



in

Client Protection

Tuesday, September 20, 2022

9:10 to 10:00 am

Resources

[MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION - RULES \(americanbar.org\)](#)

[A History of the Client Protection Rules \(americanbar.org\)](#)

[Ordinary Clients, Overreaching Lawyers, and the Failure to Implement Adequate Client Protection Measures \(uconn.edu\)](#)

Jurisdictions in Attendance

Iowa

[2021 Annual Client Security Report \(iowacourts.gov\)](#)

Illinois

[ARDC Releases 2021 Annual Report | Illinois State Bar Association \(isba.org\)](#)

Kentucky

[Proposed SCR 3.501 \(kycourts.gov\)](#)

New Jersey

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[New York Lawyers' Fund for Client Protection](#)

[The New York Lawyers' Fund: 39 Years of Client Protection | New York Law Journal](#)
[New York lawyers who steal from clients could face prison \(timesunion.com\)](#)

Maine

[Former Newport lawyer found guilty of stealing thousands of dollars from client's estate \(wabi.tv\)](#)

Wisconsin

[Inside Track: 'We Have a Responsibility:' Lindsey Draper Recognized with National Client Protection Award: \(wisbar.org\)](#)

Michigan

[Order \(michigan.gov\)](#)

Hawaii

[Hawaii Lawyers' Fund for Client Protection of the Hawai'i Supreme Court \(hawaiilawyersfund.com\)](#)

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[Pa. Lawyers With Low-Incomes to See Offer of Cost Savings | The Legal Intelligencer](#)

Delaware

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Missouri

[Client Security Fund - Your Missouri Lawyers \(missourilawyershelp.org\)](#)

Texas

[State Bar of Texas | Client Security Fund \(texasbar.com\)](#)

Rhode Island

[Client Reimbursement Fund | Rhode Island Bar Association \(ribar.com\)](#)

Articles of Interest

[Proposed New State Bar Rule, Amended Rule of Professional Conduct, and Amended New Rule of Court for the Client Trust Account Protection Program \(CTAPP\) \(ca.gov\)](#)

California, June 2022

[Lawyers' Fund for Client Protection: Righting the Wrongs \(courtnewsOhio.gov\)](#) Ohio,

June 2021

[Mandatory Interim Administrator Planning for Lawyers Coming in 2023 \(icle.org\)](#)

Michigan, 2022

[Disbarred Lawyer Sentenced to 12 Years in Prison for Stealing Injured Clients' Settlement Money and Cheating on Federal Income Taxes | USAO-CDCA | Department of Justice, February, 2022](#)

[Virginia State Bar - News - Clients' Protection Fund Pays \\$127,061 in Last Fiscal Year \(vsb.org\)](#)

[Virginia State Bar - News - Comments Sought on Proposed Amendments to Clients' Protection Fund Rules \(vsb.org\)](#)

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2021

Ordinary Clients, Overreaching Lawyers, and the Failure to Implement Adequate Client Protection Measures

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ORDINARY CLIENTS, OVERREACHING LAWYERS, AND THE FAILURE TO IMPLEMENT ADEQUATE CLIENT PROTECTION MEASURES

LESLIE C. LEVIN*

Every year, thousands of individual clients are victimized by overreaching lawyers who overcharge clients, refuse to return unearned fees, or steal their money. For more than forty years, the American Bar Association (ABA) has considered, and often proposed, client protection measures aimed at protecting clients from overreaching lawyers. These measures include requirements that lawyers use written fee agreements in their dealings with clients and rules relating to fee arbitration, client protection funds, insurance payee notification, and random audits of trust accounts. This Article examines what happened to these ABA recommendations when the states considered them and assesses the current state of client protection in the United States. It reveals that many jurisdictions have declined to adopt these recommendations or have adopted variations that do not adequately protect vulnerable clients. As a result, most states do not require lawyers to use written fee agreements and in most jurisdictions, ordinary clients have no meaningful recourse when fee disputes arise because lawyers are not required to participate in fee arbitration. While all states have established client protection funds to help reimburse clients who are victimized by their lawyers, many clients are not sufficiently compensated due to some funds' low caps on recovery. At the same time, most states have declined to adopt other client protection measures that would help deter and detect lawyer defalcations. Why has this failure to protect ordinary clients occurred? The answer appears to be, in part, that state courts have paid insufficient attention

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to these issues or deferred to the state bars. The state bars have sometimes opposed these measures or implemented them in ways that inadequately protect the public. States with mandatory state bars—which are sometimes deeply involved in the rulemaking process—appear more likely to adopt fewer client protection measures. The Article suggests that if state courts will not act to better protect ordinary clients, then state legislatures can and should do so.

TABLE OF CONTENTS

Introduction	448
I. The Bar’s Resistance to Written Fee Agreement Requirements	454
II. The Limits of Fee Dispute Arbitration Programs	458
A. A Brief History of Fee Dispute Arbitration	459
B. Current Fee Arbitration Programs	462
III. The Inadequacy of Measures to Address Lawyer Theft	470
A. Client Protection Funds	472
B. Insurance Payee Notification	477
C. Random Audits of Trust Accounts	480
IV. What Happened to Client Protection?	483
Conclusion	496

INTRODUCTION

Individual clients are often vulnerable. When they hire a lawyer, it may be the first and only time they do so. These clients are frequently seeking help with problems that deeply affect their lives, such as criminal, family, or personal injury matters. Some end up in disputes with their lawyers over money. Every year, thousands of clients are victimized by overreaching lawyers who overcharge or refuse to return unearned fees.¹ Some actually steal client money. Of course, there are

1. The precise number is not known. However, from 2017 through 2019, thirteen jurisdictions reported that their client protection funds paid an average of 1,279 claims annually for unearned fees. See AM. BAR ASS’N CTR. FOR PRO. RESP., SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019, at 8 (2020) [hereinafter SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019], https://www.americanbar.org/-content/dam/aba/administrative/professional_responsibility/2017-2019-cp-survey.pdf [<https://perma.cc/7WK9-V2M5>]. This figure does not include claims for unearned fees in the other thirty-eight jurisdictions. Nor does it include unearned fees

rules of professional conduct governing the ways in which lawyers are required to handle client money.² The penalties when lawyers violate those rules can be severe.³ Nevertheless, problems with fee disputes and overreaching lawyers continue to occur. Forty years ago, the American Bar Association (ABA) began to recommend that states adopt additional “client protection measures” to better protect clients’ financial interests and provide recourse for clients who were victimized by their lawyers.⁴ Unfortunately, most jurisdictions have declined to adopt many of those measures or did so incompletely.⁵ The reasons why this has happened and the consequences for ordinary clients have been largely unexplored.⁶

The failure to adequately protect these clients occurs from the outset of the lawyer-client relationship. Most jurisdictions do not require lawyers to put their fee arrangements (except contingent fees) in writing.⁷ Yet the absence of written agreements makes fee disputes more likely, and many individual clients cannot afford to litigate the disputes in court. Consequently, clients may be unable to obtain the

that were eventually repaid by lawyers or instances of fee overcharging that were subsequently resolved.

2. See MODEL RULES OF PRO. CONDUCT r. 1.15 (AM. BAR. ASS’N 2020).

3. See, e.g., *In re Wilson*, 409 A.2d 1153, 1158 (N.J. 1979) (stating that in misappropriation cases, “mitigating factors will rarely override the requirement of disbarment”); CONNECTICUT PRACTICE BOOK § 2-47A (2021) (providing that knowing misappropriation of client’s funds shall result in disbarment for a minimum of twelve years).

4. The ABA identifies several measures aimed at protecting clients’ financial interests as “client protection measures” including, inter alia, mandatory fee arbitration, trust account overdraft notification, insurance payee notification, random audits of trust accounts, and client protection funds. See *Client Protection Information—Resources by Topic*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonclientprotection/clientprotectioninformation. The ABA also describes most of these measures and written fee agreements as “loss prevention” rules. SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42–49. In this Article, the term “client protection measures” is used to refer to all of these measures.

5. AM. BAR ASS’N, STATE BY STATE ADOPTION OF ABA CLIENT PROTECTION PROGRAMS 1–3 (2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_by_state_cp_programs.pdf.

6. The exception is articles that discuss the failure to require written fee agreements. See Lawrence A. Dubin, *Client Beware: The Need for a Mandatory Written Fee Agreement Rule*, 51 OKLA. L. REV. 93, 95–96 (1998); Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 403–05 (2013).

7. See *infra* note 48 and accompanying text.

return of unearned fees or feel forced to pay fees they do not owe. While most jurisdictions offer fee arbitration when disputes arise, the vast majority do not follow the ABA's *Model Rules for Fee Arbitration* recommendation, which would require lawyers in fee disputes to participate in arbitration.⁸ Many jurisdictions have also failed to implement certain other ABA-recommended client protection measures—such as the *Model Rules for Insurance Payee Notification* and the *Model Rule for Random Audit of Lawyer Trust Accounts*—that would help deter lawyer theft of client money or facilitate detection.⁹ And even though all states and the District of Columbia have established client protection funds to reimburse clients for unearned fees or stolen money that is otherwise unrecoverable, many do not even attempt to fully compensate clients, as the ABA recommends.¹⁰

To be clear: the focus here is on client protection measures that help protect ordinary individuals. Large corporate clients do not, for the most part, need this protection. They are sophisticated consumers of legal services with significant clout.¹¹ Large corporate clients will almost certainly require a written engagement agreement in the unlikely event that their law firm does not offer to provide one.¹² These clients have the financial resources to sue their lawyers over legal fees. If their lawyer steals or overcharges, the lawyer's law firm will often make the corporate client whole.¹³ It is individual clients—typically less

8. See *infra* note 84 and accompanying text.

9. See *infra* notes 184, 199 and accompanying text. The only significant client protection measure most states have adopted is trust account overdraft notification. See *infra* notes 137–38 and accompanying text.

10. See MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION pmb1, r. 3(a) (AM. BAR ASS'N 1989); AM. BAR ASS'N, DIRECTORY OF LAWYERS' FUNDS FOR CLIENT PROTECTION (2020) [hereinafter DIRECTORY OF LAWYERS' FUNDS FOR CLIENT PROTECTION], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/cp_dir_fund.pdf [<https://perma.cc/S9GG-TU7X>]; *infra* notes 165, 168–69 and accompanying text.

11. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 816–17, 872, 879–80 (1990).

12. Corporate clients often wish to insert their own terms into the agreements governing lawyer representation. See Max Welsh, *Lawyers Should Negotiate Outside Counsel Guidelines*, LAW PRAC. TODAY (Sept. 14, 2017), <https://www.lawpracticetoday.org/article/lawyers-negotiate-outside-counsel-guidelines> [<https://perma.cc/RLY4-QH6D>].

13. See, e.g., Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 713

sophisticated users of legal services—who can least afford to lose their money to lawyers and who most need these client protection measures.¹⁴

The organized bar bears some—but by no means exclusive—responsibility for the failure to adequately protect these clients. On the national level, the ABA plays a very important role in lawyer regulation through its development of model rules. These include the *Model Rules of Professional Conduct* and the model rules for client protection described above. But the ABA's model rules must be approved by the 600-member House of Delegates, and they often reflect compromises to accommodate lawyers' interests.¹⁵ Once the ABA approves model rules, each jurisdiction typically considers whether to adopt the rules in its own state.¹⁶ In the case of the ABA's model rules concerning

(2011) (noting that a firm reimbursed \$500,000 to ten corporate clients upon discovery of a partner's fraudulent billing practices); Gina Passarella, *Ex-Drinker Biddle Staff Attorney Suspended for Overbilling*, LEGAL INTELLIGENCER (May 28, 2015), <https://www.law.com/thelegalintelligencer/almID/1202727597064&back=law> (reporting that Drinker Biddle refunded a corporate client for all time billed by the lawyer responsible for overbilling); see also Christine Simmons, *Charges Against Barclay Damon Partner Stand out Among Lawyer Theft Cases*, N.Y. L.J. (June 20, 2018, 5:58 PM), <https://www.law.com/newyorklawjournal/2018/06/20/charges-against-barclay-damon-partner-stand-out-among-lawyer-theft-cases> [<https://perma.cc/HS4M-D3YV>] (explaining that client protection funds see fewer claims made against large firms because large firms can reimburse clients on their own).

14. Two recent examples of the victimization of individual clients involve prominent lawyers who allegedly stole millions from their personal injury clients. See Holly Barker, *State Bar Claims Thomas Girardi Intentionally Stole from Clients*, BLOOMBERG L. (Mar. 30, 2021, 9:41 PM), <https://news.bloomberglaw.com/us-law-week/state-bar-claims-thomas-girardi-intentionally-stole-from-clients> [<https://perma.cc/JN4H-3LGE>] (describing alleged failure to pay \$2 million to families of victims of airplane crash); Michael Finnegan, *Michael Avenatti Accused at Fraud Trial of Stealing from Client to Buy Private Jet*, L.A. TIMES (July 21, 2021, 6:35 PM), <https://www.latimes.com/california/story/2021-07-21/michael-avenatti-embezzlement-trial-opens> (describing, inter alia, theft of \$4 million from paraplegic, mentally disabled client).

15. See, e.g., Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 720–21 (1989) (describing the American College of Trial Lawyers's successful efforts to effect changes to Model Rule 1.13, despite the ABA Corporations Section's strong interest in keeping the original text); see also Sam Skolnik, *ABA Passes Access to Justice Measure After Opposition Fades*, BLOOMBERG L. (Feb. 17, 2020, 6:37 PM), <https://news.bloomberglaw.com/business-and-practice/aba-passes-access-to-justice-measure-after-opposition-fades?context=article-related> [<https://perma.cc/B3W4-R3ZT>].

16. Every state but California has adopted some variation of the *Model Rules for Professional Conduct*. See *Alphabetical List of Jurisdictions Adopting the Model Rules*, AM. BAR

client protection, however, those rules, if adopted by jurisdictions at all, have often been adopted with variations that insufficiently protect clients' interests.¹⁷

One reason this has occurred is because in many jurisdictions, the state bar organizations—and not the state supreme courts—take the lead in lawyer regulation. Courts are busy with their main work (deciding cases), and lawyer regulation is frequently not at the top of their agendas.¹⁸ The supreme courts also have many other responsibilities including oversight of the state judicial system, budget preparation, lobbying the legislature for appropriations, and court reform.¹⁹ They often rely on bar organizations to propose ideas, study issues, hold hearings, make recommendations, and draft language to make changes in lawyer regulation. Not surprisingly, the input from bar organizations tends to reflect lawyers' concerns. For various reasons—including judges' tendency to identify with lawyers' interests—the courts often adopt the state bars' recommendations.²⁰

State bars vary in their role in lawyer regulation and their relationships to their states' supreme courts. Nineteen states have voluntary state bars, which lawyers can choose to join.²¹ Thirty-one

Ass'N, https://www.americanbar.org/groups/professional_responsibility/publication/s/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.

17. See, e.g., *infra* notes 84, 165–67 and accompanying text.

18. See BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 137 (2011).

19. See Steven W. Hays & James W. Douglas, *Judicial Administration: Modernizing the Third Branch*, in *HANDBOOK OF PUBLIC ADMINISTRATION* 1017 (Jack Rabin et al. eds, 3d ed. 2007) (explaining the various responsibilities of chief justices); Steven W. Hays, *The Traditional Managers: Judges and Court Clerks*, in *HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT* 221, 224 (Steven W. Hays & Cole Blease Graham, Jr. eds., 1993) (listing the many non-judicial tasks chief judges are required to handle); Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1543–46 (2006) (detailing how state supreme courts have been responsible for some court reform).

20. See BARTON, *supra* note 18, at 1, 37 (explaining judges' tendency to subconsciously be biased towards lawyers' interests); Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 981 (2020) (same). Of course, state bar organizations are not the only bar associations that recommend changes in lawyer regulation to the courts, but due to their size, they are often the most influential.

21. Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf [<https://perma.cc/X2X4-C3S8>]. In some states, less than half of the lawyers with offices in the jurisdiction belong to the voluntary state bar. *Id.* at 8–9.

states and the District of Columbia have mandatory bars, to which all lawyers in the jurisdiction must pay dues and belong.²² Mandatory bars are often established as state agencies or as instrumentalities of the judiciary.²³ These bars typically claim that public protection is one of their goals and handle some regulatory functions, such as admission or discipline.²⁴ In most other respects, they perform the same functions as voluntary state bars.²⁵ All state bars seek to protect the legal profession's image and to advance its members' interests. This can sometimes be seen in the positions the state bars take with respect to client protection issues.

This Article looks at the current state of client protection measures in the United States and explores why many jurisdictions fail to adequately protect individual clients (and their money). It focuses primarily on the ABA's recommendations concerning client protection measures because the ABA has devoted significant attention to these issues and the states often follow the ABA's lead.

Part I of the Article describes the ABA's refusal to require in its *Model Rules of Professional Conduct* that most fee agreements be in writing, even though a writing requirement would reduce subsequent fee disagreements and opportunities for lawyer overreaching. Most states have followed the ABA's approach. Yet when the ABA adopted model rules for additional client protection measures, states mostly declined to implement those measures or failed to do so in ways that would truly protect ordinary clients. As explained in Part II, even though virtually all jurisdictions have instituted lawyer-client fee arbitration programs, lawyer participation in most states is voluntary, notwithstanding the ABA's recommendation that lawyers be required to participate.

22. See *id.* at 2. In a few of the jurisdictions with mandatory state bars, there are also voluntary state bars. See, e.g., *About NCBA*, N.C. BAR ASS'N, <https://www.ncbar.org/about> [<https://perma.cc/436K-PPMG>].

23. See, e.g., OR. REV. STAT. § 9.010 (2) (2020); *History of the Bar*, WASH. STATE BAR ASS'N (Jan. 4, 2021), <https://www.wsba.org/about-wsba/who-we-are/history-of-the-wsba> [<https://perma.cc/BPW9-LPFS>].

24. See Levin, *supra* note 21, at 5–6; *Mission, Vision & Core Values*, STATE BAR OF ARIZ., <https://www.azbar.org/about-us/mission-vision-core-values> [<https://perma.cc/ALR7-693E>] (“The State Bar of Arizona exists to serve and protect the public with respect to the provision of legal services and access to justice.”).

25. These include, *inter alia*, efforts to educate lawyers about changes in the law, support them in their work, and socialize them into the norms of the profession. Levin, *supra* note 21, at 2–3. The exception is California, where in 2017, the legislature separated the State Bar of California's regulatory functions from its other bar functions and created a voluntary state bar to perform those other functions. *Id.* at 17–18.

Without such a requirement, many clients have no meaningful recourse when fee disputes arise. Part III discusses the failure by many jurisdictions to follow the ABA's recommendation that they sufficiently finance their client protection funds so that they can fully compensate individuals who have been victimized by overreaching lawyers. At the same time, most states have refused to adopt other ABA-recommended client protection measures that would help deter lawyer theft, including insurance payee notification and random trust account audits. Part IV considers why many jurisdictions have not adopted adequate client protection measures. As noted, the answer is sometimes due, in part, to resistance by the state bars and acquiescence (or inattention) by the state courts. Somewhat surprisingly, notwithstanding mandatory state bars' claimed commitment to public protection, several jurisdictions with mandatory bars have adopted fewer client protection measures than jurisdictions with voluntary state bars. The Conclusion discusses the need for closer study to better understand why many jurisdictions fail to adopt adequate client protection measures. It also suggests that the states' highest courts need to become more involved in evaluating and strengthening the states' client protection measures. If courts are unable or unwilling to take needed action, state legislatures can and should step in to do so.

I. THE BAR'S RESISTANCE TO WRITTEN FEE AGREEMENT REQUIREMENTS

The disputes that can arise when there is no written fee agreement sometimes reveal profound disagreements between clients and their lawyers. Yet even by 1969, when the ABA adopted the *Model Code of Professional Responsibility*, the Disciplinary Rules did not mention written fee agreements.²⁶ It did, however, state in an Ethical Consideration that “[i]t is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent.”²⁷ The singling out of contingent fees may have been due to concerns about potential client confusion relating to the calculation of contingent fees. But it seemingly also reflected the organized bar's long-standing disdain for contingent fees and for lawyers who worked on that basis.²⁸

26. See MODEL CODE OF PRO. RESP. DR 2-106 (AM. BAR ASS'N 1969).

27. *Id.* at EC 2-19.

