which they are being used—and, at times, misused.

Part I describes the evolution of private sanctions as a disciplinary tool, framing it against the backdrop of the ABA’s push for greater transparency from disciplinary authorities. Part II explains the administration of private sanctions and sets out the current debate about their use in light of the relevant stakeholder interests. Part III presents the results of a multi-faceted study of two decades of private sanctions, leveraging high-level statistics compiled from all states and information derived from 4,062 disciplinary decisions issued by five states that share details about their private sanctions. Part IV synthesizes these results to evaluate the arguments on both sides of the private sanctions debate, determining that disciplinary authorities are at times misusing private sanctions without any assurance that they are fulfilling their intended functions. The Article concludes with recommendations for next steps that jurisdictions must take if they wish to continue using private sanctions and the consequences if they do not.

Despite limitations in the conclusions that may be drawn on account of the reticence of many jurisdictions to disclose information, this Article makes three contributions to the private sanction debate. First, it demonstrates that private sanctions are being imposed in some cases that clearly do not meet the ABA’s limited criteria for their use. Second, it contends that the ABA’s definition of private sanctions is overinclusive when it comes to certain types of misconduct, permitting their imposition in some instances where the public has a compelling need to know. Third, irrespective of the definition employed for the imposition of private sanctions, there is no persuasive evidence that they are having their envisioned deterrent effect.

There may be circumstances in which private sanctions—imposed in connection with rehabilitative measures—could be proper, such

23. See infra Part III.A (describing the information contained in the opinions).
as when an inexperienced attorney misses a single deadline or fails to communicate with a client. But given the results of this study and greater concerns about what is unknown, this Article posits that unless a jurisdiction commits to sharing extensive information on their private sanctions, including their effectiveness as a deterrent, it should not be able to maintain a shadow disciplinary procedure.

I. LAWYER DISCIPLINE AND PRIVATE SANCTIONS

Lawyer discipline has evolved considerably from its origins as an inherent extension of judicial authority to the highly professionalized disciplinary agencies of today. This Part outlines the history of lawyer discipline in the United States, paying particular attention to the ABA’s influential roles in modestly increasing the transparency of state disciplinary proceedings and in establishing private sanctions as a disposition tool.

A. Early Disciplinary Procedures

A rudimentary form of lawyer discipline, grounded in the inherent authority of courts to regulate attorneys who appear before them, apparently existed at the time of the Founding. From what is known about the process, the sanctions were limited yet extreme: a lawyer could be struck from the roll for committing misconduct, meaning that the lawyer was forbidden from practicing in the jurisdiction thereafter. Ordinarily, discipline was meted out summarily by a judge with little additional process.

Even though these disciplinary proceedings were primitive by today’s standards, they were highly public affairs by all accounts. Not only were there no private sanctions or formalized confidential procedures, local newspapers would report on disciplinary proceedings and publish the names of subject attorneys—including those attorneys who ultimately were not sanctioned.

24. See Devlin, supra note 14, at 912–13 (noting that English courts recognized this power since at least since 1275).
25. C. S. Potts, Trial by Jury in Disbarment Proceedings, 11 TEX. L. REV. 28, 38–39 (1932); see also Geoffrey C. Hazard, Jr. & Cameron Beard, A Lawyer’s Privilege Against Self-Incrimination in Professional Disciplinary Proceedings, 96 YALE L.J. 1060, 1063–65 (1987) (discussing summary proceedings, which were displaced by the latter part of the twentieth century).
26. See Potts, supra note 25, at 41–42.
Courts likewise did not take measures to shield the lawyers’ identities. In some respects, the public nature of these proceedings was logical given that they were typically initiated by courts issuing orders to show cause and generally involved allegations of criminal conduct. Yet the extent to which these proceedings were publicized, including by courts, is in stark contrast with contemporary disciplinary procedures.

Lawyer disciplinary proceedings changed dramatically, however, in the first two decades of the twentieth century, due to a shift in the role that bar associations played in the legal profession. Although bar associations initially had been focused on fellowship among the legal community, bar associations in larger cities, most notably New York City, began to take an active role in the investigation of complaints against their members. Initially, it was often unclear what authority a bar association had to take formal action against an attorney; although some bar associations worked in conjunction with the courts, some attempted to impose sanctions on their own. But over time, bar associations gained a foothold in the investigation and resolution of complaints.

The transition of disciplinary authority from courts to bar associations had a profound effect on how investigations of lawyer grievances and disciplinary proceedings were conducted. First and foremost, the entire process became much less transparent. State bar associations kept confidential both the investigations and formal

28. Id. at 13.
29. Id. at 12; see Ex Parte Wall, 107 U.S. 265, 271–73 (1883) (discussing other cases throughout the country establishing the summary process and its parameters).
32. See ORIN N. CARTER, ETHICS OF THE LEGAL PROFESSION 89 (1915) (indicating that “[s]ome of the bar associations . . . [we]re attempting to reprimand and discipline their members . . . without taking the matter into court.”).
33. See Fred C. Zacharias, The Myth of Self-Regulation, 93 MINN. L. REV. 1147, 1161–63 (explaining how bar associations became more involved in disciplinary procedures, linking that involvement to self-regulation); see also Barton, supra note 30, at 433–44 (discussing bar associations’ roles in interpreting ethics rules).
34. Levin, supra note 11, at 14–15.
disciplinary proceedings.35 Ironically, the motivation for this lack of transparency was rooted in the notion that if members of the public were to learn about lawyer misconduct, they would lose confidence in the profession.36 At the time, most state courts (and the ABA) supported this shift in how disciplinary proceedings were conducted—most likely because of the considerable influence that bar associations exerted on the profession.37

Second, the growth of bar association involvement in investigating grievances led to the use of alternative dispositions of pending complaints, including private sanctions.38 Although the precise origin of private sanctions is difficult to pinpoint, they appear to have gained traction in a few states by the 1920s.39 Without the ABA providing guidance or recommendations on the administration of discipline at that time, the types of sanctions and conditions under which they were imposed varied widely.40 Nevertheless, several influential bar associations, such as that in New York City, regularly imposed some type of private sanction.41

B. Professionalization of Lawyer Discipline

This diffuse state of affairs largely continued unchecked throughout the first half of the twentieth century. In 1967, the ABA created the Special Committee on Evaluation of Disciplinary Enforcement (“Clark Committee”) to evaluate state disciplinary systems and recommend improvements.42 The result of the Clark Committee’s three years of work, the Clark Report, was both alarming and transformational.43 Describing the current state of lawyer disciplinary systems, it “report[ed] the existence of a scandalous situation that require[d] the immediate attention of

35. See id. at 15.
36. CLARK REPORT, supra note 16, at 143.
37. Zacharias, supra note 33, at 1162–63.
38. Levin, supra note 11, at 14.
39. Id. at 15.
40. Levin, supra note 11, at 15.
41. See CLARK REPORT, supra note 16, at 95 (discussing the prevalence of private admonitions in New York).
42. See Berenson, supra note 12, at 676–77 (describing genesis of Clark Committee).
the profession.” The Clark Report identified thirty-six problems in disciplinary enforcement and drafted recommendations to address them. It also set out a proposed disciplinary structure, under which professional staff would initially investigate a complaint to determine whether it merited a formal hearing by a grievance committee. The grievance committee would make findings and recommendations to a disciplinary board, which would approve or modify them subject to ultimate review by the state’s highest court.

The Clark Report included two recommendations of consequence to this Article. The first addressed the overall lack of transparency in the administration of discipline. According to the Clark Report, disciplinary agencies routinely limited the disclosure of their activities because they “believe[e] that the public image of the profession is damaged by a disclosure that attorney misconduct exists.” Rather than protecting the profession, however, the lack of transparency served only to foster suspicion and lower public confidence in the profession. Consequently, the Clark Report recommended that disciplinary authorities widely publicize their activities by compiling statistics, publishing details on the imposition of public discipline, and disseminating general information on activities and procedures.

The second recommendation addressed the disposition of claims involving minor misconduct. These types of claims were routinely dismissed, according to the Clark Committee, because the only alternative was a formal disciplinary proceeding, which “is unduly harsh, wastes the agency’s limited manpower and financial

44. CLARK REPORT, supra note 16, at 1.
45. See id. at 19-191 (setting out problems and recommendations); see also Johnson, supra note 43, at 47-49 (identifying key problems and recommendations).
46. CLARK REPORT, supra note 16, at xiv-xvii.
47. Id. at xv.
48. Id. at 143.
49. Id.
50. Id.
52. CLARK REPORT, supra note 16, at 92.
resources on relatively insignificant matters and . . . overburdens the court having disciplinary jurisdiction.”

The proposed solution was to allow the disciplinary authority to issue an admonition in lieu of a formal disciplinary proceeding.

An admonition is a type of private sanction, and its features reflect what this Article means when it uses the phrase. It is considered a disciplinary action and would be shared with the lawyer and complainant. Furthermore, a record of the admonition would be kept by the disciplinary authority to consider were the lawyer to be subject to a future ethics complaint. But the admonition would not be shared with the lawyer’s other clients or the public at large—meaning that it would not carry with it the adverse reputational consequences associated with public discipline. Although a number of disciplinary authorities already had been issuing private sanctions at the time of the issuance of the Clark Report, private sanctions were not universally available nor were they necessarily being used in lieu of formal disciplinary proceedings.

To demonstrate the value of admonitions, the Clark Report presented statistics from the New York Bar Association, one of the earliest adopters of private sanctions, showing that 85.7% (180 out of 210) of cases during the 1968–1969 period had resulted in private sanctions.

Interestingly, these statistics were used to suggest that these lawyers likely would not have been sanctioned publicly.

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53. Id. at 93.
54. See id. at 92–96 (describing recommendation); see also Diane M. Ellis, A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers, 52 EMORY L.J. 1221, 1224 (2003) (discussing the proposed solution and remarking on the sparse discussion of other alternative-to-discipline measures). The ABA initially called them “informal admonitions,” but they are now referred to as admonitions. See MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 10.A(5) (AM. BAR ASS’N 2020).
55. See id. r. 11.B–C (indicating that both the complainant and attorney-respondent should be notified).
56. Id. r. 10.A.5.
57. See id. (providing that a summary of the misconduct may be published, but the lawyer cannot be identified); CLARK REPORT, supra note 16, at 94 (explaining the importance of this distinction).
58. See Levin, supra note 11, at 15–16 (describing the use of private sanctions as a trend but noting variety among jurisdictions).
59. CLARK REPORT, supra note 16, at 95.
had private sanctions not been available—the possibility that they had received too lenient a sanction.

The Clark Report catalyzed widespread state reforms of disciplinary systems, with many jurisdictions adopting the recommended substantive and procedural changes. These reforms coincided with a substantial decrease in the percentage of cases in which severe sanctions such as disbarments and suspensions were imposed, relative to those in which lesser sanctions (such as private sanctions) were imposed.

C. Discipline in the Modern Era

Although the Clark Report did much to systematize and professionalize the administration of discipline, it did not fully address the ways in which the legal profession had evolved in the late twentieth century or sufficiently protect the public interest. Accordingly, the ABA undertook two other major initiatives to advance disciplinary enforcement. First, it aimed to improve the accuracy and consistency of sanctioning practices, both within jurisdictions and across jurisdictions, through its 1986 adoption of the Standards for Imposing Lawyer Sanctions (“Standards”). According to the ABA, the promulgation of the Standards was critical because “sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers.” Indeed, several professional responsibility scholars have identified the vagrancies in sanctioning

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60. See id.
64. ABA STANDARDS FOR IMPOSING LAW Y. SANCTIONS Preface (AM. BAR ASS’N 1992).
practices as among the most problematic aspects of contemporary lawyer discipline. Nevertheless, the Standards continue to reinforce the ABA’s seemingly contradictory views on the extent to which disciplinary proceedings and sanctions should be made public. On the one hand, the Standards reiterate that lawyer discipline should be public—and presumably broadly publicized—in most cases. But on the other hand, the Standards acknowledge that, in limited circumstances, a disciplinary authority may impose admonitions that “declare[] the conduct of the lawyer [to be] improper” but remain confidential. Furthermore, the Standards provide a list of criteria that disciplinary authorities can use when determining whether private sanctions should be imposed, which serve to solidify their use.

Second, the ABA created the Commission on Evaluation of Disciplinary Enforcement ("McKay Commission") in 1989 to reevaluate state disciplinary systems since the issuance of the Clark Report and provide additional recommendations. Despite the fact that “revolutionary changes had occurred” in lawyer discipline as a result of the Clark Report, the report of the McKay Commission ("McKay Report") noted that the lack of transparency in the disciplinary process continued to fuel a lack of public confidence in the profession. Indeed, the McKay Commission initially recommended that there be a “fully public discipline process,” the records of which would all presumptively be made public “from
the time of the complainant’s initial communication with the agency,” and the proceedings of which would be open to the public as well.\footnote{Id. at 34–35 (legislative history of Recommendation 7) (capitalization standardized).}

In support of this dramatic shift in the publicity of pending disciplinary proceedings, the McKay Commission noted with approval the “hard evidence” from Florida, Oregon, and West Virginia, three states that make all lawyer grievances public—even complaints that are dismissed.\footnote{Id. at 35–37; see also Berenson, supra note 12, at 681 (noting Oregon’s success).} However, when the McKay Commission presented its recommendations to the ABA House of Delegates, they were pared back significantly out of concern about the reputational harm that could be inflicted by the filing of an invalid complaint.\footnote{Nicole J. A. Reid, The Legal Profession’s “Dirty Little Secret”: Attorney-Client Sexual Relations and Public vs. Private Disciplinary Sanctions, 24 GEO. J. LEGAL ETHICS 801, 808 (2011).} In the end, the final recommendations advocated for the disclosure of formal disciplinary proceedings only upon a finding of probable cause that a violation had occurred.\footnote{See MCKAY REPORT, supra note 70, at 33 (final Recommendation 7).}

Likewise, the McKay Commission sent mixed signals when it came to the utility and continued vitality of private sanctions. In connection with its initial recommendation to open the disciplinary process to the public, it noted that a “fully open disciplinary system eliminates special procedures for sanctions such as ‘private reprimands’ or ‘admonitions’ that were formerly confidential.”\footnote{Id. at 38.} Indeed, it appears that the McKay Commission was prepared to eliminate private sanctions before the ABA House of Delegates stepped in to retain limitations on the disclosure of pending proceedings. Moreover, the McKay Report suggested that private sanctions were not an adequate tool, at least on their own, to address complaints involving minor misconduct. According to the McKay Report, disciplinary authorities were still “routinely dismiss[ing] these complaints,” which “casts suspicion on the disciplinary process.”\footnote{Id. at xviii; see also Manuel R. Ramos, Legal Malpractice: Reforming Lawyers and Law Professors, 70 TUL. L. REV. 2583, 2593 (1996) (critiquing McKay Report’s downplaying of minor misconduct).} And even when private sanctions were
issued, they “may motivate the lawyer to change[,] but provide[] no guidance on how to change.”

In the end, the McKay Report maintained the status quo with regard to private sanctions but recommended that jurisdictions also adopt non-disciplinary procedures and programs to address cases involving minor misconduct. Among the procedures and programs identified were “lawyer practice assistance, substance abuse recovery programs, [and] psychological counseling . . . .” These alternatives to discipline were viewed as preferable because “[i]n these cases, the complainant needs a remedy and the lawyer needs additional skills and guidance.” Private sanctions, when imposed on their own, do not accomplish either.

Although the McKay Report was not universally adopted, states largely have adhered to its ambivalent stance regarding the transparency of disciplinary proceedings—which stopped short of a truly public disciplinary process. A few states do allow public access to grievances that did not result in discipline, but they often have been prompted to do so because their preexisting procedures violated constitutional provisions or public records laws. Even though many states have created alternative-to-discipline programs, as will be discussed later in connection with the

77. McKay Report, supra note 70, at xvii–xviii.
79. McKay Report, supra note 70, at 48.
80. Id. at xviii; see also Ellis, supra note 54, at 1224–26 (describing aspects of alternative-to-discipline procedure outlined by the McKay Commission).
81. See Levin, supra note 11, at 27–28 (doubting suggestion that private sanctions may be rehabilitative); see also Gillers, supra note 63, at 494 (contending with the fact that rehabilitation is generally not one of the goals of lawyer discipline, though it is in California).
82. See Berenson, supra note 12, at 677–79 (describing the continuing lack of transparency nearly a decade after the McKay Report).
empirical study of disciplinary systems, those generally continue to coexist alongside private sanctions rather than replace them.\textsuperscript{85} Given the ever-increasing pressure for transparency, however, disciplinary authorities are faced with two critical questions: (1) whether they should continue to follow the ABA’s recommendations to impose private sanctions and, if so, (2) when and how such sanctions should be imposed. It is to those critical questions that this Article turns.

\section*{II. Private Sanctions: The Current Debate}

As discussed in Part I, the Clark Report recommended that disciplinary authorities have the ability to issue private sanctions because the Committee members perceived that, in cases of minor misconduct, a disciplinary authority would likely dismiss a case rather than subject an attorney to a formal proceeding.\textsuperscript{86} A private sanction would fill that gap, in that it would inform the attorney that the conduct was unethical but forego the time, expense, and potential reputational harm attendant with formal disciplinary proceedings.\textsuperscript{87}

This Part first describes the ABA’s guidance on the administration and imposition of private sanctions, identifying the limited circumstances under which they may be used. It then presents the primary arguments raised on both sides of the private sanction debate, organizing them by relevant stakeholder interests. By and large, these arguments have been made at a high level of generality—precisely because so little is known about private sanctions. Nevertheless, they provide a starting point for the empirical study that follows.

\subsection*{A. Administration of Private Sanctions}

The ABA Model Rules for Lawyer Disciplinary Enforcement ("Disciplinary Enforcement Rules") outline how sanctions, including

\textsuperscript{85} See infra Table I (indicating that thirty-six states have private sanctions and forty have alternative-to-discipline programs); see also Brown \& Wolf, supra note 78, at 270–73 (describing the diversion programs that have arisen in the wake of the McKay Report and noting some of their drawbacks).

\textsuperscript{86} See supra notes 52–58 and accompanying text.

\textsuperscript{87} See CLARK REPORT, supra note 16, at 92–96 (identifying benefits of private sanctions).
private sanctions, should be imposed. Although jurisdictions are not required to adhere to the Disciplinary Enforcement Rules, most largely follow them.

Once a lawyer grievance is filed, a disciplinary counsel will conduct an initial investigation that results in one of four outcomes: (1) dismissing the grievance, (2) referring the attorney to an alternative-to-discipline program, (3) recommending an admonition, or (4) filing formal charges. When a disciplinary counsel recommends an admonition, an attorney has the “right to demand in writing within [fourteen] days that the matter be disposed of by a formal proceeding.” If no action is taken, the attorney will be deemed to have consented to private discipline.

This procedure for admonitions is analogized to plea bargaining, although in this case the attorney does not even have to affirmatively assent or acknowledge guilt.

Admonitions, like all lawyer discipline, may be coupled with probation. According to the ABA, “[p]robation is appropriate when a lawyer can perform legal services but has problems that require supervision, such as improper maintenance of books and records, lack of timely communication with clients, mental or physical disabilities, or alcohol and chemical dependency.”

Probation is almost universally imposed along with one or more

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89. See Joy, supra note 88, at 812 (discussing the adoption of the Disciplinary Enforcement Rules as promoting standardization of state procedures).

90. MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 11.B (AM. BAR ASS’N 2020).

91. Id. r. 11.C (brackets in original).

92. Id.

93. Id. r. 11 cmt. (“The [consent] procedure is similar to the rejection of a settlement offer in a civil case or a plea bargain in a criminal case, which results in a trial.”); Brian K. Pinaire, Milton Heumann & Christian Scarlett, “Philadelphia Lawyers”: Policing the Law in Pennsylvania, 2012 J. Prof. Law. 137, 173 (2012) (noting similarities to plea bargaining but indicating that Pennsylvania disciplinary authorities resist the comparison); see also Brown & Wolf, supra note 78, at 264–65 (discussing traditional consent-by-discipline system, which requires affirmative agreement after formal charges).


95. ANNOTATED STANDARDS, supra note 20, at 88.
conditions, such as being required to practice under the supervision
of another lawyer, periodic review of trust accounts or reports of
pending client matters, attendance at CLE programs, and/or
participation in substance abuse or mental health treatment programs.96

Once an admonition is imposed, the Disciplinary Enforcement
Rules require that the complainant be informed of it.97 The authority
should also keep a record of the admonition so that it “may be
used in subsequent proceedings . . . as evidence of prior
misconduct bearing upon the issue of the sanction to be imposed in
the subsequent proceeding.”98 Moreover, the ABA suggests that
individual cases of private discipline should be published; while
measures should be taken to ensure anonymity, the reports
should “describe[s] the facts in cases where admonitions are
imposed . . . .”99 While the ABA rules do not specifically identify
what should be shared, they do not require that the details of
private sanctions be completely shrouded in secrecy—only that the
lawyer’s identifying information remain confidential.

B. Criteria for Imposition of Private Sanctions

The ABA frames the use of private sanctions as the exception to
the general rule that all lawyer discipline should be public.100 It
provides numerous reasons for this presumption, including the
following: (1) it increases public trust in the profession and in its
ability to effectively self-regulate, (2) it “enhances the integrity of
the profession and demonstrates the court’s interest in protecting
the public”; (3) it “enables victims who may have been unaware of
the disciplinary process to seek redress”; (4) it shows that the
“system does not play favorites”; (5) it enables those outside the
disciplinary system to evaluate “whether the system is operating
fairly and treating consistently lawyers who are disciplined for

96. Id. at 92–98 (identifying and discussing each condition); see also Schneyer, supra note 94, at 22–23 (describing how other attorneys may be involved in monitoring compliance).
97. MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 11.B(2) (AM. BAR ASS’N 2020). Interestingly, some jurisdictions have attempted to preclude complainants from discussing the sanction with others. See, e.g., Thurm, supra note 83, at 240 (explaining that Florida’s confidentiality provision was struck down on First Amendment grounds).
98. MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 10.A(5) (AM. BAR ASS’N 2020).
99. Id. r. 10 cmt.; see also id. r. 10.A(5) (“A summary of the conduct for which an admonition was imposed may be published in a bar publication for the education of the profession . . . .”).
100. See ABA STANDARDS FOR IMPOSING LAW. SANCTIONS r. A.1.2 (AM. BAR ASS’N 1992).
similar misconduct”; and (6) it “educate[s] members of the legal profession and help[s] deter misconduct.”\textsuperscript{101}

Accordingly, the Standards provide that an admonition should be issued only when three criteria are simultaneously met: (1) the case involves “minor misconduct,” also referring to it as “isolated”; (2) the misconduct resulted in “little or no injury to a client, the public, the legal system, or the profession”; and (3) “there is little likelihood of repetition by the lawyer.”\textsuperscript{102} Furthermore, there is a de facto fourth requirement that appears in nearly all explanations of admonitions: the misconduct should have been the result of mere negligence, rather than being done with knowledge or intent.\textsuperscript{103}

Unfortunately, neither the Standards nor its published annotations (“Annotated Standards”) provide much insight into what is meant by “minor” or “isolated” misconduct, except to reflexively state that “[a]n admonition is inappropriate in cases of more serious misconduct.”\textsuperscript{104} Nevertheless, from the examples and counterexamples cited by the ABA, it appears that misconduct (1) involving the violations of different ethical obligations,\textsuperscript{105} (2) toward multiple clients,\textsuperscript{106} or (3) in different matters generally

\textsuperscript{101} Annotated Standards, supra note 20, at 26–28.

\textsuperscript{102} ABA Standards for Imposing Law. Sanctions r. A.1.2 (Am. Bar Ass’n 1992). The Standards routinely use the term “isolated” when describing the specific conduct for which an admonition would be appropriate. See, e.g., id. r. C.4.54 (stating criteria for imposing admonition for violation of the duty of competence).

\textsuperscript{103} See, e.g., id. r. C.4.14 (tying admonition to lawyer negligence in relation to client property); id. r. C.4.24 (tying admonition to lawyer negligence in relation to revealing client confidences). See generally Nancy J. Moore, Mens Rea Standards in Lawyer Disciplinary Codes, 23 Geo. J. Legal Ethics 1, 18 (2010) (discussing how the Standards incorporate the lawyer’s mens rea into determination of the appropriate sanction).

\textsuperscript{104} Annotated Standards, supra note 20, at 84. A few states have per se rules for what cannot be considered minor, though they may be based on other circumstances such as recent prior discipline. See, e.g., Ind. Rules Att’y Admission & Discipline, r. 23(12.1)(a)(1) (Ind. 2021) (six categories in Indiana).

\textsuperscript{105} See Annotated Standards, supra note 20, at 464 (noting that the “multiple offenses” aggravating factor has been applied to violations of multiple rules in the context of a single client matter). But see id. at 465 (“Some courts have declined to apply this aggravating factor when the number of offenses is de minimis or when only one event or offense violates multiple rules.”).

\textsuperscript{106} See ABA Standards for Imposing Law. Sanctions r. C.9.22(c)–(d) (Am. Bar Ass’n 1992) (listing both “multiple offenses” and “a pattern of misconduct” among aggravating factors); Annotated Standards, supra note 20, at 431–33 (illustrating the use of public sanctions for cases involving violation of obligations to multiple clients).
would not qualify as minor and isolated. Likewise, the Standards do not provide much detail about the injury requirement; they only clarify that an admonition should be imposed only where there is negligible actual or potential injury. Finally, with regard to the likelihood of repetition, a key consideration is whether the lawyer has been subject to prior discipline: repeat offenders ordinarily should not receive private sanctions. This is in line with the Standards’ conception of progressive discipline, which provides that attorneys generally should be subject to more severe sanctions if they reoffend than otherwise because they have not been deterred by the previous discipline. While the Standards permit disciplinary authorities to discount earlier misconduct if it occurred long ago or was dissimilar to the present case, the fact of any prior discipline should militate against the imposition of a private sanction.

Although the Standards and explanatory materials attempt to be more specific about the issuance of sanctions in relation to the violation of particular ethical duties proscribed by the Model Rules
of Professional Conduct ("Model Rules" or "Rules"), by and large they merely repeat the general requirements described in this Section. A notable exception, however, exists for acts that represent a failure to maintain personal integrity, including criminal acts (Rule 8.4(b)) and acts that "involv[e] dishonesty, fraud, deceit, or misrepresentation" (Rule 8.4(c)). The Annotated Standards contain a list of criminal acts that should result in disbarment or suspension, including: the possession of illegal drugs, sexual misconduct, tax violations, domestic violence, driving under the influence of alcohol or drugs, other serious misdemeanors, and multiple criminal acts. Public reprimands should be imposed "when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer’s fitness to practice law." Although such acts may be criminal, they can be noncriminal provided that they are dishonest. By contrast, private sanctions are restricted to attorneys who have committed a "minimal infraction" that did not involve the knowing commission of a dishonest, fraudulent, or deceitful act.

112. MODEL RULES OF PROF. CONDUCT (AM. BAR ASS’N 2020).
113. See, e.g., ABA STANDARDS FOR IMPOSING LAW. SANCTIONS r. 4.54 (AM. BAR ASS’N 1992) (providing that, for violations of the competence obligation, "[a]dmonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to the client."). This has led scholars to doubt their value; they have been called "confusing and unworkably vague." Levin, supra note 65, at 38–39; see also Zacharias, supra note 68, at 681–82 (writing that the Standards still allow disciplinary authorities to "identify[] appropriate sanctions and assign[] values to aggravating and mitigating factors").
115. See ANNOTATED STANDARDS, supra note 20, at 265–79. Cf. Douglas R. Richmond, The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation, 12 GEO. J. LEGAL ETHICS 175, 190 (1999) (arguing that the violation of Rule 8.4(b), the crime provision, generally requires self-reporting to the bar because the conduct bears on the attorney’s fitness to practice law).
117. ANNOTATED STANDARDS, supra note 20, at 284 (indicating that courts most often apply the standard to non-criminal conduct, whereas criminal conduct generally results in a more severe sanction).
118. See id. at 288–89 (noting that the baseline sanction could be an admonition but might be elevated “due to aggravating factors or because additional offenses are involved").

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Even when an attorney’s misconduct meets the criteria for the imposition of private discipline, the ultimate sanction may be altered because of aggravating or mitigating circumstances.119 The Standards include several aggravating circumstances that are of particular relevance to the imposition of private sanctions, including “prior disciplinary offenses,” “a pattern of misconduct,” “multiple offenses,” “substantial experience in the practice of law,” and “bad faith obstruction” or “deceptive practices” in connection with the disciplinary proceeding.120

Many of the mitigating circumstances are the inverse of aggravating circumstances, including the “absence of a prior disciplinary record,” “full and free disclosure to disciplinary board or cooperative attitude toward proceedings,” “inexperience in the practice of law,” and the “remoteness of prior offenses.”121 Nevertheless, the existence of mitigating circumstances should not convert a public sanction to a private one unless the lawyer’s misconduct meets the baseline criteria for the imposition of private sanctions: minor misconduct that results in little to no actual or potential injury and that is unlikely to be repeated.122

C. Evaluating Private Sanctions: A Stakeholder Interest Approach

The continued use of private sanctions has not yet been the subject of extensive debate and discussion. Professor Leslie Levin has made vital contributions to the broader topic of transparency in the administration of lawyer discipline and has discussed private sanctions in that context.123 But by and large, the scholarly and practitioner communities come out on opposite sides of these

119. ABA STANDARDS FOR IMPOSING LAW. SANCTIONS Preface (AM. BAR ASS’N 1992) (instructing disciplinary authorities to first determine the recommended sanction without aggravating or mitigating factors before considering whether their presence alters the ultimate sanction); see Zacharias, supra note 68, at 681–82, 682 n.17–18 (analogizing aggravating and mitigating factors in lawyer discipline to criminal sentencing, suggesting further that they are malleable and can be used to justify a range of dispositions).

120. ABA STANDARDS FOR IMPOSING LAW. SANCTIONS r. C.9.22 (AM. BAR ASS’N 1992).

121. r. C.9.32.

122. See MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 10 cmt. (AM. BAR ASS’N 2020) (noting the limited application of admonitions, which follows its discussion of aggravating and mitigating circumstances).

123. See, e.g., Levin, supra note 11, at 22–31 (providing the most comprehensive treatment on the issue of transparency in lawyer discipline in the literature); Levin, supra note 65, at 46–48 (positing that disciplinary authorities engage in “[o]veruse of admonitions”).
issues: scholars almost uniformly advocate for more transparency in all aspects of the disciplinary process, and practitioners generally emphasize the value of maintaining confidentiality to a significant degree. The two groups rarely engage with the opposite view or offer any rejoinder—they talk at each other, not to each other.

This Article will adopt a different approach. Rather than merely reciting the arguments on both sides of the debate, this Article will explore arguments in light of relevant stakeholder interests. This Article will focus on four principal stakeholders who may be affected by the regulation of misconduct that may result in the imposition of a private sanction: (1) disciplinary authorities, (2) attorneys, (3) clients, and (4) the public at large. This list is not exhaustive, but it provides a framework to evaluate the continuing use of private sanctions. As this Section details, the validity and strength of many of these interests depend on the answers to empirical questions: in what types of cases are private sanctions being imposed, on whom are they being imposed, and whether their imposition is curbing future misconduct.

124. See, e.g., Levin, supra note 65, at 71–76 (advocating for the broad publication of all lawyer sanctions); Green, supra note 21, at 191–92 (arguing that the lack of transparency regarding the exercise of disciplinary discretion contributes to a lack of public confidence in the profession, focusing on the grievances filed against lawyers involved in the 2020 election challenges); Nancy Leong, State Court Diversity and Attorney Discipline, 89 FORDHAM L. REV. 1223, 1234–35 (2021) (suggesting that the secrecy of attorney discipline makes it difficult to know if it is being done in a biased manner); Brown & Wolf, supra note 78, at 265–67 (positing that discipline by consent should be avoided because of the lack of transparency involved); Berenson, supra note 12, at 678–83 (claiming that the lack of transparency leads to inadequate information being shared, and proposing the introduction of lawyer profiles); RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 509 (2008) (arguing for elimination of private sanctions).

125. See, e.g., Cole, supra note 22, at 18 (highlighting the value of private discipline in Minnesota). But see Phila. Bar Ass’n, supra note 19 (urging that Pennsylvania’s private discipline be eliminated).

126. For excellent articles identifying stakeholders in lawyer regulation as a general matter, see David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 799, 804–09 (1992) (identifying actors connected with four enforcement models that may regulate lawyers); Laurel S. Terry, Lawyer Regulation Stakeholder Networks and the Global Diffusion of Ideas, 33 GEO. J. LEGAL ETHICS 1069, 1072–75 (2020) (identifying broad cohorts of lawyer regulation stakeholders to evaluate how they engage with global networks).
1. Disciplinary Authorities

Private sanctions are frequently justified on the basis of their benefits to the work of disciplinary authorities. First and foremost, proponents claim that they simultaneously reduce costs and increase administrative efficiency.\textsuperscript{127} Formal disciplinary proceedings require a significant number of person-hours and other resources to conduct.\textsuperscript{128} Because disciplinary authorities often have limited staff and budgets, the elimination of private sanctions could result in all cases taking significantly longer to be resolved.\textsuperscript{129} Indeed, the disciplinary system already is criticized on the ground that the prolonged process results in many unethical attorneys continuing to practice in the interim—which ultimately could result in more harm to their other clients.\textsuperscript{130} Accordingly, private sanctions play a role in the lawyer disciplinary process similar to that of guilty pleas in criminal cases; they enable authorities to efficiently dispose of a substantial percentage of cases by consent, freeing time to devote to more serious misconduct.\textsuperscript{131} Those who oppose private sanctions question not the legitimacy of administrative concerns but rather whether they are insurmountable.\textsuperscript{132}

A related consideration is that, according to the Clark Report, private sanctions provide a beneficial option for disciplinary authorities that, when faced with a case involving minor misconduct, would otherwise have to choose between instituting a formal proceeding and dismissing the complaint.\textsuperscript{133} Invariably, disciplinary authorities would dismiss such complaints, feeling that the lawyer does not deserve a public pronouncement of wrongdoing or that

\begin{itemize}
\item \textsuperscript{127} CLARK REPORT, supra note 16, at 93; see Wilkins, supra note 126, at 829 (acknowledging significant expenses yet noting that the adoption of expedited procedures for minor misconduct might reduce them).
\item \textsuperscript{128} See MCKAY REPORT, supra note 70, at 49–52 (proposing additional expedited procedures on account of the time and expense of formal proceedings).
\item \textsuperscript{129} Dennison, supra note 19 (connecting public discipline to longer processes).
\item \textsuperscript{131} See Brown & Wolf, supra note 78, at 264–65 (acknowledging that there is an administrative efficiency argument in favor of discipline by consent).
\item \textsuperscript{132} See Levin, supra note 11, at 26.
\item \textsuperscript{133} CLARK REPORT, supra note 16, at 92–93.
\end{itemize}
the grievance does not merit the time and expense.\textsuperscript{134} But ultimately such a dismissal does not benefit the disciplinary authority or the lawyer because it gives the false impression that the conduct was not unethical or, at the very least, would not subject the lawyer to sanctions were it to be repeated.\textsuperscript{135} This is of particular concern to the disciplinary authority, since it will not have a record of discipline to use in a future proceeding if the lawyer reoffends.\textsuperscript{136} If this cycle were to be repeated, unethical lawyers could continue to skirt a disciplinary authority’s attention.\textsuperscript{137}

This argument of regulatory inaction has not yet been assessed empirically, in part because it is impossible to know for certain what percentage of grievances currently resolved by private sanctions would be dismissed if disciplinary authorities no longer had a private option. Some jurisdictions have only public sanctions, however, so a study that compares the sanctioning patterns of jurisdictions that have both types of sanctions (“dual-system jurisdictions”) with jurisdictions that have only public sanctions (“public-only jurisdictions”) may begin to reveal the extent to which private sanctions could be playing that role.\textsuperscript{138}

2. Attorneys

A second set of arguments concerns how the imposition of private sanctions affects attorneys, including (a) attorneys who have committed minor misconduct (and thus may be subject to private sanctions), and (b) other attorneys practicing in the jurisdiction. The interests of these groups differ, however, so separate considerations are merited.

For attorneys who have committed minor misconduct, the impact of private sanctions largely rests on the extent to which they

\textsuperscript{134} See id.; Levin, supra note 11, at 27 (articulating concern). Cf. Green, supra note 21, at 181–82 (explaining why there may be technical rule violations that disciplinary authorities nevertheless will decline to prosecute).

\textsuperscript{135} See CLARK REPORT, supra note 16, at 94; see also Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 647 (1981) (suggesting that disciplinary enforcement often is too lenient when it comes to public sanctions, particularly when there are no effective informal mechanisms).

\textsuperscript{136} CLARK REPORT, supra note 16, at 94.

\textsuperscript{137} Id.

\textsuperscript{138} See infra Part III.B (analyzing the differences in sanctioning patterns between dual-system and public-only jurisdictions).
are effective as a specific deterrent or rehabilitative mechanism—whether they set the attorney on the right (and ethical) track.\textsuperscript{139} Some jurisdictions, such as Minnesota, regularly claim that private sanctions perform these functions, positing that “many attorneys who commit one truly isolated act of misconduct, and who receive an admonition, are never disciplined again.”\textsuperscript{140} Unfortunately, jurisdictions do not routinely publicize the recidivism rates for privately-sanctioned attorneys—or publicly-sanctioned attorneys, for that matter—nor are those statistics collected by the ABA.\textsuperscript{141} Without more, the claim that “many” attorneys do not reoffend lacks the specificity and context needed for it to be properly evaluated.

Those who claim that private sanctions are not an effective deterrent rely on anecdotal or isolated evidence in support of their position.\textsuperscript{142} Of course, critics cannot be faulted for not producing substantial evidence of the failings of private discipline; they lack access to the information necessary to comprehensively track the subsequent disciplinary history of attorneys who have been privately sanctioned.

Likewise, the degree to which attorneys may be “rehabilitated” on account of receiving private discipline is unknown—particularly since private sanctions may be imposed with or without probation or conditions.\textsuperscript{143} Private sanctions do not have an inherent

\textsuperscript{139} Kristy N. Bernard & Matthew L. Gibson, Professional Misconduct by Mentally Impaired Attorneys: Is There A Better Way to Treat an Old Problem?, 17 GEO. J. LEGAL ETHICS 619, 635 (2004) (discussing the importance of assessing whether private sanctions and alternative-to-discipline programs actually work); Cf. Bené, supra note 63, at 924–25 (arguing that attorneys are particularly receptive to specific deterrence).

