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

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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 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 lawyer overreaching 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

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[1] The precise number is not known. However, from 2017-2019, thirteen jurisdictions reported that their client protection funds paid an average of 1,279 claims annually for unearned fees. *See* ABA Center on Professional Responsibility, Survey of Lawyers' Funds for Client Protection 2017-2019, at 8 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017-2019-cp-survey.pdf [hereafter Survey of Lawyers' Funds for Client Protection 2017-2019]. This figure does not include claims for unearned fees in the other thirty-eight jurisdictions. Nor does it include unearned fees that were eventually repaid by lawyers or instances of fee overcharging that were subsequently resolved.

[2] *See* MODEL RULES OF PROF'L CONDUCT r. 1.15 (AM. BAR. ASS'N 2018).

[3] *See, e.g.*, In re Wilson, 409 A.2d 1153, 1158 (N.J. 1999) (stating that in misappropriation cases, "mitigating factors will rarely override the requirement of disbarment"); CONN. PRAC. BOOK 2-47A (2021) (providing that knowing misappropriation of client's funds shall result in disbarment for 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* (2015), ABA, 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.

to adopt many of those measures or did so incompletely. The reasons why this has happened and the consequences for ordinary clients have been largely unexplored.[5]

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.[6] 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 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 requiring lawyers to participate in the process.[7] Many jurisdictions have also failed to implement certain other ABA-recommended client protection measures—such as the *Model Rules for 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.[8] And even though all jurisdictions 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 recommended by the ABA.[9]

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.[10] 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.[11] These clients have the financial resources to sue their lawyers

[5] 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 (1998); Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 403-405 (2013).
[6] *See infra* note 44 and accompanying text.
[7] *See infra* note 82 and accompanying text.
[8] *See infra* notes 181, 193, 195 and accompanying text. The only significant client protection measure most states have adopted is trust account overdraft notification. *See infra* notes 135-36 and accompanying text.
[9] *See* MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION Preamble, R. 3(a) (AM. BAR ASS'N 1989); *infra* notes 165-66 and accompanying text.
[10] *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 816-17, 872, 879-80 (1990).
[11] 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.

over legal fees. If their lawyer steals or overcharges, the lawyer's law firm will often make the corporate client whole.[12] It is individual clients—typically less sophisticated users of legal services—who can least afford to lose their money to lawyers and who most need these client protection measures.[13]

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 often reflect compromises to accommodate lawyers' interests.[14] Once the ABA's model rules are approved, each jurisdiction typically considers whether to adopt the rules in its own state.[15] In the case of the ABA's model rules for client protection, however, those rules, if adopted by jurisdictions at all, have often been adopted with variations that insufficiently protect clients' interests.[16]

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

TODAY (Sept. 14, 2017), https://www.lawpracticetoday.org/article/lawyers-negotiate-outside-counsel-guidelines/.

[12] *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 (2011); *Ex-Drinker Bill Staff Attorney Suspended for Overbilling*, AM. LAW. (May 27, 2015); *see also Charges Against Barclay Damon Partner Stand Out Among Lawyer Theft Cases*, N.Y. L.J. (June 20, 2018).

[13] 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. (March 31, 2021), https://news.bloomberglaw.com/us-law-week/state-bar-claims-thomas-girardi-intentionally-stole-from-clients (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), 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).

[14] *See, e.g.*, Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 702-703, 710-16, 721-22 (1989).

[15] Every state but California has adopted some variation of the Model Rules for Professional Conduct. *See Alphabetical List of Jurisdictions Adopting the Model Rules*, ABA (2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.

[16] *See, e.g., infra* notes 81-82 and accompanying text.

their agendas.[17] 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.[18] They often rely on bar organizations to bring ideas to them, study issues, hold hearings, make recommendations, and draft language effecting 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.[19]

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.[20] Thirty-one states and the District of Columbia have mandatory bars, to which all lawyers in the jurisdiction must pay dues and belong.[21] Mandatory bars are often established as state agencies or as instrumentalities of the judiciary.[22] These bars typically claim that public protection is one of their goals and handle some regulatory functions such as admission or discipline.[23] In most other respects, they perform the same functions as voluntary state bars.[24] All state bars seek to

[17] *See* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 137 (2011).
[18] *See* Steven W. Hays & James W. Douglas, *Judicial Administration: Modernizing the Third Branch*, *in* HANDBOOK OF PUBLIC ADMINISTRATION 1017 (Jack Rabin et al. eds, 3rd ed. 2007); 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); Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 NYU L. REV. 1535, 1543-46 (2006).
[19] *See* BARTON, *supra* note 17, at 1, 37; Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 981 (2020). 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.
[20] 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. In some states, less than half of the lawyers with offices in the state belong to the voluntary state bar. *Id.* at 8-9.
[21] *See*, *e.g.*, *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/.
[22] *See*, *e.g.*, OR. REV. STAT. 9.010 (2) (2020); WASH. STATE B. ASS'N (Jan. 4, 2021), https://www.wsba.org/about-wsba/who-we-are/history-of-the-wsba.
[23] *See* Levin, *supra* note 20, at 5-6; *Mission, Vision & Core Values*, STATE BAR OF ARIZ., https://www.azbar.org/about-us/mission-vision-core-values ("The State Bar of Arizona exists to serve and protect the public with respect to the provision of legal services and access to justice.").
[24] 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. *Id.* at 2-3. The exception is California, where in 2017, the legislature separated the State Bar's regulatory functions from its other bar functions and created a voluntary state bar to perform those other functions. *Id.* at 17-18.

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 followed the ABA's approach. Yet when the ABA adopted model rules for additional client protection measures, most states declined to implement those measures or failed to do so in ways that would truly protect ordinary clients. As explained in Part II, virtually all jurisdictions have instituted lawyer-client fee arbitration programs, but in most states, lawyer participation in is entirely voluntary, notwithstanding the ABA's recommendation that lawyers be required to participate. 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 courts need to become more involved in evaluating and improving 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 the client and her lawyer. Yet even by 1969, when the ABA adopted the *Model Code of Professional Responsibility*, the Disciplinary Rules did not mention written fee agreements.[25] 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."[26] 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.[27]

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.[28] The Kutak Commission noted that there was "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.[29] 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."[30] Proponents of the amendment also noted that a written agreement "would not always be needed or desirable, and, also, that requiring a writing departed significantly from current practice."[31] Consequently, Model Rule 1.5 (b), as adopted, states that "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the

[25] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106 (AM. BAR ASS'N 1969).
[26] *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-19 (1969).
[27] The elite bar associated contingent fees with ethnic lawyers, unprofessional conduct, and "ambulance chasers." *See, e.g.*, JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 43-46 (1976); *see also* MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 246 (1988).
[28] ABA Center for Professional Responsibility, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 78 (2006) [hereinafter "A Legislative History"].
[29] *See* ABA Commission on Evaluation of Professional Standards, Report to the House of Delegates 7 (June 1982).
[30] A Legislative History, *supra* note 28, at 79-80.
[31] *Id.* at 79.

client, preferably in writing…except when the lawyer will charge a regularly represented client on the same basis or rate."[32] Model Rule 1.5 (c) provided, however, that contingent fee arrangements must be in writing.[33]

In 2001, the ABA's Ethics 2000 Commission, which was tasked with reviewing the Model Rules,[34] again recommended a written fee agreement requirement "except when the lawyer will charge a regularly represented client on the same basis or rate" or when the total cost to the client would be $500 or less.[35] 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."[36] The Commission explained, "Few issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer."[37] It further noted that "the Commission believes that the time has come to minimize misunderstandings by requiring the notice to be in writing. . ..."[38] 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 Rule 1.5 it adopted in 2002.[39]

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 reduce disputes between the parties. Indeed, bar journals routinely advise lawyers to use written fee agreements.[40] Lawyer malpractice insurers typically ask lawyers in their insurance

[32] MODEL RULES OF PROF'L CONDUCT r. 1.5 (b) (AM. BAR ASS'N 1983).
[33] MODEL RULES OF PROF'L CONDUCT r. 1.5 (c) (AM. BAR ASS'N 1983).
[34] 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*, ABA, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/.
[35] A Legislative History, *supra* note 28, at 88.
[36] *Id.*
[37] *Id.* at 91.
[38] *Id.*
[39] A Legislative History, *supra* note 28, 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.*
[40] *See, e.g.*, Jill Schachner 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*, ABA J., May 2004, at 44; Dawn M. Evans, *Practice Tips for Solo and Small-Firm Lawyers*, 88 MICH. B. J. 56, 57-58 (2009); Coyt Randal Johnston & Robert L. Tobey, *The "Best of" Litigation Update 2020: Chapter 11: Legal Malpractice*, 50 THE ADVOCATE 8 (2010); Edward Poll, *Fee "Write-Down" Could Save You Headaches—and Dollars*, MASS. WEEKLY (Oct, 3, 2012), https://masslawyersweekly.com/2012/10/03/fee-write-down-could-save-you-headaches-and-dollars/.

applications whether they use written fee agreements.[41] So why did the ABA House of Delegates twice oppose the requirement that fee agreements be in writing? One possible explanation is that no one, including lawyers, like to be told what they must do. But this is not entirely convincing, because the Model Rules impose other affirmative obligations on lawyers.[42] The more likely answer is the one offered by the State Bar of Michigan: concern that a writing requirement would expose lawyers to disciplinary sanctions if they forget to use one.[43]

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.[44] Several of them follow the Ethics 2000 Commission's recommendation and only impose a writing requirement when the fee exceeds a low dollar amount.[45] State bar associations sometimes actively opposed

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[41] *See* Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 570 (2016).

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

[43] *See supra* note 30 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 5, at 403-405. It seems unlikely, however, that the House of Delegates members were quite so calculating.

[44] These jurisdictions are Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Hawaii, Massachusetts, Montana, New Jersey, New York, Pennsylvania, West Virginia, and Wisconsin. Jurisdictional Rules Comparison Charts Model Rule 1.5 (Dec. 11, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf.

