"They Don't Know What They Don't Know": A Study of Diversion in Lieu of Lawyer Discipline

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ABSTRACT

Lawyer misconduct can have devastating consequences for clients. But what is the appropriate regulatory response when lawyers make less serious mistakes? For almost thirty years, jurisdictions have offered some lawyers diversion in lieu of discipline. Diversion is intended to help educate lawyers or treat those with impairments so that they do not reoffend. Yet remarkably little is known about how diversion operates, whether it is used appropriately, and how well it seems to work. This Article addresses these questions. It draws on the limited published data and on interviews with disciplinary regulators in twenty-nine jurisdictions about their use of diversion. The Article reveals wide variations in the extent to which diversion is utilized and the circumstances under which it is used. It also describes significant differences among the jurisdictions in resource allocation and decision-making, which may affect how effectively diversion assists respondent lawyers. The Article makes recommendations for increasing the consistency of decisions to use diversion and improving the efficacy of diversion interventions. In addition, it discusses how diversion could be handled better to provide some satisfaction to complainants. Finally, and importantly, the Article stresses the need for regulators to collect and analyze data to ensure that diversion is adequately protecting the public.

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INTRODUCTION

Anna, a third-year real estate associate, lost her job during an economic downturn. After two former clients ask Anna to handle their commercial real estate closings, Anna decides to launch her own law practice. She asks her brother to help her with the bookkeeping. Six months later, the state bar regulator notifies Anna of a grievance arising out of a bank notice relating to insufficient funds in her trust account. Neither she nor her brother understood how to properly handle trust account funds. Now Anna faces possible discipline. Professional discipline, even a reprimand, could tarnish Anna's reputation and increase her malpractice insurance premiums. Yet attorneys must handle trust accounts with scrupulous care, and bar regulators' primary goal is to protect the public. What is the best regulatory response?

State disciplinary authorities receive close to 125,000 complaints against lawyers annually.[1] Some of these complaints allege serious misconduct, some involve minor mistakes, and some are baseless or are not matters that the discipline system will address.[2] Where minor misconduct has occurred, some complaints may be referred for "diversion" in lieu of discipline. Diversion referrals enable lawyers to comply with certain conditions on a confidential basis and avoid discipline sanctions. Diversion also provides an opportunity to educate and rehabilitate the lawyer, thereby helping the lawyer and protecting the public.[3] Lawyers may find themselves in diversion because they "don't know what they don't know."[4] Although diversion has been used for almost thirty years, little is known about how it works in practice. The extent of recidivism among lawyers who receive diversion remains largely unknown.

Most lawyer discipline complaints are brought by individuals against solo and very small firm lawyers.[5] These lawyers often represent individuals and small businesses, typically in personal plight matters (e.g., bankruptcy, criminal, family, personal injury). Unlike large corporate clients, which can demand that their large law firms immediately remedy a problem or can credibly threaten to sue or take their business elsewhere, individuals who are not repeat consumers of legal services may not have the leverage or understanding of how to get their lawyers to address their

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1. This is a very rough estimate. According to the ABA's Survey on Lawyer Discipline Systems, in 2019 there were over 69,500 complaints against lawyers reported by state disciplinary authorities and an additional 33,500 handled by consumer assistance programs. *See* AM. BAR ASS'N, 2019 SURVEY ON LAWYER DISCIPLINE SYSTEMS 3 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2019-sold-final.pdf [https://perma.cc/9XV6-NVVT] [hereinafter SOLD 2019]. These figures did not include California, which opened more than 16,200 cases, or New York's First Department, which processed over 2,800 complaints. *See* STATE BAR OF CAL., 2019 ANNUAL DISCIPLINE REPORT 2 (2020), https://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf [https://perma.cc/86FH-G9M6]; N.Y. ATT'Y GRIEVANCE COMM., SUP. CT., APP. DIV., FIRST JUDICIAL DEPT., 2019 ANNUAL REPORT 1 (2020), https://nycourts.gov/courts/AD1/Committees&Programs/DDC/2019%20ANNUAL%20REPORT.pdf [https://perma.cc/HNW3-REA3]. It also did not include complaints in Massachusetts, New Jersey, New York's Third Department, South Carolina, South Dakota, Vermont, West Virginia, or complaints filed with federal agencies. SOLD 2019, *supra*, at 1–3.