\textsuperscript{140} Cole, supra note 22, at 18.

\textsuperscript{141} See Benjamin P. Edwards, The Professional Prospectus: A Call for Effective Professional Disclosure, 74 WASH. & LEE L. REV. 1457, 1493 (2017) (identifying the need for state bars to share more information about public discipline and the lack of data on recidivism rates for those attorneys who have been publicly disciplined). But see, e.g., Martin Cole, Disciplinary Recidivism, 70 BENCH & B. MINN. 10, 10 (2013) (indicating that over a two-and-one-half year period, 55% of publicly disciplined lawyers had been disciplined previously). Although the article indicates that 34% had been privately sanctioned previously, it does not indicate how many had been privately sanctioned multiple times. See id.

\textsuperscript{142} See, e.g., Levin, supra note 65, at 48–49 (citing limited data from Colorado).

\textsuperscript{143} See supra notes 94–96 and accompanying text (describing probationary sanctions). The ABA compiles data on private sanctions, but that data does not indicate whether they are coupled with probation or conditions. See AM. BAR ASS’N, 2019 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) 1, 15-19 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2019-sold-final.pdf [hereinafter SOLD SURVEY 2019].
rehabilitative effect; they merely act as a disincentive to the subsequent commission of misconduct.144 Probation or conditions, by contrast, contain educational or supervisory components to provide attorneys with the tools to ethically practice on their own in the future.145 Although many jurisdictions provide high-level statistics on their probationary sanctions, they generally do not report on their effectiveness.146

A second way in which discipline may affect sanctioned attorneys is in the reputational harms that could follow publicity about the underlying misconduct.147 According to proponents of private sanctions, these reputational harms could be significant and detrimental, especially for inexperienced attorneys who have not yet built up professional goodwill.148 Those critical of private sanctions do not claim that public sanctions have no reputational consequences; instead, they question whether this concern should be given as much weight today given shifting expectations about the availability of information of relevance to the consuming public.149

144. Cf. Levin, supra note 11, at 27–28 (dubbing rehabilitative effect of all sanctions, public or private).

145. See Jon J. Lee, Double Standards: An Empirical Study of Patent and Trademark Discipline, 61 B.C. L. Rev. 1613, 1650–51 (2020) (indicating that probation has a rehabilitative effect and is used more frequently in lawyer discipline than in the criminal context); see also Levin, supra note 65, at 24–25 (discussing rehabilitative sanctions).

146. See, e.g., SOLD SURVEY 2019, supra note 143, at 20–25 (containing general information about probation in connection with public sanctions, but including nothing on its effectiveness).

147. See Zacharias, supra note 68, at 690–91 (explaining that disciplinary authorities may be reticent to sanction attorneys due to reputational concerns, felt more acutely because they are also lawyers); see also Michael V. Goetz, I’ve Received the Dreaded Letter from the Attorney Grievance Commission: Now What?, 99 Mich. Bar J., 38, 39 (June 2020) (advising attorneys who have received grievances that a benefit of private sanctions is that they “save the attorney from public scrutiny for relatively minor infractions”).

148. See Cole, supra note 22, at 18 (justifying private sanctioning on the ground that it “serves an educational function without the attorney’s reputation being affected by one lapse”); CLARK REPORT, supra note 16, at 92 (quoting disciplinary authority indicating that public sanctions are not administered even in cases where the lawyer was “wrong” because they are not so serious to deserve “a formal finding that the lawyer be disciplined”).

149. Cf. Berenson, supra note 12, at 685 (recommending that even dismissed complaints be available to the public, adopting consumer protection and consumer expectation rationales). See generally Cassandra Burke Robertson, Online Reputation Management in Attorney Regulation, 29 Geo. J. Legal Ethics 97, 99–102 (2016) (exploring the increasing importance of online reviews and providing recommendations for disciplinary authorities to bring them into their ambit).
Beyond private sanctions’ impact on sanctioned attorneys, their imposition could have an impact on other attorneys in the jurisdiction. In theory, a private sanction could operate as a general deterrent because these other attorneys either: (1) did not know that the conduct violated an ethics rule and would avoid engaging in it now that they know it is improper, or (2) did not believe that the disciplinary authority would impose sanctions for it and would be wary of engaging in it now out of concern they might get caught. If private sanctions fulfilled this role, their use would be beneficial. However, the degree to which a sanction operates as a general deterrent depends on how much information about the sanction is shared with other attorneys. Although the ABA recommends sharing the details of the conduct that resulted in a private sanction, most jurisdictions do not broadly do so. The failure to share information is not an inherent problem with private sanctions, however, for there are a number of ways that they could be shared with the public while keeping identifying information confidential.

Relatedly, attorneys facing disciplinary charges may benefit from published opinions on private discipline, which could help them effectively marshal defenses and to understand whether a

150. See Zacharias, supra note 68, at 691, 729 (explaining how lawyers may be amenable to general deterrence, as well as the importance of “the frequency and regularity of prosecutions”). One example of this phenomenon occurred in connection with Rule 8.3, the mandatory reporting rule. In the year after an Illinois attorney was sanctioned publicly pursuant to that rule, the number of reports increased by 500% in that state. Richmond, supra note 115, at 182.

151. Lee, supra note 145, at 1651; see Joy, supra note 88, at 806 n.169 (explaining that private sanctions may operate as a specific deterrent but not as a general deterrent because they remain confidential); 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, 974 n.7 (2002) (noting that “secret discipline serves no informational or deterrent function” for other attorneys).

152. Supra note 99 and accompanying text.

153. See infra Part III.A (identifying five states that comprehensively provide such details on their public-facing websites, yet indicating that they are outliers in this regard).

proposed sanction is in line with prior cases. This could be especially important with respect to identifying differential treatment on the basis of race, ethnicity, national origin, gender identity or expression, sexual orientation, disability, or other attributes.

3. Clients

When evaluating the impact of private sanctions on clients, two categories of clients should be considered: (1) the client, if any, whose matter was the subject of the grievance, and (2) the sanctioned attorney’s other current and prospective clients.

If a client’s matter was the subject of the grievance, that client often was the complainant and thus aware of the attorney’s misconduct. While most would have terminated representation, all would be on notice that the attorney may engage in unethical conduct in the future. The issue for that client, then, is the extent to which the imposition of private discipline vindicates their feeling of being treated improperly by the attorney.

According to disciplinary authorities who impose private discipline, many complainants are satisfied with this result—especially when the alternative might have been dismissal of the grievance. But unlike instances in which a disciplinary authority has dismissed a case or referred a case to an alternative-to-discipline program, the complainant generally does not have an opportunity to respond or object to the imposition of private sanctions. This lack of input

155. Levin, supra note 11, at 31; cf. MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 10 cmt. (AM. BAR ASS’N 2020) (suggesting that disciplinary authorities share written opinions on sanctions because they “not only serve to educate members of the profession about ethical behavior, but also provide precedent for subsequent cases”).

156. Leong, supra note 124, at 1234–35 (recommending that all aspects of the disciplinary process, including private sanctions, be transparent in order to uncover bias); see also Andrea A. Curcio & Alexis Martinez, Are Discipline Code Proceedings Another Example of Racial Disparities in Legal Education?, 22 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 19–22 (2022) (presenting information on racial disparities in discipline from four states).


159. CLARK REPORT, supra note 16, at 93–94 (relaying experiences of disciplinary authorities).

160. See MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 11.B (AM. BAR ASS’N 2020) (allowing complainant to respond to a decision to dismiss or referral to an alternative-to-
and recourse arguably could leave complainants feeling as though their concerns were not adequately heard or taken seriously.\footnote{Cf. Brown & Wolf, supra note 78, at 261–62 (discussing how the grievance process, irrespective of the sanction, leaves complainants “feeling unhappy with both the outcome and the process”). See generally Jon P. McClanahan, Safeguarding the Propriety of the Judiciary, 91 N.C. L. Rev. 1951, 1983 (2013) (suggesting that trust in legal decisions depends on procedural justice, which requires participants feeling that they have a “voice” in the process).}

The privately-sanctioned attorney’s other clients or prospective clients probably do not know about the sanction unless the underlying misconduct was otherwise publicized.\footnote{See, e.g., In re Disciplinary Action Against Becker, 504 N.W.2d 303 (N.D. 1993) (rejecting recommendation that an attorney receive a public reprimand for misconduct and issuing private reprimand instead). Criminal actions that violate Rule 8.4(b) also may result in private sanctions, which presumably would be publicly available if they had resulted in a conviction. See infra Table V (indicating that three of the five states in the study had imposed private sanctions for violations of Rule 8.4(b)).} Some critics of private sanctions, adopting consumer protection and autonomy principles, argue strenuously that clients deserve to know this information.\footnote{See, e.g., Berenson, supra note 12, at 672, 680 (discussing consumer protection and autonomy rationales).} There are two aspects to the argument. The first is that disciplinary authorities may be imposing private sanctions in cases where they are not warranted; i.e., where serious misconduct is involved or where the attorney is likely to reoffend.\footnote{Levin, supra note 65, at 48 n.218, 49.} Like many of the arguments against private sanctions, this one has not yet been empirically verified but rather rests on limited information about attorneys who have been privately sanctioned and then go on to commit more egregious conduct warranting public discipline.\footnote{Levin, supra note 65, at 48–49; see Benjamin P. Cooper, Attorney Self-Disclosure, 79 UNIV. CIN. L. REV. 697, 742 (2010) (advocating for attorney self-disclosure of pertinent information to prospective clients, including self-disclosure of private sanctions).}

But such anecdotal evidence does not necessarily mean that the disciplinary authority applied the relevant standard incorrectly; every disciplinary action short of disbarment comes with the risk that a sanctioned attorney might reoffend. On the other hand, a comprehensive examination of private sanctions could resolve this question.

The second aspect of this argument is that current and prospective clients have the right to know about the attorney’s discipline-program, but not making such an allowance expressly for the imposition of a private sanction.
misconduct, irrespective of whether the disciplinary authority was correct in its assessment that the case fit the criteria for imposing a private sanction.166 According to these consumer advocates, the legal profession should be treated like other commercial enterprises and professions that are obliged to share information about infractions.167 If this information is shared as part of the lawyer’s entire publicly-accessible profile, current and prospective clients would be able to fairly assess whether to retain the attorney.168 The counter to this argument is similar to the earlier ones about reputational harm; that is, the misconduct is trivial in relation to the weight that it may be given by prospective clients, disproportionately impacting the sanctioned attorney’s practice.169 Between these two extremes is the view that although some types of misconduct may be amenable to private sanctions, there are others that inherently call into question an attorney’s fitness to practice and should invariably result in public sanctions.170

4. Public at Large

The broadest argument from those who oppose private sanctions is that such sanctions engender distrust in the disciplinary process.

166. Berenson, supra note 12, at 680–81; see also Pinaire et. al, supra note 93, at 178 (identifying a view that all disciplinary actions should be made public irrespective of the misconduct at issue, but acknowledging disagreement among the authors on the view).


168. See Cooper, supra note 164, at 739 (recommending that lawyers be required to share “(1) Biographical, Licensing and Certification Information; (2) Relevant Experience and Expertise, including an explanation of why the lawyer’s prior experience is relevant to the prospective client’s case; (3) Disciplinary History; (4) Information Regarding Malpractice Insurance; and (5) Malpractice Payments.”); Berenson, supra note 12, at 684–85 (identifying several types of information that should be part of a lawyer’s public profile); DeGraw & Burton, supra note 167, at 385–91 (advocating for disclosure advertising for lawyers who have committed misconduct).


and, by extension, the legal profession as a whole.\textsuperscript{171} Indeed, the McKay Commission initially recommended eliminating private sanctions and opening up the entire disciplinary process for this reason.\textsuperscript{172} Although the McKay Report ultimately declined to recommend opening up the disciplinary process before the filing of formal charges, that decision was premised on the belief that lawyers might be unfairly harmed by the filing of a frivolous grievance.\textsuperscript{173} That argument has considerably less force as applied to private sanctions, since there has been a determination that the grievance was meritorious.

Interestingly, it is not clear to what extent the issuance of private sanctions itself lowers the public’s confidence in the disciplinary process—but that is because most people (including many attorneys) have no idea of their existence.\textsuperscript{174} But to the extent private sanctions reflect the reluctance of disciplinary authorities to publicize information about their activities, they contribute to the widespread perception that the legal profession is overly protective of its own at the expense of the public.\textsuperscript{175} Although some disciplinary authorities initially suggested that publicizing sanctions might lower public confidence in the profession by calling attention to the misconduct of a small fraction of unethical attorneys,\textsuperscript{176} that sentiment does not appear to garner support today.

Relatedly, the disclosure of all sanctions would allow those interested in the regulation of the profession to evaluate disciplinary decisions more effectively.\textsuperscript{177} Such evaluations could,

\begin{footnotesize}
\begin{enumerate}
\item Levin, supra note 65, at 71–72; Green, supra note 21, at 191–94 (discussing connection between lack of transparency and public distrust, and further explaining that private sanctions do nothing to increase transparency).
\item See supra notes 69–71 and accompanying text.
\item See supra notes 74–75 and accompanying text.
\item Cf. Zacharias, supra note 151, at 984-85 (explaining that private sanctions likely have little bearing on the public’s perception since they do not come to the public’s attention).
\item Green, supra note 21, at 193; see Paula A. Monopoli, Legal Ethics & Practical Politics: Musings on the Public Perception of Lawyer Discipline, 10 GEO. J. LEGAL ETHICS 423, 424-45 (1997) (acknowledging that there may be legitimate reasons for confidentiality in proceedings yet identifying how they contribute to the narrative of the profession as “going easy” on its own); see also Zacharias, supra note 151, at 1008 (discussing how public distrust may result from the underenforcement of ethical rules regarding advertising).
\item CLARK REPORT, supra note 16, at 143 (noting disciplinary authorities’ desire not to share information about lawyer discipline because it may decrease public trust).
\item ANNOTATED STANDARDS, supra note 20, at 28; see Levin, supra note 11, at 31–32 (describing the benefit of sharing information for research purposes).
\end{enumerate}
\end{footnotesize}
in turn, prompt beneficial changes to the presumptive sanctions associated with particular types of misconduct. For now, disciplinary authorities must be relied upon to conduct their own periodic internal reviews and propose changes to the administration of private sanctions — yet it is unclear to what extent that is happening. But short of eliminating private sanctions altogether, disciplinary authorities could opt to disclose the pertinent facts and circumstances related to their imposition. Such disclosure would facilitate empirical studies, similar to that undertaken in the next part of this Article, to evaluate the extent to which private sanctions fulfill their intended role and whether their continued use is justified.

III. EMPIRICAL STUDY OF PRIVATE SANCTIONS

To assess the merits of the claims about private sanctions, one must understand how disciplinary authorities are administering them. But to date, there has been no significant examination of their use. To address this gap, the author undertook a multi-faceted research study on private sanctions. This empirical study has two components: (1) a broad examination of the sanctioning patterns in all states and the District of Columbia, and (2) an in-depth analysis of the states that share detailed information about their public and private sanctions. At the outset, it is important to note that the limited data on private sanctions constrains the conclusions that may be drawn. Nevertheless, this Article will analyze the available information and identify additional data that would be beneficial for future work.

This Part begins with a discussion of the scope of the study and the methodology employed, including the coding and analytical decisions made to facilitate analysis across jurisdictions. Next, the results of the study, along with the inferences that may be drawn about when and how private sanctions currently are being imposed, are presented. The types of misconduct giving rise to private sanctions are identified and explored.

A. Study Scope and Methodology

Because so little is known about private sanctions, the aims of this study were twofold. First, the study was to provide information about the frequency with which disciplinary authorities are using private sanctions to resolve cases of lawyer misconduct. Although
Professional responsibility scholars mention the ubiquity and overuse of private sanctions, little data have been compiled and analyzed. Second, the study was to describe, to the extent possible, the circumstances under which private sanctions are being imposed. This type of analysis not only will provide a more complete picture of the prototypical cases and fact patterns giving rise to private sanctions, but it will also address the crucial question of whether private sanctions are being imposed in cases in which they are not warranted.

With regard to the first phase of the study, a number of jurisdictions do not broadly share their grievance processing statistics for private sanctions, either on their public-facing websites or in annual reports. However, the ABA annually administers its “Survey on Lawyer Discipline” (“SOLD survey” or “survey”) to all states and the District of Columbia in which it requests data on bar disciplinary statistics and compiles responses into a report; reports are available through 2019 and thus the survey responses from 2000 to 2019 were included in this study.

Although jurisdictions are not required to respond to the survey, most jurisdictions participate in most years. Furthermore, these statistics are likely to be more uniform than those found in other sources because the survey asks the same questions of every jurisdiction each year.

Included among the survey questions are the numbers of private and public sanctions imposed by the jurisdiction. Interpreting the responses can be complicated, though, because some jurisdictions decline to provide information about their private sanctions or they report no such sanctions—making it unclear whether the jurisdiction does not issue private sanctions at all, issues them but did not provide the numbers to the ABA, or

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178. See, e.g., Levin, supra note 65, at 46–49; Zacharias, supra note 68, at 985 n.62.
180. See id.
181. See, e.g., SOLD SURVEY 2019, supra note 143 (compiling nationwide data on public and private sanctions imposed in 2019).
had no such sanctions during the response period. Therefore, the author supplemented the survey responses with independent research on the types of discipline available in each state.

For each of the annual reports, the author coded the following variables: the jurisdiction providing the response, the types of disciplinary and non-disciplinary alternatives available, the number of complaints filed, the number of private sanctions imposed, and the number and type of public sanctions imposed. While there are additional variables that would have facilitated a more robust analysis (e.g., complaints that resulted in an alternative to discipline), those data were not readily available for many jurisdictions over the time period of the study.

With regard to the second phase of the study, it was necessary to determine which jurisdictions publicly share information on individual private sanctions. Based on the ABA’s recommendation to publish the details of privately-imposed admonitions (other than identifying information), the author expected to find many states that do so. However, that is not the case. While some states provide general descriptions of the types of misconduct that result in private sanctions, only five states make available detailed information on all of their individual private sanctions: Alabama, Delaware, Massachusetts, Vermont, and Wisconsin. These five share information about their public sanctions as well, so it is possible to compare public sanctions with private sanctions in each of those states and to compare sanctioning practices across the states. Although Massachusetts has not adopted the Standards as

182. See id. Although the SOLD survey sometimes asked jurisdictions to indicate whether they impose private sanctions, responses differed by year and did not always reflect the jurisdictions’ websites.
183. See supra note 99 and accompanying text.
have the other four states, it likewise generally limits the use of private sanctions to instances of minor misconduct.\textsuperscript{189} In using these five states for further analysis, it must be acknowledged that their sanctioning practices might not be representative of all states that issue private sanctions. Indeed, it very well might be the case that these states have different sanctioning practices precisely because they know that their privately-imposed sanctions will be publicly accessible. Although this is certainly a limitation of the data and the conclusions that may be drawn, it is inherent given the nature of the phenomenon that this study aims to understand. Furthermore, the fact that detailed information about these private sanctions will be publicly accessible (though not widely publicized) arguably could make these five states more careful about their use than the jurisdictions that share no details about their private sanctions.\textsuperscript{190}

Alabama presented difficulties in categorizing some of its discipline as \textit{private} or \textit{public}. The state actually has two types of \textit{public} reprimands: (1) with publication and (2) without publication. Although both are technically public, those without publication are not disseminated to the general public such as through newspaper publication.\textsuperscript{191} The author ultimately decided to categorize the forty-six public reprimands without publication in the dataset as \textit{public}, since the names of the sanctioned attorneys are included in the sanction even if it is not widely publicized.\textsuperscript{192}

The disciplinary opinions from these five states also vary in the level of detail they contain. Whereas Alabama does not regularly indicate whether the attorney had been disciplined previously, the

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\textsuperscript{189} See \textit{The Bd. of Bar Overseers of the Supreme Jud. Ct., Massachusetts Bar Discipline: History, Practice, and Procedure} 41 (2018) [hereinafter Mass. Practice] (“The [disciplinary authority] may approve admonitions when the lawyer has committed minor misconduct, often without harm resulting to a client or third person, and where the respondent did not act with malice or similar motive.”).