28. The elite bar associated contingent fees with ethnic lawyers, unprofessional conduct, and “ambulance chasers.” See, e.g., JEROLD AUERBACH, UNEQUAL JUSTICE:

In the early 1980s, when the ABA's Commission on Evaluation of Professional Standards, chaired by Robert Kutak ("the Kutak Commission"), drafted new *Model Rules of Professional Conduct*, its proposed Model Rule 1.5 required written fee agreements when the lawyer had not regularly represented the client.²⁹ The Kutak Commission noted "universal acknowledgement" that written fee agreements were a good practice and that fee disputes were a "major problem" in lawyer-client relations that written agreements could help address.³⁰ Nevertheless, at the ABA's 1982 Annual Meeting of its House of Delegates, the State Bar of Michigan proposed an amendment to make written agreements a "preference," with proponents of the amendment voicing "concern that imposing a writing requirement would result in disciplinary action against a lawyer who failed to have a written agreement."³¹ Proponents of the amendment also noted that a written fee agreement "would not always be needed or desirable, and, also, that requiring a writing departed significantly from current practice."³² Consequently, Model Rule 1.5(b), as adopted, requires that "[t]he scope of the representation and the basis or rate of the fee . . . shall be communicated to the client, preferably in writing . . . except when the lawyer will charge a regularly represented client on the same basis or rate."³³ Model Rule 1.5(c) provided, however, that contingent fee arrangements must be in writing.³⁴

In 2001, the ABA's Ethics 2000 Commission, which was tasked with reviewing the *Model Rules for Professional Conduct*,³⁵ again recommended a written fee agreement requirement "except when the lawyer will

LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 44–46 (1976) (describing class and ethnic biases associated with contingent fees); *see also* MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 246 (1988) (describing how the legal elite focused their reform efforts on nonelite lawyering practices, such as contingent fees).

29. AM. BAR ASS'N CTR. FOR PRO. RESP., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 78 (2006) [hereinafter A LEGISLATIVE HISTORY].

30. *See* AM. BAR ASS'N COMM'N ON EVALUATION OF PRO. STANDARDS, REPORT TO THE HOUSE OF DELEGATES 7 (1982).

31. A LEGISLATIVE HISTORY, *supra* note 29, at 79.

32. *Id.*

33. MODEL RULES OF PRO. CONDUCT r. 1.5(b) (AM. BAR ASS'N 1983).

34. *Id.* at r. 1.5(c).

35. The Ethics 2000 Commission was formed in 1997 and submitted its report to the House of Delegates at the August 2001 Annual Meeting. *Ethics 2000 Commission*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission [<https://perma.cc/JR5C-VQ3X>].

charge a regularly represented client on the same basis or rate” or when the total cost to the client would be \$500 or less.³⁶ It also recommended language stating that “[a]ny changes in the basis or rate of the fee or expenses shall also be communicated in writing.”³⁷ The Ethics 2000 Commission explained that “[f]ew issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer.”³⁸ It further noted that “[t]he Commission believes that the time has come to minimize misunderstandings by requiring the notice to be in writing”³⁹ Nevertheless, the Ethics 2000 proposal met resistance in the ABA House of Delegates, which voted to restore the “preferably in writing” language to the amended Model Rule 1.5 it adopted in 2002.⁴⁰

In some respects, this bar opposition is surprising. Written fee agreements benefit both clients and lawyers because they help confirm that there is mutual understanding about fees and thereby reduce disputes between the parties. Indeed, bar journals routinely advise lawyers to use written fee agreements.⁴¹ Lawyer malpractice insurers typically ask lawyers in their insurance applications whether they use written fee agreements.⁴² So why did the ABA House of Delegates twice oppose a requirement that fee agreements be in writing? One possible explanation is that no one, including lawyers, likes to be told what they must do. But this is not entirely convincing, because the *Model Rules of Professional Conduct* impose other affirmative obligations on lawyers

36. A LEGISLATIVE HISTORY, *supra* note 29, at 88.

37. *Id.*

38. *Id.* at 91.

39. *Id.*

40. *Id.* at 93. House of Delegates member John Bouma, a prominent Arizona attorney and former president of the State Bar of Arizona, proposed to delete the writing requirement, and the House of Delegates adopted that amendment. *Id.*

41. See, e.g., Jill S. Chanen, *It's Not Just About Money: Keeping Fee Disputes to a Minimum Can Be Key to Reducing Risks of Malpractice Claims and Disciplinary Complaints*, A.B.A. J., May 2004, at 44, 47; Dawn M. Evans, *Practice Tips for Solo and Small-Firm Lawyers*, 88 MICH. B. J. 56, 57–58 (2009); Coyt R. Johnston & Robert L. Tobey, *The “Best of” Litigation Update 2020: Chapter 11: Legal Malpractice*, 50 ADVOC. 8 (2010); Edward Poll, *Fee “Write-Down” Could save You Headaches—and Dollars*, MASS. LAWS. WKLY. (Oct. 3, 2012), <https://masslawyersweekly.com/2012/10/03/fee-write-down-could-save-you-headaches-and-dollars>.

42. See Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 569–70 (2016).

when they deal with client money.⁴³ The more likely answer is the one offered by the State Bar of Michigan: lawyers were concerned that a writing requirement would expose them to disciplinary sanctions if they forget to use one.⁴⁴

Notwithstanding the ABA's rejection of a requirement in Model Rule 1.5 that most fee agreements be in writing, fourteen jurisdictions now impose that requirement.⁴⁵ Several of them follow the Ethics 2000 Commission's recommendation and only impose a writing requirement when the fee exceeds a low dollar amount.⁴⁶ State bar associations in some of these jurisdictions actively opposed efforts to impose these writing requirements.⁴⁷

43. One such obligation concerns the requirement to place client money in a trust account, including advance fees. *See* MODEL RULES OF PRO. CONDUCT r. 1.15(a), (c) (AM. BAR ASS'N 2002).

44. *See supra* note 31 and accompanying text. Stephen Gillers suggests a third possible explanation, which is that a lack of clarity about fees may benefit lawyers, especially with individual clients who are unlikely to have the resources to go to court and fight over fees. *See* Gillers, *supra* note 6, at 403–04. It seems unlikely, however, that the House of Delegates members were quite so calculating.

45. These jurisdictions are Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Hawaii, Massachusetts, Montana, New Jersey, New York, Pennsylvania, West Virginia, and Wisconsin. AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5: FEES 1–16, 24–26, 29–30, 32–35, 40–41, 50–52 (2021) [hereinafter VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5: FEES], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-5.pdf [https://perma.cc/6J5R-AKDE]; CAL. BUS. & PROF. CODE § 6148 (West 2021).

46. The thresholds range from \$250 to \$3,000. *See, e.g.*, HAW. RULES OF PRO. RESP. r. 1.5 (b) (\$250); N.Y. COMP. CODES R. & REGS. tit. 22, § 1215.2 (a) (\$3,000); VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5: FEES, *supra* note 45, at 3, 14, 24, 30, 51.

47. For example, in 1983, a New Jersey Supreme Court appointed task force recommended that New Jersey follow the Kutak Commission's earlier draft of the Model Rules, requiring that fee agreements be in writing. *Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct*, N.J. L.J., July 28, 1983, at 1. The voluntary New Jersey State Bar Association subsequently argued (unsuccessfully) to the supreme court that the court should adopt the ABA's Model Rule 1.5(b) with its "preferably in writing" language, claiming that a writing requirement "would impose onerous burdens on lawyers." Letter from New Jersey State Bar Ass'n to the New Jersey Sup. Ct. 4 (Nov. 29, 1983) (on file with author). Likewise, when the Wisconsin Supreme Court adopted a broad written fee agreement requirement, it was propounded by Daniel W. Hildebrand, who served as Wisconsin's Ethics 2000 Committee chair, but opposed by the State Bar of Wisconsin. *See* David Ziemer, *Wisconsin Supreme Court Tentatively Mandates Written Fee Agreements*, WIS. L.J., Mar. 8, 2006; Daniel W. Hildebrand, *Ethics 2000: Understanding Proposed Changes to Professional*

More than thirty-five jurisdictions follow Model Rule 1.5(b) and do not require written fee agreements for most fee arrangements.⁴⁸ A substantial minority of lawyers in some of these states do not use written agreements. Surveys of lawyers in Iowa and Oklahoma indicated that at least seventeen percent did not routinely put their fee agreements in writing.⁴⁹ When fee arrangements are not reduced to writing, individual clients are at a disadvantage. It is harder for clients to secure the return of unearned fees and it is easier for lawyers to try overcharge their clients.⁵⁰ When fee disputes arise, individual clients have limited options.

II. THE LIMITS OF FEE DISPUTE ARBITRATION PROGRAMS

Fee disputes between lawyers and clients are not uncommon.⁵¹ They occur for many reasons including misunderstandings about how the

Conduct Rules, WIS. LAW. (Nov. 1, 2004), <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=77&Issue=11&ArticleID=668> [<https://perma.cc/WN23-E8MA>]; see also Dubin, *supra* note 6, at 99 (describing opposition to a writing requirement by the State Bar of Michigan and its members). In Hawaii, however, the mandatory Hawaii State Bar Association took no position on the issue. See E-mail from Iris M. Ito, Assistant Exec. Dir., Hawaii State Bar Ass'n, to Adam Mackie, Reference Libr., Univ. of Connecticut L. Libr. (May 10, 2021, 10:09 EDT) (on file with author).

48. VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5: FEES, *supra* note 45.

49. See, e.g., IOWA STATE BAR ASS'N, 2015 SALARY & ECONOMIC SURVEY 70–71 (2015), https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/reports/2015_economic_survey.pdf [<https://perma.cc/G9X9-M7XC>]; OKLA. BAR ASS'N, MEMBERSHIP SURVEY 12 (2013), <http://docplayer.net/10571183-Oklahoma-bar-association.html>.

50. For some examples of lawyer overreaching where there was no written fee agreement, see *Iowa Sup. Ct. Atty. Disciplinary Bd. v. Vandel*, 889 N.W.2d 659, 667–68 (Iowa 2017) (demanding an additional \$10,000 from her client three days before trial); *Joy v. Ky. Bar Ass'n*, 614 S.W.3d 496, 497 (Ky. 2021) (attempting to charge unreasonable hourly fee after being discharged); *In re Delorme*, 795 N.W.2d 293, 293–94 (N.D. 2011) (per curiam) (orally agreeing to rate of \$125 per hour but later charging \$175 per hour and \$210 per hour); *Okla. Bar Ass'n v. Burton*, 482 P.3d 739, 752–53 (Okla. 2021) (overbilling client for work at an unreasonable hourly rate and refusing to refund money owed); *McDonnell Dyer P.L.C. v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386, *1, *7 (Ct. App. Tenn. Apr. 20, 2001) (charging \$120,000 when reasonable fees for the work performed was roughly half that amount).

51. It is hard to determine precisely how often fee disputes arise. See Alan S. Rau, *Resolving Disputes over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2005–06 (1993). Disciplinary authorities report that they are called upon by clients to become involved in fee disputes “frequently.” See, e.g., Christina Pazzanese, *SJC to Consider Mandatory Fee Arbitration*, MASS. LAWS. WKLY. (Feb. 17, 2011), <https://masslawyersweek>

lawyer's fees and expenses would be calculated or what the work would ultimately cost, a failure to return unearned fees, other lawyer overreaching, and client unhappiness with the results.⁵² When fee disagreements arise, lawyers will sometimes "eat" their fees,⁵³ clients will sometimes pay (unhappily), or the parties may reach a compromise. When informal dispute resolution does not occur, lawyers may use collection agencies,⁵⁴ clients may file a discipline complaint, or a lawsuit may ensue. Fee arbitration is often a better alternative for both parties for the reasons described below.

A. *A Brief History of Fee Dispute Arbitration*

The legal profession has long counseled lawyers against suing clients for fees.⁵⁵ These lawsuits make both the lawyer and the profession look bad. The ABA's 1908 *Canons of Professional Ethics* urged that "[c]ontroversies with clients concerning compensation are to be avoided" and that lawsuits against clients "should be resorted to only to prevent injustice, imposition or fraud."⁵⁶ The 1969 ABA *Model Rules of Professional*

ly.com/2011/02/17/sjc-to-consider-mandatory-fee-arbitration. One survey of Texas lawyers revealed that thirty-one percent reported they had five or more fee disputes over the preceding five years. See Rau, *supra*, at 2007.

52. For some additional reasons why fee disputes can occur, see Rau, *supra* note 50, at 2005–06.

53. Surveys of lawyers in eight jurisdictions in 2005–2006 revealed that a significant percentage of lawyers reported that about nine to ten percent of their billed fees are uncollectible. See Paul F. Teich, *Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence*, 19 TEX. WESLEYAN L. REV. 837, 882–84 (2013); see also OKLA. BAR ASS'N, *supra* note 49, at 17 (reporting that more than thirty-eight percent of surveyed Oklahoma lawyers replied that their firm failed to collect ten percent or more of their fees); Olabisi O. Whitney & Rick DeBruhl, *Attorney Survey: Arizona Lawyers Report on Economics of Practice*, ARIZ. ATT'Y, Sept. 2016, at 22 (reporting that thirty percent of lawyers surveyed failed to collect ten percent or more of their fees); STATE BAR OF MICH., *ECONOMICS OF LAW PRACTICE IN MICHIGAN* 21 (2020), <https://www.michbar.org/file/pmrc/articles/0000156.pdf> [<https://perma.cc/FD59-AKYN>] (reporting that almost twenty-four percent of responding lawyers indicated that ten percent or more of their fees were uncollectible).

54. See IOWA STATE BAR ASS'N, *supra* note 49, at 79; see also Teich, *supra* note 53, at 880–81.

55. In 1860, George Sharswood recommended against suing clients for fees except in extraordinary circumstances. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 95 (2d ed. 1860); see also Teich, *supra* note 53, at 885.

56. See COMM. ON CODE OF PROF. ETHICS, AM. BAR ASS'N *CANONS OF PRO. ETHICS* 14 (1908).

Responsibility echoed this view.⁵⁷ The conventional wisdom among lawyers also holds that lawsuits for fees will provoke clients to counterclaim for malpractice or file a disciplinary complaint in response.⁵⁸

In the late 1920s, the organized bar began to institute voluntary fee arbitration programs.⁵⁹ One important reason was to avoid “the public airing of fee disputes.”⁶⁰ By the 1960s, several local bar associations offered voluntary fee dispute resolution to lawyers and clients.⁶¹ One commentator observed at that time that the profession would benefit from arbitration because it “would provide a fair and equitable resolution of the dispute” without publicity, the attorney would benefit “because those best qualified to evaluate his services would pass upon his charges,” and the client would benefit from being afforded a speedy, cost-free remedy.⁶² The outcomes of fee dispute resolution during this period generally favored lawyers.⁶³

Throughout this time, disciplinary authorities viewed most attorney-client fee disputes as being outside their jurisdiction.⁶⁴ In 1970, when the ABA’s Special Committee on Evaluation of Disciplinary Enforcement issued its report, it noted that the failure to address these disputes affected the public’s perception of the bar and recommended procedures to deal with ordinary fee disputes (i.e., those that did not involve “overreaching”).⁶⁵ It suggested that procedures for arbitrating fee disputes be handled outside the bar associations to avoid the

57. See MODEL CODE OF PRO. RESP. EC 2-23 (AM. BAR ASS’N 1969) (stating that “[a] lawyer should be zealous in his efforts to avoid controversies over fees with clients and . . . should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client”).

58. See, e.g., Stephen M. Blumberg, *Risk Management: Preventing Malpractice Claims*, LAW PRAC., Sept. 1987, at 54; Emily Eichenhorn, *To Sue or Not to Sue: Is the Pursuit of Unpaid Fees Worth the Risk of Litigation?*, 66 OR. STATE BAR BULL. 29 (2006); Glenn Machado, *Money Matters: Make Sure You’re Handling Your Clients’ Dollars with Sense*, NEV. LAW., Oct. 2014, at 20.

59. In 1928, the Los Angeles County Bar Association became the first bar association to establish a Committee on Arbitration. George E. Bodle, *The Arbitration of Fee Disputes Between Attorney and Clients*, 38 L.A. BAR BULL. 265, 265 (1963).

60. *Id.*

61. See AM. BAR ASS’N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF’T, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 189 (1970) [hereinafter SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF’T].

62. Bodle, *supra* note 59, at 265.

63. *Id.*

64. SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF’T, *supra* note 61, at 186, 188.

65. See *id.* at 1, 186, 188–89.

conclusion that “a group of attorneys is protecting one of its own.”⁶⁶ In 1974, another ABA committee issued a report devoted to fee dispute resolution and noted the increasing problem that lawyers would not voluntarily participate in the fee arbitration process, but the committee did not recommend that lawyers be required to do so.⁶⁷

Nevertheless, that same year, Alaska became the first state to adopt a statewide fee arbitration program in which lawyers—but not clients—were required to participate (“mandatory fee arbitration”).⁶⁸ A few other states subsequently adopted statewide voluntary or mandatory fee arbitration programs.⁶⁹ The 1983 ABA *Model Rules of Professional Conduct* encouraged lawyers to participate in fee dispute resolution even when it was not mandatory.⁷⁰ In 1992, the ABA’s Commission on Evaluation of Disciplinary Enforcement (“the McKay Commission”), which had been formed to review state lawyer discipline enforcement throughout the country, recommended fee arbitration as one of the procedures that could be used in lieu of discipline for minor misconduct.⁷¹

In 1995, the ABA adopted *Model Rules for Fee Arbitration* based on the experience in six states that had instituted mandatory fee arbitration.⁷² These model rules provide that the state’s highest court shall appoint a Fee Arbitration Commission to administer the program and that one-

66. *Id.* at 189.

67. Rau, *supra* note 51, at 2021. It also predicted that “there was little likelihood” that mandatory arbitration would gain support. *Id.*

68. See OFF. OF ATT’Y ETHICS OF THE SUP. CT. OF N.J., 2019 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 43 (2020), <https://njcourts.gov/attorneys/assets/oe/2019oaeannualrpt.pdf> [<https://perma.cc/LWX2-HV5A>]; AM. BAR ASS’N CTR. FOR PRO. RESP., 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART II–PART 1 (2007) [hereinafter 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART II–PART 1], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/Fee_Arb_Chart_2_Part_1.pdf [<https://perma.cc/XQ6Y-TXB4>].

69. For example, Oregon began its voluntary fee arbitration program in 1976 and Maine and New Jersey adopted mandatory programs in 1978. See 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART II–PART 1, *supra* note 68.

70. See MODEL RULES OF PRO. CONDUCT r. 1.5 cmt. 9 (AM. BAR ASS’N 1983) (stating that if a voluntary fee arbitration or mediation procedure has been established for fee disputes “the lawyer should conscientiously consider submitting to it”).

71. LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, RECOMMENDATION 1, 48 (1992).

72. See MODEL RULES FOR FEE ARB. Preface (AM. BAR ASS’N 1995); *A History of the Client Protection Rules*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/history.

third of the commissioners shall be nonlawyers.⁷³ They further state that fee arbitration should be mandatory for lawyers if arbitration is commenced by the client.⁷⁴ Lawyers are required to notify the client of the availability of the fee arbitration program before or at the time that the lawyer commences litigation to recover fees.⁷⁵ If the client seeks fee arbitration within thirty days, the litigation will be stayed.⁷⁶ The rules also provide that disputes exceeding \$7,500 are to be decided by three panel arbitrators, including one nonlawyer.⁷⁷ Where the disputed amount is lower, the *Model Rules for Fee Arbitration* provide that there should be a single lawyer arbitrator.⁷⁸ Fee arbitration is confidential and is binding for all parties if they have agreed in writing to be bound by it.⁷⁹ Even if a party (usually the lawyer) has not agreed to be bound, the party will be bound if a trial de novo is not sought within thirty days after the decision is served.⁸⁰ Participation in fee arbitration does not preclude the client from filing a disciplinary complaint.⁸¹

B. Current Fee Arbitration Programs

Although there are fee arbitration programs in virtually every jurisdiction,⁸² not all jurisdictions have statewide programs. Contrary to the ABA's recommendation in its *Model Rules for Fee Arbitration*, most of these programs are administered by bar associations.⁸³ Only ten

73. MODEL RULES FOR FEE ARB. r. 2 (AM. BAR ASS'N 1995).

74. *Id.* at r. 1(3).