2. State lawyer disciplinary authorities dismiss the vast majority of these complaints without an investigation or hearing. *See, e.g.*, SOLD 2019, *supra* note 1, at 5–7; ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT 22 (2020), http://iardc.org/Files/AnnualReports/AnnualReport2019.pdf [https://perma.cc/J75T-KA63] [hereinafter ARDC ANNUAL REPORT]; ATT'Y GRIEVANCE COMM'N OF MD., 44TH ANNUAL REPORT 22 (2019), https://www.courts.state.md.us/sites/default/files/import/attygrievance/docs/annualreport19.pdf [https://perma.cc/EW9B-2V8A].

3. *See, e.g.*, N.D. RULES FOR LAW. DISCIPLINE R. 6.6(B) (stating that the purpose of diversion "is to protect the public by improving the professional competence of and providing educational, remedial, and rehabilitative programs" to lawyers); *see also infra* notes 105–07, 113 and accompanying text.

4. *See* Telephone Interview with Regulator 17 (July 6, 2022) (all citations to telephone interviews are to authors' interview transcripts, on file with authors). The regulator made this observation during an interview conducted for this Article. *See infra* notes 99–100 and accompanying text.

5. *See* Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312–13 (2004).

improper conduct.[6] Because it is so difficult to prevail on a legal malpractice claim, individuals often have no recourse except to file a discipline complaint.[7]

Unfortunately, the lawyer discipline system offers limited assistance to individual complainants. Lawyer discipline systems are designed to protect the public and the administration of justice.[8] For serious misconduct, regulators may seek to impose incapacitating sanctions (suspension and disbarment) to remove lawyers from practice for a period of time. Signaling and shaming sanctions (public reprimands or private sanctions) can alert the lawyer, the legal community, and sometimes the public that the lawyer has engaged in unacceptable conduct. Discipline systems are not, however, designed to provide complainants with damages or other remedies. While a few jurisdictions order fee restitution for neglect of client matters, restitution is not the norm.[9] Complainants rarely even receive an apology from lawyers who caused them harm.[10]

Fifty years ago, the American Bar Association's ("ABA") Special Committee on Evaluation of Lawyer Disciplinary Enforcement declared the state of lawyer discipline to be "scandalous."[11] That committee noted a host of deficiencies with underfinanced bar-controlled disciplinary systems that investigated few complaints and protected the bar's elite.[12] It also observed that there were "no informal admonitory procedures to dispose of matters involving minor misconduct" and that prosecution of minor misconduct "is unduly harsh [and] wastes the agency's limited manpower and financial resources on relatively insignificant matters."[13] Yet dismissal of numerous complaints against an attorney may "immunize the attorney guilty of repetitive acts of minor misconduct from substantial discipline."[14] In 1992, when the ABA's Special Commission on Evaluation of Disciplinary Enforcement ("the McKay Commission") reported on the state of

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6. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 815–17, 824–26, 828–29 (1992).

7. Legal malpractice is notoriously difficult to prove, and even demonstrable neglect (e.g., a missed statute of limitations) will not result in a plaintiff's verdict unless the client can also demonstrate that she would have prevailed at trial in the underlying matter. HERBERT KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 54 (2018); *see* RONALD E. MALLEN, LEGAL MALPRACTICE § 33:7 (West 2022 ed.). In addition, clients of solo and small firm lawyers can typically only afford to sue for malpractice on a contingent fee basis, and legal malpractice lawyers will usually only take on high-value cases. KRITZER & VIDMAR, *supra*, at 147–48.

8. *See, e.g.*, STANDARDS FOR IMPOSING LAWYER SANCTIONS, Purpose of Lawyer Discipline Proceedings, Standard 1.1 (AM. BAR ASS'N 1992).

9. *See* Susan S. Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2055 (2017) (noting that disciplinary authorities in the United States may order restitution in limited circumstances).

10. For an examination of the use of apologies in lawyer disciplinary matters, see Leslie C. Levin & Jennifer Robbennolt, *To Err is Human, To Apologize is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513 (2021).