[45] The thresholds range from $250-$3000. *See, e.g.*, HAW. RULE OF PROF'L RESPONSIBILITY R. 1.5 (b) ($250); N.Y. COMP. CODES R. & REGS. tit. 22, §1215.2 (a) ($3000); Jurisdictional Rules Comparison Charts Model Rule 1.5, *supra* note 44.

efforts to impose these writing requirements.[46] More than thirty-five jurisdictions follow Model Rule 1.5 (b) and do not require written fee agreements for most fee arrangements.[47]

In jurisdictions that do not require written fee agreements, a significant minority of lawyers do not use them. Surveys of lawyers in Iowa and Oklahoma indicated that at least 17% did not routinely put their fee agreements in writing.[48] 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.[49] When fee disputes of any sort arise, individual clients have limited options.

II. THE LIMITS OF FEE DISPUTE ARBITRATION PROGRAMS

Fee disputes between lawyers and clients are not uncommon.[50] They occur for many reasons including misunderstandings about how the lawyer's fees and expenses would be

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[46] For example, a New Jersey Supreme Court appointed task force recommended in 1983 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 Association to the New Jersey Supreme Court 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., March 8, 2006; Daniel W. Hildebrand, *Ethics 2000: Understanding Proposed Changes to Professional Conduct Rules*, WIS. LAW., Nov. 2004. *See also* Dubin, *supra* note 5, at 98 (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., Haw. State Bar Ass'n, to Adam Mackie, Reference Librarian, University of Conn. Law Library (May 10, 2021, 10:09 EDT) (on file with author).

[47] Jurisdictional Rules Comparison Charts Model Rule 1.5, *supra* note 44.

[48] *See, e.g.*, Oklahoma Bar Ass'n Membership Survey 12 (2013), http://docplayer.net/10571183-Oklahoma-bar-association.html; Iowa State Bar Association, 2015 Salary & Economic Survey 71 (2015), https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/reports/2015_economic_survey.pdf.

[49] For some examples of lawyer overreaching where was no written fee agreement, see Iowa Supreme Court Atty. Disciplinary Bd. v. Vandel, 889 N.W.2d 659, 667-68 (Iowa 2017); Joy v. Ky. Bar Ass'n, 614 S.W.3d 496 (Ky. 2021); In re Delorme, 795 N.W.2d 293 (N.D. 2011); Okla. Bar Ass'n v. Burton, 482 P.3d 739 (Okla. 2021); McDonnell Dyer P.L.C. v. Select-O-Hits, W2000-00044-COA-R3-CV, 2001 Tenn. App. 272, *1 (Ct. App. Tenn. Apr. 20, 2001).

[50] It is hard to determine precisely how often fee disputes arise. *See* Alan Scott Rau, *Resolving Disputes Over 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, *Mass. Supreme Judicial Court to Consider Mandatory Fee Arbitration*, MASS. LAW. WEEKLY, Feb. 17, 2011. One survey of Texas lawyers revealed that 31% reported they had five or more fee disputes over the preceding five years. *See* Rau, *supra* at 2007.

calculated or what the work would ultimately cost, a failure to return unearned fees, other lawyer overreaching, and client unhappiness with the results.[51] When fee disagreements arise, lawyers will sometimes "eat" their fees,[52] clients will sometimes pay (unhappily), or the parties may reach a compromise. When informal dispute resolution does not occur, lawyers may use collection agencies,[53] 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.[54] These lawsuits make both the lawyer and the profession look bad. The ABA's 1908 *Canons of Professional Ethics* urged that "controversies with clients concerning compensation are to be avoided" and that lawsuits against clients "should be resorted to only to prevent injustice, imposition or fraud."[55] The 1969 ABA *Model Rules of Professional Responsibility* echoed this view.[56] 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.[57]

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[51] For some additional reasons why fee disputes can occur, see Rau, *supra* note 50, at 2005-06.

[52] Surveys of lawyers in eight jurisdictions in 2005-2006 revealed that a significant percentage of lawyers report that about 9-10% 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* Oklahoma Bar Ass'n Membership Survey, *supra* note 48, at 17 (reporting that more than 38% of surveyed Oklahoma lawyers replied that their firm failed to collect 10% or more of their fees); Olabisis Onisile Whitney & Rick DeBruhl, *Attorney Survey: Arizona Lawyers Report on Economics of Practice,* ARIZ. ATTORNEY, Sept. 2016, at 22 (reporting that 30% of lawyers surveyed failed to collect 10% or more of their fees); State Bar of Michigan, 2020 Economics of Law Practice in Michigan 21, https://www.michbar.org/file/pmrc/articles/0000156.pdf (reporting that almost 24% of responding lawyers indicated that 10% of more of their fees were uncollectible).

[53] *See* Iowa State Bar Association, *supra* note 48, at 79; *see also* Teich, *supra* note 52, at 880-81.

[54] In 1860, George Sharswood recommended against suing clients for fees except in extraordinary circumstances. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 151 (2d ed. 1860); *see also* Teich, *supra* note 52, at 885.

[55] *See* ABA CANONS OF PROF'L ETHICS 14 (1908).

[56] *See* ABA MODEL CODE OF PROF'L RESPONSIBILITY EC 2-23 (1969) (stating that a lawyer "should be zealous in his efforts to avoid controversy over fees with clients and … should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client").

[57] *See, e.g.,* Stephen M. Blumberg, *Risk Management: Preventing Malpractice Claims*, LAW PRACTICE, Sept. 1987, at 52; Emily Eichenhorn, *To Sue or Not to Sue: Is the Pursuit of Unpaid Fees Worth the Risk of Litigation?*, 66 OR. ST. B. BULL. 29 (2006); Glenn Machado, *Money Matters: Make Sure You're Handling Your Clients' Dollars with Sense,* NEV. LAW., Oct. 2014, at 20.

In the late 1920s, the organized bar began to institute voluntary fee arbitration programs.[58] One important reason was to avoid "the public airing of fee disputes."[59] By the 1960s, several local bar associations offered voluntary fee dispute resolution to lawyers and clients.[60] One commentator observed at that time that the profession, the attorney, and clients would benefit from arbitration in the following ways:

> The profession because such a procedure would provide a fair and equitable resolution of the dispute without attendant publicity—the attorney because those best qualified to evaluate his services would pass upon his charges—and the client because he would be afforded a speedy remedy without cost to him.[61]

The outcomes of fee dispute resolution during this period generally favored lawyers.[62]

Throughout this time, disciplinary authorities viewed most attorney-client fee disputes as being outside their jurisdiction.[63] In 1970, when the ABA's Special Committee on Evaluation of Lawyer 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").[64] It suggested that procedures for arbitrating fee disputes be handled outside the bar associations to avoid the conclusion that "a group of attorneys is protecting one of its own."[65] 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 did not recommend that lawyers be required to do so.[66]

Nevertheless, that same year, Alaska became the first state to adopt a state-wide fee arbitration program in which lawyers—but not clients—were required to participate ("mandatory

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[58] 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*, L.A. B. BULL., June 1963, at 265, 265.
[59] *Id.*
[60] *See* AMERICAN BAR ASS'N, SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT: PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 189 (1970).
[61] Bodle, *supra* note 58, at 265.
[62] *Id.*
[63] SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 60, at 186, 188.
[64] *See id.* at 1, 186, 189.
[65] *Id.* at 189.
[66] Rau, *supra* note 50, at 2021. It further noted that "there was little likelihood" that mandatory arbitration would gain support. *Id.*

fee arbitration").[67] A few other states subsequently adopted state-wide voluntary or mandatory fee arbitration programs.[68] The 1983 ABA *Model Rules of Professional Conduct* encouraged lawyers to participate in fee dispute resolution even when it is not mandatory.[69] 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.[70]

In 1995, the ABA adopted *Model Rules for Fee Arbitration* based on the experience in six states that had instituted mandatory fee arbitration.[71] The model rules provide that the state's highest court shall appoint a Fee Arbitration Commission to administer the program and that one-third of the commissioners shall be nonlawyers.[72] They further state that fee arbitration should be mandatory for lawyers if arbitration is commenced by the client.[73] 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.[74] If the client seeks fee arbitration within thirty days, the litigation will be stayed.[75] The rules also provide that disputes exceeding $7500 are to be decided by three panel arbitrators, including one nonlawyer. Where the disputed amount is lower, the model rules provide that there should be a single lawyer arbitrator.[76] Fee

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[67] *See* OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., 2019 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 43 (2020), https://njcourts.gov/attorneys/assets/oae/2019oaeannualrpt.pdf; 2006 ABA Survey of Fee Arbitration Programs Part II- Chart 1 (2007), ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/Fee_Arb_Chart_2_Part_1.pdf.

[68] 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 Part II- Chart I, *supra* note 67.

[69] *See* MODEL RULES OF PROFESSIONAL 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").

[70] LAWYER REGULATION FOR A NEW CENTURY: REPORT ON THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, Recommendation 1, 48 (1992).

[71] *See* MODEL RULES FOR FEE ARBITRATION Preface (AM. BAR ASS'N 1995); *A History of the Client Protection Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/history/.

[72] MODEL RULES FOR FEE ARBITRATION R. 2.

[73] MODEL RULES FOR FEE ARBITRATION R. 1(3).

[74] MODEL RULES FOR FEE ARBITRATION R. 1 cmt.

[75] MODEL RULES FOR FEE ARBITRATION R. 1 (7).