\textsuperscript{191} See \textit{ Ala. Rules of Disciplinary Proc.}, Rule 8(f) (ALA. 2021).

\textsuperscript{192} Indeed, the author analyzed the data both ways and found that Alabama’s sanctioning practices were even more troubling if public reprimands without publication were categorized as \textit{private}. For that reason, the author opted for the more conservative approach. Additional research on this subcategory of public reprimands may be fruitful.
other states do. To address these disparities, this study identified data points common to all five states and compiled additional data (such as on prior discipline) if several states routinely included it in their opinions. This restricted the variables that could be reliably tracked because states sometimes included information about relevant circumstances, such as aggravating and mitigating factors or the attorney’s years of experience, in some private sanctions but not in others.

As each of the disciplinary opinions was reviewed, the author coded the following variables: the state rendering the sanction, distinct ethics rule(s) violated, sanction type, sanction length (if applicable), whether the sanction was combined with probation or conditions, and whether the attorney previously had been publicly and/or privately disciplined. Where the sanction included a violation of the general misconduct rule, Rule 8.4, the subsections violated were noted separately. Furthermore, a summary of the misconduct was created for the private sanctions so that patterns and relevant characteristics could be identified and examined as the study progressed.

Finally, the appropriate timeframe and universe for the study was determined. Although there needed to be enough public and private sanctions in each state to facilitate comparisons within and between states, it was equally important not to go back too far and analyze opinions that reflected outdated reasoning or sanctions that had been based on an older ethics code. For these reasons, the study started with all available disciplinary opinions issued between 2000 and 2020, together with all available SOLD survey responses since 2000 (2000-2019). Alabama’s publicly-available disciplinary opinions dropped off dramatically before 2012, however, so the study included Alabama’s disciplinary opinions

193. The quality of all the state-specific data also is inherently limited by the accuracy and completeness of the information contained in the individual disciplinary opinions, which may differ among states.


195. The author used Microsoft Excel to input the data from each jurisdiction and IBM SPSS Statistics to perform the data analysis. The author subsequently pulled a random sample of 5% of the opinions to verify the coding.
issued only from 2012 onward. Likewise, Massachusetts’ pre-2003 disciplinary opinions often cited an older ethics code, so those were excluded as well. Disciplinary opinions were also excluded if they did not specify the ethics rules that formed the basis of the sanction, since one of the primary aims of this study was to understand the types of rule violations that are associated with private sanctions.

B. Overall Results

The first—and most basic—question about private sanctions pertains to their prevalence among jurisdictions as a disciplinary tool. The existing professional responsibility literature suggests that almost every jurisdiction imposes private sanctions.

As an initial matter, the study identified whether jurisdictions had the authority to issue private sanctions or to resolve complaints through other alternative dispositions to public discipline or dismissal. Disciplinary authorities use a variety of terms for their private sanctions (e.g., admonitions or private reprimands); although most jurisdictions have a single category of private sanctions, some have multiple categories. For purposes of this study, all private sanctions will be treated as equivalent despite any differences in terminology.

As Table I shows, thirty-six jurisdictions may impose private sanctions (dual-system jurisdictions). Nevertheless, even more jurisdictions have other non-disciplinary tools and programs as well.

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196. For example, Alabama has 91 publicly-available disciplinary actions in 2012 that met the criteria for inclusion, but only 11 in 2011 and 3 in 2010. See ALA. ST. BAR, supra note 184.


198. See, e.g., Levin, supra note 11, at 20 (“All but a few jurisdictions impose private discipline …”).
Table I. Alternatives to Public Discipline by Jurisdiction

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Private Sanctions</th>
<th>Alternative-to-Discipline or Diversion Programs</th>
<th>Jurisdiction</th>
<th>Private Sanctions</th>
<th>Alternative-to-Discipline or Diversion Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Yes</td>
<td>No</td>
<td>Montana</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Alaska</td>
<td>Yes</td>
<td>No</td>
<td>Nebraska</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Arizona</td>
<td>No</td>
<td>Yes</td>
<td>Nevada</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Yes</td>
<td>Yes</td>
<td>New Hampshire</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>California</td>
<td>Yes</td>
<td>Yes</td>
<td>New Jersey</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Colorado</td>
<td>Yes</td>
<td>Yes</td>
<td>New Mexico</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Connecticut</td>
<td>No</td>
<td>No</td>
<td>New York</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>D.C.</td>
<td>No</td>
<td>No</td>
<td>N. Carolina</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Delaware</td>
<td>Yes</td>
<td>Yes</td>
<td>N. Dakota</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Florida</td>
<td>No</td>
<td>Yes</td>
<td>Ohio</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Georgia</td>
<td>Yes</td>
<td>No</td>
<td>Oklahoma</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Yes</td>
<td>Yes</td>
<td>Oregon</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Idaho</td>
<td>Yes</td>
<td>No</td>
<td>Penn.</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Illinois</td>
<td>No</td>
<td>Yes</td>
<td>Rhode Island</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Indiana</td>
<td>Yes</td>
<td>Yes</td>
<td>S. Carolina</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Iowa</td>
<td>Yes</td>
<td>Yes</td>
<td>S. Dakota</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Kansas</td>
<td>No*</td>
<td>Yes</td>
<td>Tennessee</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Yes</td>
<td>Yes</td>
<td>Texas</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Yes</td>
<td>Yes</td>
<td>Utah</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Maine</td>
<td>No*</td>
<td>Yes</td>
<td>Vermont</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Maryland</td>
<td>No*</td>
<td>Yes</td>
<td>Virginia</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Mass.</td>
<td>Yes</td>
<td>Yes</td>
<td>Washington</td>
<td>No*</td>
<td>Yes</td>
</tr>
<tr>
<td>Michigan</td>
<td>Yes</td>
<td>Yes</td>
<td>West Va.</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Yes</td>
<td>No</td>
<td>Wisconsin</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Yes</td>
<td>Yes</td>
<td>Wyoming</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Missouri</td>
<td>No*</td>
<td>Yes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>* Other non-disciplinary communications</td>
<td></td>
<td></td>
<td>Total</td>
<td>36</td>
<td>40</td>
</tr>
</tbody>
</table>
Among the fifteen jurisdictions that do not issue private sanctions (public-only jurisdictions) are Florida, Oregon, and West Virginia, three states that are already required (by constitutional provision or statute) to publicly disclose information about lawyer grievances.\(^\text{199}\) It follows that these states would not impose private discipline—the cat is already out of the bag. But for a state such as Ohio, its disciplinary process is confidential until the filing of formal charges.\(^\text{200}\) These types of jurisdictions could impose truly private sanctions but have chosen not to do so. It is not apparent that any of these jurisdictions have eliminated private sanctions very recently; to the contrary, the possibility of eliminating private sanctions has been raised in a few states, but no action was taken.\(^\text{201}\)

Five of the fifteen jurisdictions that do not have private sanctions nevertheless issue private communications (e.g., letters of warning or letters of caution, indicated in the table with an asterisk), but those communications are not considered discipline. Non-disciplinary communications often concern unprofessional conduct that does not necessarily violate the rules,\(^\text{202}\) but then again, it is impossible to know exactly what is being communicated. Jurisdictions generally do not share any information on private communications, so one can only speculate on their use.

Moreover, twelve of the fifteen jurisdictions that do not have private sanctions have diversion or similar alternative-to-discipline programs. In total, forty jurisdictions have some type of alternative

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199. See supra notes 83–84 and accompanying text.


201. See, e.g., Dennison, supra note 19 (discussing the calls for increased transparency in Montana in 2009–2010); PHILA. BAR ASS’N, supra note 19 (recommending the elimination of private sanctions in Pennsylvania in 2020).

program, which is more than have the authority to issue private sanctions. That leaves Connecticut, Ohio, and the District of Columbia as the three jurisdictions that administer only public discipline.\textsuperscript{203} Thus, it seems that when people refer to nearly all states as issuing \textit{private sanctions}, they may be conflating private sanctions with non-disciplinary alternatives. While these other alternatives could be subject to criticism as well,\textsuperscript{204} it would be improper to lump them in with private sanctions since they are applied and administered differently.

Nevertheless, the fact that fewer jurisdictions are issuing private sanctions than is widely believed does not necessarily diminish their significance, especially among those jurisdictions that do issue them. Whereas the SOLD survey’s national statistics indicate that public sanctions are more commonly imposed than private sanctions,\textsuperscript{205} \textit{Table II} shows that the majority of dual-system jurisdictions impose private sanctions more frequently than public sanctions.\textsuperscript{206}

\textit{Table II} provides key statistics related to the sanctioning patterns of the thirty-six dual-system jurisdictions, presented in descending order based on the percentage of private sanctions imposed. In addition to providing the average (mean) annual numbers of public and private sanctions, \textit{Table II} includes sanctions on a per-thousand complaint basis to facilitate comparisons.\textsuperscript{207}

\textsuperscript{203} See \textit{supra} Table I.

\textsuperscript{204} See Bernard & Gibson, \textit{supra} note 139, at 633–35 (raising free-riding and public protection arguments against diversion programs, but ultimately rejecting those arguments); Brown & Wolf, \textit{supra} note 78, at 271–73 (highlighting “numerous disadvantages” of diversion programs, especially when viewed through a restorative justice lens).

\textsuperscript{205} See, e.g., SOLD SURVEY 2019, \textit{supra} note 143, at 17, 24 (indicating that in 2019 there were nationwide means of forty-nine public sanctions and forty-five private sanctions, along with nationwide medians of thirty-five public sanctions and thirteen private sanctions).

\textsuperscript{206} See \textit{infra} Table II.

\textsuperscript{207} The author used mean values instead of median values when reporting averages in this study because disciplinary authorities often do not resolve complaints in the years in which they are filed and at times have significant complaint backlogs. Nevertheless, the author also computed the median private and public sanctions for dual-system jurisdictions and found that twenty of the thirty-six jurisdictions (55.6\%) issued private sanctions as or more frequently than public sanctions. This result is similar to that shown in \textit{Table II}, \textit{infra}. 

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Table II. Sanctions For Dual-System Jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Average Complaints</th>
<th>Average Private Sanctions</th>
<th>Average Public Sanctions</th>
<th>Private Sanctions Per 1000 Complaints</th>
<th>Public Sanctions Per 1000 Complaints</th>
<th>Percentage Private Sanctions</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. Dakota</td>
<td>94</td>
<td>19</td>
<td>3</td>
<td>198</td>
<td>33</td>
<td>85.9%</td>
<td>1</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1217</td>
<td>126</td>
<td>39</td>
<td>104</td>
<td>32</td>
<td>76.6%</td>
<td>2</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>394</td>
<td>25</td>
<td>9</td>
<td>62</td>
<td>22</td>
<td>73.5%</td>
<td>3</td>
</tr>
<tr>
<td>Hawaii</td>
<td>464</td>
<td>24</td>
<td>12</td>
<td>52</td>
<td>25</td>
<td>67.6%</td>
<td>4</td>
</tr>
<tr>
<td>Idaho</td>
<td>382</td>
<td>27</td>
<td>14</td>
<td>72</td>
<td>37</td>
<td>66.3%</td>
<td>5</td>
</tr>
<tr>
<td>S. Carolina</td>
<td>1431</td>
<td>105</td>
<td>57</td>
<td>73</td>
<td>40</td>
<td>64.7%</td>
<td>6</td>
</tr>
<tr>
<td>New York</td>
<td>11422</td>
<td>518</td>
<td>284</td>
<td>45</td>
<td>25</td>
<td>64.6%</td>
<td>7</td>
</tr>
<tr>
<td>Iowa</td>
<td>738</td>
<td>81</td>
<td>49</td>
<td>109</td>
<td>66</td>
<td>62.3%</td>
<td>8</td>
</tr>
<tr>
<td>Penn.</td>
<td>4526</td>
<td>171</td>
<td>104</td>
<td>38</td>
<td>23</td>
<td>62.1%</td>
<td>9</td>
</tr>
<tr>
<td>Nevada</td>
<td>1519</td>
<td>44</td>
<td>28</td>
<td>29</td>
<td>19</td>
<td>60.8%</td>
<td>10</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1180</td>
<td>26</td>
<td>17</td>
<td>22</td>
<td>15</td>
<td>60.5%</td>
<td>11</td>
</tr>
<tr>
<td>Mississippi</td>
<td>514</td>
<td>29</td>
<td>20</td>
<td>57</td>
<td>39</td>
<td>59.7%</td>
<td>12</td>
</tr>
<tr>
<td>Kentucky</td>
<td>1143</td>
<td>57</td>
<td>39</td>
<td>50</td>
<td>35</td>
<td>59.2%</td>
<td>13</td>
</tr>
<tr>
<td>Michigan</td>
<td>2935</td>
<td>143</td>
<td>108</td>
<td>49</td>
<td>37</td>
<td>56.9%</td>
<td>14</td>
</tr>
<tr>
<td>N. Dakota</td>
<td>188</td>
<td>14</td>
<td>11</td>
<td>76</td>
<td>59</td>
<td>56.3%</td>
<td>15</td>
</tr>
<tr>
<td>N. Carolina</td>
<td>1420</td>
<td>90</td>
<td>75</td>
<td>63</td>
<td>53</td>
<td>54.4%</td>
<td>16</td>
</tr>
<tr>
<td>Wyoming</td>
<td>164</td>
<td>7</td>
<td>6</td>
<td>40</td>
<td>34</td>
<td>54.3%</td>
<td>17</td>
</tr>
<tr>
<td>Tennessee</td>
<td>1547</td>
<td>86</td>
<td>78</td>
<td>56</td>
<td>50</td>
<td>52.6%</td>
<td>18</td>
</tr>
<tr>
<td>Virginia</td>
<td>3707</td>
<td>92</td>
<td>84</td>
<td>25</td>
<td>23</td>
<td>52.2%</td>
<td>19</td>
</tr>
<tr>
<td>Montana</td>
<td>333</td>
<td>15</td>
<td>14</td>
<td>44</td>
<td>43</td>
<td>50.5%</td>
<td>20</td>
</tr>
<tr>
<td>Delaware</td>
<td>300</td>
<td>10</td>
<td>10</td>
<td>34</td>
<td>34</td>
<td>50.2%</td>
<td>21</td>
</tr>
<tr>
<td>Vermont</td>
<td>238</td>
<td>5</td>
<td>5</td>
<td>21</td>
<td>23</td>
<td>48.3%</td>
<td>22</td>
</tr>
<tr>
<td>Nebraska</td>
<td>462</td>
<td>12</td>
<td>16</td>
<td>27</td>
<td>35</td>
<td>43.3%</td>
<td>23</td>
</tr>
<tr>
<td>Georgia</td>
<td>2507</td>
<td>49</td>
<td>69</td>
<td>20</td>
<td>27</td>
<td>41.8%</td>
<td>24</td>
</tr>
<tr>
<td>Utah</td>
<td>960</td>
<td>18</td>
<td>28</td>
<td>19</td>
<td>29</td>
<td>39.3%</td>
<td>25</td>
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<td>New Mexico</td>
<td>617</td>
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<td>18</td>
<td>18</td>
<td>29</td>
<td>38.6%</td>
<td>26</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>2099</td>
<td>27</td>
<td>43</td>
<td>13</td>
<td>21</td>
<td>38.5%</td>
<td>27</td>
</tr>
<tr>
<td>Alabama</td>
<td>1485</td>
<td>35</td>
<td>60</td>
<td>24</td>
<td>40</td>
<td>37.1%</td>
<td>28</td>
</tr>
<tr>
<td>Arkansas</td>
<td>827</td>
<td>28</td>
<td>52</td>
<td>34</td>
<td>63</td>
<td>35.4%</td>
<td>29</td>
</tr>
<tr>
<td>Texas</td>
<td>7783</td>
<td>120</td>
<td>255</td>
<td>15</td>
<td>33</td>
<td>32.0%</td>
<td>30</td>
</tr>
<tr>
<td>Mass.</td>
<td>986</td>
<td>43</td>
<td>98</td>
<td>44</td>
<td>99</td>
<td>30.5%</td>
<td>31</td>
</tr>
<tr>
<td>Alaska</td>
<td>228</td>
<td>2</td>
<td>5</td>
<td>8</td>
<td>20</td>
<td>27.9%</td>
<td>32</td>
</tr>
<tr>
<td>Colorado</td>
<td>4046</td>
<td>21</td>
<td>74</td>
<td>5</td>
<td>18</td>
<td>21.9%</td>
<td>33</td>
</tr>
<tr>
<td>Indiana</td>
<td>1560</td>
<td>15</td>
<td>52</td>
<td>9</td>
<td>33</td>
<td>21.9%</td>
<td>34</td>
</tr>
<tr>
<td>Louisiana</td>
<td>2792</td>
<td>25</td>
<td>96</td>
<td>9</td>
<td>34</td>
<td>20.9%</td>
<td>35</td>
</tr>
<tr>
<td>California</td>
<td>15662</td>
<td>48</td>
<td>447</td>
<td>5</td>
<td>29</td>
<td>9.8%</td>
<td>36</td>
</tr>
</tbody>
</table>

Astonishingly, twenty-one of the thirty-six dual-system jurisdictions (58.3%) impose private sanctions more frequently than...
public sanctions.208 This statistic is extraordinary because private sanctions are being compared to all public sanctions and not merely to public sanctions of a particular type. In South Dakota and Minnesota, private sanctions comprise over three-quarters of the total discipline imposed.209

At the same time, the variation among these jurisdictions is striking. For example, New York and California, the two states with the highest numbers of complaints, have drastically different sanctioning patterns. Whereas 64.6% of New York’s sanctions are privately imposed, only 9.8% of California’s sanctions are privately imposed. The high degree of variation alone suggests that the two states may be using private sanctions in different circumstances. But the variation is pervasive among dual-system jurisdictions; whereas eleven jurisdictions impose private sanctions more than 60% of the time, twelve jurisdictions impose them less than 40% of the time.210 While there are a number of other circumstances that could contribute to this variation, such as the processes by which disciplinary authorities resolve complaints and how a jurisdiction’s enforcement resources are allocated,211 this variation merits further inquiry.

These statistics also raise questions about how closely dual-system jurisdictions are adhering to the guidance on the imposition of private sanctions. As discussed in Part II.B, the presumption is that all lawyer discipline should be public unless it meets the narrow criteria for the imposition of private sanctions. Thus, one might expect private sanctions to comprise a relatively small percentage of the overall discipline—and certainly less than half of the total.