11. *See* AM. BAR ASS'N, SPECIAL COMM'N ON EVALUATION OF DISCIPLINARY ENF'T, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970).

12. *Id.* at 1–2, 24–25, 175–78.

13. *Id.* at 92–93.

14. *Id.* at 94.

lawyer discipline, it found continuing deficiencies in lawyer discipline, including the failure to "address complaints of incompetence or negligence except where the conduct was egregious or repeated" and "complaints that the lawyer promised services that were not performed."[15] It further noted that "the disciplinary process also does nothing to improve the inadequate legal or office management skills that cause many of these complaints."[16] The McKay Commission recommended that "minor misconduct" be handled administratively outside the discipline system[17] in a process now known as diversion.

Today, in thirty-five U.S. jurisdictions, lawyer discipline complaints may result in diversion agreements that enable the respondent lawyer to avoid discipline sanctions even where some misconduct occurred.[18] As conceived by the McKay Commission, this process was for matters constituting "minor misconduct, minor incompetence or minor neglect."[19] In such cases, a lawyer may enter into a confidential diversion agreement with discipline authorities, which could include conditions such as attending an ethics course, fee arbitration, lawyer practice management assistance, mentoring, substance abuse recovery programs, or psychological counseling.[20] If the lawyer satisfactorily completes the terms in the agreement, the disciplinary complaint is dismissed.[21]

It is not easy to study states' use of diversion in lieu of lawyer discipline. Diversion decisions do not appear in written opinions, and diversion agreements are confidential. Although many jurisdictions annually report to the ABA the number of complaints that are referred to diversion programs, the reporting is incomplete and uneven.[22] Disciplinary authorities typically do not publish demographic information about the lawyers who receive diversion. Nor do they usually publish information about which diversion conditions they utilized during the year, how often they used them, or the reasons why diversion is imposed.

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15. AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY: REPORT ON THE COMMISSION OF EVALUATION OF DISCIPLINARY ENFORCEMENT xv (1992), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ [https://perma.cc/5KGB-3MFW] [hereinafter MCKAY COMM'N REPORT].

16. *Id.*

17. *See id.* at Recommendations 8–10.

18. The most recent ABA Survey on Lawyer Discipline Systems indicates that there are thirty-two jurisdictions with diversion programs, but it includes Arkansas, Indiana, and Nebraska, which do not offer diversion. *See* SOLD 2019, *supra* note 1, at 9–12. It also does not reflect that California and the District of Columbia offer diversion programs. *Id.* at 9; *see* CAL. BUS. & PROF. CODE § 6231 (West 2022); D.C. BAR RULES R. XI, § 8.1 (1972). Nor does SOLD list the diversion programs in Massachusetts, New Jersey, South Carolina, and Vermont. *See* SOLD 2019, *supra* note 1, at 9–12.

19. MCKAY COMM'N REPORT, *supra* note 15, at Recommendation 9.

20. Bryan D. Burgoon, *Diversion to Disbarment, The Florida Lawyer Discipline System*, FLA. BAR NEWS (Dec. 1, 2013), https://www.floridabar.org/the-florida-bar-news/diversion-to-disbarment-the-florida-lawyer-discipline-system/ [https://perma.cc/QJ86-MUF5]; *see also* ILL. RULES OF THE ATT'Y REGIS. & DISCIPLINARY COMM'N R. 56(b).

21. *See, e.g.*, COLO. R. CIV. P. R. 242.17(e). *But see* 27 N.C. ADMIN CODE 01B .0112(i)–(k) (stating that dismissal is not automatic but is considered as mitigating evidence).

22. *See infra* notes 56–58 and accompanying text.