75. *Id.* at r. 1 cmt.

76. *Id.* at r. 1(7).

77. *Id.* at r. 3(2).

78. *Id.*

79. *Id.* at r. 1(4), 8(1).

80. *Id.* at r. 1(4).

81. *Id.* at r. 1 cmt.

82. Arkansas and North Carolina are the exceptions. See AM. BAR ASS'N, 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS (2016) [hereinafter 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/fee_arbitration_survey_2016.xlsx.

83. It appears that only Maine and a few other jurisdictions have fee arbitration programs that are entirely independent of their states' bar organizations. See, e.g., ME. BAR r. 7. Along with Maine, both Michigan and New Jersey house their fee arbitration programs within their disciplinary systems. See *id.*; MICH. CT. r. 9.130(A); *Office of Attorney Ethics*, N.J. CTS., <https://njcourts.gov/attorneys/oae.html> [<https://perma.cc/S5T-R576>]. In some areas of New York, the program is handled by voluntary bar associations, and in others it is administered by the Administrative Judge's Office. See N.Y. STATE ATT'Y-CLIENT FEE DISP. RESOL. PROGRAM, 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS 12–13 [hereinafter N.Y. 2019 ANNUAL REPORT

jurisdictions make arbitration mandatory for lawyers if the client seeks it.⁸⁴ In those jurisdictions, the requirement was imposed by statute or court rule.⁸⁵ Georgia does not make fee arbitration mandatory, but it places pressure on lawyers to arbitrate fee disputes by providing that if the lawyer refuses to arbitrate, the arbitration can still go forward, and “the award rendered will be considered as prima facie evidence of the fairness of the award in any action brought to enforce the award.”⁸⁶ Clients can be compelled to submit to fee arbitration in some jurisdictions if their lawyers included a fee arbitration clause with adequate disclosure in their engagement agreements.⁸⁷

TO THE ADMINISTRATIVE BOARD OF THE COURTS], <https://www.nycourts.gov/legacyPDFs/admin/feedispute/Annual-Report-2019.pdf> [<https://perma.cc/2JFH-FEX9>].

84. The jurisdictions are Alaska, California, District of Columbia, Maine, Montana, New Jersey, New York, Ohio, South Carolina, and Wyoming. See AM. BAR ASS’N, *supra* note 5. In addition, North Carolina requires lawyers to participate in mediation, but if no agreement can be reached, the client must go to court. See 27 N.C. ADMIN. CODE §§ 1D.0707–08 (2020); Harry B. Warren, *New Fee Dispute Resolution Rules: Good-Bye Nonbinding Arbitration*, N.C. STATE BAR J., Fall 2000, at 28, 29.

85. See 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART II–PART 1, *supra* note 68; 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 137.0 (2021).

86. The burden of proof shifts to the lawyer to prove otherwise. See GA. BAR r. 6-410, 6-417. Nevada makes arbitration mandatory for a lawyer if, during the preceding two years, the attorney has been the subject of three or more fee disputes within the Committee’s jurisdiction. STATE BAR OF NEV. DISP. ARB. COMM. RULES OF PROC. (IV)(B)(2), https://www.nvbar.org/wp-content/uploads/Fee-Dispute-Rules-of-Procedure_Nov-8-2017_FINAL.pdf [<https://perma.cc/FB74-UL7W>].

87. See, e.g., *Ober v. Mozingo*, No. D038616, 2002 WL 432544, at *3–4 (Cal. Ct. App. Mar. 19, 2002) (stating that, generally, an attorney can include mandatory arbitration clauses regarding fee disputes in initial retainer agreements); *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So. 3d 315, 319 (Fla. Ct. App. 2011) (holding that arbitration agreement in engagement agreement was not unconscionable or a violation of public policy); *Innovative Images, LLC v. Summerville*, 848 S.E.2d 75, 79–81 (Ga. 2020) (holding that the inclusion of the mandatory arbitration clause in engagement agreement did not rise to the level of unconscionability or significantly contravene public policy and was enforceable); *Hodges v. Reasonover*, 103 So. 3d 1069, 1077–78 (La. 2012) (stating that mandatory arbitration agreement regarding fee disputes are proper under Louisiana law, although a failure to make the proper disclosures around the waiver of rights could be grounds for voiding the agreement). In 2002, the ABA issued a Formal Opinion that concluded it was permissible to include in a retainer agreement a provision requiring a client to submit to binding arbitration of fee disputes but stated that the lawyer must explain the implications of binding arbitration to the extent necessary for the client to make an “informed decision” before signing the agreement. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 02-425 (2002).

Some jurisdictions require that the fee disputes exceed a minimum dollar amount to qualify for resolution through their fee arbitration programs.⁸⁸ As recommended by the ABA, most jurisdictions' fee arbitration programs provide for two lawyer arbitrators and one nonlawyer arbitrator to decide larger disputes.⁸⁹ The arbitration process is free or offered at a low cost to both parties.⁹⁰ Several jurisdictions also offer mediation of fee disputes.⁹¹

Why would a jurisdiction not require mandatory fee arbitration? After all, fee arbitration has advantages for both lawyers and clients because it is faster, cheaper, and more private than litigation.⁹² One answer appears to be that many bar organizations oppose it.⁹³ Some

88. See, e.g., *Fee Arbitration Program*, STATE BAR OF N.M., <https://www.sbnm.org/For-Public/I-Have-a-Dispute-with-My-Lawyer/Dispute-a-Lawyers-Fee> [<https://perma.cc/AW6G-BF9P>] (establishing a \$1,000 minimum in dispute for arbitration).

89. The Los Angeles County Bar Association is on the high end and will only provide three arbitrators if the dispute exceeds \$25,000. *Mandatory Fee Arbitration Approved Programs*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Approved-Programs> [<https://perma.cc/DJ5E-Z3WE>]. In most jurisdictions, the threshold amount for three arbitrators is substantially lower.

90. See, e.g., *Fee Dispute Resolution Program*, VA. STATE BAR, <https://www.vsb.org/site/public/fee-dispute-resolution-program> [<https://perma.cc/54LV-CTVG>] (stating that petitioner pays a one-time \$20 fee, and the other party pays no administrative fees).

91. See, e.g., *Attorney Fee Disputes*, ALASKA BAR ASS'N, <https://alaskabar.org/for-the-public/attorney-fee-disputes> [<https://perma.cc/YK4S-QGXS>]; ATT'Y/CLIENT ARB. Bd., D.C. BAR, *FEE ARBITRATION SERVICE RULES OF PROCEDURE 5* (2018), <https://www.dcbbar.org/getmedia/3ee82b36-fcca-4690-b734-7e510871e6cd/ACAB-Fee-Arbitration-Filing-Packet> [<https://perma.cc/7466-PZYA>]; *Fee Dispute Resolution Program*, OR. STATE BAR, <https://www.osbar.org/feedisputeresolution> [<https://perma.cc/SN3R-RVCY>].

92. See John Leubsdorf, *Against Lawyer Retaining Liens*, 72 *FORDHAM L. REV.* 849, 873 (2004). For discussion of some additional disadvantages of litigation, see Rau, *supra* note 51, at 2016–18.

93. See, e.g., *In re LiVolsi*, 428 A.2d 1268, 1272–73 (N.J. 1981) (rejecting New Jersey Bar Association's argument that mandatory fee arbitration was unconstitutional); Marilyn Lindgren Cohen, *Mandatory Fee Arbitration: Is It the Wave of the Future?*, OR. STATE BAR BULL., Dec. 1994, at 33, 35 (describing reasons why Oregon State Bar Board of Governors did not support mandatory arbitration for lawyers); Dara McLeod, *Virginia State Bar Panel Rejects Mandatory Fee Dispute Resolution*, VA. LAWS. WKLY., Dec. 6, 2004 (describing state bar task force's rejection of mandatory mediation); Pazzanese, *supra* note 51 (describing opposition to mandatory arbitration by Massachusetts bar organizations); Gary Spencer, *Matrimonial Rules Delayed for Changes; Presiding Justices to Weigh Criticisms*, N.Y. L.J., Oct. 28, 1993, at 8 (describing "uniform opposition among

lawyers believe that low-cost or free fee dispute arbitration programs make it too easy for clients to dispute their fees and to delay or avoid payment.⁹⁴ They argue that mandatory arbitration would cause lawyers to require most of their fees up front, resulting in fewer clients who could retain lawyers, or that it would force lawyers to write off more of their fees.⁹⁵ Lawyers have claimed—less persuasively—that they do not want to be deprived of a jury trial.⁹⁶ Lawyers also argue that mandatory fee arbitration would “creat[e] more reasons to be disciplined” because arbitrators would be considering the reasonableness of fees under the *Model Rules of Professional Conduct*.⁹⁷

Washington’s experience illustrates how lawyers can thwart efforts to adopt mandatory fee arbitration programs. The mandatory Washington State Bar Association (WSBA) first adopted a voluntary fee arbitration program in the mid-1970s.⁹⁸ In 1995, the WSBA and a Washington Supreme Court Task Force on Lawyer Discipline produced a joint report with recommendations including that Washington institute a mandatory fee arbitration program.⁹⁹ Regulators reported that “55% of the time the lawyer decline[d] to arbitrate fee disputes, leaving [clients] frustrated.”¹⁰⁰ In 1996, the WSBA’s Board of Governors approved, in concept, a proposal to implement such a fee program.¹⁰¹ A WSBA committee then developed draft rules to implement the new program and the *Washington State Bar News* reported these developments in August 1997. The Board of

bar groups” to proposed mandatory fee arbitration program in New York); David Ziemer, *WI Supreme Court Addresses Ethics, Fee Arbitration*, WIS. L.J., Dec. 25, 2002 (describing “strong opposition amongst the bar” to mandatory fee arbitration).

94. See, e.g., Stephen T. Carmick, Letter to the Editor, WASH. STATE BAR NEWS, July 1998, at 8, 9; Steven A. Hemmat, Letter to Editor, WASH. STATE BAR NEWS, July 1998, at 7, 8; Terry Lee, *It Ain’t Broke, so What Are We Fixing? An Argument Against Mandatory Fee Arbitration*, WASH. STATE BAR NEWS, May 1998, at 25.

95. See, e.g., Lee, *supra* note 94, at 25; Hemmat, *supra* note 94, at 7–8.

96. See, e.g., *In re LiVolsi*, 428 A.2d at 1273. It is unclear why a lawyer would prefer that a fee dispute be decided by a jury rather than a panel composed primarily of peers.

97. Lee, *supra* note 94, at 25.

98. *The Board’s Work*, WASH. STATE BAR NEWS, Aug-Sept. 1974, at 14.

99. Lindsay T. Thompson, *Refining Lawyer Discipline in Washington: A Multifaceted Approach*, WASH. STATE BAR NEWS, Aug. 1995, at 15, 17, 19.

100. See Barbara Harper & Randy Beitel, *Fee Arbitration to Be Mandatory when Requested by a Client*, WASH. STATE BAR NEWS, Aug. 1997, at 37.

101. Barrie Althoff & Randy Beitel, *Governors Restructure Attorney Discipline*, WASH. STATE BAR NEWS, Apr. 1996, at 35, 36; M. Wayne Blair & Marijean E. Moschetto, *Fee Arbitration: An Update on Revisions to the Proposal and an Argument in Support*, WASH. STATE BAR NEWS, May 1998, at 24, 24.

Governors anticipated taking final action the following month but invited interested parties to share their views with the WSBA.¹⁰² At the Board of Governors's September meeting, they faced a "firestorm," with lawyers complaining that the proposed rule was being "loaded in favor of consumers."¹⁰³ The Board of Governors decided to table discussion so that more WSBA members could weigh in.¹⁰⁴ The lawyers' responses that followed were largely negative.¹⁰⁵ Even after many revisions of the proposed rule, there was "overwhelming negative reaction from [WSBA] members."¹⁰⁶ In June 1998, the Board of Governors voted to "put a stake through the heart" of the proposal and to cease to consider mandatory fee arbitration.¹⁰⁷

The voluntary fee arbitration programs that are found in most jurisdictions today vary in certain notable respects. Some jurisdictions have statewide fee arbitration programs established by court rule and administered by the state bar.¹⁰⁸ In other jurisdictions these programs were established and are entirely run by the state bar.¹⁰⁹ Some states with large lawyer populations, such as Illinois, Pennsylvania, and Texas, have no statewide programs, and voluntary fee dispute resolution programs are only offered through local bar associations.¹¹⁰ A few

102. Harper & Beitel, *supra* note 100, at 39.

103. *Annual Meeting and September 11-12 Board of Governors Meeting*, WASH. STATE BAR NEWS, Oct. 1997, at 40. One governor stated that the rule was "too volatile in its current form." *Id.*

104. *Id.*

105. See Letters to the Editor, WASH. STATE BAR NEWS, Oct. 1997, at 8, 9-11; *The Board's Work*, WASH. STATE BAR NEWS, Nov. 1997, at 31.

106. Mary Fairhurst, *President's Report*, WASH. STATE BAR NEWS, Sept. 1998, at 13.

107. *Id.*; see also Sherrie Bennett, *The Board's Work*, WASH. STATE BAR NEWS, July 1998, at 33 (asserting that the Board had voted to "permanently cease" considering mandatory fee arbitration as a result of the increasing number of antiarbitration resolutions).

108. Kentucky, Nevada, and Utah are examples. See, e.g., 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART II-PART I, *supra* note 68.

109. See *id.*

110. See, e.g., *How to Submit a Request for Investigation*, ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF SUP. CT. OF ILL., https://web.archive.org/web/20181228152900/http://www.iardc.org/htr_otherinfoprov.html; *FAQs - Public*, PA. BAR ASS'N, <http://www.pabar.org/site/For-the-Public/FAQs-and-Legal-Links/FAQ> [<https://perma.cc/6S7M-W5LR>]; *Resolving Fee Disagreements*, STATE BAR OF TEX., <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemwithanAttorney/ResolvingFeeDisagreements/default.htm> [<https://perma.cc/8VE2-VMP4>].

programs do not use nonlawyer arbitrators or use only a single lawyer-arbitrator, even for higher value fee disputes.¹¹¹

How easy is it for clients to learn about the availability of fee arbitration when a fee dispute arises? It really depends. New York requires lawyers to advise clients of the availability of fee arbitration in writing when a fee dispute cannot otherwise be resolved.¹¹² Some other jurisdictions do a good job of informing the public about the availability of fee arbitration in places where clients are likely to look, such as lawyer disciplinary agency and state bar websites.¹¹³ But in other jurisdictions, it is more difficult for clients to learn about fee arbitration programs. The Mississippi Bar's website, for example, does not provide the public with information about how to contact its Dispute Resolution Committee.¹¹⁴ Even after searching the North Dakota State Bar Association's website, I was unable to determine that North Dakota had a fee dispute resolution program without writing to the state bar to confirm that it had one. The District of Columbia's Attorney/Client Arbitration Board reports that "public awareness about the program" is its biggest challenge.¹¹⁵

It can be even more challenging to learn about the work of most fee arbitration programs. (The term "black hole" comes to mind.) The ABA Committee on Client Protection periodically surveys states to

111. States that exclusively use lawyer-arbitrators include Colorado, Mississippi, Oregon, and Rhode Island. See 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS, *supra* note 82; 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS, CHART V-PART 1 (2007), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/Fee_Arb_Chart_5_Part_1.pdf [<https://perma.cc/YF7B-D9QD>].

112. See 22 N.Y. COMP. R. & REGS. tit. 22 § 137.6(a)(1) (2021).

113. See, e.g., *FAQ/Fee Arbitration*, STATE BAR OF GA., <https://www.gabar.org/about/thebar/faq/faqs.cfm?filter=Fee%20Arbitration> [<https://perma.cc/9MX3-7AZW>]; *Lawyer Fee Dispute Resolution*, LA. STATE BAR ASS'N, <https://www.lsb.org/Public/FeeDisputeResolution.aspx> [<https://perma.cc/F248-VZUB>]. A few of the websites provide helpful brochures that explain the process. See, e.g., VA. STATE BAR, FEE DISPUTE RESOLUTION PROGRAM (2020), <https://www.vsb.org/docs/fee-dispute-brochure.pdf> [<https://perma.cc/72K6-W5V2>].

114. The website refers the reader to the Committee rules, but those rules do not explain how to contact the Committee. See *The Program*, MISS. BAR, <https://www.msbar.org/ethics-discipline/fee-disputes/the-program> [<https://perma.cc/FK7E-NDBE>]. In addition, the Mississippi Bar's *Frequently Asked Questions* about problems with an attorney make no reference to fee disputes. See *Frequently Asked Questions*, MISS. BAR, <https://www.msbar.org/ethics-discipline/disciplinary-process/frequently-asked-questions> [<https://perma.cc/NU2P-U9JS>].

115. 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS, *supra* note 82.

obtain information about their programs, but its most recent survey only yielded responses from ten jurisdictions and one local bar association.¹¹⁶ Some information about fee arbitration programs can be gleaned if jurisdictions publish annual reports,¹¹⁷ but most jurisdictions do not do so.

The limited data reveal substantial differences in the extent to which fee arbitration is utilized. Comparisons are difficult because the jurisdictions report their data differently, but Georgia's program appears to be the most active, with approximately ninety-eight new disputes reported every month during the period 2019 to 2020 and about twenty-five hearings scheduled monthly.¹¹⁸ New Jersey received 796 matters in 2019¹¹⁹ while New York closed 770 matters.¹²⁰ Yet only forty-five fee arbitration disputes were filed in the District of Columbia in 2019, which was similar to the number of filings received in Maine.¹²¹ While the Los Angeles County Bar Association's mandatory fee

116. *Id.* One of the ten reporting jurisdictions was Arkansas, which had no fee dispute resolution program.

117. While a few jurisdictions provide detailed information about their arbitration programs, most only indicate the number of matters filed or disposed of during the year. *See, e.g.*, ALASKA BAR ASS'N, 2018 ANNUAL REPORT [hereinafter ALASKA 2018 ANNUAL REPORT], <https://alaskabar.org/wp-content/uploads/2018-annual-report-1.pdf> [<https://perma.cc/682Z-JNGH>]; ATT'Y/CLIENT ARB. BD. OF THE D.C. BAR, 2019–20 ANNUAL REPORT [hereinafter D.C. 2019–20 ANNUAL REPORT]; STATE BAR OF GA., BOG BOARD BOOK: 2020 ANNUAL MEETING 84–87 (2020) [hereinafter GA. BOG BOARD BOOK], https://www.gabar.org/committeesprogramssections/boardofgovernors/upload/AM20_Boardbook.pdf [<https://perma.cc/24EJ-3WFC>]; ME. BD. OF OVERSEERS OF THE BAR, 2018 ANNUAL REPORT 5 [hereinafter ME. 2018 ANNUAL REPORT], <https://www.mebaroverseers.org/about/pdf/2018%20Annual%20Report.pdf> [<https://perma.cc/J2U5-AZKX>]; STATE BAR OF NEV., ANNUAL REPORT 2020 [hereinafter NEV. ANNUAL REPORT 2020], <https://www.nvbar.org/wp-content/uploads/SBN-2020-Annual-Report.pdf> [<https://perma.cc/AU9D-K99X>]; N.Y. 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 83, at 15–16, 18–19; OFF. OF ATT'Y ETHICS OF THE SUP. CT. OF N.J., *supra* note 68, at 46. When contacted directly, some fee arbitration programs also provided annual statistics.

118. GA. BOG BOARD BOOK, *supra* note 117, at 85.

119. OFF. OF ATT'Y ETHICS OF SUP. CT. OF N.J., *supra* note 68, at 46. The description in this paragraph focuses on the period 2019 or 2019 to 2020, depending on how the jurisdiction reported data, because the number of disputes and dispositions in 2020 to 2021 were likely affected by COVID-19.