One possible explanation for the high percentages of private sanctions could be that they are being used in lieu of dismissing actionable grievances, rather than in lieu of imposing public sanctions. If this is the case, it would provide considerable support for the continued use of private sanctions; at least the attorney

208. Supra Table II.
209. See supra Table II.
210. Supra Table II.
would be apprised of the misconduct and the disciplinary authority would have a record of the discipline.\textsuperscript{212}

Figure I sheds light on the issue of possible substitution effects, showing the average (mean) numbers of sanctions per thousand complaints for dual-system and public-only jurisdictions. It suggests that disciplinary authorities may be using private sanctions as substitutes for both dismissals and public sanctions, rather than solely for one or the other.

\textit{Figure I: Sanctions for Dual-System and Public-Only Jurisdictions}

Overall, dual-system jurisdictions issue more sanctions on a per-thousand complaint basis than public-only jurisdictions issue them (seventy-nine vs. forty-eight). This provides some support for the proposition that private sanctions may be imposed under circumstances in which a public-only jurisdiction would decline to impose discipline. On the other hand, dual-system jurisdictions are imposing fewer public sanctions than their public-only counterparts; dual-system jurisdictions imposed thirty-five public sanctions on a per-thousand complaint basis, in comparison with forty-eight for

\textsuperscript{212} See CLARK REPORT, supra note 16, at 94 (positing these arguments in support of permitting the imposition of private sanctions).
public-only jurisdictions. This thirteen-sanction disparity could represent lawyer grievances that would have resulted in public sanctions in a public-only jurisdiction but were only privately-sanctioned in a dual-system jurisdiction.

To further assess the significance of these findings, Pearson correlation coefficients were calculated for several variables, including: the type of sanctioning system (dual-system vs. public-only), the average number of complaints, the number of disciplinary sanctions of any type per thousand complaints, the numbers of public and private sanctions per thousand complaints, and the percentage of private sanctions imposed. A correlation coefficient measures the existence and strength of the relationship between two variables; however, it does not indicate whether there is a causal relationship between the variables.213

This analysis yielded three findings of note. First, there was a statistically significant positive correlation between whether the jurisdiction was a dual-system jurisdiction and the number of disciplinary sanctions of any type per thousand complaints.214 Second, there was a statistically significant negative correlation between whether the jurisdiction was a dual-system jurisdiction and the number of public sanctions per thousand complaints.215 Taken together, these results reinforce the findings in Figure 1 that dual-system jurisdictions are imposing more disciplinary sanctions—but fewer public sanctions—than their public-only counterparts. This lends credence to the hypothesis that disciplinary authorities in dual-system jurisdictions may be imposing private sanctions not only for some cases that would otherwise receive no discipline but also for some cases that would otherwise result in a public sanction. Third, there was a statistically significant negative correlation among dual-system jurisdictions between the average number of complaints and the percentage of private sanctions imposed.216 This means that dual-system jurisdictions with higher numbers of complaints impose relatively fewer private sanctions relative to public sanctions. This result has intuitive

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214. Pearson correlation coefficient was .335, significant at the .05 level.
215. Pearson correlation coefficient was -.297, significant at the .05 level.
216. Pearson correlation coefficient was -.350, significant at the .05 level.
appeal; one possible explanation is that administrative resources in high-complaint jurisdictions may be stretched thin, leading them to focus their efforts on grievances that warrant public discipline. At the same time, this finding undercuts the argument that private sanctions are particularly beneficial to busy disciplinary authorities because they are a way to efficiently resolve a substantial number of cases involving minor misconduct.217

Although the foregoing results show that dual-system jurisdictions are imposing private sanctions at dramatically different rates and imposing public sanctions at lower rates than their public-only counterparts, caution must be taken in interpreting these results for a number of reasons. First, as noted earlier, there are a number of other variables that could contribute to or explain the variation among jurisdictions, such as the ways in which ethics complaints are investigated and resolved, resource constraints and allocation, and differences in the conduct that gave rise to complaints. These additional data points would be beneficial to explore and analyze in a future study.

Second, these results do not necessarily indicate that private sanctions are being imposed improperly for cases in which public sanctions should be warranted. For example, it could be the case that public-only jurisdictions are electing to publicly sanction some attorneys who are committing minor misconduct that otherwise would receive a private sanction in a dual-system jurisdiction. To explore the issue of whether private sanctions are being administered appropriately, the second phase of the study examined individual private sanctions imposed by five dual-system jurisdictions.

C. Jurisdiction-Level Analysis

As discussed in Part III.A, five states publish information on individual grievances in which public or private sanctions are imposed: Alabama, Delaware, Massachusetts, Vermont, and Wisconsin. Even though the results of this study cannot be used to draw definitive conclusions about how all dual-system jurisdictions administer private sanctions, the data from these five states provide

217. See CLARK REPORT, supra note 16, at 93 (indicating that the ability to impose private sanctions would be more advantageous to larger and busier disciplinary authorities).
a considerable glimpse into their use. This type of analysis of empirical data has been conspicuously absent from the private sanction debate.

*Table III* provides the numbers of individual private and public sanctions that were analyzed in the study, based on the selection criteria outlined in Part III.A.218 In total, 4,062 disciplinary sanctions were included.

*Table III. Sanction Distribution by State*

<table>
<thead>
<tr>
<th>State</th>
<th>Private Sanctions</th>
<th>Public Sanctions</th>
<th>Total Sanctions</th>
<th>Percentage Private Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL219</td>
<td>215</td>
<td>249</td>
<td>464</td>
<td>46.3%</td>
</tr>
<tr>
<td>DE</td>
<td>161</td>
<td>136</td>
<td>297</td>
<td>54.2%</td>
</tr>
<tr>
<td>MA220</td>
<td>595</td>
<td>1316</td>
<td>1911</td>
<td>31.1%</td>
</tr>
<tr>
<td>VT</td>
<td>98</td>
<td>92</td>
<td>190</td>
<td>51.6%</td>
</tr>
<tr>
<td>WI</td>
<td>443</td>
<td>757</td>
<td>1200</td>
<td>36.9%</td>
</tr>
<tr>
<td>Total</td>
<td>1512</td>
<td>2550</td>
<td>4062</td>
<td>37.2%</td>
</tr>
</tbody>
</table>

These states vary across a number of dimensions of relevance to this study. Whereas Delaware and Vermont have fairly equal numbers of private and public sanctions, Massachusetts and Wisconsin have substantially more public sanctions than private sanctions. Two of the five states impose a high number of sanctions

218. There are modest differences in the distributions of private and public sanctions between the SOLD survey statistics and the individual sanctions that were isolated for this study. This was to be expected, given the slightly different time frames involved, the exclusion criteria for individual sanctions, and the unavailability of older sanctions in Alabama and Massachusetts. See Part III.A.

219. Disciplinary opinions prior to 2012 were excluded. See supra note 196 and accompanying text.

220. Disciplinary opinions prior to 2003 were excluded. See supra note 197 and accompanying text.
on an annual basis. Yet none of the states’ sanctioning practices lie at the extremes, in relation to the SOLD survey statistics.

This Section addresses three issues relevant to the questions of when and how private sanctions are imposed: (1) whether private sanctions are limited to minor, isolated instances of misconduct; (2) to what extent private sanctions are being used for recidivist attorneys; and (3) to what extent disciplinary authorities are using private sanctions as an opportunity for rehabilitation. Each of these issues will be addressed in turn.

1. How “Minor” and “Isolated” is the Misconduct?

Under the Standards, private sanctions should be limited to minor, isolated instances of misconduct. Unfortunately, the Standards do not provide definitive guidance on the dividing line between minor and non-minor misconduct, but it appears that minor misconduct should involve the violation of relatively few distinct ethics rules. Other published empirical studies of lawyer discipline confirm that the number of distinct ethics rules violated is correlated with the severity of the sanction imposed. It follows that grievances resulting in private sanctions should involve the violation of one or very few distinct ethics rules—and certainly fewer than would subject an attorney to public discipline. Figure II confirms that the average (mean) number of distinct rules violated is lower for private sanctions than for public ones, though the disparity is not as large as might be expected.

221. See supra Table II (Alabama issued 95 and Massachusetts issued 141).
222. Supra Table II (showing that none are among top five or bottom five states in regard to the percentage of private sanctions). None of the states had a relatively high percentage of private sanctions (which may have been fruitful to explore), but this study necessarily was limited to those jurisdictions that publish details on their individual private sanctions.
223. See supra notes 103–07 and accompanying text (discussing the limitations on private sanctions).
224. Id.
225. See, e.g., Lee, supra note 170, at 401 n.275 and accompanying text (finding the number of distinct rules violated to be predictive of the severity of sanction imposed in Massachusetts and Ohio).
Figure II. Average Number of Distinct Ethics Rules Violated

At the outset, it is important to keep in mind when comparing public and private sanction statistics that the underlying misconduct generally should be more serious for public sanctions—that is often why the lawyer was publicly sanctioned. The relevant questions are the degree of difference and the extent to which private sanctions should be used at all for cases involving the violation of multiple rules. Notably, in three states, the average private sanction includes the violation of two or more distinct ethics rules. When considering both the average number of rules violated and the comparisons between private and public sanctions, the results from Alabama (2.1 vs. 3.2) and Delaware (2.0 vs. 3.3) in particular call into question whether private sanctions are being used for some cases that do not qualify as minor misconduct.

Figure III presents the distribution of the number of distinct rules violated for the private sanctions in each state. It confirms that Alabama, Delaware, and Massachusetts are using private sanctions in a sizable percentage of cases where lawyers have violated several distinct rules.
According to *Figure III*, more than one-quarter of the private sanctions in Alabama, Delaware, and Massachusetts involve the violation of three or more distinct rules, and twelve percent of the private sanctions in Alabama involve the violation of four or more distinct rules. By contrast, over eighty percent of Vermont’s private sanctions involve the violation of a single rule; no cases in that state involve the violation of four or more distinct rules. This suggests that these sets of states may be treating multiple rule violations differently with regard to the sanction imposed — although some of the variation may be due to the types of misconduct involved or how these states are administering the Rules.

The types of misconduct involving multiple rule violations are varied and often simultaneously consist of improper actions toward clients, the courts, and/or the bar. One such case occurred in Alabama, where an attorney was retained to represent a client in a criminal matter.\(^{226}\) Not only did the attorney fail to respond to her client on multiple occasions, she also did not properly supervise her

\(^{226}\) *Ala. St. Bar*, supra note 184 (private reprimand on April 11, 2013).
assistant and thereby lost documents that were relevant to the client’s case. The attorney then failed to correct legal documents on her client’s behalf (despite promises to do so) and showed up late to her client’s sentencing. When the disciplinary authority began investigating the case, the attorney did not respond to its inquiry. Despite the attorney’s missteps on multiple fronts, she was privately sanctioned for violating four distinct rules.

While the number of distinct rules violated provides some information about whether a lawyer’s misconduct should be considered minor or isolated, it is only part of the story. Another way to conceive of minor and isolated misconduct is that it involves one client matter or analogous representation; if misconduct crosses multiple clients or relates to different matters (“multiple instances of misconduct”), it is not isolated and also suggests that the lawyer could commit misconduct in the future.

Disciplinary authorities do not routinely identify multiple instances of misconduct in their opinions. Although the Standards identify “multiple offenses” as an aggravating circumstance that may be used to elevate the sanction, disciplinary authorities vary in their interpretation of that phrase and often do not include a discussion of any aggravating circumstances. Accordingly, the author manually coded each private sanction for whether the underlying misconduct involved multiple clients or unrelated instances of misconduct.

Figure IV shows the percentage of disciplinary actions in each state that include multiple instances of misconduct, comparing private sanctions to public sanctions. The themes that emerge in Figure IV are similar to those present in Figure III.

227. Id.
228. See supra notes 106–07 and accompanying text.
229. See supra note 105 (noting that disciplinary authorities also use “multiple offenses” to refer to multiple ethics rule violations within a single client matter, which would not fall within the “multiple instances of misconduct” definition).
230. If the opinion did not describe the underlying conduct fully, the author coded the opinion as not involving multiple instances of misconduct.
Figure IV. Sanctions Involving Multiple Instances of Misconduct

Once again, Delaware and Alabama are among the leaders in terms of the percentage of private sanctions involving multiple instances of misconduct (15.5% and 14.0%, respectively). But Wisconsin has a relatively high percentage on this metric as well, with nearly fifteen percent of its private sanctions involving multiple instances of misconduct. Even though the rates are considerably lower in Massachusetts (7.9%) and Vermont (8.2%), it is important to remember that any misconduct falling in this category is—under this working definition—not minor and isolated; therefore, private sanctions should not be available.

One such private sanction was imposed on a Massachusetts attorney who had committed misconduct in three different client matters, including refusing to return the client’s retainer fee until after a grievance had been filed.231 Although the private sanction was based on the violation of only two distinct ethics rules, the lawyer clearly had exhibited a pattern of misconduct toward clients.232 This repeated misconduct is precisely of the sort for which public sanctions should be imposed.

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232. Id.
2. Are Recidivist Attorneys Receiving Private Sanctions?

In addition to private sanctions ostensibly being limited to instances of minor misconduct, they generally should not be imposed on repeat offenders—especially if the prior sanction was recent or related to the misconduct at issue.233 Other than Alabama, which makes the least information about its sanctions publicly available, the states in this study regularly indicate whether a disciplined attorney had been previously publicly- or privately-sanctioned. However, the opinions from these four states do not routinely include the timing of the prior sanction or its content (especially for private sanctions), so those variables could not be included in the study.

Because of the nature of the data, it is impossible to definitively track privately-sanctioned attorneys to determine whether they were subject to later discipline. That analysis would be more telling for assessing whether private sanctions operate as an effective deterrent. But it is possible to look backwards from the standpoint of an attorney who is currently being sanctioned to calculate what percentage of those cases involve recidivist attorneys. Figure V depicts these percentages, showing considerable differences among the states for both publicly- and privately-sanctioned attorneys.

233. See supra notes 108-11 and accompanying text.
The “repeat offender” problem is often raised by critics of private discipline; they argue that some unethical attorneys continue to stay under the public’s radar even though the state bar knows that they have been sanctioned on multiple occasions. This concern is borne out in the data and especially in Wisconsin, where one-sixth of its privately-sanctioned attorneys have been disciplined previously. To be clear, Wisconsin also appears to have a serious recidivism problem among attorneys who receive public sanctions. In the other three states, fewer than ten percent of privately-sanctioned attorneys have been subject to prior discipline. But under the Standards, repeat offenders almost invariably should receive public sanctions—both because prior

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234. See, e.g., Leslie C. Levin, Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock, 22 GEO. J. LEGAL ETHICS 1549, 1551 n.17 (2009) (noting that some of the most unethical attorneys profiled had been privately admonished multiple times). Cf. Cole, supra note 22, at 18 (raising the issue that some lawyers in Minnesota might be receiving several private sanctions before the conduct will be deemed not to be minor).

235. See supra: Figure V (showing that 49.4% of lawyers receiving public discipline had prior discipline); see also Martin Cole, To Protect and Deter, 67 BENCH & BAR OF MINN. 12, 13 (2010) (noting five-to-ten-year recidivism rate of 42% for Minnesota attorneys receiving public reprimands).
discipline should be considered an aggravating circumstance and because it indicates a likelihood of repetition.\textsuperscript{236}

In order to understand more about the sanctioning patterns for repeat offenders, this study isolated disciplinary cases in which an attorney previously had been subject only to prior private discipline. Among that subset of cases, it identified what type of discipline was imposed in the present case. \textit{Table IV} presents these results, which indicate that multiple private sanctions are being imposed on repeat offenders to a significant extent.

\begin{table}
\centering
\caption{Cases in Which Attorney Had Only Prior Private Discipline}
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{State} & \textbf{Total Cases} & \textbf{Private Sanction Issued} & \textbf{Public Sanction Issued} & \textbf{Percentage Private Sanction} \\
\hline
DE & 25 & 10 & 15 & 40.0\% \\
MA & 132 & 29 & 103 & 22.0\% \\
VT & 9 & 4 & 5 & 44.4\% \\
WI & 143 & 44 & 99 & 30.8\% \\
\hline
\textbf{Total} & \textbf{309} & \textbf{87} & \textbf{222} & \textbf{28.2\%} \\
\hline
\end{tabular}
\end{table}

The number of cases in Vermont is very small; accordingly, no conclusions should be drawn from that state alone. But Wisconsin and Massachusetts each have over one hundred cases that fall within this category, and both imposed a private sanction—once again—in a considerable percentage of cases (30.8\% and 22.0\%, respectively). These statistics are also notable in light of the fact that both states issue substantially higher percentages of public sanctions than private sanctions (61.5\% and 69.5\% public sanctions, respectively),\textsuperscript{237} so the result cannot be explained by the two states’ overall sanctioning patterns.

The stories of some of these private repeat offenders may not have been headline-grabbing at the time of their initial sanctions, but their patterns of misconduct are nevertheless concerning. Consider, for instance, Robert J. Baratki, a Wisconsin

\textsuperscript{236} See supra notes 108–11 and accompanying text.
\textsuperscript{237} See supra Table II (indicating the percentage of private sanctions).
divorce attorney.\textsuperscript{238} He initially received two private reprimands in succession: one for starting a consensual sexual relationship with a client while representing her in child custody matters, and a second for practicing law while administratively suspended.\textsuperscript{239} Shortly thereafter, he “began sending flirtatious, and sometimes sexual, text messages” to a client.\textsuperscript{240} He later made unwelcome advances to the client and, in one meeting, he “lifted [the client’s] shirt and kissed her abdominal area.”\textsuperscript{241} Beyond this sexual harassment, Baratki provided subpar representation to other clients, committed trust account violations, and practiced law while administratively suspended.\textsuperscript{242} This time Baratki was suspended, albeit for only six months. The disciplinary opinion acknowledged that he “did not learn from either of his prior private reprimands” and had engaged in “serious and troublingly familiar misconduct. . . . He abused his position of trust as a lawyer (again), [and] practiced law during a suspension (again) . . . .”\textsuperscript{243} Although one might question why the first grievance did not result in a public sanction, there is an even stronger argument that the second should have and, if it had, it may have protected multiple clients from harm.

Although surely many attorneys who receive a private sanction go on to have an otherwise unblemished career, calculating the deterrent effect of private sanctions from these data is impossible. A few jurisdictions indicate they are monitoring recidivism rates and suggest that private sanctions are working as deterrents.\textsuperscript{244} But what this study shows is that all four of these states are imposing private sanctions on attorneys who have been disciplined before (with Wisconsin doing so more often than the others), and some attorneys continue to stay underneath the public’s radar by receiving multiple private sanctions in succession. Nothing is known about recidivism in

\begin{footnotes}
\item[239] Id. at 251.
\item[240] Id.
\item[241] Id.
\item[242] Id. at 252–53.
\item[243] Id. at 256.
\item[244] See, e.g., Cole, supra note 22, at 18 (noting that “many” attorneys receiving private sanctions do not reoffend). But see, e.g., Cole, supra note 141, at 10 (finding that 34% of publicly-sanctioned attorneys previously had been privately sanctioned).
\end{footnotes}
Alabama—not to mention the dual-system jurisdictions that choose not to disclose information on their private sanctions.