Little is known about which lawyers receive diversion, what standards are actually being applied, or whether lawyers who receive diversion later engage in other misconduct. One 2002 study of diversion in Arizona concluded that diversion "is working."[23] The study provides some demographic information (gender, years of practice) about the lawyers who received diversion and indicates that those who accepted diversion received fewer subsequent charges than those who did not.[24] Unfortunately, that study has some significant limitations.[25] Other data from Florida indicate that 10% of the lawyers who satisfied their diversion conditions were subsequently disciplined one or more times, but the study only tracked some of the lawyers who participated in diversion for a relatively short time period.[26] A more recent Wisconsin study found that the incidence of recidivism over a longer period was substantially higher in that state.[27]

This Article seeks to shed light on the use of diversion in lieu of lawyer discipline and to begin to assess how well it is working for respondent lawyers, regulators, complainants, and the public. Part I provides a brief overview of the lawyer discipline process and identifies where diversion fits into discipline proceedings. It also describes the ways in which the ABA *Model Rules for Lawyer Disciplinary Enforcement* ("*MRLDE*") suggest that diversion should be structured. Part II discusses state statistics revealing the frequency with which diversion is used and additional data from three jurisdictions to provide a fuller picture of the use—and reuse—of diversion. Part III discusses key findings from interviews with discipline regulators in twenty-nine jurisdictions about their diversion programs. Those interviews reveal that the regulators generally appear to be happy to have diversion as part of their regulatory toolkit. Nevertheless, their procedures, the diversion conditions available to them, and the resources for diversion vary significantly from state-to-state. The interviews also revealed shortcomings in some of the programs. Part IV discusses some problems identified in the interviews and offers recommendations to improve the effectiveness of diversion programs. These suggestions include efforts to promote consistency in the treatment of respondent lawyers to avoid bias in the use of diversion. Regulators can also take steps to promote durable learning, provide greater transparency, and increase complainants' satisfaction with the process. Regulators should also collect and evaluate data to determine whether they are using

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23. Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1221 (2003).

24. *Id.* at 1251–52.

25. *See infra* notes 72–73 and accompanying text.

26. *See* HAWKINS COMM'N ON REV. OF DISCIPLINE SYS. REP. & RECOMMENDATIONS, A REPORT AND ANALYSIS OF TARGETED ASPECTS OF THE ATTORNEY DISCIPLINE SYSTEM 14, App. D (2011) [hereinafter HAWKINS COMM'N REPORT]; *infra* note 78 and accompanying text.

27. *See* LESLIE C. LEVIN & SUSAN SAAB FORTNEY, REPORT TO THE WISCONSIN OFFICE OF LAWYER REGULATION: ANALYSIS OF GRIEVANCES FILED IN CRIMINAL AND FAMILY MATTERS FROM 2013–2016, at 6 (Aug. 1, 2020); *see also* Michael F. Thompson, Lawyer Prior Violation Study 2–3 (Sept. 13, 2021) (unpublished report) (on file with authors); *infra* note 96 and accompanying text.

diversion effectively and appropriately. The Conclusion describes some final thoughts for judges, regulators, scholars, and other parties interested in designing the optimal lawyer regulatory system.

I. SITUATING DIVERSION IN THE LAWYER DISCIPLINE PROCESS

To provide context and background on the role that diversion plays in lawyer discipline systems, this Part describes when and how regulators use diversion as an alternative to discipline.[28] Typically, a disciplinary matter starts when a potential complainant (often a client or opposing party) reviews the disciplinary authority's website or contacts the regulatory authority concerning a problem involving a lawyer. About a dozen jurisdictions have Attorney Consumer Assistance Programs ("ACAPs") that attempt to resolve low-level concerns involving issues such as failure to communicate.[29] Some jurisdictions with ACAPs attempt to resolve minor problems before a complaint is even filed.[30] Disciplinary authorities in other states often review the complaints they receive to determine whether they are appropriate for informal resolution.[31]

If a complaint is not referred elsewhere for resolution, disciplinary authorities will review and dismiss it if the matter is not within their jurisdiction or the alleged misconduct does not constitute a violation of the professional conduct rules.[32] If an investigation appears warranted, disciplinary counsel will conduct

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28. Because the process can vary considerably from state to state, the description that follows does not reflect the variations in the procedures in all jurisdictions.

29. The Mississippi Bar launched the first consumer assistance program in 1994. *See* Stephanie Francis Ward, *Voices of Reason*, ABA. J., 1, 2 (Mar. 21, 2006). One of the reasons for starting ACAPs was that the majority of complaints did not raise issues that the disciplinary authorities would address, leading to public disillusionment with the lawyer discipline process. *See* Roy M. Sobelson, *Legal Ethics*, 48 MERCER L. REV. 387, 387 (1996).