[76] MODEL RULES FOR FEE ARBITRATION R. 3.

arbitration is confidential and is binding for all parties if they have agreed in writing to be bound by it.[77] 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.[78] Participation in fee arbitration does not preclude the client from filing a disciplinary complaint.[79]

B. Current Fee Arbitration Programs

Although there are fee arbitration programs in virtually every state,[80] not all have statewide programs. Contrary to the ABA model rules' recommendation, most of these programs are administered by bar associations.[81] Only ten jurisdictions make arbitration mandatory for lawyers if the client seeks it.[82] In those jurisdictions, the requirement was imposed by statute or court rule.[83] Georgia does not make 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."[84] Clients can be compelled to submit to

[77] MODEL RULES FOR FEE ARBITRATION R.1(4), 8.
[78] MODEL RULES FOR FEE ARBITRATION R. 1(4).
[79] MODEL RULES FOR FEE ARBITRATION R. 1 cmt.
[80] Arkansas and North Carolina are the exceptions. *See* 2016 ABA Survey of Fee Arbitration Programs.
[81] 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., Fee Disputes*, ME. BOARD OF OVERSEERS OF THE BAR, https://mebaroverseers.org/regulation/bar_rules.html?id=638765. Along with Maine, Michigan and New Jersey house their fee arbitration programs within their disciplinary systems. *See id.;* MICH. CT. R. 9.130 (A) (2020); *Office of Attorney Ethics*, N.J. COURTS, https://njcourts.gov/attorneys/oae.html. 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* NEW YORK STATE ATTORNEY CLIENT FEE DISPUTE RESOLUTION PROGRAM, 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS 12-13, https://www.nycourts.gov/legacyPDFs/admin/feedispute/Annual-Report-2019.pdf.
[82] The jurisdictions are Alaska, California, District of Columbia, Maine, Montana, New Jersey, New York, Ohio, South Carolina and Wyoming. *See* ABA Standing Comm. on Client Protection, State-by-State Adoption of ABA Client Protection Programs (Dec. 2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_by_state_cp_programs.pdf. 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, .0708 (2020); Harry B. Warren, *New Dispute Resolution Rules, Good-bye Nonbinding Arbitration*, N.C. ST. B. J., Fall 2000, at 28, 29.
[83] See 2006 ABA Survey of Fee Arbitration Programs, Chart II-Part 1, *supra* note 68; N.Y.C.R.R. Part 137 (2020).
[84] The burden of proof shifts to the lawyer to prove otherwise. *See* GA. BAR R. 6-410, 6-417 (2020). 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. ARBITRATION COMMITTEE RULES OF PROCEDURE (IV)(B)(2) (2017),

fee arbitration in some jurisdictions if their lawyers included a fee arbitration clause with adequate disclosure in their engagement agreements.[85] Some jurisdictions set minimum amounts on fee disputes that can be subject to fee arbitration.[86] As recommended by the ABA, most jurisdictions' fee arbitration programs provide for two lawyer arbitrators and one non-lawyer arbitrator to decide larger disputes.[87] The arbitration process is free or offered at a low cost to both parties.[88] Several jurisdictions also offer mediation of fee disputes.[89]

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.[90] One answer appears to be that many bar organizations oppose it.[91] Some lawyers

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file:///C:/Users/llevi/Downloads/Fee%20Dispute%20Rules%20of%20Procedure_Nov%208%202017_FINAL.pdf.

[85] *See*, *e.g*., Ober v. Mozingo, No. D038616, 2002 WL 432544, at *3 (Cal. Ct. App. Mar. 18, 2002); Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 319 (Fla. Ct. App. 2011); Innovative Images, LLC v. Sommerville, 848 S.E.2d 75, 79-81 (Ga. Ct. App. 2020); Hodges v. Reasonover, 103 So. 3d 1069, 1077 (La. 2012). In 2002, the ABA issued a Formal Opinion which 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 Committee on Ethics & Professional Responsibility, Formal Opinion 02-425 (2002).

[86] *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 (establishing a $1000 minimum for arbitration).

[87] The Los Angeles Country 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. In most jurisdictions, the threshold amount for three arbitrators is substantially lower.

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

[89] *See, e.g., Attorney Fee Disputes*, ALASKA BAR ASS'N, https://alaskabar.org/for-the-public/attorney-fee-disputes/; DC Bar, *Information Sheet on the Fee Arbitration Service*, https://www.dcbar.org/getmedia/3ee82b36-fcca-4690-b734-7e510871e6cd/ACAB-Fee-Arbitration-Filing-Packet; *Fee Dispute Resolution Program*, OR. STATE BAR, https://www.osbar.org/feedisputeresolution.

[90] *See* John Leubsdorf, *Against Lawyer Retaining Liens*, 72 FORDHAM L. REV. 849, 873-74 (2004). For discussion of some additional disadvantages of litigation, see Rau, *supra* note 50, at 2016-18.

[91] *See*, *e.g*., In re LiVolsi, 428 A.2d 1268 (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. ST. B. BULL., Dec. 1994, at 33, 34 (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. LAW. WEEKLY, Dec. 6, 2004 (describing State Bar task force's rejection of mandatory mediation); Pazzanese, *supra* note 50 (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 bar groups" to proposed mandatory fee arbitration

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.[92] 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.[93] Lawyers have claimed—less persuasively—that they do not want to be deprived of a jury trial.[94] Lawyers also argue that mandatory fee arbitration would "create[e] more reasons to be disciplined" because arbitrators would be considering the reasonableness of fees under the rules of professional conduct.[95]

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.[96] 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.[97] Regulators reported that "55% of the time the lawyer decline[d] to arbitrate fee disputes, leaving [clients] frustrated."[98] In 1996, the WSBA's Board of Governors approved, in concept, a proposal to implement such a fee program.[99] 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 Governors anticipated taking final action the following month, but invited interested parties to share their views with the WSBA.[100] At the Board of Governor's September meeting, they described feedback from lawyers as "a firestorm," with lawyers

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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).

[92] *See, e.g.*, Stephen T. Charmick, Letter to the Editor, WASH. ST. B. NEWS, July 1998, at 9; Steven A. Hemmett, Letter to Editor, WASH. ST. B. NEWS, July 1998, at 7-8; Terry Lee, *It Aint Broke So What Are We Fixing: An Argument Against Mandatory Fee Arbitration*, WASH. ST. B. NEWS, May 1998, at 25.

[93] *See*, *e.g.*, Lee, *supra* note 92, at 25; Hemmet, *supra* note 92, at 7-8.

[94] *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.

[95] Lee, *supra* note 92, at 25.

[96] *The Board's Work*, WASH. ST. B. NEWS, Aug-Sept. 1974, at 14.

[97] Lindsay T. Thompson, *Refining Lawyer Discipline: A Multifaceted Approach*, WASH. ST. B. NEWS 15, 19 (Aug. 1995).

[98] *See* Barbara Harper & Randy Beitel, *Fee Arbitration to be Mandatory When Requested by a Client*, WASH. STATE B. NEWS, Aug. 1997, at 37.

[99] Barrie Althoff & Randy Beitel, *Governors Restructure Attorney Discipline*, WASH. ST. B. NEWS, April 1996, at 35-36; M. Wayne Blair & Marijean E. Moscetto, *Fee Arbitration: An Update on Revisions to the Proposal & and an Argument in Support*, WASH. ST. B. NEWS, May 1998, at 24, 24.

[100] Harper & Beitel, *supra* note 98, at 39.

complaining the proposed rule was being "loaded in favor of consumers."[101] The Board of Governors decided to table discussion so that more WSBA members could weigh in.[102] The lawyers' responses that followed were largely negative.[103] Even after many revisions of the proposed rule, there was "overwhelming negative reaction from [WSBA] members."[104] The Board of Governors voted in June 1998 "to put a stake through the heart" of the proposal and to cease to consider mandatory fee arbitration.[105]

The voluntary fee arbitration programs that are found in most jurisdictions today vary in certain notable respects. Some jurisdictions have state-wide fee arbitration programs established by court rule and administered by the state bar.[106] In other jurisdictions these programs were established and are entirely run by the state bar.[107] Some states with large lawyer populations such as Illinois, Pennsylvania, and Texas have no state-wide programs and voluntary fee dispute resolution programs are only offered through local bar associations.[108] A few programs use no non-lawyer arbitrators, or use only a single lawyer-arbitrator, even for higher value fee disputes.[109]

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 in writing of the availability of fee arbitration when a fee dispute cannot be resolved.[110] Some other jurisdictions

[101] *Annual Meeting and September 11-12 Board of Governors Meeting*, WASH. ST. B. NEWS, Oct. 1997, at 40. One governor stated that the rule was "too volatile in its current form." *Id.*
[102] *Id.*
[103] *See Letters to the Editor*, WASH. ST. B. NEWS, Oct. 1997, at 8-11; *The Board's Work*, WASH. ST. B. NEWS, Nov. 1997, at 31.
[104] *President's Report*, WASH. ST. B. NEWS, Sept. 1998, at 33.
[105] *Id.; see also* Sherrie Bennett, *The Board's Work*, WASH. ST. B. NEWS, July 1998, at 33.
[106] Kentucky, Nevada, and Utah are examples. *See, e.g.*, 2006 ABA Survey of Fee Arbitration Programs, Chart II-Part I, *supra* note 68.
[107] *See id.*
[108] *See e.g., See How to Submit a Request for Investigation*, ARDC OF THE SUPREME COURT OF ILL., https://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; *Resolving Fee Disputes*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/ResolvingFeeDisagreements/default.htm.
[109] States that exclusively use lawyer-arbitrators include Colorado, Mississippi, Oregon, and Rhode Island. *See* 2016 ABA Survey of Fee Arbitration Programs, *supra* note 80; 2006 ABA Survey of Fee Arbitration Programs (2007), Chart V-Part 1, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/Fee_Arb_Chart_5_Part_1.pdf.
[110] *See* N.Y. RULES OF CHIEF ADMIN. JUDGE 137.6 (a)(1) (2021).

do a good job of informing the public of the availability of fee arbitration in places where clients are likely to look, such as lawyer disciplinary agency and bar association websites.[111] But in other jurisdictions, it is more difficult for clients to learn about fee arbitration programs. The Mississippi State Bar website states that its Fee Dispute Resolution Committee has established procedures to handle disputes, but does not explain how to contact the Committee.[112] Even after searching the North Dakota Bar'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.[113]

It can be even more challenging to learn additional information about most fee arbitration programs. (The term "black hole" comes to mind.) The ABA Committee on Client Protection periodically surveys states to obtain information about their programs, but its most recent survey only yielded responses from ten jurisdictions and one local bar association.[114] Some information about fee arbitration programs can be gleaned if jurisdictions publish reports,[115] but most

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[111] *See, e.g.*, *FAQ/Fee Arbitration*, STATE BAR OF GA., https://www.gabar.org/aboutthebar/faq/faqs.cfm?filter=Fee%20Arbitration; *Lawyer Fee Dispute Resolution*, LA. STATE BAR ASS'N, https://www.lsba.org/Public/FeeDisputeResolution.aspx. A few of the websites provide helpful brochures that explain the process. *See, e.g.*, Va. State Bar, *Fee Dispute Resolution Program*, https://www.vsb.org/docs/fee-dispute-brochure.pdf .

[112] 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/#:~:text=The%20Fee%20Dispute%20Resolution%20Committee,It%20is%20a%20free%20program. 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/.

[113] 2016 ABA Survey of Fee Arbitration Programs, *supra* note 80.