3. Are Private Sanctions Rehabilitative?

Proponents of private sanctions may frame them as an opportunity to rehabilitate attorneys who have made missteps. But as discussed in Part II.B, private sanctions primarily operate as a deterrent unless they have been coupled with additional measures to monitor or promote compliance. Although the SOLD survey collects data on probation, it does not ask whether probation or conditions were imposed in connection with a private sanction. Consequently, it is impossible to get a broad sense of how frequently private sanctions are imposed in connection with these additional measures.

By contrast, the disciplinary opinions from these five states do indicate when a sanction includes probation or conditions. Figure VI presents the incidence rates for the imposition of probation or conditions in connection with the private and public sanctions in each state. Disbarments were omitted from these calculations, since by their nature the subject attorneys were excluded from practice. Figure VI reveals vast disparities among these five states regarding their use of these additional measures.

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245. See Reid, supra note 73, at 813 (identifying but ultimately rejecting argument).
246. See supra note 143.
Figure VI: Probation or Conditions Included with Sanctions

The substantial percentages of probation or conditions coupled with private sanctions in Delaware (63.4%) and Massachusetts (48.1%) are in stark contrast with Alabama (1.9%), Wisconsin (5.6%), and Vermont (13.3%). The dramatic differences between these two sets of states suggests that they conceive of private discipline differently. For Delaware and Massachusetts, it is frequently used as an opportunity to provide additional guidance or supervision that promotes ethical conduct. For the other three states, the private sanction primarily is used for its deterrent effect.

Equally interesting are the differences within each state depending on the type of sanction imposed. Once again, Delaware and Massachusetts impose probation or conditions more often in connection with private sanctions than with public sanctions. In Delaware, privately-sanctioned attorneys have probation or conditions imposed on them at a 59.2% higher rate than their publicly-sanctioned counterparts; in Massachusetts that percentage increase jumps to 187.8%. The opposite trend is present in the three states that do not frequently impose probation or conditions

247. See supra Figure VI.
in connection with private sanctions. For instance, Alabama rarely imposes probation or conditions together with any of its sanctions, but it is even less likely to do so in connection with its private sanctions (-71.4%). 248

These disparate approaches to private and public sanctions suggest that there may be considerable variation among all dual-system jurisdictions in this regard. One reason that may be posited for the hesitancy to attach probation or conditions to private sanctions is the additional administrative expense. But while there may be costs associated with ensuring compliance, many conditions do not require out-of-pocket costs to the disciplinary authority (e.g., supervision by a local lawyer, additional CLE requirements). Certainly, these conditions are as or less expensive to implement than formal alternative-to-discipline programs, which have been established in four of the five states in the study. 249

To the extent that these rehabilitative measures do involve additional expenses, a separate question arises: how should expenses be allocated among privately- and publicly-sanctioned attorneys? Although private sanctions should, in theory at least, be reserved for minor, isolated misconduct, the fact that they are not disclosed to the public may militate in favor of additional supervision. On the other hand, public sanctions should involve more egregious misconduct or have the potential to cause injury, arguably requiring additional intervention.

One additional data point that would assist in making this allocation decision is the extent to which these rehabilitative measures are effective in reducing recidivism rates among privately- and publicly-sanctioned attorneys. There has been little study of recidivism rates, much less study of whether probation or conditions have an impact on them, but there are indications from other empirical research that such measures can be successful. 250

248. See supra Figure VI.

249. See supra Table I (showing that Delaware, Massachusetts, Vermont, and Wisconsin have formal alternative-to-discipline programs). Some states pass along costs of probation or diversion programs to attorney-participants. See, e.g., Diversion Program, Ok. Bar Ass’n, https://www.okbar.org/ec/diversionprogram/ (last visited Feb. 10, 2023) (indicating that diversion program participants are financially responsible).

250. See, e.g., Betty M. Shaw, The Role of Probation in the Disciplinary System, 59 Bench & Bar Minn., 12, 12 (2002) (finding that 75% of attorneys receiving probation over a ten-year
Figure V suggests that recidivism may be a significant issue but, without the ability to track privately-sanctioned attorneys after they received their sanctions, no definitive conclusions can be drawn. It is worth noting, however, that Delaware and Massachusetts, the two states that impose probation or conditions more frequently with private sanctions, have lower percentages of disciplinary actions that involve recidivist attorneys; determining whether there is a causal relationship between these variables would require additional data that is currently unavailable.

D. Misconduct Resulting in Private Sanctions

Whereas the preceding section shed light on the circumstances in which private sanctions may be imposed and how they are administered, it did not examine the underlying misconduct. This additional layer of information is critically important, for even the violation of a single ethics rule based on a single event could merit a severe public sanction, such as an attorney who committed tax fraud.

This section identifies the types of misconduct commonly associated with private sanctions. Furthermore, it explores whether private sanctions are being used to regulate misconduct that should merit a public sanction—either because jurisdictions are not adhering to the ABA’s criteria for their imposition or because the misconduct is of a type such that private sanctions categorically should be off limits.

Although the individual ethics rules are a starting point for categorizing lawyer misconduct, many of them appear infrequently as a basis for discipline and can be difficult to assess or compare. Furthermore, related obligations sometimes appear under different
rules—which could result in drawing distinctions that do not in fact exist. For example, disciplinary authorities often conflate the duty of competence (Rule 1.1) and the duty of diligence (Rule 1.3) and may cite one or the other as the basis for discipline when a lawyer provides substandard services to a client.²⁵³ Relatedly, the special conflict-of-interest rules (Rule 1.8) are just context-specific applications of the general conflict-of-interest principles (Rule 1.7). For these reasons, this study created several conceptual categories containing related rules; these categorizations are included in the Appendix.

These conceptual categories were used along with other relevant ethics provisions to develop a taxonomy of the misconduct that leads to private and public sanctions in each state. In Table V below, which contains these results, categories are denoted by “(C),” Model Rules are denoted by their rule numbers, and state-specific provisions are denoted by “(Spec.).” The incidence rates for each category or rule violation are presented by state and by the type of sanction imposed (private or public). The categories and rules were further grouped into broader types of obligations and color-coded on that basis: orange cells are core client obligations, blue cells are financial obligations, green cells are obligations to entities other than clients, and yellow cells are obligations related to integrity of the profession.

After the data were compiled for each state, the differences in incidence rates between the private and public sanctions were tested for their statistical significance; one star indicates that the differences were statistically significant at the 95% confidence level, and two stars indicate that the differences were statistically significant at the 99% confidence level. The results for each of the broad types of obligations are discussed below.

²⁵³ Mark A. Armitage, Regulating Competence, 52 EMORY L.J. 1103, 1104 (2003) (noting that diligence and competence are “intertwined” and positing that “some [disciplinary] decisions may actually cast the [violation] in terms of diligence rather than competence because there may be reticence to characterize a lawyer as ‘incompetent’”).
Table V. Ethics Categories and Rules Cited in Disciplinary Opinions

<table>
<thead>
<tr>
<th>Ethics Rule(s)</th>
<th>AL</th>
<th>DE</th>
<th>MA</th>
<th>VT</th>
<th>WI</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Private</td>
<td>Public</td>
<td>Private</td>
<td>Public</td>
<td>Private</td>
</tr>
<tr>
<td>Service (C)</td>
<td>40.0%</td>
<td>39.4%</td>
<td>23.0%</td>
<td>32.4%</td>
<td>47.7%</td>
</tr>
<tr>
<td>Communication (RI.4)</td>
<td>38.1%</td>
<td>40.6%</td>
<td>14.9%</td>
<td>22.8%</td>
<td>36.6%</td>
</tr>
<tr>
<td>Confidentiality (RI.6)</td>
<td>1.9%</td>
<td>1.2%</td>
<td>0.0%</td>
<td>0.7%</td>
<td>4.2%</td>
</tr>
<tr>
<td>Conflict of Interest (C)</td>
<td>7.0%</td>
<td>12.4%</td>
<td>5.0%</td>
<td>4.4%</td>
<td>9.6%</td>
</tr>
<tr>
<td>Proper Termination (RI.16)</td>
<td>7.0%</td>
<td>14.5%</td>
<td>5.0%</td>
<td>11.8%</td>
<td>15.3%</td>
</tr>
<tr>
<td>Fines (RI.5)</td>
<td>6.5%</td>
<td>11.2%</td>
<td>11.2%</td>
<td>14.7%</td>
<td>10.4%</td>
</tr>
<tr>
<td>Safeguarding Property (RI.15)</td>
<td>17.7%</td>
<td>32.1%</td>
<td>40.4%</td>
<td>43.4%</td>
<td>18.3%</td>
</tr>
<tr>
<td>Third-Party Obligations (C)</td>
<td>3.7%</td>
<td>5.2%</td>
<td>1.2%</td>
<td>4.4%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Court Obligations (C)</td>
<td>6.5%</td>
<td>16.5%</td>
<td>13.7%</td>
<td>30.1%</td>
<td>2.5%</td>
</tr>
<tr>
<td>Bar Obligations (C)</td>
<td>4.2%</td>
<td>20.1%</td>
<td>0.6%</td>
<td>18.4%</td>
<td>4.2%</td>
</tr>
<tr>
<td>Crime (R8.4b)</td>
<td>4.2%</td>
<td>9.2%</td>
<td>3.1%</td>
<td>29.4%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Fraud/Deceit (R8.4c)</td>
<td>5.6%</td>
<td>25.3%</td>
<td>12.4%</td>
<td>44.9%</td>
<td>5.2%</td>
</tr>
<tr>
<td>Admin of Justice (R8.4d)</td>
<td>7.9%</td>
<td>23.7%</td>
<td>53.4%</td>
<td>63.2%</td>
<td>6.1%</td>
</tr>
<tr>
<td>Fitness to Practice (Spec.)</td>
<td>37.7%</td>
<td>69.9%</td>
<td>N/A</td>
<td>N/A</td>
<td>5.0%</td>
</tr>
<tr>
<td>Violate Attorney’s Oath (Spec.)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Bias/Prejudice (Spec.)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
1. Core Client Obligations

It should be no surprise that violations of core client obligations such as competence and diligence (collectively, the service category) along with communication frequently served as a basis for public discipline in all five states. This result is in line with other empirical studies of attorney discipline and with the pronouncements of disciplinary authorities themselves. Likewise, they often formed the basis for private discipline. For example, at least 40% of the private sanctions in Alabama and Massachusetts included a violation of the rules in the service category, and more than 35% of the private sanctions in those states included a violation of the communication rule (Rule 1.4).

The other three core client obligations—confidentiality, avoiding conflicts of interest, and proper termination of the client-lawyer relationship—were cited less often as a basis of public or private discipline. Notably, there were statistically significant differences for all states with regard to violations of the proper-termination rule (Rule 1.16), being more prevalent among public sanctions than private sanctions. This result is rational, since this type of misconduct often results in a client having to scramble to find substitute counsel or leaves a client without their files or property; these are potential or actual injuries to the client that would strongly militate in favor of imposing a public sanction.

Given that a substantial amount of lawyer misconduct involves attorneys who provide substandard service to clients or fail to properly communicate with clients, the question becomes what criteria should be employed to differentiate between misconduct that should be subject only to public sanctions and that which may

254. See, e.g., Lee, supra note 170, at 397 (finding that diligence and communication were consistently among the five-most cited rules in a seven-state study).

255. See, e.g., Stephanie Francis Ward, Top 10 Ethics Traps, ABA J. (Nov. 1, 2007), https://www.abajournal.com/magazine/article/top_10_ethics_traps (describing the largest ethics traps, which include diligence and communication issues).

256. Supra Table V.

257. Supra Table V.

258. See, e.g., In re Solomon, 886 A.2d 1266, 1266–68 (Del. 2005) (imposing three-year suspension for violation of Rule 1.16(d), in which counsel withdrew and left client without counsel).

259. See, e.g., In re Hongisto, 988 A.2d 1065, 1068–69 (Vt. 2010) (imposing two concurrent six-month suspensions for, among other violations, failing to return client documents needed to litigate case that resulted in an adverse client impact).
be amenable to private sanctions. Arguably, violations of these obligations are ones in which private sanctions may be the most appropriate, since they could include a single instance of failing to maintain communication with a client or missing a deadline due to a significant medical or family issue. While prospective clients undoubtedly would want to know that an attorney had committed misconduct that involved a client matter, it would be almost untenable to establish a per se rule that a violation of these obligations would result in a public sanction—unless private sanctions were to be eliminated entirely.

As explored in Part III.C, private sanctions generally should not be imposed when an attorney has committed multiple instances of misconduct or violated several distinct ethics rules, since either of those circumstances indicate that the misconduct is not minor and isolated. Examining the data in this regard, 72 of the 602 (12.0%) private sanctions that include a service category violation involve multiple instances of misconduct, and 121 (20.1%) are based on violations of four or more distinct rules. While there may be additional cases in the service category that should also receive public sanctions, the cases that fall into either category (or certainly those that fall into both) are ones in which private sanctions arguably are being inappropriately imposed.

2. Financial Obligations

Whereas the most common lawyer grievances involve violations of the core client obligations, the mishandling of client

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261. See Linda Morton, Finding the Suitable Lawyer: Why Consumers Can’t Always Get What They Want and What the Legal Profession Should Do About It, 25 U.C. DAVIS L. REV. 283, 308 (1992) (discussing disconnect between consumers wanting information on “quality and integrity of lawyers” and state bars’ reluctance to provide it).

262. See supra Part III.C.1–2.

263. Of the 602 private sanctions in this group, 32 (5.3%) involved attorneys who had committed multiple instances of misconduct and had violated four or more distinct ethics rules.
funds is more often associated with severe sanctions.\textsuperscript{264} This is borne out in the data in three of the five states: the public sanctions in Alabama, Massachusetts, and Wisconsin include violations of Rule 1.15, the safeguarding-property rule, at much higher rates than do their private sanctions. In Massachusetts, for example, 48.4\% of its public sanctions include a violation of Rule 1.15, compared to 18.3\% of its private sanctions (+164.2\%).\textsuperscript{265} Massachusetts and Wisconsin also have higher rates of public sanctions for violations of Rule 1.5, the rule regulating lawyer fees and fee agreements, although the differences between the rates are less pronounced.\textsuperscript{266}

But the story is dramatically different in Delaware and Vermont. In Delaware, nearly as many private sanctions include a violation of Rule 1.15 as do public sanctions (40.4 vs 43.4\%).\textsuperscript{267} In Vermont, the incidence rate for private sanctions exceeds that for public sanctions—29.6\% vs. 17.4\%—and that difference is statistically significant.\textsuperscript{268}

These sanctioning patterns in Delaware and Vermont merited separate analysis. The author coded each private sanction containing a violation of Rule 1.15 by whether the misconduct involved (1) an accounting or reconciliation problem, (2) commingling of funds, or (3) an error in the disbursement of funds. Presumably accounting or reconciliation problems would be the types that would be eligible to receive private sanctions, since they might not result in an injury to a client.\textsuperscript{269} On the other hand, one would think—and the Annotated Standards suggest—that commingling funds and disbursement mistakes ordinarily would receive public sanctions.

\begin{itemize}
  \item \textsuperscript{264} See Matter of Siegel, 627 A.2d 156, 160 (N.J. 1993) (collecting cases from state supreme courts where misappropriation of client funds automatically resulted in disbarment); Cassandra Burke Robertson, \textit{How Should We License Lawyers?}, 89 FORDHAM L. REV. 1295, 1312 (2021) (discussing data on how frequently financial improprieties are associated with severe sanctions).
  \item \textsuperscript{265} \textit{Supra} Table V (difference is statistically significant at the .01 level).
  \item \textsuperscript{266} \textit{Supra} Table V (difference in Massachusetts is statistically significant at the .05 level, while the difference in Wisconsin is statistically significant at the .01 level).
  \item \textsuperscript{267} \textit{Supra} Table V (difference does not meet the threshold for statistical significance).
  \item \textsuperscript{268} \textit{Supra} Table V (difference is statistically significant at the .05 level).
  \item \textsuperscript{269} See ANNOTATED STANDARDS, supra note 20, at 161 ("An admonition would be appropriate, for example, when a lawyer’s sloppy bookkeeping practices make it difficult to determine the state of a client trust account, but when all client funds are actually properly maintained.").
\end{itemize}
Private Sanctions, Public Harm?

since those actions have the potential to injure a client. Of the sixty-five private sanctions in Delaware that include a Rule 1.15 violation, forty-four (67.7%) involve accounting or reconciliation issues, and the remaining twenty-one (32.3%) involve commingling or disbursement errors. By contrast, of the twenty-nine private sanctions in Vermont, only nine (31.0%) involve accounting or reconciliation issues, while the remaining twenty (69.0%) involve commingling or disbursement mistakes. One would expect to find statistics more like those in Delaware rather than those in Vermont, given the types of misconduct involved.

One example of these more serious Vermont cases involved an attorney who “commingl[ed] personal and client funds,” “deposit[ed] his own money in excess of bank fees,” and “use[d] money held in trust for one client to carry out the business for another client without that client’s permission.” In total, at least eighty errors had been made by the attorney over a thirteen-year time period, including the wrongful holding of $13,000 of undistributed client funds after the conclusion of representation; five clients’ funds ultimately could not be returned. Although the Vermont Supreme Court acknowledged the potential for injury due to the attorney’s misconduct, it ultimately determined that a private sanction was warranted because the attorney had taken steps to rectify the errors. Examining these Vermont opinions further, it appears that the state purports to apply the Standards and its own case law in ruling on sanctions but regularly uses mitigating circumstances to reduce presumptively public expressive or incapacitating sanctions to private ones.

Given that trust account violations have the potential to harm clients, one might expect disciplinary authorities to impose probation

270. See id. at 155 (“The most common cases . . . [imposing suspension] involve lawyers who commingle client funds with their own or fail to remit funds properly.”). Massachusetts applies a more lenient standard to lawyers who intentionally commingle funds, suggesting that they may receive private reprimands provided that there was no loss or other type of misconduct. MASS. PRACTICE, supra note 189, at 40.


273. PRB, 121 A.3d at 676, 679-80.

274. See, e.g., id. at 680 (finding that the facts were less extreme than another case in which a public sanction was imposed).
or conditions frequently in those cases. Once again, there are vast disparities between Delaware and Vermont in this regard; 72.3% of Delaware’s private sanctions for Rule 1.15 violations include probation or conditions, while only 13.8% of Vermont’s do. In other words, Vermont not only routinely imposes private sanctions for arguably more serious trust account violations but also does not pair its sanctions with educational requirements or supervision—the types of measures that could protect the sanctioned attorney’s unwary current or prospective clients.

3. Obligations to Entities Other than Clients

Beyond clients, there are three types of entities to which attorneys owe heightened obligations: third persons they encounter while representing clients (e.g., opposing parties),

tribunals, and the bar itself.

The results of this study indicate that the five states infrequently sanction attorneys for violations of obligations to third persons and, with the exception of Massachusetts (which has higher rates of these violations among its public sanctions), there are no statistically significant differences in the incidence rates between their private and public sanctions.

On the other hand, there are dramatic differences in nearly all of the states when it comes to violations of obligations to courts and the bar (which includes disciplinary authorities). In Massachusetts, for example, 25.2% of its public sanctions involve a violation of court obligations and 22.0% involve violations in connection with the bar, compared to rates of 2.5% and 4.2%, respectively, for its private sanctions. Similar trends are present in Alabama, Delaware, and Wisconsin.