120. N.Y. 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 83, at 4. The fact that New York, with a larger lawyer population than New Jersey, has roughly the same number of cases may be explained, in part, by the fact that New York excludes criminal matters from its mandatory fee arbitration program. *See* 22 N.Y. COMP. R. & REGS. tit. 22 § 137.1(b)(2) (2021).

121. D.C. 2019–20 ANNUAL REPORT, *supra* note 117, at 4; ALASKA 2018 ANNUAL REPORT, *supra* note 117.

arbitration program receives 200 to 300 fee arbitration requests each year, the Chicago Bar Association's voluntary program received sixty-seven fee complaints in 2019.¹²² Family and criminal matters generate the most fee arbitration requests.¹²³ Real estate/landlord-tenant and litigation matters also account for a significant number of the requests.¹²⁴

The disputes in mandatory arbitration jurisdictions involved meaningful amounts when considering that the clients were mostly individuals. In New York, the average amount in dispute in 2019 was \$17,432,¹²⁵ and in Georgia, the average amount in controversy was \$15,155.¹²⁶ Clients made more than eighty percent of the requests for arbitration in New York, while clients made sixty percent of the requests in the District of Columbia.¹²⁷ In some jurisdictions lawyers disproportionately obtained awards while in others the clients were favored.¹²⁸ The reasons for these differences remain to be explored.

122. See E-mail from Sharon McLawyer, Dir., Los Angeles Cnty. Bar Ass'n Att'y Client Mediation & Arb. Servs., to Maryanne Daly-Doran, Reference Libr., Univ. of Connecticut L. Libr. (July 6, 2021, 19:55 EDT) (on file with author); Chicago Bar Association Professional Fees Committee Statistics (on file with author).

123. 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS, *supra* note 82; 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART IV (2007) [hereinafter 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART IV], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/Fee_Arb_Chart_4.pdf [<https://perma.cc/X4XK-5HEE>]; OFF. OF ATT'Y ETHICS OF THE SUP. CT. OF N.J., *supra* note 68, at 47 (reporting that matrimonial cases generated thirty-two percent of all fee arbitration matters in New Jersey); N.Y. 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 83, at 9 (reporting that family matters constituted the majority of cases handled). In the District of Columbia, however, employment/EEO matters gave rise to the most fee arbitration matters. D.C. 2019–20 ANNUAL REPORT, *supra* note 117, at 5.

124. N.Y. 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 83, at 9; OFF. OF ATT'Y ETHICS OF SUP. CT. OF N.J., *supra* note 68, at 47–48; 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS, *supra* note 82; 2006 ABA SURVEY OF FEE ARBITRATION PROGRAMS CHART IV, *supra* note 123.

125. N.Y. 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 83, at 4.

126. GA. BOG BOARD BOOK, *supra* note 117, at 85–86. Of course, the amounts in dispute were probably lower in jurisdictions where attorneys' fees are generally lower, but most other jurisdictions did not report this information.

127. D.C. 2019–20 ANNUAL REPORT, *supra* note 117, at 4; N.Y. 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 83, at 17.

128. In the District of Columbia in 2019–20, in twelve out of twenty awards, lawyers were the prevailing party. D.C. 2019–20 ANNUAL REPORT, *supra* note 117, at 7. Likewise, in Maine, dispositions favored attorneys by a two-to-one ratio. ME. 2018 ANNUAL

What seems clear, however, is that the voluntary fee arbitration programs in most jurisdictions are insufficient to address the needs of individual clients. These programs are more likely to be bar created and bar run, with limited or no accountability to the courts. In some large jurisdictions, voluntary fee dispute arbitration is handled by local bar associations and is not available in all parts of the state.¹²⁹ Lawyers can refuse to participate in voluntary arbitration programs—and many do.¹³⁰ The number of lawyers who decline to participate—like so much else about voluntary programs—is not known. When lawyers refuse to participate in fee arbitration, clients have little recourse except litigation, which is frequently not a real option. Many individual clients cannot afford to hire another lawyer and pay the litigation costs associated with resolving fee disputes. Disciplinary agencies typically decline to consider these complaints.¹³¹ Thus, clients in states with voluntary programs are often left with no viable recourse when fee disputes arise.

III. THE INADEQUACY OF MEASURES TO ADDRESS LAWYER THEFT

Lawyer theft of client money has been a longstanding problem for the legal profession.¹³² Lawyers steal from client trust accounts; pocket

REPORT, *supra* note 117, at 5 (reporting that hearing panel found in favor of lawyers in nineteen matters and in favor of clients in six). In contrast, in only approximately one-third of the New Jersey cases in 2019 did the hearing panels uphold the attorneys' fees in full. OFF. OF ATT'Y ETHICS OF SUP. CT. OF N.J., *supra* note 68, at 46. In the balance, they reduced the attorneys' fees by 28.4% of the total billings that were subject to reductions. *Id.*

129. For example, in Illinois, where local bar associations handle fee arbitration matters, there are some county bar associations that do not offer fee arbitration. See *How to Submit a Request for Investigation*, *supra* note 110.

130. See, e.g., 2016 ABA SURVEY OF FEE ARBITRATION PROGRAMS, *supra* note 82 (reporting that eighty percent of lawyers declined to arbitrate clients' disputes in Mississippi).

131. See, e.g., LA. ATT'Y DISCIPLINARY BD., UPHOLDING STANDARDS OF PROFESSIONAL CONDUCT (2016), <https://www.ladb.org/docs/Publication/LADBBrochure.pdf> [<https://perma.cc/CSC5-UPBS>] ("Fee disputes are not normally handled within the lawyer discipline system . . ."); *Lawyer Disciplinary Board FAQ*, W. VA. STATE BAR, <https://wvbar.org/public-information/lawyer-disciplinary-board-faq> [<https://perma.cc/UJ76-Y28L>] (stating that "[f]ee matters ordinarily are not a basis for discipline of a lawyer").

132. See, e.g., James R. Devine, *Lawyer Discipline in Missouri: Is a New Ethics Code Necessary?*, 46 MO. L. REV. 709, 713–14 (1981) (describing an 1825 Missouri statute permitting disbarment of lawyers convicted of a felony for retaining his client's money after the client demanded its return).

insurance settlement checks, payments received in connection with real estate closings or the proceeds of estates; or refuse to refund unearned fees. When they steal, they often victimize more than one client.¹³³ States' rules of professional conduct contain detailed provisions for how lawyers are to safeguard client money,¹³⁴ but those rules have failed to prevent some lawyers from stealing from their clients.

Forty years ago, the ABA began to adopt model rules for client protection that were directly aimed at addressing lawyer thefts.¹³⁵ The first was the *Model Rules for Client Security Funds*, but the states' funds often fail to cover all of victims' losses.¹³⁶ The ABA also adopted *Model Rules for Trust Account Overdraft Notification*, which require financial institutions to notify lawyer disciplinary authorities when an overdraft occurs in a client trust account.¹³⁷ Most states have also adopted this measure,¹³⁸ yet it only detects defalcations when the lawyer has completely emptied a trust account. The ABA subsequently recommended additional client protection measures, including its *Model Rule for Payee Notification* and *Model Rules for Random Audit of Trust Accounts*, but most jurisdictions have not adopted these measures.¹³⁹ The net effect is that many states fail to adequately protect individual clients from overreaching lawyers.

133. See, e.g., David W. Leefe, *Client Assistance Fund; Compensating for Lawyer Misdeeds, Repairing the Negative Image*, LA. B. J., June/July 2002, at 32, 33–34.

134. See, e.g., CONN. RULES OF PRO. CONDUCT r. 1.15.

135. *A History of the Client Protection Rules*, *supra* note 72.

136. See MODEL RULES FOR CLIENT SECURITY FUNDS (AM. BAR ASS'N 1981); *infra* notes 158, 160–64 and accompanying text.

137. *A History of the Client Protection Rules*, *supra* note 72; MODEL RULES FOR TR. ACCT. OVERDRAFT NOTIFICATION (AM. BAR ASS'N 1988).

138. SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42.

139. The ABA also recommends one other measure to protect client money from misappropriation, which sets standards for maintaining client trust account records. See MODEL RULE ON FIN. RECORDKEEPING (AM. BAR ASS'N 1993). Some states require certification of compliance with the jurisdiction's recordkeeping rules. See SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42–43. Unfortunately, certification measures seem unlikely to prevent a lawyer who wishes to steal client money from doing so.

A. *Client Protection Funds*

When lawyers steal client funds, the money is usually gone before the theft is detected.¹⁴⁰ Malpractice insurance does not cover these losses,¹⁴¹ and lawyers who steal often have no other money with which to repay their victims.¹⁴² Even if the lawyers are ordered to make restitution, they may be unable to do so because they are disbarred, imprisoned, or both. Thus, the only way that some clients can recover any of their money is by making a claim to a jurisdiction's client protection fund.

In 1981, when the ABA first adopted *Model Rules for Client Security Funds* (later renamed the *Model Rules for Lawyers' Funds for Client Protection*), most jurisdictions already had established some form of client protection fund.¹⁴³ The purpose of the funds—from the organized bar's perspective—is to preserve the public's trust in the integrity of the legal profession.¹⁴⁴ The ABA's *Model Rules for Lawyers' Funds for Client Protection* provide that the funds should be established under the supervision of the state's highest court and be part of the jurisdiction's lawyer regulation system.¹⁴⁵ They further state that client protection funds should reimburse failures “to refund unearned fees received in advance” as well as “theft or embezzlement of money or the wrongful taking or conversion” of money or property.¹⁴⁶ These model rules contemplate that the funds will “fully reimburse losses”¹⁴⁷ and provide for the state supreme court to provide for funding by lawyers

140. See Leefe, *supra* note 133 at 33–34.

141. See Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PRO. 41, 52 (2004) (noting that lawyers' professional liability policies do not cover claims arising from dishonest, malicious, or fraudulent acts of an insured).

142. See MODEL RULES FOR LAWS.' FUNDS FOR CLIENT PROT. pmbl. (AM. BAR ASS'N 1989). In some cases, the lawyers may have also filed for bankruptcy. See, e.g., Lawyer Disciplinary Bd. v. Thorn, 783 S.E.2d 321, 329 (W. Va. 2016).

143. See SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 13–14.

144. See MODEL RULES FOR LAWS.' FUNDS FOR CLIENT PROT. r. 1.A (AM. BAR ASS'N 1989); see also *Lawyers Fund*, STATE BAR OF MONT., <https://www.montanabar.org/For-the-Public/Client-Protection-Fund> [<https://perma.cc/KDN7-7Q45>]; *Client Protection Fund*, STATE BAR OF N.D., https://www.sband.org/page/client_protect_claim [<https://perma.cc/X7Y8-QXK4>].

145. MODEL RULES FOR LAWS.' FUNDS FOR CLIENT PROT. r. 1 cmt. 3, r. 2(2) (AM. BAR ASS'N 1989).

146. *Id.* at r. 10(C). This includes “where the lawyer took money in the guise of a fee, a loan or an investment.” *Id.* at r. 10 cmt. 3.

147. *Id.* at pmbl.

“in amounts adequate for the proper payment of claims.”¹⁴⁸ In an apparent compromise among the drafters, however, the rules also recognize that the fund’s Board of Trustees may fix a maximum amount of reimbursement, even though “[f]ull reimbursement is the goal of a Fund.”¹⁴⁹

Today, all U.S. jurisdictions have statewide client protection funds,¹⁵⁰ but their “organization, funding, accessibility and responsiveness to client claims vary widely.”¹⁵¹ In many states, they are supervised by state bar organizations rather than the courts.¹⁵² In more than thirty jurisdictions, the funds are financed by mandatory lawyer assessments, while the rest are funded by budget appropriations, voluntary lawyer contributions, or other means.¹⁵³ The lawyer assessments range from \$5 to \$75 annually, except in Delaware, where the assessment is substantially higher.¹⁵⁴ The funds’ boards of trustees are also empowered to seek restitution from the offending attorneys, but those recoveries tend to be modest.¹⁵⁵ Most of the jurisdictions have payment caps per claimant, with the average cap being \$100,000.¹⁵⁶ The majority also have a payment cap per lawyer, with the caps ranging from \$20,000 to \$1.5 million.¹⁵⁷ In some years, the amounts available in some jurisdictions’ client protection funds exceed the legitimate claims.¹⁵⁸

148. *Id.* at r. 3(a).

149. *Id.* at r. 14(1) & cmt.

150. DIRECTORY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION, *supra* note 10.

151. *A History of the Client Protection Rules*, *supra* note 72.

152. *See, e.g.*, ABA CTR FOR PRO. RESP., 2014–2016 SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 3 (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_16_survey_of_lawyers_funds_for_client_protection_final.pdf [<https://perma.cc/4C8Y-768Q>].

153. SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 17–18.

154. Delaware lawyers in private practice who have been admitted more than ten years are required to pay \$336. *Id.* at 19.

155. *See, e.g.*, MO. BAR, 2020 ANNUAL REPORT 27 (2020), https://mobar.org/site/content/About/Annual_Report.aspx [<https://perma.cc/XN5X-FDAL>] (reporting less than \$90,000 of restitution recovered in preceding year); STATE BAR OF NEV., CLIENTS’ SECURITY FUND ANNUAL REPORT 4 (2020), <https://nvbar.org/wp-content/uploads/2020-Nevada-CSF-Annual-Report.pdf> [<https://perma.cc/8P6G-L9L7>] (reporting that about \$5,000 of restitution recovered).

156. This is based on the thirty-eight jurisdictions reporting to the ABA. *See* SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 3.

157. *Id.* at 25–26.

158. *Id.* at 8 (noting “several funds” reported an inability to reimburse eligible claims due to payment limitations or lack of available funds).

Client protection funds in the United States paid out about \$35 million in 2019,¹⁵⁹ although clients' actual monetary losses far exceeded that amount. This is mostly because the funds' caps on recovery are grossly insufficient in some cases.¹⁶⁰ For example, Nevada lawyer Robert Graham, whose probate and real estate practice "was a 20-year business failure" stole \$17 million from clients.¹⁶¹ Twenty-three of his clients filed claims with Nevada's Client Security Fund in the "approved" amount of \$7.85 million, but due to Nevada's \$50,000 per claimant cap, these clients recovered less than \$1.1 million.¹⁶² Even with Pennsylvania's \$100,000 per victim cap, eleven clients' losses exceeded that cap in 2019.¹⁶³ A payment cap per lawyer can also leave

159. The client protection funds that responded to the ABA's most recent survey reported that they paid out approximately \$32.3 million in 2019. See SURVEY OF LAWYERS' FUND FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 4. Florida, Missouri, South Carolina, and the District of Columbia are among the jurisdictions that did not report to the ABA. Florida alone paid out at least \$2 million. See *Annual Reports of Committees of the Florida Bar, Clients' Security Fund*, FLA. BAR J., May/June 2019, at 88, 99, https://www.floridabar.org/the-florida-bar-journal/annual-reports-of-committees-of-the-florida-bar2018-2019/#Clients_Security_Fund [<https://perma.cc/6249-WPXL>]; Noreen Marcus, *Florida Bar Has Money-Back Guarantee for Clients of Thieving Lawyers, but Collecting Isn't Easy*, FLORIDABULLDOG.ORG (May 9, 2018), <https://www.floridabulldog.org/2018/05/florida-bar-has-money-back-guarantee-for-clients-of-thieving-lawyers-but-collecting-isnt-easy> [<https://perma.cc/KS9Z-TF3N>]. Claims paid in South Carolina during the 2019–20 year totaled \$445,793. S.C. BAR, LAWYERS' FUND FOR CLIENT PROTECTION OF SOUTH CAROLINA ANNUAL REPORT 2 (2020), https://www.scb.org/media/filer_public/67/ac/67ace869-56d7-415f-b10a-b36faadf2cc5/lfcpr_ar.pdf [<https://perma.cc/7FLK-6GSF>].

160. For instance, in Nevada, thirty-eight eligible clients had \$2.5 million of approved losses in 2020 but only received \$260,000—about one-tenth of that amount—from the client security fund. NEV. ANNUAL REPORT 2020, *supra* note 117, at 4. In Tennessee, the most common problem experienced by the client protection fund was "[l]arge claim losses exceeding Fund caps." SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 12; see also Elizabeth Amon, *An Empty Promise: How Client Protection Funds Around the Nation Betray Those They Were Designed to Protect*, N.J. L.J., Aug. 28, 2000, at 4.

161. Jeff German, *State Bar of Nevada Wants to Disbar Lawyer Charged with Stealing Millions from Clients*, LAS VEGAS REV. J. (Mar. 9, 2017), <https://www.reviewjournal.com/local/local-las-vegas/state-bar-of-nevada-wants-to-disbar-lawyer-charged-with-stealing-millions-from-clients> [<https://perma.cc/4CCU-LE3S>].

162. See STATE BAR OF NEV., CLIENTS' SECURITY FUND ANNUAL REPORT 2019, at 6, <https://www.nvbar.org/wp-content/uploads/2019-Nevada-CSF-Annual-Report.pdf> [<https://perma.cc/3RVN-769W>]. Some of his other clients' claims had not yet been resolved at the time of the report. *Id.*

163. PA. LAWS. FUND FOR CLIENT SEC., REPORT ON 2019–20 OPERATIONS 2, <https://r91.5e5.myftpupload.com/wp-content/uploads/Annual-Report-2019-2020.pdf>

clients grossly undercompensated. For example, one client only received \$20,000—one-tenth of the money her Kentucky lawyer stole from her—because her lawyer had victimized many other clients and the Kentucky Bar Association capped per lawyer recovery at \$150,000.¹⁶⁴ Some jurisdictions place limits on the total amounts that the funds will pay out annually to all claimants.¹⁶⁵ Florida only pays misappropriation claims on a pro rata basis at the end of the year if there is not enough money to pay all approved losses.¹⁶⁶ It will only refund unearned fees up to \$5,000.¹⁶⁷

While the *Model Rules for Lawyers' Funds for Client Protection* contemplate that the goal of the funds is full reimbursement, in many jurisdictions, the states' funds are described as a "public service" that carry no obligation to reimburse victims of lawyer defalcations.¹⁶⁸ And indeed, many funds' rules and practices reflect no commitment to full reimbursement of victims.¹⁶⁹ Some of the funds operate with no court oversight and little transparency; at least ten jurisdictions do not

[<https://perma.cc/2ELD-RMBH>]. According to the report, at the start of the 2019–20 fiscal year, the 159 pending claims carried an award potential of \$2.97 million after applying the \$100,000 cap, but the actual claims exceeded \$8.1 million. *Id.*

164. *See, e.g.,* Andrew Wolfson, *Ripped-Off Legal Clients Say a Kentucky Fund that Was Supposed to Reimburse Them Only Gave Them Pennies on the Dollar*, LOUISVILLE COURIER-J. (Feb. 25, 2019), <https://www.courier-journal.com/story/news/local/2019/02/25/kentucky-fund-ripped-off-legal-clients-falls-far-short/2775939002> [<https://perma.cc/P2AB-PZ5H>].

165. For example, Oklahoma's fund will only pay out a maximum of \$175,000 annually for all claims. *See* OFF. OF GEN. COUNS. OF OKLA. BAR ASS'N, ANNUAL REPORT OF THE PROFESSIONAL RESPONSIBILITY COMMISSION 18 (2021), <https://www.okbar.org/wp-content/uploads/2021/02/2020-PRC-Annual-Report.pdf> [<https://perma.cc/ZUN6-UYVG>].

166. *Annual Reports of Committees of the Florida Bar*, *supra* note 159, at 28; Marcus, *supra* note 159.

167. *See Clients' Security Fund Frequently Asked Questions*, FLA. BAR, <https://www.floridabar.org/public/consumer/pamphlet007/#what-losses-are-covered> [<https://perma.cc/HGR4-HDQ4>]. While advance fees paid by individual clients often fall within this range, they sometimes exceed that amount. *See, e.g., In re Fleming*, 970 So. 2d 970 (La. 2017) (per curiam) (describing lawyer who refused to refund any of \$25,000 fee); *In re Hoffman*, 834 N.W.2d 636 (N.D. 2013) (describing lawyer who failed to refund any of \$30,000 fee where reasonable fee was \$4,540).