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

[115] 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* ALASKA BAR ASSOCIATION 2018 ANNUAL REPORT 4 (2019), https://alaskabar.org/wp-content/uploads/2018-annual-report-1.pdf; 2019-20 ANNUAL REPORT OF THE ATTORNEY/CLIENT ARBITRATION BOARD OF THE DISTRICT OF COLUMBIA BAR (2020); STATE BAR OF GA., BOG BOARD BOOK, ANNUAL MEETING 2020, at 84-87, https://www.gabar.org/committeesprogramssections/boardofgovernors/upload/AM20_Boardbook.pdf; BOARD OF OVERSEERS OF THE BAR 2018 ANNUAL REPORT 5, https://www.mebaroverseers.org/about/pdf/2018%20Annual%20Report.pdf ; STATE BAR OF NEVADA, ANNUAL REPORT 2020, at 4, https://www.nvbar.org/wp-content/uploads/SBN-2020-Annual-Report.pdf; N.Y. STATE ATTORNEY-CLIENT FEE RESOLUTION PROGRAM 2019 ANNUAL REPORT, https://www.nycourts.gov/legacyPDFs/admin/feedispute/Annual-Report-2019.pdf; OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 43. When contacted directly, some fee arbitration programs also provided annual statistics.

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 98 new disputes reported every month during the period 2019-20 and about 25 hearings scheduled monthly.[116] New Jersey received 796 matters in 2019[117] while New York closed 770 matters.[118] 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.[119] While the Los Angeles County Bar Association's mandatory fee arbitration program receives 200-300 fee arbitration requests each year, the Chicago Bar Association's voluntary program received 67 fee complaints in 2019.[120] Family and criminal matters generate the most fee arbitration requests.[121] Real estate/landlord tenant and litigation matters also account for a significant number of the requests.[122]

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

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[116] BOG BOARD BOOK, *supra* note 115, at 84-85.

[117] OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 46. The description in this paragraph focuses on the period 2019 or 2019-20, depending on how the jurisdiction reported data, because the disputes and dispositions were likely affected by COVID-19.

[118] N.Y. STATE ATTORNEY-CLIENT FEE RESOLUTION PROGRAM 2019 ANNUAL REPORT, *supra* note 115, 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* N.Y. RULES OF CHIEF ADMIN. JUDGE §137.1 (b)(2) (2021).

[119] 2019-20 ANNUAL REPORT OF THE ATTORNEY/CLIENT ARBITRATION BOARD OF THE DISTRICT OF COLUMBIA BAR, *supra* note 115, at 4; BOARD OF OVERSEERS OF THE BAR 2018 ANNUAL REPORT, *supra* note 115, at 5.

[120] *See* E-mail from Sharon McLawyer, Dir., LACBA Attorney Client Mediation and Arbitration Services, to Maryanne Daly-Doran, Reference Librarian, Univ. of Conn. Law Library (July 6, 2021, 19:55 EDT); Chicago Bar Association Professional Fees Committee Statistics (on file with author)

[121] 2016 ABA Survey of Fee Arbitration Programs, *supra* note 80; 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; OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 47 (reporting that matrimonial cases generated 32% of all matters in New Jersey); NEW YORK STATE ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM, 2019 ANNUAL REPORT TO THE ADMINISTRATIVE BOARD OF THE COURTS, *supra* note 115, 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. 2019-20 ANNUAL REPORT OF THE ATTORNEY/CLIENT ARBITRATION BOARD OF THE DISTRICT OF COLUMBIA BAR 5, *supra* note 115, at 172-73.

[122] N.Y. STATE ATTORNEY-CLIENT FEE RESOLUTION PROGRAM 2019 ANNUAL REPORT, *supra* note 115, at 9; OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 47-48; 2016 ABA Survey of Fee Arbitration Programs, *supra* note 80; 2006 ABA Survey of Fee Arbitration Programs, Chart IV, *supra* note 121.

in 2019 was $17,432.[123] In Georgia, the average amount in controversy was $15,155.[124] Clients made more than eighty of the requests for arbitration in New York, while clients made sixty percent of the requests in the District of Columbia.[125] In some jurisdictions lawyers disproportionately obtained awards while in others the clients were favored.[126] The reasons for these differences remain to be explored.

What seems clear, however, is that the voluntary fee arbitration programs in most of the 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.[127] Lawyers can refuse to participate in voluntary arbitration programs —and many do.[128] 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. It is often not economically feasible for individual clients to hire another lawyer and pay the litigation costs associated with resolving fee disputes. Disciplinary agencies typically decline to consider these complaints.[129] Thus, clients in these states are often left with no viable recourse when fee disputes arise.

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[123] N.Y. STATE ATTORNEY-CLIENT FEE RESOLUTION PROGRAM 2019 ANNUAL REPORT, *supra* note 115, at 4.
[124] BOG BOARD BOOK, *supra* note 115, 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.
[125] *Id.* at 4; N.Y. STATE ATTORNEY-CLIENT FEE RESOLUTION PROGRAM 2019 ANNUAL REPORT, *supra* note 115, at 17.
[126] In the District of Columbia in 2019-20, in 12 out of 20 awards, lawyers were the prevailing party. 2019-20 ANNUAL REPORT OF THE ATTORNEY/CLIENT ARBITRATION BOARD OF THE DISTRICT OF COLUMBIA BAR, *supra* note 115, at 7. Likewise in Maine, dispositions favored attorneys by a two-to-one ratio. MAINE 2018 BOARD OF OVERSEERS ANNUAL REPORT, *supra* note 115, a 5 (reporting that hearing panel found in favor of lawyers in 19 matters and in favor of clients in 6). In contrast, in only approximately one-third of the New Jersey cases in 2019, did the hearing panels uphold the attorneys' fees in full. OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 46. In the balance, they reduced the attorneys' fees by 28.4% of the total billings that were subject to reductions. *Id.*
[127] 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 108.
[128] *See, e.g.*, 2016 ABA Survey of Fee Arbitration, *supra* note 80 (reporting that 80% of lawyers declined to arbitrate clients' disputes in Mississippi).
[129] *See, e.g.*, Louisiana Attorney Discipline Board, https://www.ladb.org/docs/Publication/LADBBrochure.pdf ("Fee disputes are not normally handled

III. THE INADEQUACY OF MEASURES TO ADDRESS LAWYER THEFT

Lawyer theft of client money has been a longstanding problem for the legal profession.[130] Lawyers steal from client trust accounts; pocket 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.[131] States' rules of professional conduct contain detailed provisions for how lawyers are to safeguard client money,[132] but those rules have not prevented a small number of lawyers from stealing from their clients.

Forty years ago, the ABA began to adopt model rules for client protection measures that were directly aimed at addressing lawyer thefts.[133] The first was the *Model Rules for Client Security Funds*, but the states' funds often fail to cover all of victims' losses.[134] The ABA also adopted model rules requiring financial institutions to notify lawyer disciplinary authorities when an overdraft occurs in a client trust account.[135] Most states have also adopted this measure,[136] 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.[137] The net effect is that many states fail to adequately protect individual clients from overreaching lawyers.

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within the lawyer discipline system."); *Lawyer Disciplinary Board FAQ*, W. VA. STATE BAR, https://wvbar.org/public-information/lawyer-disciplinary-board-faq/ (stating that "[f]ee matters ordinarily are not a basis for discipline of a lawyer").

[130] *See, e.g.*, James R. Devine, *Lawyer Discipline in Missouri: Is a New Ethics Code Necessary*, 46 MO. L. REV. 709, 714 (1981) (describing 1825 Missouri statute permitting disbarment of lawyers convicted of a felony for retaining his client's money after the client demanded its return).

[131] *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, 34.

[132] *See, e.g.*, CONN. RULES OF PROF'L CONDUCT r. 1.15 (2021).

[133] *A History of the Client Protection Rules*, *supra* note 71.

[134] *See* MODEL RULES FOR CLIENT SECURITY FUNDS (AM. BAR ASS'N 1981); *infra* notes 157-61, 174 and accompanying text.

[135] *A History of the Client Protection Rules*, *supra* note 71; MODEL RULES FOR TRUST ACCOUNT OVERDRAFT NOTIFICATION (AM. BAR ASS'N 1988).

[136] Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 42.

[137] The ABA also recommends one other measure to protect client money from misappropriation, which is standards for maintaining client trust account records. *See* ABA MODEL RULE ON FINANCIAL 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.

1. Client Protection Funds

When lawyers steal client money, the money is usually gone before the theft is detected. Malpractice insurance does not cover these losses[138] and lawyers who steal often have no other money with which to repay their victims.[139] Even if the lawyers are ordered to make restitution, they may be unable to do so because they are disbarred or 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.[140] 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.[141] The ABA's model rules 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.[142] 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.[143] The model rules contemplate that the funds will "fully reimburse losses"[144] and provide for the state supreme court to provide for funding by lawyers "in amounts adequate for the proper payment of claims."[145] In an apparent compromise

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[138] *See* Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROFESSION 41, 46, 52 (2004) (noting that lawyers' professional liability policies do not cover claims arising from dishonest, malicious, or fraudulent acts of an insured).

[139] *See* ABA MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION Preamble (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 (W. Va. 2016).

[140] *See* Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 13-14.

[141] *See* MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION r. 1 (AM. BAR ASS'N 1989) ("The purpose of the Lawyers' Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers."). *See also Lawyers' Fund*, STATE BAR OF MONT., https://www.montanabar.org/page/LFCP; *Client Protection Fund*, STATE BAR OF N.D., https://www.sband.org/page/client_protect_claim (same).

[142] MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION r. 1 cmt. 3, 2(2) (AM. BAR ASS'N 1989).

[143] MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION r. 10(C). This includes "where the lawyer took money in the guise of a fee, a loan or an investment." Rule 10 cmt. 3.

[144] MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION Preamble.