30. *See, e.g.*, *Attorney Discipline*, FLA. BAR (2023), https://www.floridabar.org/public/acap/ [https://perma.cc/7Y4T-79SL]; *Client Assistance Program of the Office of the General Counsel (CAP)*, STATE BAR OF GA. (2022), https://www.gabar.org/committeesprogramssections/programs/consumerassistanceprogram/index.cfm [https://perma.cc/DWG5-TM2V]; *Filing a Complaint Against an Attorney*, MASS. BD. OF BAR OVERSEERS [https://perma.cc/7DER-26RA] (last visited Nov. 23, 2022); *Client-Attorney Assistance Program (CAAP)*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/Problemswithan Attorney/CAAP/default.htm [https://perma.cc/S5C2-S4G4] (last visited Nov. 23, 2022).

31. *See, e.g.*, VT. PRO. RESP. BD., PROFESSIONAL RESPONSIBILITY PROGRAM, FY 21 ANNUAL REPORT 5, 6 (2021); WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2020–2021, at 4 (2021); *see also Attorney Matters*, N.Y. SUP. CT., APP. DIV., SECOND JUD. DEP'T, https://www.nycourts.gov/courts/ad2/attorneymatters_ComplaintAboutaLawyer.shtml [https://perma.cc/A79E-EXK7] (last visited Dec. 27, 2022) (noting that after a staff attorney reviews a complaint, it "may be transferred to the grievance, mediation, or fee dispute committee of a local bar association").

32. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T R. 11(A)(1) (AM. BAR ASS'N 2002) [hereinafter MRLDE]; W. VA. RULES OF LAW. DISCIPLINARY PROC. R. 2.4(a) (2013). Some complaints do not fall within the jurisdiction of the disciplinary agency because the alleged misconduct occurred outside the statute of limitations or for other reasons. In some jurisdictions, disciplinary authorities will not consider certain claims such as ineffective assistance of counsel, even though these claims may implicate duties of diligence and competence which are governed by the rules of professional conduct. *See, e.g.*, *Important Information and Instructions*, STATE BAR OF GA. (2017), https://www.gabar.org/forthepublic/upload/Grievance-Form_English.pdf [https://perma.cc/JFG4-RLZJ] (stating that state bar cannot discipline lawyers for ineffective assistance of counsel).

one.[33] Before filing formal charges, disciplinary counsel may propose that the lawyer consent to diversion conditions in lieu of discipline if the alleged misconduct was minor in nature and disciplinary counsel believes diversion is appropriate.[34] The lawyer may then enter into a negotiated agreement to comply with certain conditions.[35] If diversion does not occur, disciplinary counsel may file formal charges.[36] A hearing will be held, and if a referee or hearing panel finds lawyer misconduct, the decision-maker will recommend a sanction to a disciplinary board or state court for approval.[37]

The ABA *Model Rules for Lawyer Disciplinary Enforcement*, which were first adopted in 1992, outline procedures for diversion,[38] although jurisdictions do not uniformly follow the *MRLDE*'s approach.[39] Typically, disciplinary counsel or someone else within the disciplinary authority's office will offer a lawyer diversion for actions involving minor misconduct.[40] Disciplinary counsel and the respondent lawyer negotiate an agreement, "the terms of which shall be tailored to the individual circumstances."[41] The conditions may include "fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education, ethics school, or any other program authorized by the court."[42] If the lawyer accepts diversion, the lawyer is required to sign the agreement and complete it within a specified time period. The lawyer is also required to pay all costs incurred in connection with the diversion contract.[43] If the lawyer does not complete the conditions within the specified time, the lawyer may then be subject to discipline.[44]

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33. *See, e.g.*, *File a Complaint*, ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., https://www.iardc.org/Home/FileComplaint [https://perma.cc/DVV9-7DZN] (last visited Nov. 23, 2022).