168. *See, e.g.,* N.H. RULES OF THE SUP. CT. r. 55(1); KAN. RULE RELATING TO LAWS.' FUND FOR CLIENT PROT. 241 (a) (3).

169. *See, e.g.,* MONT. LAWS.' FUND FOR CLIENT PROT. r. 10 (stating that there is no legal right to reimbursement and that all payments "are a matter of grace"). In Missouri, payments are limited to eighty percent of the amount of the loss greater than \$5,000, with a maximum payment of \$50,000. *See* MO. BAR, *supra* note 155, at 5.

publish any sort of annual report.¹⁷⁰ Some states' funds that publish reports do not reveal the difference between the amounts victims actually lost and the amounts paid to them by the funds.¹⁷¹

Most fund claimants are clients whose lawyers retained unearned fees.¹⁷² The funds also pay out substantial dollar awards for thefts in personal injury, trust and estate, and real estate matters.¹⁷³ These clients are sometimes unsophisticated consumers of legal services, yet many funds are not administered from a consumer-oriented perspective. In many jurisdictions, the availability of client protection funds is not publicized.¹⁷⁴ In most jurisdictions, clients' claims cannot be submitted electronically.¹⁷⁵ Although the *Model Rules for Lawyers' Funds for Client Protection* intend for the funds to provide "meaningful" and "prompt" reimbursement to victimized clients,¹⁷⁶ claimants typically must wait for reimbursement until a final disciplinary determination is made.¹⁷⁷ This can take years during which some

170. SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 10.

171. *See, e.g.*, STATE BAR OF ARIZ., ANNUAL REPORT 2019, at 3, <https://www.azbar.org/media/f0pk5mo5/2019-annual-report-final.pdf> [<https://perma.cc/XT6Q-FB2H>] (revealing the amount paid out but not the amount actually lost by victims); *Annual Reports of the Committees of the Florida Bar*, *supra* note 159, at 28 (same); STATE BAR OF TEX., COMMISSION FOR LAWYER DISCIPLINE ANNUAL REPORT 11 (2020), <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=41986> [<https://perma.cc/JT5S-Z49X>] (same); WASH. STATE BAR ASS'N, WASHINGTON DISCIPLINE SYSTEM 2019 ANNUAL REPORT 14, https://www.wsba.org/docs/default-source/licensing/discipline/2019-discipline-system-annual-report.pdf?sfvrsn=d5100ef1_10 [<https://perma.cc/PN8R-Y9EU>] (same).

172. *See, e.g.*, SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 8.

173. *Id.*

174. *See id.* at 10 (reporting that sixty-two percent of reporting jurisdictions do not produce any public information or marketing material for their client protection funds).

175. *Id.*

176. *See* MODEL RULES FOR LAWS.' FUNDS FOR CLIENT PROT. pmbl. (AM. BAR ASS'N 1989).

177. *See, e.g.*, RULES REGULATING FLA. BAR r. 7-2.4; N.H. RULES OF SUP. CT. r. 55(4); SUP. CT. OF OHIO RULES FOR GOV'T OF THE BAR r. VIII, § 7 (C) (3); *The Client Security Fund of the State Bar of Texas*, https://www.texasbar.com/AM/Template.cfm?Section=Free_Legal_Information2&Template=/CM/ContentDisplay.cfm&ContentID=34079 [<https://perma.cc/CPJ7-4ZEX>]. In California, the average time to pay out for its client security fund is three years. *See* Letter from Leah T. Wilson, Exec. Dir., State Bar of California, to California Legis. Leaders (Mar. 15, 2018), <https://www.calbar.ca.gov/Portals/0/2018ClientSecurityFundReport.pdf> [<https://perma.cc/E42N-8TNP>]. In Wisconsin, some approved payments to claimants were deferred because the fund had insufficient money. *See* STATE BAR OF WIS., ANNUAL REPORT OF

clients may be unable to obtain the medical and other care that they need while awaiting repayment of the money. There is no question that whatever amount the client protection fund eventually pays victims is better than nothing. But in most jurisdictions, more could be done for these clients.

B. *Insurance Payee Notification*

One way in which individual clients could be better protected from theft is by making it harder for lawyers to steal insurance settlement proceeds. Lawyers steal insurance proceeds in various ways including the unauthorized settlement with an insurer of the client's claim, forgery of the client's signature on settlement documents and checks, and misappropriation of the client's share of the proceeds.¹⁷⁸ In 2019, twenty-nine percent of the dollars paid by client protection funds were due to lawyer theft of insurance settlement funds.¹⁷⁹ These thefts often victimize seriously injured clients who require continuing medical care.¹⁸⁰

In 1991, the ABA approved a *Model Rule for Payee Notification* that requires insurers to provide written notice to a claimant that they sent a payment to the claimant's lawyer in an effort to reduce the possibility that the lawyer can misappropriate the funds.¹⁸¹ Fred Miller, the former Executive Director of New York's Client Protection Fund (the state that originated the insurance payee notification rule)¹⁸² noted that the rule "pretty well eliminated this type of claim in New York. But

THE WISCONSIN LAWYERS' FUND FOR CLIENT PROTECTION, FISCAL YEAR 2018, at 2, <https://www.wisbar.org/forPublic/IHaveaDisputeWithMyLawyer/Documents/FY%2018%20Annual%20Report.pdf> [<https://perma.cc/6RXB-9SMH>].

178. MODEL RULE FOR PAYEE NOTIFICATION Preface (AM. BAR ASS'N 1991).

179. SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 8.

180. *See, e.g.*, Letter from Douglas J. Stamm, former Chair, Oregon Client Security Fund, to Oregon State Bar Bd. of Governors (Nov. 14, 2019) (on file with author) (describing several claims involving losses far exceeding the \$50,000 cap in which "claimants suffered from . . . permanent disabilities such as paralysis").

181. *See A History of the Client Protection Rules*, *supra* note 72.

182. The *Model Rule for Payee Notification* was based on a New York rule that required insurers to notify the payee in insurance settlements when it sent out checks to the claimant's attorney in excess of \$5,000. *Id.*; N.Y. COMP. CODES R. & REGS. tit. 11, § 216.9(a) (1988).

if it does occur, the rule also helps catch the defalcating lawyer.”¹⁸³ Nevertheless, today only sixteen jurisdictions require insurance payee notification.¹⁸⁴

Some state bar associations came to support a payee notification rule after becoming convinced that such a rule was needed to protect lawyers’ reputations or the solvency of client protection funds. For example, in 2007, Virginia trial lawyers initially opposed efforts to require insurance payee notification.¹⁸⁵ A few months later, after lawyer Steven Conrad was arrested and charged with settling hundreds of cases without clients’ approval and signing their names to settlement checks, the Virginia State Bar approved a payee notification rule.¹⁸⁶ The Louisiana State Bar Association supported payee notification legislation in 2011 after it saw the impact of claims due to thefts of insurance settlement funds on Louisiana’s Client Assistance Fund.¹⁸⁷ But the insurance industry opposed it on the grounds it was burdensome and the bill did not progress to a vote in the legislature.¹⁸⁸ In 2021, Oregon became the most recent state to adopt such a requirement, which the Oregon State Bar actively supported after it learned of substantial insurance settlement defalcations by a single lawyer that resulted in numerous claims against its client security fund.¹⁸⁹

183. Lynda C. Shely, *The ABA Model Rules for Trust Account Notification and Model Rule for Payee Notification: Client Protection for the Next Millennium*, PRO. LAW., Spring 2000, at 23, 23.

184. These jurisdictions are California, Connecticut, Delaware, Georgia, Hawaii, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Virginia. See SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 44; Oregon State Bar, Meeting of the Board of Governors Minutes 172–75 (Feb. 12, 2021); 2021 Or. Laws Ch. 140 (S.B. 180). The Texas Insurance Commission encourages insurers to notify clients when they send out settlement checks but does not require it. See *infra* note 234 and accompanying text.

185. See Marc Davis, *A Lawyer’s Misdeeds Spur State Bar to Revisit Proposal*, VIRGINIAN-PILOT (Mar. 16, 2008, 12:00 AM), https://www.pilotonline.com/news/article_9396105f71b9-5d12-b838-e1c90e95cdfa.html.

186. *Id.*

187. Leefe, *supra* note 133, at 34.

188. *Id.*

189. See *Testimony Before the S. Comm. on Judiciary and Ballot Measure 110 Implementation in Support of S.B. 180 with the 2 Amendments on Behalf of the Oregon State Bar*, 2021 Reg. Sess. (Or. 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/12231> [<https://perma.cc/H6D9-ZDK6>] (statement of Amber Hollister, Gen. Counsel of the Oregon State Bar); Nigel Jaquiss, *Lawmakers and Oregon State Bar Weigh Protections for Victims of Dishonest Lawyers*, WILLAMETTE WK. (Feb. 15,

Other jurisdictions have declined to adopt payee notification, sometimes due to the bar's indifference or resistance. For example, the Florida Bar's Client Security Fund Committee recommended to the Bar's Board of Governors in 1996 that it adopt payee notification, but the Committee was unable to generate support for the proposal.¹⁹⁰ Since then, lawyer misconduct involving insurance settlement checks has repeatedly occurred.¹⁹¹ The State Bar of Arizona's Board of Trustees also rejected such a rule.¹⁹² In a few states, the failure to adopt payee notification was due to anticipated or actual insurance industry opposition.¹⁹³ Several jurisdictions report that they have never even

2021, 10:27 PM), <https://www.wweek.com/news/courts/2021/02/15/lawmakers-and-oregon-state-bar-weigh-protections-for-victims-of-dishonest-lawyers> [https://perma.cc/BR5W-VPBM] (describing Bar's response to thefts by lawyer Lori Deveney, who "allegedly stole millions of dollars from her clients by cashing their settlement checks from insurers"); Letter from Douglas J. Stamm, *supra* note 180.

190. See Annual Report: Committees of the Florida Bar, FLA. B.J., June 1996, at 52, 73.

191. See, e.g., *In re Gray*, 145 So. 3d 825 (Fla. 2014); Fla. Bar v. Brownstein, 953 So. 2d 502, 508 (Fla. 2007) (per curiam); Fla. Bar v. Catalano, 685 So. 2d 1299, 1300–01 (Fla. 1996) (per curiam); Fla. Bar v. Sweeney, 730 So. 2d 1269, 1270 (Fla. 1998) (per curiam); Christy Turner, *St. Johns County Lawyer Sentenced for Stealing Insurance Claim Settlements*, CBS47 (Jan. 10, 2019, 7:00 PM), <https://www.actionnewsjax.com/news/local/st-johns-county-lawyer-sentenced-for-stealing-insurance-claim-settlements/902467067> [https://perma.cc/J4YX-VCCY]; *Disbarred Lawyer Arrested for Defrauding Clients out of \$700K*, *FDLE Says*, 10TAMPA BAY (Dec. 11, 2020, 2:36 PM), <https://www.wtsp.com/article/news/crime/former-clearwater-lawyer-fraud-arrest/67-ecec86e0-1373-4b05-a8f4-fdc5e00f10ad> [https://perma.cc/2T84-DNJY]; David J. Neal, *An Orlando Lawyer Stole \$111,000 from Clients, Bar Says, Got Suspended and Ignored It*, *MIAMI HERALD* (May 16, 2021, 10:28 AM), <https://www.miamiherald.com/news/business/article251453043.html>.

192. See SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 44; Telephone Interview by Adam Mackie, Reference Libr., Univ. of Conn. L. Libr. with Karen Weigand Oschmann, Client Prot. Fund Admin., State Bar of Ariz. (May 6, 2020).

193. In one jurisdiction the voluntary state bar never formally took a position after informal conversations revealed that because the legislature included many insurance agents, such legislation was unlikely to pass. See E-mail from Adam Mackie, Reference Libr., Univ. of Connecticut L. Libr., to author (June 2, 2021, 10:49 AM). In Michigan, the state bar supported a payee notification rule, but it did not progress in the legislature. See State Bar of Mich., Proposed Payee Notification Legislation, (Apr. 21, 2018), https://www.michbar.org/file/generalinfo/pdfs/4-21-18payee_notification.pdf [https://perma.cc/BKD8-8ZA4]; *2017/2018 At the Capitol*, MICH. BAR J., May 2018, at 83, <http://www.michbar.org/file/barjournal/article/documents/pdf4article3394.pdf> [https://perma.cc/45BB-CFW2]; see also *supra* note 188 and accompanying text.

considered the ABA's recommendation on payee notification.¹⁹⁴ The net effect is that individual clients are more vulnerable to lawyer theft in states that do not require payee notification.

C. *Random Audits of Trust Accounts*

Some lawyers steal from clients by taking funds they are holding in client trust accounts. In an effort to reduce these thefts, the ABA's McKay Commission recommended in 1992 that courts adopt a rule providing for random audits of client trust accounts.¹⁹⁵ At that time, eight jurisdictions already used random audits, and the McKay Commission noted that they had "proven effective to deter and detect the theft of funds even before clients file complaints."¹⁹⁶ In 1993, the ABA adopted the *Model Rule for Random Audit of Trust Accounts*.¹⁹⁷ A few additional jurisdictions subsequently adopted random audit procedures.¹⁹⁸ Today, however, there are only nine states with operational random audit programs.¹⁹⁹

One of those states is Connecticut, which first considered random audits in the late 1980s after a prominent Danbury lawyer stole more than \$2 million from his client trust account.²⁰⁰ In 1990, the Connecticut Bar Association's (CBA) Task Force on the Commission of Legal Ethics recommended a host of measures to improve lawyer regulation, including random audits of trust accounts.²⁰¹ The CBA's Board of Governors endorsed the proposal, but the CBA's House of

194. SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 44–45.

195. LAWYER REGULATION FOR A NEW CENTURY, *supra* note 71, at 75. It explained that the usual requirement imposed on disciplinary counsel to show cause to believe misconduct occurred before permitting an audit made it difficult to detect thefts that were ongoing. *Id.* at 76.

196. *Id.* at 76. The jurisdictions were Iowa, Nebraska, New Hampshire, New York (First and Second Departments), North Carolina, Vermont, and Washington. *Id.*

197. *A History of The Client Protection Rules*, *supra* note 72.

198. The jurisdictions are Arizona, Connecticut, Hawaii, Idaho, Kansas, and Maine. See SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42; HAW. RULES GOVERNING TR. ACCT. r. 7.

199. Those jurisdictions are Connecticut, Delaware, Iowa, Kansas, New Hampshire, New Jersey, North Carolina, Vermont, and Washington. See OFF. OF ATT'Y ETHICS OF SUP. CT. OF N.J., *supra* note 68, at 49.

200. See Andrew Houlding, *Price of Propriety: \$300 Per Lawyer*, CONN. L. TRIB., Nov. 25, 1991, at 32; *Talks Urged in Suits Against Judge's Estate*, N.Y. TIMES, Sept. 25, 1988, at 48. The lawyer was also working as a probate judge, but the defalcations were due to theft of money connected to real estate transactions.

201. Houlding, *supra* note 200.

Delegates narrowly rejected it.²⁰² The following year, Connecticut's Judicial Council on Legal Ethics also recommended random audits, contending it was an essential part of the package of recommended reforms.²⁰³ The Connecticut Supreme Court, which was then dealing with its own budget problems was reportedly reluctant "to take on a fight to squeeze more money out of legal practitioners" to finance regulatory reforms and wanted the CBA's Task Force Chair to take the lead on getting the CBA to accept the reforms.²⁰⁴ The Task Force chair was apparently unable to garner CBA support. It was not until 2006, the year after Connecticut lawyers misappropriated more than \$12.5 million during a three-month period, that a CBA Task Force again recommended random audits.²⁰⁵ It seems worth noting that the thefts had attracted significant attention in the popular press.²⁰⁶ It was only then—and without input from the CBA House of Delegates—that the Connecticut Supreme Court adopted a rule enabling random trust account audits.²⁰⁷

New Jersey has been a national leader in the use of random audits.²⁰⁸ Its Office of Attorney Ethics acknowledges that the deterrent effect is "not quantifiable" but maintains that "[j]ust knowing there is an active audit program is an incentive not only to keep accurate records, but also to avoid temptations to misuse trust funds."²⁰⁹ In 2019, New Jersey's Random Audit Compliance Program conducted 556 audits. Fourteen lawyers were disciplined—including four disbarments—through the program's detection efforts.²¹⁰ Over the program's thirty-

202. *Id.*

203. *Why Lawyers Must Pay for Ethics Reform*, CONN. L. TRIB., Nov. 25, 1991, at 32.

204. Houlding, *supra* note 200.

205. See Douglas Malan, *Practice Book Rules Bave Teeth*, CONN. L. TRIB., May 22, 2006.

206. See, e.g., Hilda Munoz, *Suspended Lawyer Is Arraigned; Elizabeth Zemko Accused of Stealing from Clients' Bank Accounts, Estates*, HARTFORD COURANT, May 6, 2005, at B2; Fran Silverman, *Cracking down on Unethical Lawyers*, N.Y. TIMES, Feb. 27, 2005, at 3; Daniel Tepper, *Claims Coming Fast for Victims of Lawyers*, CONN. POST, Sept. 1, 2005; *Father, Son Accused of Stealing Clients' Money*, ASSOCIATED PRESS, Jan. 21, 2005.

207. See Douglas Malan, *Judges Embrace Lawyer-Theft Crackdown; Increased Policing of Attorney Advertisements Also Wins Final Approval*, CONN. L. TRIB., July 3, 2006.

208. OFF. OF ATT'Y ETHICS OF SUP. CT. OF N.J., *supra* note 68, at 49.

209. *Id.*

210. Letter from Charles Centinaro, Dir., N.J. Office of Att'y Ethics, to Chief Justice Stuart Rabner and Associate Justices of the N.J. Sup. Ct. (May 11, 2020), <https://njcourts.gov/attorneys/assets/oea/2019oeannualrpt.pdf> [<https://perma.cc/2Q3B-E9LR>].

nine-year existence, 234 attorneys, “detected solely by this program, have been disciplined for serious ethical violations.”²¹¹

Jurisdictions offer a variety of reasons when they decline to adopt random audit programs. Some conclude that the cost of a random audit program would be too great to justify imposing the expense on lawyers.²¹² As the Florida State Bar’s president explained after the idea was considered and rejected there, “[f]irst of all, who’s going to pay for it?” He continued, “[t]he bar can’t afford to hire an auditing firm to go around the state and audit lawyers’ trust accounts.”²¹³ Others note that these audits mostly pick up low-level, unintentional errors.²¹⁴ Some contend that random audits do not pick up all defalcations because lawyer theft does not necessarily involve trust account violations.²¹⁵ In addition, opponents argue, general audit practice is to reconcile trust account balances, and such auditing may be insufficient to detect defalcations.²¹⁶

Yet New Jersey’s experience demonstrates that the audits can be performed by auditors in ways that detect lawyer theft.²¹⁷ While the cost of random audits cannot be ignored, the number of audits need not necessarily be substantial to have some deterrent effect. Meanwhile, lawyer theft from client trust accounts remains a serious problem. Lawyers who steal from these accounts sometimes take large sums of

211. OFF. OF ATT’Y ETHICS OF SUP. CT. OF N.J., 2020 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 17 (2021), <https://www.njcourts.gov/attorneys/assets/oae/2020oaeannualrpt.pdf> [<https://perma.cc/86FA-KFMX>].

212. *See In re* Promulgation of Amendments to the Rules of the Supreme Court for Registration of Attorneys, Annual Report of the Minnesota Client Security Board, C9-81-1206, at A.19–A.20 (July 1998), [https://www.mncourts.gov/mncourtsgov/media/AdministrativeFileArchive/Client%20Security%20Board%20ADM10-8026%20\(formerly%20C0-85-2205\)/1998-07-28-Client-Security-Bd-Annual-Rpt.pdf](https://www.mncourts.gov/mncourtsgov/media/AdministrativeFileArchive/Client%20Security%20Board%20ADM10-8026%20(formerly%20C0-85-2205)/1998-07-28-Client-Security-Bd-Annual-Rpt.pdf) [<https://perma.cc/3D3N-CAJ4>].