In one sense, these results are to be expected; after all, lawyers who violate obligations to tribunals (e.g., filing frivolous lawsuits,
displaying a lack of candor to a tribunal) often have engaged in serious misconduct. The same can be said for an attorney who has failed to cooperate or provided misleading answers in connection with a disciplinary investigation. In fact, the Standards are constructed in such a way that this type of misconduct almost inevitably results in a more severe sanction.281

Nevertheless, there is a key difference between these categories of misconduct and those in the preceding subsections: whereas a privately sanctioned attorney’s other clients and prospective clients ordinarily will not learn of the attorney’s misconduct (and therefore cannot make informed decisions about whether to continue or initiate a client-attorney relationship), tribunals and their representatives do not need this information to make decisions regarding the attorney. Furthermore, the disciplinary authority necessarily knows that the lawyer has committed misconduct and can be (and should be) on the lookout for future misconduct even without publication of the sanction. Indeed, the disparities between the types of sanctions imposed in connection with breaches of the client-lawyer relationship and those imposed for violations of obligations toward tribunals or the bar provide empirical support for critics’ concerns that disciplinary authorities prioritize the preservation of the appearance of an ethical profession over the protection of the public.282

281. See, e.g., ABA STANDARDS FOR IMPOSING LAW. SANCTIONS r. B.6.23 (AM. BAR ASS’N 1992) (suggesting public reprimand for “caus[ing] interference or potential interference with legal proceeding”); id. r. B.9.22(e) (listing among aggravating factors “bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency”); ANNOTATED STANDARDS, supra note 20, at 347 (“Courts also impose public reprimands when lawyers fail to cooperate in disciplinary investigations or neglect to comply with orders from disciplinary authorities.”).

4. Obligations Related to the Integrity of the Profession

The general misconduct rule (Rule 8.4) contains provisions that aim to safeguard the “integrity of the profession.” Unlike the preceding groupings of obligations, these catchall provisions apply at all times—irrespective of whether an attorney is acting in a professional capacity. Explaining why the Model Rules include catchall provisions, Stephen Gillers observed that “the [discipline] is needed to tell the public that some conduct renders a person unfit to be a licensed lawyer regardless of how she would behave in practice.” A few states in this study also have state-specific catchall provisions, which have a similar aim.

A strong argument exists that a violation of any of these provisions generally should result in a public sanction, and often a more severe sanction such as a suspension or disbarment. That is because the misconduct has been proscribed despite the fact that it does not necessarily occur in the lawyer’s practice and, as described below, each of the provisions is constructed in such a way that normally precludes its use for minor, isolated misconduct. Although the Standards indicate that some of these provisions ordinarily should be subject to severe sanctions, as described in further detail below, for other provisions it provides no guidance or suggests that private sanctions may be permissible.

The crime provision, Rule 8.4(b), proscribes “committing] a criminal act that reflects adversely on the lawyer’s honesty,
trustworthiness or fitness as a lawyer in other respects.” 289 As indicated in Part II.B, the Standards prescribe that these violations normally should result in public sanctions, unless the violation was a “minimal infraction” and had no element of fraud or deceit. 290 Furthermore, in many of these instances, the attorney has been convicted of a crime and has a public record (though a conviction is not required), 291 which ameliorates the concern about the lawyer incurring reputational harm if the information becomes public. 292

The results from Massachusetts and Vermont are reassuring: all Rule 8.4(b) violations resulted in public sanctions (12.1% and 18.5% of their total public sanctions, respectively). 293 While Alabama and Delaware have a few private sanctions that include a Rule 8.4(b) violation, Rule 8.4(b) violations are much more prevalent among their public sanctions. 294

But in Wisconsin, 18.5% of its private sanctions include a Rule 8.4(b) violation. 295 That statistic itself raises a concern that Wisconsin is improperly using private sanctions for lawyers who commit crimes. To know more, the author coded each of these private sanctions in Wisconsin according to the crime committed. The results are summarized in Table VI, together with the ABA’s default sanction for the crime. 296 These results confirm that these private sanctions are almost always too lenient in relation to the ABA’s recommendation.

289. Model Rules of Prof. Conduct r. 8.4(b) (AM. BAR ASS’N 2020).
290. Supra notes 115-18 and accompanying text.
291. 8.4 Misconduct, ANN. MOD. RULES PROF. COND. § 8.4 (collecting cases that noted this fact).
292. See Berenson, supra note 12, at 686 stating that the privacy concerns are lessened for crimes because “criminal conviction information is generally available to the public”).
293. Supra Table V.
294. Supra Table V (difference in Alabama is statistically significant at the .05 level, while the difference in Delaware is statistically significant at the .01 level).
295. Supra Table V. Even though the difference between Wisconsin’s private and public sanctions (18.5% vs. 15.7%) does not meet the threshold for statistical significance, the fact that Rule 8.4(b) violations are so prevalent among private sanctions is itself concerning.
296. See Annotated Standards, supra note 20, at 238-89 (discussing the sanctions for different crimes).
Table VI: Crimes in Wisconsin Resulting in Private Sanctions

<table>
<thead>
<tr>
<th>Crime</th>
<th>Frequency</th>
<th>Percentage of Total</th>
<th>Default Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Driving While Intoxicated</td>
<td>53</td>
<td>70.7%</td>
<td>Suspension</td>
</tr>
<tr>
<td>Disorderly Conduct</td>
<td>4</td>
<td>5.3%</td>
<td>Private Sanction</td>
</tr>
<tr>
<td>Domestic Violence</td>
<td>4</td>
<td>5.3%</td>
<td>Suspension</td>
</tr>
<tr>
<td>Battery</td>
<td>3</td>
<td>4.0%</td>
<td>Public Expressive / Suspension</td>
</tr>
<tr>
<td>Drug Possession</td>
<td>3</td>
<td>4.0%</td>
<td>Suspension</td>
</tr>
<tr>
<td>Concealed Carry Violation</td>
<td>2</td>
<td>2.7%</td>
<td>Unclear</td>
</tr>
<tr>
<td>Violating Stalking/ Harassment Injunction</td>
<td>2</td>
<td>2.7%</td>
<td>Suspension</td>
</tr>
<tr>
<td>Hit-and-Run</td>
<td>2</td>
<td>2.7%</td>
<td>Suspension</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>1</td>
<td>1.3%</td>
<td>Suspension / Disbarment</td>
</tr>
<tr>
<td>Intentionally Lying to Tribunal</td>
<td>1</td>
<td>1.3%</td>
<td>Disbarment</td>
</tr>
<tr>
<td>Total</td>
<td>75</td>
<td>100.0%</td>
<td></td>
</tr>
</tbody>
</table>

Of these seventy-five private sanctions, only four (5.3%) involve a crime that clearly merited a private sanction.297 The vast majority involve crimes that ordinarily would subject the attorney to a suspension or perhaps a disbarment, including sexual assault, violation of protective orders, domestic violence, drug possession, and intentionally lying to a tribunal.298 Furthermore, the sheer number of driving-while-intoxicated offenses (fifty-three) is striking; while some states—including Wisconsin—have instituted diversion programs to assist lawyers who have issues with substance abuse,299 private sanctions do not necessarily include rehabilitative components.

The second catchall provision, Rule 8.4(c), proscribes “conduct involving fraud, deceit, or misrepresentation.”300 As with Rule

297. See supra Table VI. The Annotated Standards do not contain a default sanction for a concealed carry violation.
298. See supra note 115 and accompanying text.
299. See, e.g., SUPREME COURT OF WISCONSIN, supra note 157, at 6 (indicating that thirty-one attorneys successfully completed diversion programs of any type in 2019-2020).
300. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 2020).
8.4(b) above, the Standards strongly suggest that discipline for a violation of this provision should be public; the only exception could be for cases in which the misconduct was not committed knowingly or intentionally. The results from this study confirm that relatively few private sanctions in each state involve a violation of Rule 8.4(c), in comparison to the substantially higher percentages of public sanctions in each state. For example, in Massachusetts, only 5.2% of its private sanctions include a Rule 8.4(c) violation while 52.8% of its public sanctions include such a violation. The pertinent question, however, is not whether the rates of private sanctions are low, but whether private sanctions were merited for any of these cases. To address this question, the author coded all private sanctions that included a violation of Rule 8.4(c) according to whether the lawyer’s misconduct was done with knowledge or intent (denoted as “Knowledge+”). If the opinion was not clear regarding the lawyer’s mental state in committing the misconduct, the decision was coded as not involving knowledge or intent. Table VII presents the results for all five states, which indicate that more than eighty percent of these private sanctions involved lawyers who at least knew their conduct was fraudulent or deceitful.

301. See ABA STANDARDS FOR IMPOSING LAW. SANCTIONS r. B.5.11-14 (AM. BAR ASS’N 1992). Indeed, the Disciplinary Enforcement Rules exclude “dishonesty, deceit, fraud, or misrepresentation” from the misconduct that can be considered “lesser misconduct,” which is a higher threshold than “minor” misconduct because it concerns restrictions on practice. See MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 9.B (AM. BAR ASS’N 2020).

302. Supra Table V (difference is statistically significant at the .01 level). Interestingly, Massachusetts suggests that even intentional Rule 8.4(c) violations could receive admonitions if they are done to achieve a “lawful purpose,” especially if they further client interests. See MASS. PRACTICE, supra note 189, at 282. However, it was unclear from the opinions if or when the disciplinary authority had made such a determination.
Table VII: Rule 8.4(c) Violations Imposing Private Sanctions

<table>
<thead>
<tr>
<th>State</th>
<th>Total Sanctions</th>
<th>No Knowledge</th>
<th>Knowledge+</th>
<th>Percentage Knowledge+</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>12</td>
<td>4</td>
<td>8</td>
<td>66.7%</td>
</tr>
<tr>
<td>DE</td>
<td>20</td>
<td>6</td>
<td>14</td>
<td>70.0%</td>
</tr>
<tr>
<td>MA</td>
<td>31</td>
<td>4</td>
<td>27</td>
<td>87.1%</td>
</tr>
<tr>
<td>VT</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>33.3%</td>
</tr>
<tr>
<td>WI</td>
<td>59</td>
<td>7</td>
<td>51</td>
<td>86.4%</td>
</tr>
<tr>
<td>Total</td>
<td>125</td>
<td>23</td>
<td>101</td>
<td>80.8%</td>
</tr>
</tbody>
</table>

Although the numbers of sanctions from some states are low, the combined numbers suggest that these disciplinary authorities are imposing private sanctions on lawyers who have committed knowing or intentional deceits. The high number (fifty-one) and percentage (86.4%) in Wisconsin are particularly concerning, as are the cases from Massachusetts and Delaware.303

Examining the disciplinary actions, it was striking how many of them involved deceitful activity toward clients or on behalf of clients. A number of attorneys falsely notarized documents on behalf of clients, including a Delaware attorney who did so on behalf of a physically infirm client at the insistence of the client’s son—which later gave rise to allegations of undue influence.304 Likewise, many grievances involved lying to clients about cases, such as the Massachusetts attorney who, “in response to repeated requests . . . about the status of the case . . . intentionally misrepresented to the clients that the suit had been filed with the court[,] gave them a false docket number . . . [and] made additional representations to the clients concerning the course of the case.”305 These misrepresentations not only were intentional, but also elaborate and repeated, which undoubtedly elevates their seriousness.

The next set of catchall provisions is among the most general: it includes Rule 8.4(d), which proscribes “conduct that is prejudicial

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303. Supra Table VII.
to the administration of justice,” and the fitness-to-practice provision, a rule that appeared in the prior version of the ABA ethics code and proscribes “any other conduct that adversely reflects on [the lawyer’s] fitness to practice law.” This latter provision still exists in two of the five states in this study (Alabama and Massachusetts) as well as in five other states. Both the administration-of-justice and fitness-to-practice provisions have been criticized and lauded for their generality, which can give rise to inconsistencies in how disciplinary authorities use them yet provide flexibility for authorities to regulate misconduct that does not fit within an existing rule.

Unlike with Rule 8.4(b) and 8.4(c), the Standards provide no definitive guidance on whether violations of these other types of catchall provisions could result in private sanctions; nevertheless, a fair reading of them indicates that the drafters believe that private sanctions may be appropriate. However, a strong argument can be made that violations of either of these catchall provisions (or similar state-specific provisions), when they occur, should almost invariably result in public sanctions. A finding that Rule 8.4(d) was violated means that the lawyer’s conduct was prejudicial to the administration of justice—this is an interference with the very system that lawyers have an obligation to protect. Similarly, a

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308. See id.; Mass. Rules of Prof. Conduct r. 8.4(h) (Mass. St. Bar 2022); Lee, supra note 170, at 368 (identifying the seven states that have retained the fitness-to-practice provision).
309. Compare Richard W. Painter, Rules Lawyers Play by, 76 N.Y.U. L. Rev. 665, 669 (2001) (presenting strong arguments in favor of clearly defined rules) with Samuel J. Levine, Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework, 77 Tul. L. Rev. 527, 573-74 (2003) (arguing that broad ethics provisions such as these should be included in ethics codes to regulate elusive misconduct). See also Alex B. Long, Of Prosecutors and Prejudice (or “Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?”), 55 U.C. Davis L. Rev. 1717, 1730–36 (2022) (discussing the use of Rule 8.4(d) and the fitness-to-practice provision to discipline prosecutors who exhibit bias and noting differing views on their validity and administration).
310. See Annotated Standards, supra note 20, at 288-89.
311. Brian Sheppard, The Ethics Resistance, 32 Geo. J. Legal Ethics 235, 273 (2019) (identifying different state approaches to Rule 8.4(d) violations, noting that they often require “serious” or “egregious” misconduct); see also Douglas E. Abrams, Plagiarism in Lawyers’ Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice, 47 Wake Forest L. Rev. 921, 923 (2012) (highlighting how conduct violating Rule 8.4(d) may be cited in appropriate cases along with other provisions, which will result in heightened sanctions).
lawyer who has violated the fitness-to-practice provision has—by definition—committed misconduct that reflects adversely on the lawyer’s fitness to practice, which would suggest that the misconduct was serious.\textsuperscript{312}

The results of the study regarding these two provisions are much more variable, likely because the Standards provide scant guidance on the proper sanction to impose. In three of the four states that have adopted Rule 8.4(d), a significantly higher percentage of public sanctions than private sanctions include a violation of the provision.\textsuperscript{313} In Delaware, by contrast, over half of both private and public sanctions include a Rule 8.4(d) violation (53.4\% and 63.2\%, respectively).\textsuperscript{314} The variation in sanctioning patterns is even more dramatic for the fitness-to-practice provision: whereas 5.0\% of the private sanctions in Massachusetts contain a fitness-to-practice provision violation, 37.7\% of the private sanctions in Alabama contain a violation of the provision.\textsuperscript{315}

The contexts in which disciplinary authorities cite these provisions are diverse and beyond the scope of this Article;\textsuperscript{316} nevertheless, a few examples demonstrate how private sanctions are at times being used inappropriately in connection with catchall provisions to obscure particularly appalling misconduct. In Alabama, an attorney was privately sanctioned under its fitness-to-practice provision for sending his client multiple sexually inappropriate texts, repeatedly requesting to meet with her in her home and, once there, making unwelcome sexual advances.\textsuperscript{317} In another Alabama case, an attorney retaliated against opposing counsel for filing a grievance against him by writing a letter to the judge, “accusing the complainant of calling the judge a derogatory name and making other disparaging remarks about her.”\textsuperscript{318} That

\begin{itemize}
\item \textsuperscript{312} See Lee, supra note 170, at 418 (finding that fitness-to-practice provision violations are correlated with more severe sanctions, especially disbarment).
\item \textsuperscript{313} Supra Table V (Alabama, Massachusetts, and Vermont).
\item \textsuperscript{314} Supra Table V (difference between public and private sanctions does not meet threshold for statistical significance).
\item \textsuperscript{315} Supra Table V.
\item \textsuperscript{316} For a thorough discussion of the different categories of fitness-to-practice provision violations, see generally Lee, supra note 170, at 403–12.
\item \textsuperscript{317} ALA. ST. BAR, supra note 184 (private reprimand on May 31, 2013).
\item \textsuperscript{318} Id. (private reprimand on April 9, 2016).
\end{itemize}
attorney, too, received a private sanction, this time for violating Rule 8.4(d) and the fitness-to-practice provision.\textsuperscript{319}

The last two state-specific provisions in Table V proscribe misconduct that is among the most egregious. Wisconsin and Vermont each have enacted an anti-bias provision targeting discrimination and harassment,\textsuperscript{320} and Wisconsin also has a provision proscribing “violat[ing] the attorney’s oath (‘oath provision’).\textsuperscript{321} The few cases involving violations of either state’s anti-bias provision all resulted in public sanctions—undoubtedly the appropriate sanction.\textsuperscript{322} The same cannot be said for Wisconsin’s oath provision; although only six cases resulted in private sanctions, the facts are nothing short of shocking. They include, among others: “sexually suggestive comments to a co-worker over a period of several years and, on one occasion, kiss[ing] her without consent”;\textsuperscript{323} “engaging in inappropriate and potentially sexual advances toward . . . the beneficiary of a trust that [the lawyer] was administering as the trustee”;\textsuperscript{324} and “sen[ding] a series of late-night emails to opposing counsel that contained derogatory, vulgar and hostile comments, some of which threatened violence.”\textsuperscript{325}

Although the numbers are small, it is alarming that such misconduct would ever result in a private sanction.

IV. ASSESSING THE CONTINUING USE OF PRIVATE SANCTIONS

As the results of the preceding empirical study demonstrate, private sanctions are available in thirty-six states and, where they are available, they often comprise the majority of sanctions

\textsuperscript{319} Id. (private reprimand on April 9, 2016).

\textsuperscript{320} VT. RULES OF PROF. CONDUCT r. 8.4(g) (VT. ST. BAR 2021); WISC. RULES OF PROF. CONDUCT r. 8.4(i) (WISC. ST. BAR 2021).

\textsuperscript{321} WISC. RULES OF PROF. CONDUCT r. 8.4(g) (WISC. ST. BAR 2021).

\textsuperscript{322} Supra Table V; see also Veronica Root Martinez, Combating Silence in the Profession, 105 VA. L. REV. 805, 859 (2019) (arguing that anti-bias provisions such as Model Rule 8.4(g) capture only the most egregious instances of misconduct).


imposed.\footnote{See supra Part III.B.} For those reasons alone they warrant greater attention, not only by those in the profession but also by those who have concerns about how unethical attorneys can put the public at risk. Furthermore, the study provides a window into the sanctioning practices of five states that have chosen to partially lift their veils—yet there still is much we do not know.

As discussed in Part II.B, the primary arguments in the debate over private sanctions arise in connection with the stakeholders who are involved with or affected by the disciplinary process: disciplinary authorities, attorneys, clients, and the public at large. This Part uses the results of the empirical study to assess the accuracy of the claims made on behalf of these four stakeholders while simultaneously identifying the continuing areas of uncertainty.