[145] MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION R. 3 (a).

among the drafters, however, the rules also recognize that the fund's Board of Trustees may fix a maximum amount of reimbursement, even though "full reimbursement is the goal of a Fund."[146]

Today, all U.S. jurisdictions have statewide client protection funds,[147] but their "organization, funding, accessibility and responsiveness to client claims vary widely."[148] In many states, they are supervised by state bar organizations rather than the courts.[149] More than thirty of the funds are financed by mandatory lawyer assessments, while the rest are funded by budget appropriations, voluntary lawyer contributions, or other means.[150] The lawyer assessments range from $5 to $75 annually, except in Delaware, where the assessment is substantially higher.[151] The funds are also empowered to seek restitution from the offending attorneys but those recoveries tend to be modest.[152] Most of the jurisdictions have payment caps per claimant, with the average cap being $100,000.[153] The majority also have a payment cap per lawyer, with the caps ranging from $20,000 to $1.5 million.[154] In some years, the amounts available in some jurisdictions' client protection funds exceed the legitimate claims.[155]

Client protection funds in the United States paid out about $35 million in 2019,[156] although clients' actual monetary losses far exceeded that amount. This is mostly because the

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146 MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION r. 14(1) & cmt.
147 *Directory of Lawyers Funds for Client Protection*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/cp_dir_fund.pdf .
148 *A History of the Client Protection Rules, supra* note 71.
149 *See, e.g.*, 2014-2016 Survey of Lawyers' Fund 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.
150 Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 17-18 .
151 Delaware lawyers in private practice who have been admitted more than ten years are required to pay $336. *Id.* at 19.
152 *See, e.g.*, 2019-2020 MISSOURI BAR ANNUAL REPORT 5, https://mobar.org/site/content/About/Annual_Report.aspx (reporting less than $41,000 of restitution recovered in preceding year); STATE BAR OF NEVADA, CLIENTS' SECURITY FUND ANNUAL REPORT 2020, at 4, https://nvbar.org/wp-content/uploads/2020-Nevada-CSF-Annual-Report.pdf (reporting about $5000 of restitution recovered).
153 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.
154 *Id.* at 25-26.
155 *Id.* at 8 ("several funds" reported an inability to reimburse eligible claims due to payment limitations or lack of available funds.).
156 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*

funds' caps on recovery are grossly insufficient in some cases.[157] For example, Nevada lawyer Robert Graham, whose probate and real estate practice "was a 20-year business failure" stole $17 million from clients.[158] 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.[159] Even with Pennsylvania's $100,000 per victim cap, eleven clients' losses exceeded that cap in 2019.[160] A payment cap per lawyer can also leave 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.[161] Some jurisdictions place limits on the total amounts that the funds will pay out annually to all claimants.[162] Florida only pays misappropriation claims on a pro rata basis at the end of the year

of Committees of the Florida Bar, Clients' Security Fund, FLA. B. 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; Noreen Marcus, *Florida Bar has money-back guarantee for clients of thieving lawyers, but collecting isn't easy* (May 9, 2018), FLORIDABULLDOG.ORG, https://www.floridabulldog.org/2018/05/florida-bar-has-money-back-guarantee-for-clients-of-thieving-lawyers-but-collecting-isnt-easy/. Claims paid in South Carolina during the 2019-2020 year totaled $445,793. LAWYERS' FUND FOR CLIENT PROTECTION OF SOUTH CAROLINA ANNUAL REPORT: JULY 1, 2019-JUNE 30, 2020, at 2, https://www.scbar.org/media/filer_public/67/ac/67ace869-56d7-415f-b10a-b36faadf2cc5/lfcp_ar.pdf.

[157] 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. STATE BAR OF NEVADA, ANNUAL REPORT 2020, *supra* note 115, 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 8.

[158] Jeff German, *State Bar of Nevada want to disbar lawyer charged with stealing millions from clients*, LAS VEGAS REV.-J. (March 10, 2017), https://www.reviewjournal.com/local/local-las-vegas/state-bar-of-nevada-wants-to-disbar-lawyer-charged-with-stealing-millions-from-clients/.

[159] *See* STATE BAR OF NEVADA, CLIENTS' SECURITY FUND ANNUAL REPORT 2019, at 6, https://www.nvbar.org/wp-content/uploads/2019-Nevada-CSF-Annual-Report.pdf. Some of his other clients' claims had not yet been resolved at the time of the report.

[160] PENNSYLVANIA LAWYERS FUND FOR CLIENT SECURITY, REPORT ON 2019-20 OPERATIONS 2, https://r91.5e5.myftpupload.com/wp-content/uploads/Annual-Report-2019-2020.pdf. 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.*

[161] *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/.

[162] For example, Oklahoma's fund will only pay out a maximum of $175,000 annually for all claims. *See* Office of the General Counsel of the Oklahoma Bar Ass'n, ANNUAL REPORT OF THE PROFESSIONAL

if there is not enough money to pay all approved losses.[163] It will only refund unearned fees up to $5000.[164]

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.[165] And indeed, many funds' rules and practices reflect no commitment to full reimbursement of victims.[166] Some of the funds operate with no court oversight and little transparency; at least ten jurisdictions do not publish any sort of annual report.[167] Even some states that publish reports do not reveal the difference between the amounts victims actually lost and the amounts paid to them by the funds.[168]

Most fund claimants are clients whose lawyers retained unearned fees.[169] The funds also pay out substantial dollar awards for thefts in personal injury, trust and estate, and real estate matters.[170] These clients are sometimes unsophisticated consumers of legal services, yet many funds are not administered from a consumer-oriented perspective. In many jurisdictions, the

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RESPONSIBILITY COMMISSION, JAN. 1, 2020 – DEC. 31, 2020, at 18, https://www.okbar.org/wp-content/uploads/2021/02/2020-PRC-Annual-Report.pdf.

163 *Annual Reports of Committees of the Florida Bar, supra* note 156, at 99; Marcus, *supra* note 156.

164 *See Clients' Security Fund Frequently Asked Questions,* FLA. BAR, https://www.floridabar.org/public/consumer/pamphlet007/#what-losses-are-covered. 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) (refusal to refund any of $25,000 fee); In re Hoffman, 834 N.W.2d 636 (N.D. 2013) (refusal to refund any of $30,000 fee where reasonable fee was $4540).

165 *See, e.g.,* N.H. RULES OF THE SUPREME COURT 55(1); KAN. RULE RELATING TO LAWYERS' FUND FOR CLIENT PROTECTION 241 (a)(3).

166 *See, e.g.,* MONT. LAWYERS' FUND FOR CLIENT PROTECTION RULE 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* 2019-2020 MISSOURI. BAR ANNUAL REPORT, *supra* note 152, at 5.

167 Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 10.

168 *See, e.g.,* STATE BAR OF ARIZ., ANNUAL REPORT 2019, at 3, https://www.azbar.org/media/f0pk5mo5/2019-annual-report-final.pdf (revealing the amount paid out but not the amount actually lost by victims); *Annual Reports of the Committees of the Florida Bar*, *supra* note 156; at 99 (same); STATE BAR OF TEX., COMMISSION FOR LAWYER DISCIPLINE ANNUAL REPORT: JUNE 1, 2019-MAY 31, 2020, at 11, https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=41986 (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 (same).

169 *See, e.g.*, Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 8.

170 *Id.*

availability of client protection funds is not publicized.[171] In most jurisdictions, clients' claims cannot be submitted electronically.[172] Although the *Model Rules for Lawyers' Funds for Client Protection* intend for the funds to provide "meaningful, prompt, and cost-free reimbursement to clients,"[173] claimants typically must wait for reimbursement until a final disciplinary determination is made.[174] This can take years during which some clients may be unable to hire another lawyer to represent them in an ongoing legal matter or obtain the medical and other care that they need. 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.

2. Insurance Payee Notification

One way in which individual clients could be better protected is by making it harder for lawyers to steal insurance settlement proceeds. Lawyers steal insurance proceeds in various ways including the unauthorized settlement of the client's claim with an insurer, forgery of the client's signature on settlement documents and settlement checks, and misappropriation of the client's share of the proceeds.[175] In 2019, twenty-nine percent of the dollars paid by client protection

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[171] *See* Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 10 (reporting that 62% of reporting jurisdictions do not produce any public information or marketing material for their client protection funds).
[172] *Id.*
[173] *See* MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION Preamble (AM. BAR ASS'N 1989).
[174] *See, e.g.*, RULES REGULATING FLA. BAR 7-2.4; N.H. RULES OF SUPREME COURT 55(4); SUPREME COURT OF OHIO RULES FOR GOVERNMENT OF THE BAR 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. In California, the average time to pay out for its client security fund is three years. *See* Letter from Leah T. Wilson, Executive Dir., State Bar of Cal., to Cal. Legislative Leaders (March 15, 2018), https://www.calbar.ca.gov/Portals/0/2018ClientSecurityFundReport.pdf. In Wisconsin, some approved payments to claimants were deferred simply because the fund had insufficient money. *See* STATE BAR OF WISCONSIN, ANNUAL REPORT OF THE WISCONSIN LAWYERS' FUND FOR CLIENT PROTECTION, FISCAL YEAR 2018, at 2, https://www.wisbar.org/forPublic/IHaveaDisputeWithMyLawyer/Documents/FY%2018%20Annual%20Report.pdf .
[175] MODEL RULE FOR PAYEE NOTIFICATION Preface (AM. BAR ASS'N 1991).

funds were due to lawyer theft of insurance settlement funds.[176] These thefts can be substantial and often victimize seriously injured clients who require continuing medical care.[177]

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.[178] Fred Miller, the former Executive Director of New York's Client Protection Fund (the state that originated the insurance payee notification rule)[179] noted that the rule "pretty well eliminated this type of claim in New York. But if it does occur, the rule also helps catch the defalcating lawyers."[180] Nevertheless, today only sixteen jurisdictions require insurance payee notification.[181]

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.[182] 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.[183] In Louisiana, the State Bar 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.[184] But the insurance industry opposed it on the grounds it was burdensome and the bill did not progress to a vote in

[176] Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 8.
[177] *See, e.g.,* Letter from Douglas J. Stamm, former Chair, Or. Client Security Fund to Or. State Bar Board of Governors (Nov. 14, 2019) (describing several claims involving losses far exceeding the $50,000 cap in which "claimants suffered from permanent disabilities such as paralysis").
[178] *See A History of the Client Protection Rules, supra* note 71.
[179] 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.*; 11 N.Y.C.R.R. 216.9(a) (1988).
[180] Lynda C. Shely, *The ABA Model Rules for Trust Account Notification and Model Rule for Payee Notification: Client Protection for the Millennium*, PROF'L LAW., Spring 2000, at 23.
[181] 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 172-175 (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 231 and accompanying text.
[182] *See* Marc Davis, *A lawyer's misdeeds spur state bar to revisit proposal*, VIRGINIAN-PILOT (March 16, 2008), https://www.pilotonline.com/news/article_9396105f-71b9-5d12-b838-e1c90e95cdfa.html.
[183] *Id.*
[184] Leefe, *supra* note 131, at 34.

the legislature.[185] 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.[186]

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 Board of Governors in 1996 that it adopt payee notification, but the Committee was unable to generate Bar support for the proposal.[187] Since then, lawyer misconduct involving insurance settlement checks has repeatedly occurred.[188] The State Bar of Arizona's Board of Trustees also rejected such a rule.[189] Several jurisdictions report that they have never even considered the ABA's recommendation on payee notification.[190] Admittedly, the failure to adopt payee notification in some jurisdictions is also be due to anticipated or actual insurance industry opposition.[191] The net effect, however, is that individual clients are more vulnerable to lawyer theft in states that do not require payee notification.