213. Celia Ampel, *Sticky Fingers: Attorney Thefts from Clients Spiked in Great Recession*, DAILY BUS. REV. (Mar. 9, 2018), <https://www.law.com/dailybusinessreview/2018/03/09/sticky-fingers-attorney-thefts-from-clients-spiked-in-great-recession> [<https://perma.cc/BPY2-UJ7S>].

214. *See, e.g.*, Gary Blankenship, *Trust Accounting Pilot Program May Be Ready for Board Action in March*, FLA. BAR NEWS (Feb. 15, 2017), <https://www.floridabar.org/the-florida-bar-news/trust-accounting-pilot-program-may-be-ready-for-board-action-in-march> [<https://perma.cc/RU44-FJQE>].

215. *In re* Promulgation of Amendments to the Rules of the Supreme Court for Registration of Attorneys, *supra* note 212, at 20.

216. *Id.*

217. *See supra* notes 209–10 and accompanying text.

money.²¹⁸ These thefts can continue for months or even years before they are detected.²¹⁹ Some of these losses might have been deterred or averted if the jurisdictions had adopted rules enabling regulators to randomly audit client trust accounts.

IV. WHAT HAPPENED TO CLIENT PROTECTION?

What explains the failure by many jurisdictions to adopt adequate client protection measures? To answer this question, it is necessary to start with the state supreme courts, which in most jurisdictions are ultimately responsible for adopting the rules governing lawyers. As previously noted, these courts also have a number of other important responsibilities, some of which may present more obvious, pressing or pervasive challenges. Given the demands of other court business, state supreme courts may not have the time or inclination to examine the adequacy of the client protection measures in their states unless the bar, state regulators, or the media bring a problem to their attention.

218. See, e.g., Kelsey Gibbs, *Fallen State Trooper's Daughter Speaks out on Attorney Going to Prison for Stealing from Clients*, NEWSCHANNEL5 NASHVILLE (Apr. 22, 2019), <https://www.newschannel5.com/news/attorney-sentenced-for-stealing-more-than-1m-from-clients-trust-funds> (discussing Tennessee attorney who stole over \$1.35 million from clients' accounts); R. Robin McDonald, *Disbarred Lawyer Sentenced to Federal Prison for Stealing Escrowed Funds*, DAILY REP. (July 21, 2020, 2:54 PM) (discussing Georgia lawyer who stole more than \$335,000 from escrow account); Debra Cassens Weiss, *Millions Missing from Lawyer's Trust Account, Bar Alleges After He Abruptly Closes Law Firm*, A.B.A. J. (Jan. 5, 2017, 10:05 AM), https://www.abajournal.com/news/article/lawyer_transferred_home_to_his_wife_after_abruptly_closing_law_firm_bar_all [<https://perma.cc/7U9P-CW6K>]; *Former Real Estate Attorney Sentenced to 66 Months in Prison for Defrauding Clients and Lenders*, U.S. ATT'Y'S OFF. FOR DIST. OF MASS. (Sept. 25, 2020), <https://www.justice.gov/usao-ma/pr/former-real-estate-attorney-sentenced-66-months-prison-defrauding-clients-and-lenders> [<https://perma.cc/8VQW-GE2Q>] (describing Massachusetts lawyer who stole over \$450,000 from client trust account); *Disbarred Houston Lawyer Steals More than \$500,000 from Client*, OFF. OF DIST. ATT'Y, HARRIS CNTY. TEX. (Oct. 2, 2020), <https://app.dao.hctx.net/disbarred-houston-lawyer-steals-more-500000-client> [<https://perma.cc/XK79-KLL6>] (describing misappropriation from client trust account).

219. See, e.g., *Disbarred Lawyer Pleads Guilty to Stealing Client Escrow Funds*, DIST. ATT'Y KINGS CNTY. (June 4, 2015), <http://www.brooklynnda.org/2015/09/10/disbarred-lawyer-pleads-guilty-to-stealing-client-escrow-funds> (describing lawyer who stole hundreds of thousands of dollars from more than twenty-five clients over more than four-year period); Zak Fallia, *Disbarred Attorney Charged with Stealing from Escrow Fund Accounts in Westchester*, ARMONK DAILY VOICE (Sept. 7, 2019), <https://dailyvoice.com/new-york/armonk/news/disbarred-attorney-charged-with-stealing-from-escrow-funds-accounts-in-westchester/775163> [<https://perma.cc/DL4Z-PLKJ>] (describing lawyer who stole from escrow accounts over four-year period).

Moreover, supreme court justices do not see many fee disputes between lawyers and individual clients; those clients can rarely afford to litigate those issues to the state's highest court. Courts may not focus on the operation of fee arbitration programs as they are typically bar-run activities. Likewise, courts may be unaware of the inadequacy of the payments to some victims of dishonest lawyers when they do not oversee their states' client protection funds.²²⁰

And what about the state legislatures? Legislatures tend to give the courts a wide berth on issues pertaining to lawyer regulation.²²¹ This is because state courts claim the inherent or constitutional authority to regulate the practice of law,²²² and a few claim the exclusive right to do so.²²³ Legislators may harbor concerns that any law they pass regulating the legal profession could be struck down on separation of powers grounds.²²⁴ Moreover, there is rarely anyone lobbying for legislative involvement to protect the public's interests. Economic theory helps explain the public's absence from the debates. Producers of goods and services (in this case, lawyers) are more likely to invest in political action than are consumers due to producers' narrow focus on their own products or income, in contrast to consumers' more varied areas of concern.²²⁵

The most motivated actor when it comes to lawyer regulation is the legal profession itself, and it can play an outsized role in lawyer

220. Even if supreme courts review client protection funds' reports, those reports often do not reveal the differences between what the funds paid out and the amounts actually lost by claimants. See *supra* note 171 and accompanying text.

221. See, e.g., Levin, *supra* note 20, at 1007. The exception is California, which takes a more active role in lawyer regulation than other jurisdictions. See *id.* at 978, 1002–03.

222. *Clark v. Austin*, 101 S.W.2d 977, 980 (Mo. 1937) (en banc) (noting that the Court “has [the] inherent power to define and regulate the practice of law”); *Unauthorized Prac. of L. Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24, 33 (Tex. 2008) (stating that the court's inherent power to regulate the practice of law derives from the state constitution); see also Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 69 (2009).

223. See *In re Day*, 54 N.E. 646, 653 (Ill. 1899); *Clark*, 101 S.W.2d at 983–84; *In re Brown*, 708 N.W.2d 251, 256 (Neb. 2006) (per curiam); *In re Splane*, 16 A. 481, 483 (Pa. 1889); Rigertas, *supra* note 222, at 69; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 6–7 (1989).

224. See Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, HOFSTRA L. REV. (forthcoming 2021).

225. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 10–36 (1971).

regulation. After the ABA promulgates model rules, state bars usually weigh in on whether those rules should be adopted in their jurisdictions, either on their own initiative or at the state supreme court's request.²²⁶ Both mandatory and voluntary state bars engage in these activities. In some jurisdictions, mandatory bars can be especially influential in this process.

The mandatory (or “unified”) bars began to appear in the 1920s because some lawyers believed that a compulsory statewide association, well-financed by dues and possessing the power to discipline members, could influence state legislatures far better than a voluntary, financially weak bar organization.²²⁷ Proponents thought that these bars would be beneficial for lawyers' economic interests,²²⁸ and mandatory bars could also benefit the public because they provided a means of gaining greater resources to raise the quality of the legal profession and fill a regulatory vacuum.²²⁹ Today, statutes or court rules in some states provide for participation by mandatory state bar organizations in changes to the rules governing lawyers.²³⁰ Rule proposals from a few mandatory state bars require votes by rank-and-file members.²³¹ In other jurisdictions, the courts routinely solicit the mandatory bar's views or wait for the state bar to make proposals.²³² Not surprisingly, lawyers are often reluctant to endorse regulation that adds to their obligations or subjects themselves to greater scrutiny.

Texas's approach to client protection illustrates some of this dynamic. Texas does not require lawyers to provide written fee agreements in most matters or submit to mandatory fee arbitration.²³³

226. See, e.g., *supra* note 47.

227. See DAYTON D. MCKEAN, *THE INTEGRATED BAR* 36, 39–40, 43–44, 48 (1963).

228. *Id.* at 34, 36. Proponents believed that mandatory bars could both restrict the number of lawyers and set minimum fee schedules. See Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35, 38 (1994).

229. See Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. BAR FOUND. RSCH. J. 1, 17–18.

230. See, e.g., OR. REV. STAT § 9.490(1) (2020). The mandatory North Carolina State Bar has statutory power to adopt rules and regulations for the bar, which shall be certified to the supreme court, and the court may only decline to have them entered if the chief justice concludes they are inconsistent with the statute governing the state bar. N.C. GEN. STAT. § 84-21 (2020).

231. See, e.g., IDAHO BAR COMM'N RULES r. 906(a); *infra* note 238 and accompanying text.

232. See, e.g., Levin, *supra* note 20, at 1028.

233. TEXAS DISCIPLINARY RULES OF PRO. CONDUCT r. 1.04(c); SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 44. Texas is also one of only

It is one of only three states that does not require trust account overdraft notification and has not adopted an insurance payee notification requirement or random audits.²³⁴ Texas lawyers have collectively stolen millions of dollars from clients,²³⁵ yet Texas caps payments from its Client Security Fund at \$40,000 per claimant.²³⁶

two states where disciplinary counsel must show that a lawyer's fee is "unconscionable" rather than simply "excessive" in order to impose discipline. See SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS 16 (2017), https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20and%20Board%20of%20Law%20Examiners%20Staff%20Report%20with%20Final%20Results_6-21-17_0.pdf [<https://perma.cc/9U4X-4UBC>].

234. See SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42, 44. In 2010, the State Bar of Texas did, however, ask the Texas Insurance Commissioner to assist with efforts to prevent lawyer thefts and in turn, the Commission "strongly encourage[d]" insurers to voluntarily notify claimants that the settlement checks were sent to their lawyers. See *Commissioner's Bulletin B-0035-10*, TEX. DEP'T OF INS. (Aug. 31, 2010), <https://www.tdi.texas.gov/bulletins/2010/cc34.html> [<https://perma.cc/KB3Q-8Q9Z>]. Nevertheless, lawyer theft of settlement checks continues to occur in Texas, suggesting that not all insurers are complying with the request. See, e.g., Andrew Moore, "There Was Always an Excuse": Killeen Ex-Attorney Costs Clients Thousands, *Texas Supreme Court Says*, KCEN (Feb. 23, 2020), <https://www.kcentv.com/article/news/local/central-texas-attorney-resigns/500-980798b5-dfe2-4a66-bf82-44e1bc09bebc> [<https://perma.cc/9DX2-SWNF>] (describing lawyer who settled case and took insurance money without client's knowledge); Brenda Sapino Jeffreys, *Ex-Client Sues Onetime Lawyer over Settlement Money*, TEX. LAW., May 1, 2015, at 9 (describing client who did not learn that lawyer had settled case and obtained insurance proceeds for almost two years); John Rupolo, *Former Abilene Attorney Burt Burnett Pleads Guilty to Not Paying Clients Settlement Money*, KTXS12 (Oct. 29, 2019), <https://ktxs.com/news/crime-watch/former-abilene-attorney-burt-burnett-pleads-guilty-to-not-paying-clients-settlement-money> [<https://perma.cc/EH26-XV9A>] (describing lawyer who stole more than \$575,000 from clients); Veronica Soto, *Abilene Attorney Pleads Not Guilty to Stealing Insurance Settlement Money from Clients*, KTXS12 (Aug. 3, 2018), <https://ktxs.com/news/big-country/abilene-attorney-pleads-not-guilty-to-stealing-insurance-settlement-money-from-clients> [<https://perma.cc/3MRC-KUL8>]; *Disciplinary Actions*, TEX. B.J., June 2020, at 412–13.

235. See, e.g., OFF. OF DIST. ATT'Y, HARRIS CNTY. TEX., *supra* note 218 (describing Houston lawyer who misappropriated \$500,000); Scott Gordon, *Dallas Attorney Indicted in Client's Theft*, 5NBCDFW (June 14, 2018, 9:49 AM), <https://www.nbcdfw.com/news/local/dallas-attorney-indicted-in-clients-theft/235097> [<https://perma.cc/H8UR-RU3M>] (reporting on lawyer theft of \$365,000); Martha Neil, *Suspended Texas PI Lawyer Gets 35 Years in Client Theft Case*, A.B.A. J. (Aug. 29, 2008, 9:18 PM), https://www.abajournal.com/news/article/former_pi_lawyer_gets_35_years_in_client_theft_case [<https://perma.cc/N7QK-22QW>] (describing lawyer who stole \$1.6 million from clients).

236. SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 26.

So what is going on in Texas? In Texas, the supreme court regularly seeks the Texas State Bar's views on issues pertaining to lawyer regulation and the bar often responds in ways that reflect its members' interests.²³⁷ Although the Texas Supreme Court has the inherent authority to adopt rules governing Texas lawyers, the Texas State Bar Act provides for a state bar referendum on rule proposals before the supreme court adopts rules governing the conduct of state bar members.²³⁸ The Texas Supreme Court "has historically chosen to defer to a vote of state bar members before making significant changes" to its *Disciplinary Rules of Professional Conduct*.²³⁹ So, after a torturous eight-year process to amend the Texas rules to bring them more in line with the ABA's *Model Rules of Professional Conduct*—which involved several public hearings and reconciling draft amendments submitted by a Supreme Court Task Force, the state bar, and the Texas Supreme Court²⁴⁰—a 2011 state bar referendum to amend the Texas rules failed in all respects.²⁴¹ This occurred even though the final draft submitted to Texas State Bar members was one that had been

237. For example, when the Texas Supreme Court considered whether to adopt a rule requiring uninsured lawyers to disclose that they did not carry malpractice insurance—another ABA-recommended client protection measure—it sought the Texas State Bar's views. See Levin, *supra* note 20, at 1022–23. Not surprisingly, many Texas lawyers opposed such a measure. *Id.* at 1022, 1024. The State Bar Board of Governors communicated this opposition to the supreme court, which then declined to adopt an insurance disclosure rule. *Id.* at 1024.

238. TEX. GOV'T CODE § 81.024 (b)–(g) (2016); SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 233, at 13; NATHAN L. HECHT ET AL., TEX. JUD. BRANCH, HOW TEXAS COURT RULES ARE MADE 3–4 (2016), <https://www.txcourts.gov/media/1374851/How-Court-Rules-Are-Made.pdf> [<https://perma.cc/8PH4-TX9Q>]. From 1987 to 2021, the State Bar of Texas held six referenda. Only three passed. *Id.* at 4; Lowell Brown, *Texas Lawyers Approve Rule Amendments in 2021 Rules Vote*, STATE BAR OF TEX. (Mar. 4, 2021), <https://blog.texasbar.com/2021/03/articles/state-bar/texas-lawyers-approve-rule-amendments-in-2021-rules-vote> [<https://perma.cc/6N8G-6FWL>].

239. SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 233, at 13.

240. See Approval of Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Misc. Docket. No. 09-9175 (Tex. Oct. 20, 2009); Timeline of Development of Proposed Rules.

241. See *State Bar of Texas Announces Results of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct*, STATE BAR OF TEX. (Feb. 17, 2011), https://www.texasbar.com/AM/Template.cfm?Section=Press_Releases&Template=/CM/HTMLDisplay.cfm&ContentID=12942 [<https://perma.cc/99NX-7GDV>].

approved by the state bar leadership.²⁴² The Texas Supreme Court adopted no rule changes at that time.

Although the State Bar of Texas is also subject to sunset reviews by the Texas legislature every twelve years,²⁴³ that process has only led to modest improvements in client protection. In 1990, the Sunset Commission staff recommended that Texas's Client Security Fund—which had been established in 1975 by the state bar—should be statutorily placed under the oversight of the Texas Supreme Court, that the caps on payments to victims should be raised, and that the fund should be required to maintain a minimum balance.²⁴⁴ In response, the state bar increased its fund's claims cap from \$20,000 to \$30,000 and required a minimum fund balance of \$1.25 million.²⁴⁵ Once the state bar did this, the Texas legislature did not provide for supreme court oversight of the bar-run Client Security Fund, as the Sunset Commission recommended.²⁴⁶

In the most recent sunset review cycle (2016-2017), the Texas State Bar's Chief Disciplinary Counsel and the Sunset Commission staff recommended trust account overdraft notification, but the Sunset Commission, which is composed of twelve Texas legislators, did not adopt the recommendation.²⁴⁷ The reason was apparently due, in part,

242. See Kennon L. Peterson, *Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct: Brief Background and Explanation Updated November 2010*, 73 TEX. BAR J. 894, 894 (2010).

243. The reviews occur because the state bar is a state agency. See State Bar of Texas, TEX. SUNSET ADVISORY COMM'N, <https://www.sunset.texas.gov/reviews-and-reports/agencies/state-bar-texas> [<https://perma.cc/3SZ3-5ZDG>].

244. See *Sunset Commission Staff Report Recommendations Include Repeal of State Bar Act, Placing Bar Funds in State Treasury*, 53 TEX. BAR J. 865, 878–80 (1990).

245. See Walter Borges, *5,000 Face Possible IOLTA Suspensions; but State Bar Enforcement Efforts Lagging; Behind the Bar*, TEX. LAW., Oct. 1, 1990, at 31.

246. See SUNSET ADVISORY COMM'N, ANALYSIS OF SUNSET LEGISLATION 36–37 (1991), <https://www.sunset.texas.gov/public/uploads/files/reports/Analysis%20of%20Sunset%20Legislation%2072%20Leg%201991.pdf> [<https://perma.cc/WHL7-3KZU>].

247. SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 233, at A8, 26–27. The Chief Disciplinary Counsel sought both Trust Account Overdraft Notification and Payee Notification during the last Sunset review. See STATE BAR OF TEX., SELF-EVALUATION REPORT TO THE SUNSET ADVISORY COMMISSION 93, 278–81 (Sept. 1, 2015), <https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20SER%20-%20Accessible.pdf> [<https://perma.cc/J2MR-ZUBE>]. The Sunset Commission also declined to recommend payee notification.

to legislators' concerns about burdening the banks.²⁴⁸ The Commission staff also recommended that the legislature repeal requirements for a state bar referendum to approve disciplinary rule changes because the state bar rulemaking process "[o]bstructs [c]hanges [n]eeded" to regulate lawyers effectively.²⁴⁹ Nevertheless, on the motion of Sunset Commission member Senator Kirk Watson, a former member of the Texas State Bar's Executive Committee,²⁵⁰ the Sunset Commission "[m]odified" the Sunset staff's recommendation and decided to retain the referendum process but streamline the Bar's rulemaking process.²⁵¹ The legislature, in turn, established a new state bar committee to improve the state bar's rulemaking process, which included an opportunity for the public to provide input.²⁵² It retained the state bar referendum process for proposed disciplinary rule changes that originate with the State Bar of Texas.²⁵³

As the Texas example suggests, mandatory bars include many constituents, and there may be instances where there are disagreements among bar leadership, bar regulators working within the organization, state bar committees, and bar members when it comes to lawyer regulation. Depending upon the attitudes of bar leadership and the processes for gaining bar approval of certain measures, there may be times when a mandatory bar expresses support for consumer protection measures even though rank-and-file members

248. Three Sunset Commission members voiced this concern, including one who referred to Texas as "the leading banking state." See Texas State Senate, *Sunset Advisory Commission Hearing* (Aug. 22, 2016), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=40&clip_id=11260 [<https://perma.cc/A8HX-KD36>].

249. SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 233, at 13.

250. See *Meet Kirk*, KIRK WATSON TEX. SENATOR, <http://www.kirkwatson.com/meet-kirk/father-and-attorney> [<https://perma.cc/G3RJ-ZDLC>].

251. SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 233, at A7.

252. See TEX. STATE BAR ACT §§ 81.0876–79 (2017); SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 233, at A1.

253. TEX. STATE BAR ACT §§ 81.0877–78. After the new state bar committee was constituted in 2017, it vetted eight proposals that were approved by Texas State Bar members in a 2021 referendum. None concerned protection of client money. See *Texas Lawyers Approve Rule Amendments in 2021 Rules Vote*, *supra* note 238; COMMITTEE ON DISCIPLINARY RULES AND REFERENDA, 2020 ANNUAL REPORT 8–13, https://www.texasbar.com/Content/NavigationMenu/CDRR/Annual_Reports1/2020AnnualReport.pdf [<https://perma.cc/24JQ-D6WY>].

disagree.²⁵⁴ Obviously, when lawyer regulation is subject to bar members' approval, it can be more difficult to implement regulation that places additional obligations on lawyers.

In fact, even though mandatory bars claim that public protection is part of their mission, several jurisdictions with mandatory bars have adopted substantially fewer "client protection measures" than jurisdictions with voluntary state bars. This may occur due to the influence of mandatory bars on judicial decision making or because of the state's process for rule adoption. One rough indicator that states with mandatory bars, on the whole, may provide fewer of the client protection measures discussed in this Article can be seen in the tables below, which show the jurisdictions with the most and fewest client protection measures.

*Table 1. Jurisdictions with Most Client Protection Measures*²⁵⁵

Jurisdiction (*indicates mandatory bar)	Written Fee Agreement	Mandatory Fee Arbitration	Trust Overdraft Notification	Insurance Payee Notification	Random Audits of Trust Account ²⁵⁶	CPF Cap Per Claimant
Alaska*	x	x	x			\$50,000
Arizona*	x		x		x	\$100,000
California*	x	x	x	x		\$100,000
Connecticut	x		x	x	x	No cap
Delaware			x	x	x	No cap
D.C.*	x	x	x			\$100,000
Hawaii*	x		x	x	x	\$100,000
Maine		x	x		x	\$50,000

254. See, e.g., Levin, *supra* note 20, at 1013–14 (reporting that the Board of Governors of the Nevada Bar suggested a rule change despite fifty-six percent of Nevada State Bar survey respondents expressing opposition).

255. For support for the data in Table 1, see *supra* notes 45, 84, 184, 199 and accompanying text; SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 25; *Clients' Security Fund*, D.C. BAR, <https://www.dcbar.org/for-the-public/resolve-attorney-problems/clients%E2%80%99-security-fund> [<https://perma.cc/TJ2E-Y4JF>]; E-mail from Mike Larson, Dir., Law Assistance Program, State Bar of Montana, to author (July 14, 2021, 10:18 EDT) (on file with author) (stating there is no claim cap on the amount clients can recover, but recovery is limited to the amount available in the fund).

256. The jurisdictions listed in this column have rules providing for random audits, but it is not clear that they all continue to perform them. See *supra* note 199 and accompanying text. Simply having these rules on the books, however, may have some deterrent effect.

Montana*	x	x	x			No cap
Nebraska			x	x	x	No cap
New Jersey	x	x	x	x	x	\$400,000
New York	x	x	x	x	x ²⁵⁷	\$400,000
Pennsylvania	x		x	x		\$100,000

Jurisdictions with at least three of the five client protection measures previously discussed are included in Table 1, which shows the jurisdictions with the most client protection measures. The jurisdictions' per claimant caps on client protection fund awards are also displayed but were not weighed when calculating which jurisdictions were seemingly the most and least protective of clients. While the caps on claimants' client protection fund recoveries are indicative of a jurisdiction's commitment to client protection, the caps may also vary due to differences in the claims experience in the jurisdictions. Thus, Alaska and Maine are included in the table with the most client protection measures even though they cap victims' client protection fund recoveries at the relatively low amount of \$50,000.²⁵⁸ It seems noteworthy that the majority of states with the most client protection measures are jurisdictions with voluntary state bars, even though thirty-two of the fifty-one jurisdictions in the United States have mandatory state bars. Stated differently, almost 37% of the jurisdictions with voluntary state bars appear in Table 1 while only 18.75% of the jurisdictions with mandatory bars appear there.²⁵⁹

257. Only New York's First and Second Departments provide for random audits. *See* N.Y. APP. DIV. FIRST DEP'T RULES § 603.27; N.Y. APP. DIV. SECOND DEP'T RULES § 691.12(a).

258. The Alaska State Bar's most recent annual report indicates that its Lawyers' Fund for Client Protection considered no claims in 2018. *See* ALASKA 2018 ANNUAL REPORT, *supra* note 117. The preceding year, it considered one claim, for which it paid \$2,500. *See* ALASKA BAR ASS'N, 2017 ANNUAL REPORT, <https://alaskabar.org/wp-content/uploads/2017-annualreport.pdf> [<https://perma.cc/WBP3-NKAF>]. Since Maine's Lawyers' Fund for Client Protection was established in 1997, it has approved claims in the amount of \$816,567, but it does not report the victims' actual losses. *See* LAWS' FUND FOR CLIENT PROT., 2019 ANNUAL REPORT 3, https://mebaroverseers.org/complaint/Annual_Reports/2019%20Annual%20Report.pdf [<https://perma.cc/8XXV-E3SN>]. In 2019, it only received one claim, which was in the amount of \$2,500. *Id.*

259. One additional state with a mandatory bar that almost made it into Table 1 was Georgia, which has trust account notification and payee notification. *See* SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42, 44. Georgia does not have mandatory arbitration, but it places some pressure on lawyers to participate in fee arbitration due to the presumption concerning the fairness of the award in enforcement proceedings if the client prevails in arbitration and the lawyer

There are, however, some alternative explanations for this pattern. It is conceivable that the six Northeastern states with voluntary state bars that appear in Table 1 have more client protection measures because lawyers steal larger amounts of client money in those states.²⁶⁰ Some support for this explanation can be found in the fact that from 2017 to 2019, fifty-eight percent of the money paid by client protection funds came from thirteen jurisdictions in the Northeast and middle Atlantic states.²⁶¹ But this statistic could, instead, be due to the fact that these jurisdictions have client protection funds with higher claims caps.²⁶² The explanation might also be due to diffusion of client protection rules to neighboring jurisdictions. States have long emulated other states' policies through a process known as policy diffusion.²⁶³ Policy diffusion is often seen in geographically proximate states,²⁶⁴ which may help explain why some of the Northeastern states take similar approaches to client protection. Alternatively, Northeastern states and California may be politically more "consumer-oriented" than other parts of the country. The National Consumer Law Center's evaluation of the states with the "best" and "worst" consumer protection laws suggests that a state's consumer protection orientation may help to explain why two of the jurisdictions appear in Table 1.²⁶⁵

did not participate. *See supra* note 86 and accompanying text. Nevertheless, Georgia does not make arbitration mandatory and has an extremely low cap on its client protection fund (\$25,000), which seemingly makes it inappropriate to classify it as a one of the most protective jurisdictions. If it had been included in Table 1, however, the percentage of all mandatory bars that appear in that table would increase to 21.875%.

260. *See* SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42, 44.

261. *See id.* at 7.

262. In fact, the client protection funds in Connecticut, Delaware, Maryland, Massachusetts, and New Hampshire place no per claimant cap on recoveries. *See id.* at 25–26.

263. *See* Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 AM. POL. RES. 521, 521 (2004). This process is affected by many variables and can occur through mechanisms including imitation and learning. *See* Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841 (2008); *see also* Tiffany Bergin, *How and Why Do Criminal Justice Public Policies Spread Throughout U.S. States? A Critical Review of the Diffusion Literature*, 22 CRIM. JUST. POL'Y REV. 403, 416 (2011).

264. *See* Bergin, *supra* note 263, at 405.

265. There does not appear to be a state-by-state ranking of states' consumer protection orientations. The National Consumer Law Center (NCLC) has analyzed states' consumer protection laws on a variety of measures, but it only identifies a few of the "best" and "worst" jurisdictions. *See, e.g.*, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-

Regression analyses would be needed to more reliably test the impact of this factor.

Perhaps more telling is Table 2, showing the jurisdictions with the fewest client protection measures. All but one of these jurisdictions have mandatory state bars. Three of the jurisdictions with the fewest client protection measures (Mississippi, South Dakota, and Texas) have instituted none of the measures discussed in this Article. It should be noted, however, that two of those three (Mississippi and South Dakota) also have among the weakest consumer protection laws in the country.²⁶⁶ Michigan and Minnesota are outliers in Table 2 because their client protection funds have relatively generous per claimant caps. While it is conceivable that some of the other jurisdictions in Table 2 see relatively low-level lawyer defalcations, this cannot be said of other jurisdictions like Indiana, Louisiana, and Texas.²⁶⁷

STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf> [https://perma.cc/Z823-L3MC]. According to the NCLC, Connecticut, Hawaii, Illinois, Massachusetts, and Vermont have the most protective laws. *Id.* at 2–3. Only one of those Northeastern states (Connecticut) appears in Table 1, as does Hawaii.

266. According to the NCLC, Colorado, Oregon, and South Dakota have the weakest substantive consumer protection statutes in the country. *Id.* at 13. Iowa and Mississippi provide the weakest remedies for consumers. *Id.* at 44. Mississippi and South Dakota do require lawyer certification of compliance with recordkeeping rules. This is not an ABA-recommended client protection measure, but it is tracked by the ABA. See SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 42.

267. For some Texas cases see *supra* note 235. For some of the defalcation cases in Louisiana and Indiana, see Karen Kidd, *Hammond Attorney Suspended Indefinitely After Conviction for Stealing at Least \$186,000 from Client*, LA. REC. (Feb. 11, 2020), <https://louisiana-record.com/stories/523756156-hammond-attorney-suspended-indefinitely-after-conviction-for-stealing-at-least-186-000-from-client> [https://perma.cc/SR6Q-QD6S]; Zach Parker, *Facing \$2-Million Judgment for Defrauding Blind Client, Monroe Attorney Seeks New Trial*, OUACHITA CITIZEN (Feb. 17, 2021), https://www.hannapub.com/ouachitacitizen/news/local_state_headlines/facing-2-million-judgment-for-defrauding-blind-client-monroe-attorney-seeks-new-trial/article_b66d6c54-7135-11eb-b764-d67fe7f81c6f.html [https://perma.cc/MZ8Y-MKL8] (describing Louisiana lawyer who admitted stealing more than \$1.8 million from client); Martha Neil, *Ex-Lawyer Accused of Stealing \$4.5M from Clients Is Now Represented by Public Defender*, A.B.A.J. (Jan. 25, 2013, 6:48 PM), <https://www.abajournal.com/news/article/ex-lawyer> [https://perma.cc/T6XK-E7V6] (describing Indiana personal injury lawyer); Teresa Auch Schultz, *Valparaiso Attorney to Plead Guilty in Client Theft Case*, CHI. TRIB. (Apr. 24, 2015), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-valparaiso-attorney-to-plead-guilty-st-0425-20150424-story.html> (reporting on Indiana lawyer who stole more than \$2 million); Dave Stafford, *Suspended Lawyer Accused of Thefts from Disabled Clients Jailed on Warrant*, IND. LAW. (Jan. 21, 2020), <https://www.theindianalawyer.com/articles/suspended-lawyer-accused-of-thefts-from->

*Table 2. Jurisdictions with Fewest Client Protection Measures*²⁶⁸

Jurisdiction (* indicates mandatory bar)	Written Fee Agreement	Mandatory Fee Arbitration	Trust Account Overdraft	Insurance Payee Notification	Random Audits of Trust	CPF Limits Per Claimant
Alabama*			x			\$75,000
Indiana*			x			\$15,000
Louisiana*			x			\$25,000
Michigan*			x			\$150,000
Minnesota			x			\$150,000
Mississippi*						\$10,000
North Dakota*			x			\$25,000
South Dakota*						\$10,000
Texas*						\$40,000
Utah*			x			\$20,000

It must be noted, however, that if one other ABA-recommended “client protection measure” were considered—the rule regarding disclosure of whether a lawyer carries malpractice insurance²⁶⁹—the jurisdictions with mandatory bars would look somewhat more protective of clients than they do in the tables provided here. South Dakota, which has a mandatory bar and appears in Table 2, has the

disabled-clients-jailed-on-warrant [https://perma.cc/BLF7-5PPX] (describing Indiana lawyer who stole more than \$250,000 from clients); Dave Stafford, *Justices in Tug-of-War over Judge in Suit Accusing Ex-Lawyer of Estate Theft*, IND. LAW. (Feb. 2, 2021), https://www.theindianalawyer.com/articles/justices-in-tug-of-war-over-judge-in-suit-accusing-ex-lawyer-of-estate-theft [https://perma.cc/DU35-3M34] (describing Indiana lawyer who allegedly stole more than \$775,000 from a client’s estate).

268. For support for the data in Table 2, see *supra* notes 45, 84, 184, 199 and accompanying text; SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION 2017–2019, *supra* note 1, at 25–26; *Client Security Fund*, STATE BAR OF S.D., https://www.statebarofsouthdakota.com/client-security-fund [https://perma.cc/CCG5-PZ6P].

269. MODEL COURT RULE ON INS. DISCLOSURE (AM. BAR ASS’N 2004).

most demanding disclosure rule in the country.²⁷⁰ It requires uninsured lawyers to disclose directly to clients, on firm letterhead, and in any advertising that they do not carry professional liability insurance.²⁷¹ The only jurisdictions that go further than the ABA's disclosure recommendation—and require lawyers to maintain lawyer professional liability insurance (Oregon and Idaho)—have mandatory state bars.²⁷² In Oregon, the bar proposed mandatory insurance largely because they believed that a state professional liability fund would result in lower insurance rates for lawyers.²⁷³ In Idaho, however, bar members (narrowly) approved the change on public protection grounds.²⁷⁴

Thus, there are times when mandatory state bar members *will* support client protection measures rather than lawyers' interests.²⁷⁵ There are also jurisdictions where mandatory state bars have less influence on the rulemaking process than in some other states.²⁷⁶

270. Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV. 1281, 1299–1301 (2016). In fact, insurance disclosure rules provide relatively weak client protection—as compared to an insurance requirement—because clients often do not understand their implications. *Id.* at 1325–27. But South Dakota's rule is better than most.

271. S.D. RULES OF PRO. CONDUCT r. 1.4(c) (2020). The State Bar's Professional Liability Insurance Committee "felt that we owed it to clients in South Dakota to inform them if the attorneys had malpractice insurance or not." E-mail from Jeffrey T. Sveen, former President, South Dakota Bar, to author (Apr. 29, 2015, 17:52 EDT) (on file with author). The committee's recommendation was approved by state bar members at its annual meeting. See COMMITTEE REPORTS OF THE STATE BAR OF SOUTH DAKOTA 55 (1999) (on file with author).

272. See *Who We Are*, OSB PRO. LIAB. FUND, <https://www.osbplf.org/about/who-we-are.html> [<https://perma.cc/5NNU-ZFSJ>]; *2018 Malpractice Coverage Requirement—General Information*, IDAHO STATE BAR (2019), <https://isb.idaho.gov/blog/2018-malpractice-coverage-requirement> [<https://perma.cc/7JWA-3A6C>].

273. See Daniel O'Leary, *The Professional Liability Fund*, OR. STATE BAR BULL., June 1978, at 9 (describing an Oregon State Bar Board of Governors statement about the benefits to lawyers of the professional liability fund).

274. See Diane K. Minnich, *2016 Resolution Process—The Results*, ADVOC., Jan. 2017, at 22.

275. This could also be seen with respect to some of the client protection measures described in this Article. For instance, the California State Bar supported legislation that would require written fee agreements where the fee was expected to exceed \$1,000. See *Business Associations and Professions*, 18 PAC. L.J. 467, 473 (1987). It is worth noting, however, that this occurred during a period when the state bar was under intense scrutiny by the state legislature. See RICHARD L. ABEL, *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* 22–43 (2011).

276. In Hawaii, the supreme court appoints an independent task force and then invites comment on the proposed rules. See, e.g., James A. Kawachika, *The New Hawai'i Rules of Professional Conduct: What You Absolutely Need to Know and Why—Part I*, HAW. BAR

Closer study is needed to determine whether, on balance, jurisdictions with mandatory state bars tend to produce regulation that is less protective of the public, and whether this occurs *because* of the activities of the state bars. If this is the case, it is not necessarily because voluntary state bars are more concerned with client protection. Rather, voluntary state bars may simply have less direct influence in the rulemaking process.

CONCLUSION

It is important to reiterate that state bar associations are just part of this story. There are several other factors that contribute to the extent to which client protection measures are implemented in any jurisdiction. These include, *inter alia*, the state supreme court's view of its role in lawyer regulation, the jurisdiction's rulemaking process, the incidence of lawyer overreaching in a state, and the money available for regulatory responses. Case studies and more fine-grained, systematic comparisons of the political and economic conditions in various jurisdictions would be needed to better identify why the regulatory differences occur.²⁷⁷

What is evident, however, is that in some jurisdictions, individual clients are not adequately protected, and that the courts share responsibility for this state of affairs. Courts need to be more engaged when considering client protection measures. They should not overly rely on state bars—which are inherently self-interested organizations—to determine how to regulate lawyers. Courts should create their own task forces to consider possible changes in lawyer regulation. These task forces should include nonlawyer consumer advocates (and not just “friends of lawyers”) who will speak out to protect clients' interests. Where the courts maintain responsibility for certain client protection measures—such as fee arbitration and client protection funds—they should insist on receiving reports that meaningfully advise them of how well these programs are operating. Where these programs are not under court supervision, the courts should investigate whether they

J., Mar. 2014, at 4; *Court Briefs*, HAW. BAR J., Feb. 2011, at 22; *see also HSBA Happenings*, HAW. BAR J., Mar. 2019, at 15 (describing the mandatory Hawaii State Bar Association's decision not to comment on the supreme court's proposed rule change).

277. *See generally* Virginia Gray, *The Socioeconomic and Political Context of States*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 1, 3–23 (Virginia Gray et al. eds., 11th ed. 2018) (describing the many reasons why states make different policy choices).

should assume an oversight role—as the ABA recommended—to ensure that the programs are operating in a manner that adequately protects the public.

If courts are not willing to do this work, then they should allow the state legislatures to step in to protect the public. Admittedly, this is unlikely in jurisdictions where state courts maintain that they have the exclusive authority to regulate the practice of law and that “any encroachment” by the legislature is unacceptable.²⁷⁸ Other courts, however, have been more flexible, indicating a willingness to uphold legislative regulation of the legal profession in aid of the court’s judicial functions,²⁷⁹ as a matter of comity,²⁸⁰ or on other grounds.²⁸¹ A few have gone further, recognizing that the legislature has its own role to play in regulating the legal profession.²⁸²

Thus, there seem to be openings in some states for the legislatures to do more to protect vulnerable clients. Some courts have concluded

278. See *Beyers v. Richmond*, 937 A.2d 1082, 1090–93 (Pa. 2007); see also *In re Infotechnology, Inc.*, 582 A.2d 215, 218 (Del. 1990) (referring to the court’s “sole and exclusive jurisdiction over matters affecting governance of the Bar”); *Injured Workers Ass’n of Utah v. State*, 374 P.3d 14, 20, 22 (Utah 2016) (noting court’s authority is both exclusive and “extensive”); *State ex rel. Fiedler v. Wis. Senate*, 454 N.W.2d 770, 773 (Wis. 1990) (referring to “the exclusive authority of the judicial branch to define and regulate the activities” of lawyers).

279. See *In re Kaufman*, 206 P.2d 528, 539 (Idaho 1949); see also *Hays v. Ruther*, 313 P.3d 782, 788 (Kan. 2013); *Att’y Gen. of Md. v. Waldron*, 426 A.2d 929, 937–38 (Md. 1981); *Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 724 S.E.2d 733, 741 (W. Va. 2012); *Walter W. Steele, Jr., Cleaning up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 418 (1978).

280. See, e.g., *In re Opinion of the Justices*, 180 N.E. 725, 727 (Mass. 1932); Wolfram, *supra* note 223, at 16.

281. See, e.g., *Sadler v. Or. State Bar*, 550 P.2d 1218, 1222–23 (Or. 1976) (recognizing the legislature’s police power to protect the public); *Bester v. La. Sup. Ct. Comm. on Bar Admission*, 779 So. 2d 715, 718 (La. 2001) (indicating that the legislature may pass laws regulating the practice of law that do not “destroy, frustrate, or impede the court’s inherent constitutional authority”).