34. *See* MRLDE R. 11(G)(1); RULES GOVERNING THE MO. BAR & THE JUDICIARY R. 5.105. Nevertheless, in some jurisdictions, diversion is available at any stage of the disciplinary process. *See, e.g.*, ARIZ. ATT'Y DIVERSION GUIDELINES § IV (2011), https://www.azbar.org/media/m4zh1syl/diversion-guidelines.pdf [https://perma.cc/7K5B-NH3D].

35. *See, e.g.*, IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14(3)(b)–(c) .

36. *See* MRLDE R. 11(D); LA. RULES FOR LAW. DISCIPLINARY ENF'T § 4(B)(3). In some jurisdictions, diversion may be offered at the hearing stage. *See, e.g.*, RULES REGULATING THE FLA. BAR R. 3-5.1(b)(2).

37. *See, e.g.*, MRLDE R. 11(E), 11(F); CONN. PRAC. BOOK §§ 2–40 (h), 2–47A (2023).

38. *See* MRLDE R. 11(G).

39. Florida and Texas are two large states that do not closely follow the *MRLDE*. *See* RULES REGULATING THE FLA. BAR R. 3-5.3; TEX. RULES OF DISCIPLINARY PROC. R. 16.

40. *See, e.g.*, COLO. R. CIV. P. R. 242.17(c)(2); LA. RULES FOR LAW. DISCIPLINARY ENF'T § 11(A) (providing for disciplinary counsel to refer lawyers for diversion). *But see* IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14 (stating that disciplinary board decides on diversion with the agreement of director for attorney discipline).

41. MRLDE R. 11(G)(4).

42. MRLDE R. 11(G)(1).

43. MRLDE R. 11(G)(4).

44. MRLDE R. 11(G)(7)(b). The failure to complete diversion can be used against respondents in a few jurisdictions. *E.g.*, WASH. STATE CT. RULES FOR ENF'T OF LAW. CONDUCT R. 6.6 (indicating that a material breach of a diversion agreement can be considered in subsequent discipline matters).

The *MRLDE* state that diversion is appropriate for "lesser misconduct."[45] A matter is not lesser misconduct if it involves misappropriation, the misconduct results in or is likely to result in substantial prejudice to the client or another person, or the respondent has been publicly disciplined within the past three years.[46] In addition, it is not lesser misconduct if it is of the same nature as misconduct for which the lawyer was disciplined in the past five years, involves dishonesty or deceit, constitutes a serious crime, or is part of a pattern of similar misconduct.[47] Other factors that disciplinary counsel consider when deciding whether to refer a lawyer to a diversion program include whether the presumptive sanction is likely to be no more severe than a reprimand, whether participation in the program is likely to benefit the respondent and accomplish the program's goals, whether aggravating or mitigating factors exist, and whether diversion was already tried.[48]

Some jurisdictions have more stringent limits on when diversion can be offered. For example, a few provide that diversion may be offered to a lawyer only once, absent extraordinary circumstances.[49] In California, Michigan, and New York, the rules limit diversion to lawyers suffering from mental health problems or an impairment such as substance abuse.[50]

Diversion is treated as confidential in most jurisdictions.[51] The *MRLDE* provide that complainants are to be told of the decision to refer the respondent to a diversion program and shall be provided a reasonable opportunity to submit a statement offering any new information.[52] In a few states, when diversion has been successfully completed, the records are destroyed three years after the charge is dismissed.[53]

The states also differ in the impact of the diversion agreements. In some states, lawyers are required to admit the wrongdoing while in others they are not.[54] In a few jurisdictions, diversion may be considered in any future disciplinary matters involving the respondent,[55] but in most, completed diversion is not considered in subsequent discipline matters.

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45. MRLDE R. 11(G)(1).

46. MRLDE R. 9(B).

47. MRLDE R. 9(B).

48. MRLDE R. 11(G)(3).

49. *E.g.*, D.C. BAR RULES R. XI, § 8.1(b)(2); *see also* TEX. RULES OF DISCIPLINARY PROC. R. 16.03(F) (noting that "[g]enerally, a Respondent is eligible to participate in the program one time").

50. *See, e.g.*, CA. BUS. & PROF. CODE §§ 6230–6231 (2011); MICH. CT. RULES R. 9.114(C)(1)(a); N.Y. RULES FOR ATT'Y DISCIPLINARY MATTERS § 1240.11.