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185 *Id.*

186 *See* Testimony Before the Senate Committee on Judiciary and Ballot Measure 110 Implementation in Support of Senate Bill 180 with the 2 amendments on Behalf of the Oregon State Bar (March 8, 2021), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/12231; Nigel Jaquiss, *Lawmakers and Oregon State Bar Weigh Protections for Victims of Dishonest Lawyers*, WILLAMETTE WEEK, https://www.wweek.com/news/courts/2021/02/15/lawmakers-and-oregon-state-bar-weigh-protections-for-victims-of-dishonest-lawyers/ (describing Bar's response to thefts by lawyer Lori Deveney, who "allegedly stole millions of dollars by cashing their settlement checks from insurers"); Letter from Douglas J. Stamm, *supra* note 177.

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

188 *See, e.g.*, *In re* Gray, 145 So.3d 825 (Fla. 2014); Fla. Bar v. Brownstein, 953 So.2d 502, 508 (Fla. 2007); Fla. Bar v. Catalano, 685 So.2d 1299, 1300-01 (Fla. 1997); Florida Bar v. Sweeney, 730 So.2d 1269, 1270 (Fla. 1998); Christy Turner, *St. Johns County Lawyer Sentenced for Stealing Insurance Claim Settlements*, CBS47 (Jan. 10, 2019), https://www.actionnewsjax.com/news/local/st-johns-county-lawyer-sentenced-for-stealing-insurance-claim-settlements/902467067/; *Disbarred lawyer arrested for defrauding clients out of $700K, FDLE says*, 10TAMPA BAY (Dec. 11, 2020), https://www.wtsp.com/article/news/crime/former-clearwater-lawyer-fraud-arrest/67-ecec86e0-1373-4b05-a8f4-fdc5e00f10ad; *An Orlando lawyer stole $111,000 from clients, Bar says, got suspended and ignored it*, MIAMI HERALD (May 16, 2021), https://www.miamiherald.com/news/business/article251453043.html.

189 *See* Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 44; Telephone Interview by Adam Mackie, Reference Librarian, University of Conn. Law Library of Karen Weigand Oschmann, Client Protection Fund Admin., State Bar of Ariz. (May 6, 2020).

190 Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 44-45.

191 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 Librarian, University of Conn. Law Library, to author

3. Random Audits of Trust Accounts

Some lawyers steal from clients by helping themselves to 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.[192] 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."[193] In 1993, the ABA adopted the *Model Rule for Random Audit of Trust Accounts*.[194] A few additional jurisdictions subsequently adopted random audit procedures.[195] Today, however, there are only nine states with operational random audit programs.[196]

One of those states is Connecticut, which first considered random audits in the late 1980s after a prominent Danbury lawyer stole more $2 million from his client trust account.[197] 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.[198] The CBA's Board of Governors endorsed the proposal, but the CBA's House of Delegates narrowly rejected it.[199] The following year, Connecticut's Judicial Council on Legal Ethics also recommended random audits, contending it was an essential part of the package of

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(June 2, 2021, 10:49 EDT). In Michigan, the State Bar supported a payee notification rule, but it did not progress in the legislature. *See* Proposed Payee Notification Legislation – State Bar of Michigan (Apr. 21, 2018), https://www.michbar.org/file/generalinfo/pdfs/4-21-18payee_notification.pdf; *2017/2018 At the Capitol*, MICH. B. J. 83 (May 2018), http://www.michbar.org/file/barjournal/article/documents/pdf4article3394.pdf; *see also supra* note 185 and accompanying text..

[192] LAWYER REGULATION FOR A NEW CENTURY, *supra* note 70, 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.

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

[194] *A History of The Client Protection Rules*, *supra* note 71.

[195] 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 TRUST ACCOUNTING R. 7 (2014).

[196] Those jurisdictions are Connecticut, Delaware, Iowa, Kansas, New Hampshire, New Jersey, North Carolina, Vermont, and Washington. *See* OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 49.

[197] *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.

[198] Houlding, *supra* note 197.

[199] *Id.*

recommended reforms.[200] 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.[201] 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.[202] The thefts had attracted significant attention in the popular press.[203] 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.[204]

New Jersey has been a national leader in the use of random audits.[205] 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."[206] 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.[207] Over the program's thirty-nine year existence, 234 attorneys, "detected solely by this program, have been disciplined for serious ethical violations."[208]

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

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[200] *Why Lawyers Must Pay for Reform*, CONN. L. TRIB., Nov. 25, 1991, at 32.
[201] Houlding, *supra* note 197.
[202] *See* Douglas Malan, *Practice Book Rules Bare Teeth*, CONN. L. TRIB. (May 22, 2006).
[203] *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*, AP, Jan. 21, 2005.
[204] *See* Douglas Malan, *Judges Embrace Lawyer-Theft Crackdown; Increased Policing of Attorney Advertising Also Wins Final Approval*, CONN. L. TRIB. (July 3, 2006).
[205] OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., *supra* note 67, at 49.
[206] *Id.*
[207] Letter from Charles Centinaro, Dir., N.J. Office of Attorney Ethics, to Chief Justice Stuart Rabner and Associate Justices of the N.J. Supreme Court (May 11, 2020), https://njcourts.gov/attorneys/assets/oae/2019oaeannualrpt.pdf.
[208] OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., 2020 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 17 (2021), https://www.njcourts.gov/attorneys/assets/oae/2020oaeannualrpt.pdf.

imposing the expense on lawyers.[209] As the Florida State Bar's president explained after the idea was considered and rejected there, "First of all, who's going to pay for it?" He continued, "The bar can't afford to hire an auditing firm to go around the state and audit lawyers' trust accounts."[210] Others note that these audits mostly pick up low-level, unintentional errors.[211] Some contend that random audits do not pick up all defalcations because lawyer theft does not necessarily involve trust account violations.[212] In addition, opponents argue, general audit practice is to reconcile trust account balances, and such auditing may be insufficient to detect defalcations.[213]

Yet New Jersey's experience demonstrates that the audits can be performed by auditors in ways that detect lawyer theft.[214] 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 money.[215] These thefts can continue for months or even

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[209] *See In re* Promulgation of Amendments to the Rules of the Supreme Court for Registration of Attorneys, Report of the Client Security Board, C9-81-1206, at A-19 – A20 (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.
[210] Celia Ampel, *Sticky Fingers: Attorney Thefts from Clients Spiked in Great Recession*, FLA. BUS. REV. (March 9, 2018), https://www.law.com/dailybusinessreview/2018/03/09/sticky-fingers-attorney-thefts-from-clients-spiked-in-great-recession/#:~:text=Florida%20saw%20an%20uptick%20in,to%20keep%20their%20practices%20afloat.
[211] *See, e.g.*, *Gary Blankenship, Trust Accounting Pilot Program May be Ready for Board Action in March*, FLA. B. NEWS (Feb. 15, 2017), https://www.floridabar.org/the-florida-bar-news/trust-accounting-pilot-program-may-be-ready-for-board-action-in-march/.
[212] *In re* Promulgation of Amendments to the Rules of the Supreme Court for Registration of Attorneys, *supra* note 209, at 20.
[213] *Id*.
[214] *See supra* note 208 and accompanying text.
[215] *See, e.g.*, Kelsey Gibbs, *Fallen 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 REPORT (July 21, 2020) (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*, ABA J. (Jan. 5, 2017), https://www.abajournal.com/news/article/lawyer_transferred_home_to_his_wife_after_abruptly_closing_law_firm_bar_all; U.S. Attorney's Office for the District of Massachusetts, Former Real Estate Attorney Sentenced to 66 Months in Jail for Defrauding Clients and Lenders (Sept. 25, 2020), https://www.justice.gov/usao-ma/pr/former-real-estate-attorney-sentenced-66-months-prison-defrauding-clients-and-lenders (describing Massachusetts lawyer who stole over $450,000 from client trust account);

years before they are detected.[216] 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 their states' client protection measures unless the bar or state regulators bring a problem to their attention. Moreover, supreme court justices do not see many fee disputes between lawyers and individual clients; those clients can rarely afford to litigate those issue 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.[217]

And what about the state legislatures? Legislatures tend to give the courts a wide berth on issues pertaining to lawyer regulation.[218] This is because state courts claim the inherent or constitutional authority to regulate the practice of law,[219] and a few claim the exclusive right to

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Office of District Attorney, Harris County Texas, *Disbarred Houston Lawyer Steals More than $500,000 from Client* (Oct. 2, 2020), https://app.dao.hctx.net/disbarred-houston-lawyer-steals-more-500000-client (describing misappropriation from client trust account).

[216] *See, e.g.*, *Disbarred Lawyer Pleads Guilty to Stealing from Clients' Escrow Accounts*, DISTRICT ATTORNEY KINGS COUNTY (June 4, 2015), http://www.brooklynda.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/ (describing lawyer who stole from escrow accounts over four-year period).

[217] 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 168 and accompanying text.

[218] *See, e.g.*, Levin, *supra* note 19, at 1007. The exception is California, which takes a more active role in lawyer regulation than other jurisdictions. *See id*. at 978, 1002-1003.