282. See *In re Att’y Discipline Sys.*, 967 P.2d 49 (Cal. 1998) (noting that court has respected the legislature’s exercise of a reasonable degree of regulation of the legal profession); *Bergman v. District of Columbia*, 986 A.2d 1208, 1225 (D.C. 2010) (stating that the court’s “‘primary’ power” to discipline lawyers does not mean “that the legislature is precluded from playing any role in the regulation of . . . attorneys and the practice of law”); *Abdool v. Bondi*, 141 So. 3d 529, 548 (Fla. 2014) (noting that the legislature “also possesses the inherent authority to regulate some aspects of legal representation”); *Newton v. Cox*, 878 S.W.2d 105, 111 (Tenn. 1994) (observing “that areas exist in which both the legislative and judicial branch have interests, and that in such areas both branches may exercise appropriate authority”).

that consumer protection laws of general applicability can be applied to lawyers.²⁸³ As one court noted, “entrepreneurial aspects of legal practice—how the price of legal services is determined, billed, and collected . . . [are] business aspects of the legal profession” and therefore properly subject to the state’s consumer protection act.²⁸⁴ Another, when upholding the application of the state’s consumer protection statute to lawyers observed, “[w]e should not permit the special relationship of attorneys to the judiciary to blind us to the fundamental importance of the relationship of attorneys to their clients.”²⁸⁵ Some courts have also upheld statutes specifically aimed at protecting lawyers’ clients, such as laws limiting lawyers’ recoveries in contingent fee cases²⁸⁶ and setting attorneys’ fee formulas in workers compensation matters.²⁸⁷

Legislatures may be able to do even more to protect vulnerable clients. For example, they may be able to require that fee arrangements be in writing in order for lawyers to bring suit to recover their fees (other than on a quantum meruit basis).²⁸⁸ Such a law would not interfere with the courts’ authority over lawyers in the discipline process and would be likely to incentivize more lawyers to put their fee agreements in writing. Legislatures should be able to require insurance companies to provide payee notification—and are even better positioned than courts to do so—without causing courts concern that their authority is being usurped. Likewise, because of

283. See *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1024–25 (Alaska 2009); *Crowe v. Tull*, 126 P.3d 196, 209 (Colo. 2006); *Heslin v. Conn. L. Clinic of Trantolo & Trantolo*, 461 A.2d 938, 944–45 (Conn. 1983); *Andrews & Lawrence Pro. Servs., LLC v. Mills*, 223 A.3d 947, 962–66 (Md. 2020); *Short v. Demopolis*, 691 P.2d 163, 170 (Wash. 1984). But see *Cripe ex rel. Schmitz v. Leiter*, 703 N.E.2d 100, 102 (Ill. 1998); *Beyers*, 937 A.2d at 1089–93 (refusing to apply consumer protection law to lawyers).

284. *Short*, 691 P.2d at 168.

285. *Heslin*, 461 A.2d at 945.

286. See, e.g., *Roa v. Lodi Med. Grp., Inc.*, 695 P.2d 164, 168–69 (Cal. 1985) (upholding statute limiting contingent fee recovery to twenty-five percent); *Newton*, 878 S.W.2d at 107, 112 (upholding statute limiting contingent fee recovery by lawyers to thirty-three percent in medical malpractice cases).

287. See, e.g., *David v. Bartel Enters.*, 856 N.W.2d 271, 274–75 (Minn. 2014); see also *Multiple Inj. Tr. Fund v. Coburn*, 386 P.3d 628, 636–39 (Okla. 2016) (enforcing statutory fee formula in certain workers’ compensation cases).

288. It seems less likely that courts would uphold statutory requirements that lawyers submit to fee arbitration. But see CAL. BUS. & PROF. CODE § 6200(c) (West 2021) (making arbitration mandatory for lawyers in fee disputes). In California, however, the supreme court already accedes to significant legislative involvement in lawyer regulation. See *supra* note 221; Levin, *supra* note 20, at 1002.

state legislatures' role in funding the state courts, they could provide funding for random audits and more money for client protection funds. (Although the likelihood they would do so seems low given other legislative priorities.)

The point here is not that it would be preferable for state legislatures—rather than the courts—to assume responsibility for adopting additional client protection measures. The courts have more expertise with respect to these issues²⁸⁹ and more reasons to be concerned about lawyers' conduct. Moreover, Texas's experience with its Sunset Commission suggests that some legislators may be more concerned about protecting corporate interests than they are about public protection.²⁹⁰ Rather, the point is that legislatures should be able to act to better protect the public if the courts lack the time, attention, or political will to do so. Of course, before any legislature is likely to act, there would need to be advocates for client protection measures. Success in the legislature would also be difficult because state bars already bankroll entrenched lobbyists who advocate for lawyers' interests. Yet the mere possibility that the state legislature will act to further protect clients may induce state supreme courts and state bars to give client protection issues more serious attention. Regardless of whether it is the courts or the state legislatures that are ultimately moved to act, ordinary clients need and deserve more protection from overreaching lawyers than they are currently receiving.

289. See Benjamin Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market*, 37 GA. L. REV. 1167, 1240 (2003).

290. See *supra* notes 247–48 and accompanying text.

A History of the Client Protection Rules

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A History of the Client Protection Rules

Remedies for defalcation of clients' funds by lawyers were established in English Commonwealth countries at the beginning of the 20th century.¹ Developments in the law regarding lawyers' responsibilities appear to be tied historically to depressed economic times during which lawyers misappropriated client funds.

The first major development in the protection of client funds arose in the turmoil of the Boer War (1899-1902) when the English stock market tumbled, sending many solicitors and well established firms into bankruptcy. Until then, solicitors commonly commingled their own funds with client funds and even used clients' funds, unless earmarked for a particular purpose.²

The severe losses following the market collapse prompted Parliament in 1901 to amend the Larceny Act of 1861 to make it a criminal offense to convert funds or property held in trust. The expansion of criminal liability for defalcation was not accompanied by passage of civil laws requiring the segregation of client funds; by 1907, however, solicitor's training included bookkeeping courses.

The English Law Society established a special committee to examine professional accounting requirements and the possible formation of a Guarantee Fund to protect defrauded clients. The special committee concluded that solicitors were duty bound to make a full and proper accounting of clients' funds by maintaining separate accounts. Further protections were considered unnecessary.⁴ It was not until Parliamentary amendments were made to the Solicitors' Act, 1933,⁵ that the Law Society was required

to draft rules requiring solicitors to establish segregated client accounts and to maintain records of those accounts.

While the English Law Society declined to recommend the creation of a compensation fund in 1907,⁶ New Zealand emerged as a leader in the development of client protection remedies, particularly with the passage in 1908⁷ of a provision requiring solicitors to deposit client funds into bank trust accounts. This was followed in 1913 with amendments empowering the New Zealand Law Society to make rules requiring audits of solicitors' trust accounts.⁸

Despite these provisions, losses by defaulting solicitors came to the attention of the New Zealand Parliament in 1926, and the Attorney General, who recommended that the New Zealand Law Society draft and introduce legislation regarding solicitors' accounting of client trust funds. The Association of New Zealand Chambers of Commerce presented a resolution in February 1927, providing:

[t]hat this Conference brings before the Law Society the necessity of Solicitors handling trust moneys, subscribing to an adequate indemnity insurance, or failing that, the Law Society provides a guarantee fund to admitted solicitors similar to the guarantee funds provided by the banks.⁹

That March, the concerns of Parliament and the Association of Chambers of Commerce were reviewed by the New Zealand Law Society Council when the Council of the Wellington

District Law Society proposed the "creation of a fund for the purpose of making provision for monetary losses incurred by clients of defaulting solicitors."¹⁰ The measure prompted the formation of a committee to study legislation regarding Solicitors' Trust Accounts and to work with the New Zealand Attorney General in the formulation of legislation. After prolonged discussions the Law Society drafted a bill that was passed by the New Zealand Parliament creating the first trust fund, the Solicitors' Fidelity Guarantee Fund.¹¹

When originally established, the fund reimbursed those who suffered monetary losses because of theft by

a solicitor or a solicitor's servant or agent of any money or other valuable property entrusted to the solicitor in the course of practice. All solicitors were required to contribute to the fund. After the Act was adopted, the Law Society drafted an advertising circular, for publication by local law societies, informing the public about the fund benefits.

In 1930, the Legal Practitioners' Fidelity Guarantee Fund was established in Queensland, Australia.¹² The first fidelity fund in Canada was established in Alberta in 1939, and entitled the Assurance Fund.¹³ A compensation fund was created in England in 1941 into which every practicing solicitor was required to contribute annually.¹⁴ Funds were established in Scotland in 1949¹⁵ and Ireland¹⁶ in 1954.

World War II may have played a prominent, if unexpected, role in the development of lawyers' funds for client protection in the United States. According to one history of the development of such funds, Kenneth G. McGilvray, of Sacramento, California, learned about the fund concept while stationed in New Zealand during the war and returned home to publish an article discussing the New Zealand experience in the California State Bar Journal in 1946.¹⁷

Several years later, in 1953, Robert G. Storey, then American Bar Association (ABA) president, discussed lawyers' funds for client protection in his report to the Association. Interest in the funds was stimulated by New Jersey Supreme Court Chief Justice Arthur G. Vanderbilt and Harvard Law School Dean Erwin Griswold. The ABA established a committee in 1955 to study and promote the creation of such funds.¹⁸ In the United States, 1959 stands out as a watershed year in the development of client protection measures. The first American lawyers' fund for client protection was established in Vermont in January 1959 through the auspices of the Vermont Bar Association. In February, the ABA House of Delegates adopted a resolution approving such funds in principle and urging all state bar associations to appoint feasibility study committees. In May, the Board of Governors of the Illinois State Bar Association adopted a resolution approving the principle of a fund and appointing a committee to develop ways to establish a fund with the Chicago Bar Association. In June, the Philadelphia Bar Association adopted a resolution putting a clients' security fund into operation. In August, a meeting of the ABA Clients' Security Fund Committee reported that 34 state bar associations had appointed committees to study fund creation. In September the State

Bar of Washington voted to establish a security fund. The next month, bar associations in Colorado and New Mexico followed suit. In November the Board of Governors of the Virginia State Bar Association approved the establishment of a fund in principle.¹⁹ By 1976, 47 jurisdictions had established some form of lawyers' funds for client protection.²⁰ By 1998, all jurisdictions in the United States and Canada had not established a fund. The organization, funding, accessibility and responsiveness to client claims vary widely among the funds.

MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION

Since 1969 the ABA Standing Committee on Client Protection has actively promoted the establishment, maintenance and improvement of lawyers' funds for client protection for the benefit of the public and the profession. The Committee published Suggested Guidelines for the Establishment and Operation of a Clients' Security Fund in the mid 1970s, and in 1979 began its effort to codify into black letter the basic mechanism to achieve reimbursement of losses generated by the dishonest conduct of lawyers.

In 1981, the ABA House of Delegates approved the Model Rules for Clients' Security Funds. Nearly a decade later, based on experience in reimbursement programs nationally, the rules were updated and renamed Model Rules for Lawyers' Funds for Client Protection. The revisions were adopted by the ABA House of Delegates in 1989.

Over the ensuing years other important safeguards have been developed by the various jurisdictions that have led to the development of other important Model Rules by the Standing Committee on Client Protection. (The Standing Committee on Lawyers' Responsibility for Client Protection was constituted in 1984 through a merger of the Standing Committee on Clients' Security Fund and the Standing Committee on the Unauthorized Practice of Law. In 1997 the Committee was renamed the Standing Committee on Client Protection.)

In August 2002, the ABA House of Delegates accepted a package of revisions to the Model Rules for Lawyers' Funds for Client Protection. The amendments reflect experience gained during the two decades

that have elapsed since the original Model Rules were adopted. Every U.S. jurisdiction now has a fund to compensate clients for financial loss resulting from their lawyer's dishonesty. Rather than making significant changes, the revisions are intended to fine-tune aspects of lawyers' funds for client protection.

MODEL RULES FOR TRUST ACCOUNT OVERDRAFT NOTIFICATION

Lawyers are required to maintain client funds in specially designated escrow or trust accounts, according to Rule 1.15 of the ABA Model Rules of Professional Conduct. In 1988, the ABA House of Delegates adopted the Model Rules for Trust Account Overdraft Notification, requiring financial institutions to notify the state lawyer disciplinary agency when an overdraft has occurred in a lawyers' trust or escrow account. This rule is designed to operate as an "early warning" that a lawyer may be engaging in conduct that might injure clients.

MODEL RULE FOR PAYEE NOTIFICATION

In 1991, the ABA House of Delegates approved a Model Rule for Payee Notification that requires insurers to provide written notice to a claimant that payment was delivered to the claimant's lawyer or other representative by draft, check or otherwise. This Model Rule was based on Regulation 64 of the Department of Insurance of the State of New York, 11 NYCRR 216.9, promulgated in 1988, that had proved highly successful in protecting client interests.

MODEL RULE ON FINANCIAL RECORDKEEPING

The Model Rule on Financial Recordkeeping, adopted in February 1993, delineates the types of financial records that must be maintained by a lawyer. In 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct, including Rule 1.15, requiring lawyers to maintain "complete records" regarding trust or escrow accounts. Rule 1.15 does not provide lawyers with practical guidance in

complying with these recordkeeping duties. Consequently, a Model Rule was drafted to provide further definition of the requirements of Rule 1.15 and to establish uniform and minimal standards for the maintenance of law firm financial records.

MODEL RULE FOR RANDOM AUDIT OF LAWYER TRUST ACCOUNTS

Additionally, the Model Rule for Random Audit of Trust Accounts was approved in August 1993. Adoption of such a rule had been included as Recommendation Number 16 in the Report of the Commission on the Evaluation of Disciplinary Enforcement, otherwise known as the "McKay Commission," which the ABA House of Delegates adopted in February 1992.

The McKay Commission had found by 1992 that trust account notification, recordkeeping and random audit rules had been adopted by a sufficient number of jurisdictions so that a body of experience was able to demonstrate that these programs were effective deterrents as well as detectors of thefts of funds by lawyers. Consequently, the Commission recommended the highest court in each jurisdiction adopt a rule authorizing the lawyer disciplinary agency to conduct audits of lawyer trust accounts selected at random without having a basis to believe misconduct occurred.

When this Model Rule was adopted, random audit programs existed in Delaware, Iowa, Nebraska, New Hampshire, New Jersey, New York (1st and 2d Departments), North Carolina and the state of Washington.

MODEL RULES FOR FEE ARBITRATION

Another important series of recommendations in the McKay Commission report centered around the establishment of procedures for handling the numerous complaints received by disciplinary agencies that do not involve allegations of lawyer misconduct, but reflect legitimate client concerns. Among these, the Commission recommended adoption of a program for the mandatory arbitration of fee disputes.

As a result of this recommendation, the ABA House of Delegates in February 1995 adopted the Model

Rules for Fee Arbitration. These rules were based on experience in six states that had programs for mandatory fee arbitration: Alaska, California, Maine, New Jersey, South Carolina and Wyoming.

MODEL RULES FOR MEDIATION OF CLIENT-LAWYER DISPUTES

On August 4, 1998, at its Annual meeting in Toronto, the ABA House of Delegates adopted the black-letter of the Model Rules for Mediation of Client-Lawyer Disputes. The mediation process will benefit the public by directly addressing instances where a lawyer is alleged to have engaged in lesser misconduct but the misconduct does not warrant a formal disciplinary proceeding. A mediation program will also protect the public by removing matters involving lesser misconduct from the disciplinary system and thereby allowing disciplinary counsel to focus their efforts on more serious matters.

GUIDELINES FOR THE ADOPTION OF A DEFINITION OF THE PRACTICE OF LAW

On August 11, 2003 the ABA House of Delegates adopted the Report and Recommendation of the Task Force on the Model Definition of the Practice of Law. The Guidelines for the Adoption of a Definition of the Practice of Law recommend that every jurisdiction and territory adopt a definition of the practice of law that includes the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity and that each state and territory should determine who may engage in the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.

There are an increasing number of situations where nonlawyers, or lawyers licensed in a different state or territory, are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. The adoption by jurisdictions and territories of a definition of the practice of law is an important step in protecting the public from unqualified service providers and in

eliminating uncertainty for persons working in law-related areas, including lawyers licensed in other states or territories, about the propriety of their conduct.

MODEL COURT RULE ON INSURANCE DISCLOSURE

On August 10, 2004, the American Bar Association House of Delegates adopted as ABA policy the Model Court Rule on Insurance Disclosure. The Model Court Rule requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. It places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer's conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period. Lawyers who do not comply with the Model Court Rule are not unauthorized to practice law until they comply. The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to hire a particular lawyer.

The information submitted by lawyers will be made available by such means as designated by the highest court in the jurisdiction. For example, in Illinois, Kansas, Nebraska and Virginia, information regarding a lawyer's professional liability insurance is made available to a potential client if the client telephones the bar association and requests it. The information can also be accessed on the bars' websites. (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). To date, twelve jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance.

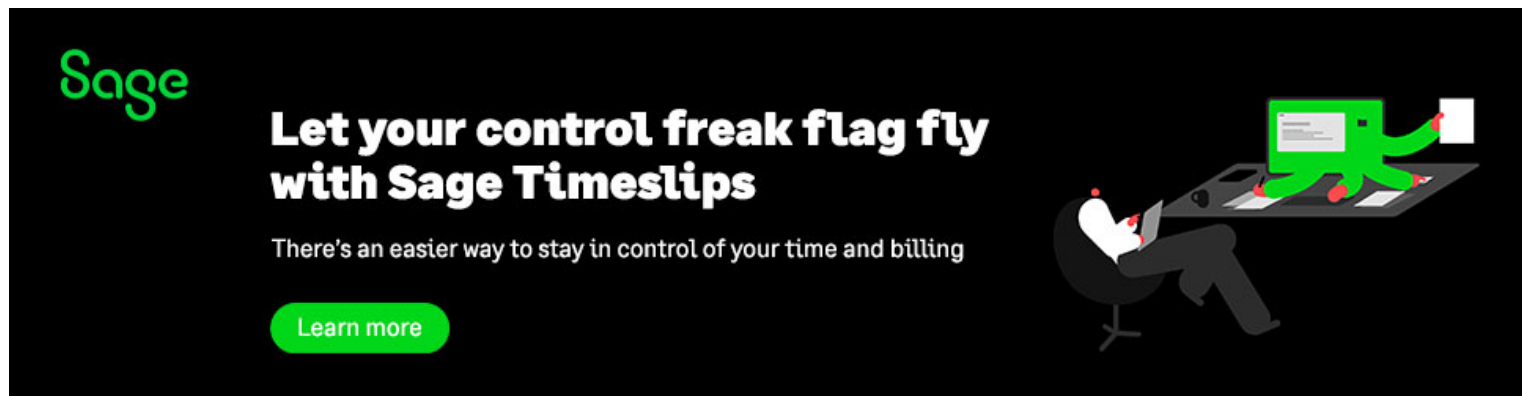
MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

On February 12, 2007, the American Bar Association House of Delegates adopted as policy the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. The Model Court Rule

provides that, after the highest court in an affected jurisdiction, or in another jurisdiction to which displaced persons temporarily relocate, determines that an emergency exists that affects the state's justice system and the provision of legal services, the court may allow: (1) out-of-state lawyers to provide pro bono legal services to the citizens of the affected state within certain constraints described in the model rule; and (2) lawyers from an affected state can provide legal services in an unaffected state on a temporary basis if these services are reasonably related to the lawyer's practice in the affected jurisdiction. The Model Court Rule incorporates the fundamental and well-settled Association policy that regulation of the legal profession vests with the judicial branch of government. The provision of temporary pro bono legal services under the Model Court Rule shall be assigned and supervised through an established not-for-profit bar association, pro bono program or legal services program or through such organization specifically designated by the highest court. The Model Court Rule requires out-of-state lawyers to file a registration statement with the Clerk of the Court in a form prescribed by the Court. Under paragraph (b) of the Model Court Rule, an emeritus lawyer from another United States jurisdiction may provide pro bono legal services on a temporary basis in an affected jurisdiction.

[Table of Contents](#)

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