51. *See, e.g.*, ARIZ. SUP. CT. RULES R. 70 (b)(4); COLO R. CIV. P. R. 242.17(g).

52. MRLDE R. 11(G)(2).

53. *See* ARIZ. SUP. CT. RULES R. 71(b); COLO. R. CIV. P. R. 251.13(f).

54. In New Jersey, the lawyer must acknowledge the misconduct. N.J. CT. RULES R.1:20–3(i)(2)(B). In Delaware, acceptance of conditional diversion means the lawyer does not contest the finding that there was probable cause that the respondent engaged in misconduct. DEL. LAWS.' RULES OF DISCIPLINARY PROC. R. 9(b)(4)(D).

55. *See* IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14(5); KAN. RULES RELATING TO DISCIPLINE OF ATT'YS R. 212(h)(2); LA. RULES FOR LAW. DISCIPLINARY ENF'T § 11(H).

II. THE DATA ON LAWYER DIVERSION

A. GENERAL JURISDICTIONAL INFORMATION

It is not clear how much lawyer diversion occurs in the United States. The best resource is the ABA's Survey on Lawyer Discipline Systems ("SOLD"), which annually reports the number of complaints jurisdictions referred to diversion and the number of respondents who completed or did not complete diversion.[56] Unfortunately, seven jurisdictions did not report their 2019 diversion statistics to the ABA, and two reported that they did not maintain data on diversion referrals.[57] SOLD also contains some information that differs from information in states' annual disciplinary reports.[58]

According to SOLD, some jurisdictions utilize diversion much more frequently than others. Several states with smaller populations refer ten or fewer complaints to diversion annually.[59] But some other states refer a more substantial number of complaints to diversion. In 2019, Florida referred 140 complaints to diversion while Kentucky referred seventy-three complaints.[60] To put this in perspective, this was 3.9% of all complaints received in Florida but almost 6.9% of all discipline complaints received in Kentucky.[61] In contrast, in Illinois, where disciplinary authorities received 27% more complaints than in Florida, only seven lawyers were referred to diversion, and fifty-seven lawyers were referred to the Lawyer Assistance Program ("LAP").[62] The numbers of diversion referrals can also vary considerably in a single jurisdiction from year to year.[63]

Annual reports published by state discipline authorities also provide, at best, limited information on diversion. Most annual reports from state disciplinary authorities only report the number of diversions,[64] and some do not even provide

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56. *See* SOLD 2019, *supra* note 1, at 9–12.

57. We are using 2019 diversion statistics in this discussion because of the possibility that diversion was utilized less frequently during the COVID-19 pandemic. Massachusetts, Michigan, New Jersey, most of New York, South Carolina, Vermont, and West Virginia did not report their 2019 data. Ohio and Virginia advised the ABA that they do not maintain data on diversion referrals. *Id.* at 13.

58. *Compare, e.g.*, *id.* at 9 (reporting Arizona had 112 diversions in 2019), *with* ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., ANNUAL REPORT OF THE ATTORNEY REGULATION ADVISORY COMMITTEE TO THE ARIZONA SUPREME COURT 7 (Apr. 30, 2020), https://www.azcourts.gov/Portals/108/ARC%20Report%202019.pdf?ver=2021-04-14-181725-203 [https://perma.cc/U2YT-U23K] (reporting 127 diversions).

59. According to SOLD, there are thirteen jurisdictions that fall into that category. SOLD 2019, *supra* note 1, at 9–12.

60. *Id.* at 9–10.

61. *Id.* at 3 (reporting that Kentucky received 1,057 complaints).

62. *See* ARDC ANNUAL REPORT, *supra* note 2, at 30.

63. *Compare, e.g.*, AM. BAR ASS'N, 2018 SURVEY ON LAWYER DISCIPLINE SYSTEMS 14 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf [https://perma.cc/8FK3-P2LE], *with* SOLD 2019, *supra* note 1, at 9–10 (reflecting that Arizona referred 77 complaints to diversion in 2018 as compared to 112 in 2019).