[219] Clark v. Austin, 101 S.W.2d 977, 980 (Mo. 1937) (noting that the Court "has the inherent power to define and regulate the practice of law"); Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., 261 S.W.3d 24, 34 (Tex. 2008) (stating that the Court's inherent power to regulate the practice of law

do so.[220] Legislators may harbor concerns that any law they pass regulating the legal profession could be struck down on separation of powers grounds.[221] 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.[222]

The most motivated actor when it comes to lawyer regulation is the legal profession itself, and it can play an outsized role in lawyer 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.[223] 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 from dues and possessing the power to discipline members, could influence state legislatures far better than a voluntary, financially weak bar organization.[224] Proponents thought that these bars would be beneficial for lawyers' economic interests,[225] and that mandatory bars could also benefit the public, because they provided a means of gaining greater resources to raise the quality of the profession and fill a

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derives from the state constitution); *see also* Laura Rigertas, *Lobbying and Litigating Against "Legal Bootleggers – the Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early 20th Century*, 46 CAL. W. L. REV. 65, 69 (2009).

[220] *See* In re Day, 54 N.E. 646, 653 (Ill. 1899); Clark v. Austin, 101 S.W.2d at 983-84; *In re* Brown, 708 N.W.2d 251, 256 (Neb. 2006); *In re* Splane, 16 A. 481, 483 (Pa. 1889); Rigertas, *supra* note 219, at 69; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK 1, 6-7 (1989).

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

[222] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 10-36 (1965).

[223] *See, e.g.*, *supra* note 46.

[224] *See* DAYTON D. MCKEAN, THE INTEGRATED BAR 36, 39-40, 43-44, 48 (1963).

[225] *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).

regulatory vacuum.[226] Today, statutes or court rules in some states provide for participation by mandatory state bar organizations in changes to the rules governing lawyers.[227] Rule proposals from a few mandatory state bars require votes by rank-and-file members.[228] In other jurisdictions, the courts routinely solicit the mandatory bar's views or wait for the state bar to make proposals.[229] Not surprisingly, lawyers are often reluctant to endorse regulation that imposes additional obligations or subject 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.[230] 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.[231]

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[226] *See* Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 17–18.

[227] *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).

[228] *See, e.g.,* IDAHO BAR COMM'N RULES r. 906(a); *infra* note 235 and accompanying text.

[229] *See, e.g.,* Levin, *supra* note 19, at 1028.

[230] TEXAS R. DISCIPLINARY PROCEDURE r. 1.04(c); Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 44. Texas is also one of only 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.

[231] *See* Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 42, 44. In 2010, the State Bar did, however, ask the Texas Insurance Commissioner to assist with efforts to prevent lawyer thefts and in turn, the Commission "strongly encouraged" insurers to voluntarily notify claimants that the settlement checks were sent to their lawyers. *See* Commissioner's Bulletin B-0035-10, TEX. DEPT. OF INSURANCE (Aug. 10, 2010), https://www.tdi.texas.gov/bulletins/2010/cc34.html. 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 (describing lawyer who settled case and took insurance money without client's knowledge); Brenda Sapino Jeffreys, *Ex-Client Sues Onetime Lawyer Over Settlement*, TEX. LAW., May 11, 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 (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/abilene/abilene-attorney-accused-of-pocketing-settlement-money; *Disciplinary Actions*, TEX. B.J., June 2020, at 412-13.

Texas lawyers have stolen millions of dollars from clients,[232] yet Texas caps payments from its Client Security Fund at $40,000 per claimant.[233] So what is going on in Texas? In Texas, the Supreme Court regularly seeks the State Bar's views on issues pertaining to lawyer regulation and the Bar often responds in ways that reflect its members' interests.[234] Although the 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.[235] The Court "has historically chosen to defer to a vote of State Bar members before making significant changes" to its Disciplinary Rules of Professional Conduct.[236] 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 Court[237]—a 2011 State Bar referendum to amend the Texas rules failed in all respects.[238] This occurred even though the final draft submitted to

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[232] *See, e.g.*, Office of District Attorney, *supra* note 215 (describing Houston lawyer who misappropriated $500,000); Scott Gordon, *Dallas Attorney Indicted in Client's Theft*, 5NBCDFW(June 14, 2018), https://www.nbcdfw.com/news/local/dallas-attorney-indicted-in-clients-theft/235097/ (reporting on lawyer theft of $365,000); Martha Neil, *Suspended Texas PI Lawyer Gets 35 Years in Client Theft Case*, ABA J. (Aug. 29, 2008), https://www.abajournal.com/news/article/former_pi_lawyer_gets_35_years_in_client_theft_case (describing lawyer who stole $1.6 million from clients).

[233] Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 26.

[234] 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 State Bar's views. *See* Levin, *supra* note 19, 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.

[235] TEX. GOVT. CODE § 81.024 (b)-(g) (2016); SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 230, at 13; Nathan L. Hecht et al., *How Texas Court Rules Are Made* 2-3, https://www.txcourts.gov/media/1374851/How-Court-Rules-Are-Made.pdf. From 1987-2021, there were six State Bar referenda. Only three passed. *Id.* at 3; *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/.

[236] SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 230, at 13.

[237] *See* Approval of Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Misc. Dkt. No. 09-9175 (Tex. Sup. Ct. Oct. 20, 2009); Timeline of Development of Proposed Rules (on file with author).

[238] *See* State Bar of Texas, *State Bar of Texas Announces Results of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct* (Feb. 17, 2011), https://www.texasbar.com/AM/Template.cfm?Section=Press_Releases&Template=/CM/HTMLDisplay.cfm&ContentID=12942.

State Bar members was one that had been approved by the State Bar leadership.[239] The 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,[240] 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 Supreme Court, that the caps on payments to victims should be raised, and that the fund should be required to maintain a minimum balance.[241] In response, the State Bar increased its Funds' claims cap from $20,000 to $30,000 and required a minimum fund balance of $1.25 million.[242] 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.[243] In the most recent sunset review cycle (2016-2017), the 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.[244] The reason was apparently due, in part, to legislators' concerns about burdening the banks.[245] The Commission staff also recommended that the legislature repeal requirements for a State Bar referendum to approve disciplinary rule changes because the State

239 *See* Kennon L. Peters, *Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct: Brief Background and Explanation Updated Nov. 2010*, 73 TEX. B. J. 894, 896 (2010).
240 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.
241 *See Sunset Commission Staff Report Recommendations Include Repeal of State Bar Act, Placing Bar Funds in State Treasury*, 53 TEX. B.J. 865, 878-80 (1990).
242 *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.
243 *See* Sunset Advisory Commission, Analysis of Sunset Legislation 36-37 (1991), https://www.sunset.texas.gov/public/uploads/files/reports/Analysis%20of%20Sunset%20Legislation%2072%20Leg%201991.pdf.
244 SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 230, at A-8, 26-27. The Chief Disciplinary Counsel sought both Trust Account Overdraft Notification and Payee Notification during the last Sunset review. *See* State Bar of Texas, Self-Assessment Report to the Sunset Advisory Commission 93, 278-79 (Sept. 1, 2015), https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20SER%20-%20Accessible.pdf. The Sunset Commission also declined to recommend payee notification.
245 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.

Bar rulemaking process "obstructs changes needed to effectively regulate lawyers."[246] Nevertheless, on the motion of Sunset Commission member Senator Kirk Watson, a former member of the Texas State Bar's Executive Committee,[247] the Sunset Commission "modified" the Sunset staff's recommendation and decided to retain the referendum process but streamline the Bar's rulemaking process.[248] 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.[249] It retained the State Bar referendum process for proposed disciplinary rule changes that originate with the State Bar.[250]

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 disagree.[251] 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 decisionmaking 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.

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[246] SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 230, at 3.
[247] *See Meet Kirk*, KIRK WATSON TEXAS SENATOR, http://www.kirkwatson.com/meet-kirk/.
[248] SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 230, at A7.
[249] *See* TEX. STATE BAR ACT §§ 81.0876-81.0879 (2017); SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS, *supra* note 230, at A1.
[250] TEX. STATE BAR ACT §§ 81.0877-81.0878 (2017). 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 235; COMMITTEE ON DISCIPLINARY RULES AND REFERENDA, 2020 ANNUAL REPORT 8-13,
https://www.texasbar.com/Content/NavigationMenu/CDRR/Annual_Reports1/2020AnnualReport.pdf.
[251] *See, e.g.*, Levin, *supra* note 19, at 1013-14.

I. Jurisdictions with Most Client Protection Measures[252]

Jurisdiction (* indicates mandatory bar)	Written Fee Agreement	Mandatory Fee Arbitration	Trust Overdraft Notification	Insurance Payee Notification	Random Audits of Trust Account[253]	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
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[254]	$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 I, 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 weighted 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

[252] For support for the data in Table I, see *supra* notes 44, 82, 181, 196, 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; E-mail from Mike Larson, Coordinator, Lawyer Assistance Program, State Bar of Mont., to author (July 14, 2021, 10:18 EDT) (stating there is no claim cap on the amount clients can recover, but recovery is limited to the amount available in the fund).
[253] 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 196 and accompanying text. Simply having these rules on the books, however, may have some deterrent effect.
[254] Only New York's First and Second Departments provide for random audits. *See* N.Y. APP. DIV. FIRST DEPT. RULES § 603.27; N.Y. APP. DIV. SECOND DEPT. RULES § 691.12(a).

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.[255] 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 I while only 18.75% of the jurisdictions with mandatory bars appear there.[256]

There are, however, some alternate explanations for this pattern. It is conceivable that the six northeastern states with voluntary state bars that appear in Table I have more client protection measures because lawyers steal larger amounts of client money in those states. Some support for this explanation can be found in the fact that from 2017-2019, fifty-eight percent of the money paid by client protection funds came from thirteen jurisdictions in the Northeast and middle Atlantic states.[257] But this fact could, alternatively, be due to the fact that that these jurisdictions have client protection funds with higher claims caps.[258] 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.[259] Policy diffusion is often seen in

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[255] The Alaska State Bar's most recent annual report indicates that its Lawyers' Fund for Client Protection considered no claims in 2018. *See* ALASKA BAR ASSOCIATION 2018 ANNUAL REPORT, *supra* note 115, at 4. The preceding year, it considered one claim, for which it paid $2500. *See* ALASKA BAR ASSOCIATION 2017 ANNUAL REPORT 4, https://alaskabar.org/wp-content/uploads/2017-annualreport.pdf. Since Maine's Lawyers' Fund for Client Protection was established in 1997, it has approved claims of $816,567, but it does not report the actual amount of the claims. *See* Lawyers' Fund for Client Protection 2019 Annual Report 3, https://mebaroverseers.org/complaint/Annual_Reports/2019%20Annual%20Report.pdf. In 2019, it only received one claim, which was in the amount of $2500. *Id.*

[256] One additional state with a mandatory bar that almost made it into Table I 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 did not participate. *See supra* note 84 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 I, however, the percentage of all mandatory bars that appear in that table would increase to 21.875%.