\textbf{A. Disciplinary Authorities}

Disciplinary authorities urge that private sanctions facilitate their work based on two rationales: (1) lower administrative costs associated with their imposition, and (2) concern that attorneys who commit minor misconduct likely would receive no discipline if there was no option to impose a private sanction.\footnote{See supra Part II.B.1.} The study itself did not shed much light on this first question, since the SOLD survey does not collect information on the expenses associated with particular types of sanctions. Intuitively, one would assume there would be lower costs for private sanctions since most are agreed upon by the attorney in exchange for avoiding a formal proceeding. Three considerations are countervailing, however. First, the study does show that, despite suggestions to the contrary, fifteen jurisdictions administer disciplinary systems without having the ability to issue private sanctions.\footnote{See supra Table 1.} Nor is there any indication from the survey data that these disciplinary authorities have ground to a halt. Illinois, a public-only jurisdiction, received 4,937 disciplinary complaints in 2019, over twice the national average.\footnote{SOLD SURVEY 2019, supra note 143, at 1.} Second, even more jurisdictions run alternative-to-discipline programs (forty) than use private sanctions (thirty-six); these programs also
entail costs and often address the same types of misconduct.\textsuperscript{330} Third, there is nothing precluding jurisdictions from using a consent-to-discipline process for public reprimands, as they often do with private sanctions.\textsuperscript{331} Although the ABA suggests that public reprimands should not be imposed without a “hearing,”\textsuperscript{332} there need not be an extensive trial given the lawyer’s consent.

The validity of the second argument, whether disciplinary authorities otherwise will be inclined to dismiss cases of minor and isolated misconduct, is almost impossible to know for certain. Unfortunately, jurisdictions do not broadly share the details of dismissed grievances—even those in which they are ostensibly public record.\textsuperscript{333} Nevertheless, the SOLD survey data indicates that the answer may be state-specific. Dual-system jurisdictions are dramatically different among themselves with respect to the rates at which they impose private sanctions.\textsuperscript{334} Although dual-system jurisdictions impose more sanctions of any type than their public-only counterparts, they impose fewer public sanctions.\textsuperscript{335} This suggests that states may be substituting both ways: imposing private sanctions in some cases that would otherwise be dismissed or not result in discipline, and imposing private sanctions in some cases that would otherwise receive public sanctions. Accordingly, the argument that private sanctions are a next-best alternative is a modest one and raises additional questions about whether dual-system jurisdictions are inappropriately imposing private sanctions.

\textbf{B. Attorneys}

Attorneys, like disciplinary authorities, are presumed to benefit from the imposition of private sanctions. Whereas for sanctioned

\begin{flushleft}
\textsuperscript{330} Supra Table 1; see supra note 79 and accompanying text; see also Ellis, supra note 54, at 1222 (indicating that Arizona reviews its programs, including its diversion program, “based on their cost and effectiveness”).

\textsuperscript{331} See MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 21.B (AM. BAR ASS’N 2020) (indicating that consent-to-discipline procedure is available for private sanctions).

\textsuperscript{332} See Id. r. 10 cmt.

\textsuperscript{333} See, e.g., Submitting an Ethics Complaint Regarding an Oregon Lawyer, OR. STATE BAR, http://www.osbar.org/secured/cao_attorneycomplaints.asp (last visited Mar. 10, 2023) (indicating that complaints are retained by the Oregon public records clerk and are “available for inspection,” but without online access or a method of comprehensive inspection).

\textsuperscript{334} See supra Table II and accompanying text.

\textsuperscript{335} See supra Figure I and accompanying text.
\end{flushleft}
attorneys the primary benefit is the possibility of specific deterrence or rehabilitation without a public pronouncement of misconduct, other attorneys are assumed to benefit from the general deterrent effect.\textsuperscript{336}

Because of limitations in the data, it is impossible to evaluate how effective private sanctions are as a deterrent. Even in the four states that share information on private sanctions and prior discipline, accurately calculating recidivism rates is impossible. At most, we know that all four states are imposing private sanctions on recidivist attorneys, with concerning statistics in Wisconsin (16.7\% of private sanctions involving recidivist attorneys).\textsuperscript{337} Even more troubling is that, at times, these four states are not following the progressive discipline model, the result being that current and prospective clients are being kept in the dark about offenders who have received multiple private sanctions.\textsuperscript{338} For disciplinary authorities to substantiate their claims on the deterrent effect of private sanctions, they must share more information.

To be sure, it is not clear that public sanctions operate effectively as a deterrent either. There is scarce information available on recidivism rates for lawyers who have been publicly sanctioned, and it is mixed at best.\textsuperscript{339} But the pertinent question is whether private sanctions operate so effectively as a deterrent that they merit the secrecy they are accorded.

It may be the case that some disciplinary authorities are routinely pairing private sanctions with probation or conditions to promote rehabilitation. This is impossible to tease out for all states using the SOLD survey data, but some information can be gleaned from the five states in this study. In them, considerable differences exist in the extent to which probation or conditions are imposed with private sanctions: whereas Delaware and Massachusetts

\begin{footnotesize}
336. See supra Part II.B.2.
337. Supra Figure V.
338. See supra Table IV (indicating that privately-sanctioned attorneys had received a subsequent private sanction in a substantial percentage of cases).
339. See, e.g., Cole, supra note 141, at 10 (noting that 21\% of attorneys sanctioned during a two-and-one-half year period previously had been publicly sanctioned); Attorney Discipline: Recidivism, ILLINOIS COURTS, https://www.illinoiscourts.gov/News/506/Attorney-Discipline-Recidivism/news-detail/ (last visited Mar. 10, 2023) (stating that 18\% of lawyers who had been publicly sanctioned over a twenty-five-year period had been disciplined again); Levin, supra note 11, at 3 n.10 (identifying high recidivism statistics from Louisiana and Michigan).
\end{footnotesize}
regularly impose them in connection with private sanctions (63.4% and 48.1%, respectively), the other three states report doing so less than one-seventh of the time.\textsuperscript{340} To know whether these rehabilitative efforts worked, however, jurisdictions would have to share information on the recidivism rates for these attorneys and, as noted above, those data are not available.

It would be even more difficult to assess the extent to which private sanctions operate as a general deterrent for other attorneys. One thing is certain, though: attorneys cannot be deterred by something they do not know exists. The five states in this study have done more than others in making some information on individual private sanctions available. Other jurisdictions provide general descriptions of categories of misconduct that give rise to such sanctions, but many share nothing at all.\textsuperscript{341}

\textbf{C. Clients}

Determining whether private sanctions are appropriately addressing the interests of current clients and prospective clients involves two primary considerations. The first is whether private sanctions are being imposed accurately, which means in accordance with the criteria for their intended use. The second is whether private sanctions are being imposed appropriately, which means in cases in which the client does not have a strong countervailing interest in learning about the misconduct.\textsuperscript{342} At the bottom, these inquiries are both related to the ABA’s definition of private sanctions: how closely are jurisdictions adhering to the definition, and whether the definition is the correct one for drawing the distinction between private and public sanctions.

As to the first consideration, the study reveals that private sanctions are sometimes being used in circumstances that should not qualify as \textit{minor} and \textit{isolated}. Four of the five states have imposed private sanctions on attorneys who have violated four or more distinct ethics rules, with Alabama leading the pack.\textsuperscript{343} In three of the five states—Alabama, Delaware, and Wisconsin—at

\begin{itemize}
\item \textsuperscript{340} \textit{Supra} Figure VI.
\item \textsuperscript{341} See Levin, \textit{supra} note 65, at 72 n.325 (discussing how jurisdictions limit dissemination).
\item \textsuperscript{342} See \textit{supra} Part II.B.3.
\item \textsuperscript{343} \textit{Supra} Figure III (indicating that 12\% of Alabama’s private sanctions involved attorneys who had violated four or more distinct ethics rules).
\end{itemize}
least fourteen percent of the private sanctions involve attorneys who have committed multiple instances of misconduct.\textsuperscript{344} These results hold true with regard to violations of the core client service obligations, which comprise a sizeable percentage of cases that are currently receiving private sanctions.\textsuperscript{345} Given the potential risk of harm to an attorney’s other clients or future clients—were this conduct to be repeated—these misuses of private sanctions are concerning.

Even more troubling, these states are regularly failing to adhere to the ABA’s stated guidance on the use of private sanctions. Although Vermont often restricts its use of private sanctions to violations of one or few distinct rules, it frequently imposes them in connection with non-trivial violations of Rule 1.15, the safeguarding-property rule, without requiring additional rehabilitative measures to promote future compliance.\textsuperscript{346} Wisconsin is imposing private sanctions on a substantial number of attorneys who have committed serious crimes that undermine the integrity of the profession, including domestic violence, sexual assault, and intentionally lying to a tribunal.\textsuperscript{347} These states are also using private sanctions for fraud and related misconduct, even when it has been done knowingly and at times involves lying to clients.\textsuperscript{348}

The resolution of the second consideration turns on an examination of the types of misconduct that give rise to private and public sanctions. Whereas most states have relatively similar proportions of private and public sanctions that involve violations of a lawyer’s core client obligations, violations of a lawyer’s obligations to tribunals and the bar almost invariably result in public sanctions rather than private ones.\textsuperscript{349} This disparity begs the question: is it right to view unethical actions in the context of the client-lawyer relationship as less deserving of public sanctions than those that occur before a court or disciplinary authority?

\textsuperscript{344} \textit{Supra} Figure IV.

\textsuperscript{345} \textit{See supra} notes 262-63 and accompanying text.

\textsuperscript{346} \textit{Compare supra} Part III.C.1 (identifying that private sanctions in Vermont ordinarily involve the violation of relatively few distinct rules) \textit{with supra} Part III.D.2 (describing the concerning use of private sanctions in Vermont in connection with violations of the safeguarding-property rule).

\textsuperscript{347} \textit{Supra} Table VI.

\textsuperscript{348} \textit{See supra} notes 300-05 and accompanying text.

\textsuperscript{349} \textit{Supra} Table VI.
Of course, there are times when private sanctions may seem especially appropriate for violations of client obligations (e.g., when an inexperienced attorney negligently misses a single deadline). But in light of the differences in how these constituents are situated and the potential risk if the disciplinary authority sanctions too leniently, the issue of where to draw the line merits additional debate. Even if jurisdictions adhered closely to the Standards as currently written, this disparity would continue given their lack of detail on what is considered minor misconduct and their inclusion of aggravating circumstances that will almost guarantee that misconduct toward courts or the bar (but not necessarily toward clients) merits a public sanction.350

Likewise, the Standards fail to recognize that some types of misconduct, especially that related to the integrity of the profession, ordinarily should not be subject to private sanctions.351 Conduct that is prejudicial to the administration of justice or that reflects adversely on a lawyer’s fitness to practice generally is of the sort that clients—and the public at large—has a need to know.352 The existence of catchall provisions, without additional guidance to ensure that they are being administered properly, enables an unscrupulous decisionmaker to sweep egregious misconduct under the rug.353

**D. Public at Large**

Those critical of private sanctions, and of the disciplinary process more broadly, believe that state bars are reluctant to disclose the misdeeds of unethical attorneys that reflect poorly on the profession.354 Ironically, this lack of transparency continues to

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351. *See ANNOTATED STANDARDS, supra* note 20, at 288–89 (not restricting violations of these obligations to public sanctions).
352. *See supra* notes 310–12 and accompanying text.
353. *See Lee, supra* note 170, at 419–20 (providing best practices for implementing the fitness-to-practice provision, in light of its general language and concerns about overreaching and bias in its application).
fuel widespread public distrust of the profession; outsiders are apt to “assume the worst.” 355

The results of the empirical study do not suggest that all, or even the majority, of private sanctions are improperly imposed. However, the disciplinary authorities in all five states at times use private sanctions for patterns or types of misconduct in which members of the public may be at risk of future harm, whether they retain the privately-sanctioned lawyers themselves or otherwise come into contact with the lawyers in the future. 356

But it bears repeating that these five state disciplinary authorities are doing much more than their counterparts to foster transparency and thus be accountable for their actions. We know very little about how the other thirty-one jurisdictions are using private sanctions, which only serves to heighten suspicion about their propriety and effectiveness.

CONCLUSION: IMPLICATIONS AND RECOMMENDATIONS

Thus far, private sanctions largely have evaded the attention of those who have pushed for reform of the legal profession. But in this era of transparency reckonings that have transformed multiple sectors, it is only a matter of time until disciplinary authorities are squarely under the microscope.

How do private sanctions fare in achieving their aims? If these five states are at all representative, there is cause for great concern. At the very least, we know that private sanctions sometimes are being imposed for conduct that is not minor and isolated. We also know that they are being used for a wide variety of breaches of client obligations, including financial misconduct, without assurances that the sanctioned attorneys will be able to reform their ways. Additionally, they are being used at times for categories of misconduct that one would assume to be off-limits for private sanctions, including for serious crimes and other conduct that offends our collective notions of what it means to be fit to practice law.

Moreover, even less is known about their effectiveness as a deterrent of future misconduct. The limitations in the data shared

355. Cf. Green, supra note 21, at 191–93 (discussing the “opacity of the disciplinary process,” which includes not sharing details on dismissals and sharing little information on private sanctions).

356. See generally supra Part III.C.-D.
by these states make it impossible to know definitively how frequently recidivism occurs, which is critical for evaluating whether private sanctions are adequately protecting the public from future harm—or whether the misconduct should be disclosed so the public can protect itself.

In short, no compelling evidence exists that private sanctions are achieving the goals touted by their proponents, but there is evidence from these five states that private sanctions are at times being improperly used. One might believe that the problem merely is that these states are not adhering to the ABA’s guidance on the imposition of private sanctions. While that may explain some of the results, it does not fully capture the problem. Part of the problem is the considerable ambiguity in the Standards regarding the meanings of minor and isolated as they apply to particular types of ethical obligations. But another problem is that the Standards have been constructed in such a way that they provide for lesser sanctions for some types of ethical obligations (those toward clients or that implicate the integrity of the profession) relative to others (those toward tribunals or the bar itself). There needs to be considered dialogue among stakeholders regarding what types of misconduct should merit private sanctions, in light of the possible risk when a public sanction is not imposed. This dialogue has not yet occurred, precisely because private sanctions have been absent from the conversation.

Given these findings, this Article concludes that private sanctions should not continue to be imposed by disciplinary authorities until jurisdictions undertake a comprehensive examination of their validity and effectiveness. Despite the fact that these five states share information about their private sanctions (which have the potential to operate as a check on their use), they have not limited their use of private sanctions to the circumstances for which they were originally intended, nor is there data showing that they are effective.

At the same time, it should be acknowledged that these five states may not be representative of all jurisdictions in how they use private sanctions. Furthermore, even for these five states, it could be the case that private sanctions are operating as an effective

357. See supra notes 104-06 and accompanying text.
deterrent, which would weigh in favor of their continued use—albeit in a more limited fashion. Accordingly, this Article identifies five recommendations for jurisdictions that wish to continue their use of private sanctions. Absent the implementation of these five recommendations, there is not enough evidence to justify their continued use—especially in light of the fact that jurisdictions also have the ability to regulate misconduct through alternative-to-discipline programs that have additional oversight.

First, all dual-system jurisdictions must make individual private sanctions publicly available, as have the five states in this study. This recommendation is one that long has been endorsed in principle by the ABA, albeit without specific guidance on what information should be shared.358 There is no logical reason to keep non-identifying information about these sanctions confidential, and the author could find no evidence that the publication of these sanctions led to the attorneys’ identities being revealed. In the absence of reputational harm, the only legitimate reason for these sanctions not being publicly available is the administrative costs associated with putting them in a format for public consumption and publishing them on a disciplinary website. These costs, while not negligible, are justified given that there is no other way for other lawyers or members of the public to know what is happening behind closed doors.

Second, each private sanction should include at least the relevant misconduct, the ethics rules that were violated, any probation or conditions imposed, the attorney’s disciplinary history, and, to the extent possible, a discussion of why the disciplinary authority believed that a private sanction (rather than a public sanction) was warranted. On these latter points, the five states varied considerably; for example, whereas Alabama included nothing about its reasoning or whether the attorney previously had been sanctioned, Massachusetts often included a discussion of the aggravating and mitigating circumstances it considered. If disciplinary authorities cannot provide this level of detail because they are not evaluating cases in this manner, that fact is itself problematic.

358. Supra note 99 and accompanying text.
Third, information about privately-sanctioned attorneys should be collected and shared in order to better understand what types of attorneys typically receive such sanctions. For example, if private sanctions are more frequently imposed on inexperienced attorneys who are practicing in a particular subject matter area, that information might inform CLE requirements or contribute to the development of a new alternative-to-discipline program. Furthermore, if private sanctions are being disproportionately imposed along lines of race or gender identity, those issues could be addressed as well. The five states varied considerably in the types of information they share about privately-sanctioned attorneys, which made it difficult to conduct a meaningful analysis across states on these issues. Ideally, much of this information could be included as part of the publicly-available sanction; however, if there are concerns about identifiability, it could be compiled and shared separately.

Fourth, dual-system jurisdictions should compile and share recidivism statistics for all sanctions, including private sanctions. Because private sanctions presumably are being imposed for their deterrent effect, they should continue to remain private only if they are in fact working as a deterrent. Moreover, disciplinary authorities should greatly benefit from publicizing recidivism rates for privately-sanctioned attorneys, provided that the sanctions are working as well as their proponents claim. This level of transparency continues to be lacking from disciplinary authorities, which only feeds allegations that the profession is self-interested and inadequately concerned with the possible harm that may befall members of the public who interact with unethical attorneys.359

Because of concerns about identifying attorneys who receive both private and public sanctions, it would be extremely difficult to accurately track recidivism rates through individual sanctions. For that reason, jurisdictions likely would need to compile statistics on recidivism rates separately. Recidivism rates could be calculated based on a specified number of years after the initial offense, e.g., ten years, along with whether the subsequent misconduct resulted in a private sanction, public sanction, or participation in an

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359. See supra note 282 and accompanying text.
alternative-to-discipline program. Information on probation and conditions should be collected and analyzed as well, to determine the extent to which they are impacting recidivism rates. These data could in turn inform future sanctioning practices.

Fifth, jurisdictions should conduct analyses similar to those performed and suggested in this Article, share their results with stakeholders, invite input on types of cases that should—and should not—be subject to private sanctions, and make changes to their sanctioning practices accordingly. As things stand, disciplinary authorities are making decisions on the types of cases that warrant private sanctions on their own, without input from the legal profession or others invested in ensuring that the profession adequately protects the public. But this type of engagement is critical if the legal profession hopes to engender public trust in its system of self-regulation. Moreover, if a number of jurisdictions widely shared information on private sanctions and sought feedback from stakeholders, the ABA could collect this information, conduct a more comprehensive analysis of jurisdictional practices, and develop a refined set of best practices that could promote greater consistency.

Undoubtedly the implementation of these five recommendations will impose administrative burdens on disciplinary authorities that wish to continue imposing private sanctions. It also will invite criticism of their use and perhaps proposals for their elimination outright. But as the results of this study show, the alternative—maintaining the status quo—would be irresponsible. Unless disciplinary authorities can put forth convincing evidence that private sanctions are being imposed properly and that they are effectively protecting the public from future unethical behavior, the public deserves to be able to take measures to protect itself. It is only a matter of time before the public realizes that many jurisdictions are maintaining these shadow disciplinary procedures—and it will demand answers.

360. There have been a few empirical studies verifying the success of alternative programs. See, e.g., Ellis, supra note 54, at 1252–64 (Arizona); Willing, supra note 250, at 844–45 (Texas).
### Appendix. Rule Categories

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