[257] *See* Survey of Lawyers' Funds for Client Protection 2017-2019, *supra* note 1, at 6-7.

[258] 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.

[259] *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*, AM. J. POL. SCI. 849, 841 (2010); *see also* Tiffany Bergin, *How and Why Do Criminal Justice Public Policies*

geographically proximate states,[260] which may help explain why some of the Northeastern states take similar approaches to client protection. It is also conceivable that the northeastern states and California are 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 a few of the jurisdictions appear in either table.[261] Regression analyses would be needed to more reliably test the impact of this factor.

Perhaps more telling is Table II, showing the jurisdictions on the other end of the spectrum. All but one of the jurisdictions with the fewest client protection measures 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) have among the weakest consumer protection laws in the country.[262] Michigan and Minnesota are outliers in Table II because their client protection funds have relatively generous per claimant caps. While it is conceivable that some of the other jurisdictions in Table II see relatively low-level lawyer defalcations, this cannot be said of other jurisdictions like Indiana, Louisiana, and Texas.[263]

Spread Throughout the U.S. States? A Critical Review of the Diffusion Literature, 22 CRIM. JUST. POLICY REV. 403, 416 (2011).

[260] *See* Bergin, *supra* note 259, at 405.

[261] 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.*, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices* (2018), NCLC, https://www.nclc.org/images/pdf/udap/udap-report.pdf. 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 I, as does Hawaii. 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. Two of those five jurisdictions appear in Table II, which shows the jurisdictions with the fewest client protection measures.

[262] *See supra* note 261. 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.

[263] For some Texas cases see *supra* note 232. 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://louisianarecord.com/stories/523756156-hammond-attorney-suspended-indefinitely-after-conviction-for-stealing-at-least-186-000-from-client; 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-

II. Jurisdictions with Fewest Client Protection Measures[264]

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—rules regarding disclosure of whether a lawyer carries malpractice insurance—the jurisdictions with mandatory bars would look somewhat more protective of

judgment-for-defrauding-blind-client-monroe-attorney-seeks-new-trial/article_b66d6c54-7135-11eb-b764-db7fe7f81c6f.html (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*, ABA J. (Jan. 25, 2013), https://www.abajournal.com/news/article/ex-lawyer (describing Indiana personal injury lawyer); Teresa Auch Schultz, *Valparaiso Attorney to Plead Guilty in Client Theft Case*, CHICAGO 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); Robert Stafford, *Suspended Lawyer Accused of Thefts from Disabled Clients Jailed on Warrant* (July 21, 2020), https://www.theindianalawyer.com/articles/suspended-lawyer-accused-of-thefts-from-disabled-clients-jailed-on-warrant (describing Indiana lawyer who stole more than $250,000 from clients); David Stafford, *Justices in Tug-of-War Over Judge in Suit Accusing Ex-Lawyer of Estate Theft*, INDIANA LAW. (Feb. 2, 2021), https://www.theindianalawyer.com/articles/justices-in-tug-of-war-over-judge-in-suit-accusing-ex-lawyer-of-estate-theft (describing Indiana lawyer who allegedly stole more than $775,000 from a widow client's estate).

[264] For support for the data in Table II, see *supra* notes 44, 82, 181, 196 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/p/cm/ld/fid=28.

clients than they do in the tables provided here.[265] In fact, insurance disclosure rules—as compared to the requirement that lawyers maintain malpractice insurance— provide relatively weak client protection because clients often do not see the disclosures or understand their implications.[266] 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.[267] 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.[268] In Idaho, however, bar members (narrowly) approved the change on public protection grounds.[269] The mandatory State Bar of South Dakota proposed that state's insurance disclosure rule, which arguably imposes more demanding direct disclosure requirements on uninsured lawyers than anywhere else in the country.[270] Thus, there are times when mandatory state bar members *will* support client protection measures.[271] There are also jurisdictions where mandatory state bars have less influence on the rulemaking process than in

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[265] *See Compendium of Client Protection Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/contents/; ABA MODEL RULE ON INSURANCE DISCLOSURE (AM. BAR ASS'N 2004). Minnesota and South Dakota are the only jurisdictions in Table II that require that insurance information be disclosed on an official website (Minnesota) or directly in writing to clients (South Dakota). *See* Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*. 68 FLA. L. REV. 1281, 1299-1301 (2016).

[266] *See* Levin, *supra* note 265, at 1325-27.

[267] *See About the PLF*, OSB PROFESSIONAL LIABILITY FUND, https://www.osbplf.org/about-plf/overview.html; *2018 Malpractice Coverage Requirement-General Information*, IDAHO STATE BAR (2019), https://isb.idaho.gov/blog/2018-malpractice-coverage-requirement/.

[268] *See* Daniel O'Leary, *The Professional Liability Fund: Milestone*, OR. ST. B. BULL., June 1978, at 9 (describing an Oregon State Bar Board of Governors statement about the benefits to lawyers of the professional liability fund).

[269] *See* Diane K. Minnich, *2016 Resolution Process – The Results*, THE ADVOCATE, Jan. 2017, at 22.

[270] Uninsured lawyers in South Dakota are required to disclose directly to clients, on firm letterhead, and in any advertising that they do not carry professional liability insurance. *See* S.D. RULES OF PROF'L 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, S.D. Bar, to Leslie C. Levin (April 29, 2015, 17:52 EDT). The Committee's recommendation was approved by State Bar members at its Annual Meeting. *See* Committee Reports of the State Bar of South Dakota 55-56 (1999) (on file with author).

[271] 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 $1000. *See Business Associations and Professions*, 18 PAC. L.J. 467, 473-74 (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).

some other states.[272] 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.[273]

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

[272] 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 Hawa'i Rules of Professional Conduct: What you Absolutely Need to Know and Why—Part I*, HAW. B. J., Mar. 2014, at 4; *Court Briefs*, HAW. B.J., Feb. 2011, at 22; *see also HSBA Happenings*, HAW. B.J., Mar. 2019, at 15 (describing the mandatory Hawaii State Bar Association's decision not to comment on Supreme Court's proposed rule change).
[273] *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).

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.[274] 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,"[275] as a matter of comity,[276] or on other grounds.[277] A few have gone further, recognizing that the legislature has its own role to play in regulating the legal profession.[278]

There are seemingly openings in some states for the legislatures to do more to protect vulnerable clients. Some courts have concluded that consumer protection laws of generally applicability can be applied to lawyers.[279] As one court noted, "entrepreneurial aspects of legal

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[274] *See* Beyers v. Richmond, 937 A.2d 1082, 1090-92 (Pa. 2007); *see also In re* Infotechnology, 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. Utah, 374 P.3d 14, 20 (Utah 2016) (noting court's authority is both exclusive and "extensive"); *In re* Fiedler v. Wisconsin 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).
[275] *See In re* Kaufman, 206 P.2d 528, 539 (Idaho 1949); *see also* Hays v. Ruther, 313 P.3d 782, 409-10 (Kan. 2013); Attorney General of Maryland v. Waldron, 426 A.2d 929, 937 (Md. 1981); Shenendoah Sales & Serv. v. Assessor of Jefferson County, 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).
[276] *See, e.g.*, *In re* Opinion of the Justices, 180 N.E.725, 727 (Mass. 1932); Wolfram, *supra* note 220, at 16.
[277] *See, e.g.*, Sadler v. Oregon State Bar, 550 P.2d 1218, 1222–23 (Or. 1976) (recognizing the legislature's police power to protect the public); Bester v. Louisiana Supreme Court 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").
[278] *See In re* Attorney Discipline System, 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. App. Ct. 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 regulation"); Newton v. Cox, 878 S.W.2d 105, 111 (Tenn. 1994) (observing "that areas exists in which both the legislative and judicial branch have interests, and that in such areas, both may exercise appropriate authority").
[279] *See* Pepper v. Routh Crabtree, APC, 219 P.3d 1017, 1024 (Alaska 2009); Crowe v. Tull, 126 P.3d 196, 209 (Colo. 2006); Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 944-45 (Conn. 1983); Andrews & Lawrence Prof'l Services, LLC, v. Mills, 223 A.3d 947, 962-66 (Md. 2020); Short v. Demopolis, 691 P.2d 163, 170 (Wash. 1984). *But see* Cripe v. Leiter, 703 N.E.2d 100, 102 (Ill. 1998); Beyers v. Richmond, 937 A.2d 1082, 1089-92 (Pa. 2007) (refusing to apply consumer protection statutes to lawyers).

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.[280] Another observed when upholding the application of the state's consumer protection statute to lawyers, "[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."[281] Some courts have also upheld statutes specifically aimed at protecting lawyers' clients, such as laws limiting lawyers' recoveries in contingent fee cases[282] and setting attorneys' fee formulas in workers compensation matters.[283]

Legislatures may be able to do even more to protect vulnerable clients. For example, they may be able to require that fee arrangements must be in writing in order for lawyers to bring suit to recover their fees (other than on a quantum meruit basis).[284] 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 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 issues[285] and more reasons to be concerned about lawyers' conduct. Moreover, Texas's experience with its Sunset Commission suggests that some

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[280] Short v. Demopolis, 691 P.2d at 168.
[281] Heslin, 461 A.2d at 946.
[282] *See, e.g.*, Roa v. Lodi Medical Group, Inc., 695 P.2d 164, 168-69 (Cal. 1985) (upholding statute limiting contingent fee recovery to 25%); Newton v. Cox, 878 S.W.2d 105 (Tenn. 1994) (upholding statute limiting contingent fee recovery by lawyers to 33% in medical malpractice cases).
[283] *See, e.g.*, David v. Bartel Enterprises, 856 N.W.2d 271, 274-75 (Minn. 2014); *see also* Multiple Injury Trust Fund v. Coburn, 386 P.3d 628, 636-39 (Okla. 2016).
[284] It seems less likely that courts would uphold statutory requirements that lawyers submit to fee arbitration. *But see* CAL. BUS. & PROF. CODE § 6200(c) (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 218 and accompanying text.
[285] *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).

legislators may be more concerned about protecting corporate interests than they are about public protection. 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 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 than they are currently receiving.