64. *See, e.g.*, ARDC ANNUAL REPORT, *supra* note 2, at 32; ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., *supra* note 58, at 7.

that information.[65] New Jersey is one of the very few jurisdictions that reported the most common offense leading to diversion (money recordkeeping) and that the most common condition was completion of the New Jersey State Bar Association's Ethics Diversionary Education Course.[66]

As previously noted, there have been only two systematic studies of lawyer diversion. The first study examined all disciplinary charges against Arizona lawyers from April 1992 through April 2002 that resulted in referral to the State Bar's Law Office Management and Assistance Program ("LOMAP").[67] Most of the 448 lawyers who were referred were solo practitioners.[68] Women lawyers were underrepresented in this group.[69] The study found that lawyers who completed diversion were "significantly more likely to receive fewer and/or less serious subsequent disciplinary charges than lawyers who ha[d] not completed such a program."[70] It also appears that lawyers who completed diversion may have received less discipline,[71] but the author did not report whether the difference was statistically significant. Unfortunately, the control group against which recidivism rates were compared included lawyers who did not qualify for diversion because their offenses were too serious.[72] Moreover, the study only analyzed recidivism within three years after the lawyer completed diversion because disciplinary records were expunged if the lawyer in question had no discipline imposed during that time period.[73]

Florida has also attempted to assess the effects of lawyer diversion. In 2011, the Florida Bar appointed a commission (the "Hawkins Commission") to review aspects of its lawyer discipline system, including diversion. At that time, lawyers who received diversion were only eligible to receive it once every seven years.[74] The Hawkins Commission subsequently reported that a study of diversions from June 2004 through June 2011 "determined that 90% of those in [diversion] programs

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65. *See, e.g.*, N.Y. ATT'Y GRIEVANCE COMM., *supra* note 1.

66. SUP. CT. OF N. J., OFF. OF ATT'Y ETHICS, 2021 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 31 (2022), https://www.njcourts.gov/sites/default/files/attorneys/office-attorney-ethics/2021oaeannualrpt.pdf [https://perma.cc/JJ3N-6GRF]; *see also* OKLA. BAR. ASS'N, 2020 ANNUAL REPORT OF THE PROFESSIONAL RESPONSIBILITY COMMISSION 8 (2021), https://www.okbar.org/wp-content/uploads/2021/02/2020-PRC-Annual-Report.pdf [https://perma.cc/P5MY-8VV2] (indicating diversion conditions imposed on Oklahoma lawyers).

67. Ellis, *supra* note 23, at 1221–22. The median years in practice of the lawyers referred for diversion was sixteen years. *Id.* at 1238.

68. *Id.* at 1251.

69. While 34% of active lawyers were female, only 14.2% of all lawyers referred to diversion were women. *Id.* at 1244. This is consistent with findings in other studies that women are less likely to be the subject of lawyer discipline then men. *See, e.g.*, Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. L. REV. 785, 799–800 (2004).

70. Ellis, *supra* note 23, at 1253. The length of participation in diversion did not have much of an impact on desirable outcomes. *Id.* at 1265.

71. *Id.* at 1253.

72. *Id.* at 1237; Diane M. Ellis, *Is Diversion a Viable Alternative to Traditional Discipline?: An Analysis of the First Ten Years in Arizona*, PRO. LAW., Fall 2002, at 4, 9.

73. Ellis, *supra* note 23, at 1236, 1253.

74. HAWKINS COMM'N REPORT, *supra* note 26, at 14.

ha[d] no subsequent history of discipline."[75] Moreover, when recidivism occurred, the misconduct was not necessarily in the same subject areas.[76] The study itself was not published, although the Commission supplied a table that shows the diversion completion dates and the discipline imposed for attorneys who later engaged in misconduct.[77] In some of those cases, the attorneys received multiple subsequent sanctions. The table does not reveal how many of the 939 lawyers who participated in diversion did so toward the end of the study period (e.g., 2009–2011), which means that their subsequent conduct was only tracked for a very short period. The table does not state—but suggests through the conditions identified—some reasons for diversion, which seemingly included trust account issues, advertising violations, lack of competence, law office management issues, and anger management problems.[78]

B. THE WISCONSIN DATA

A study we conducted of lawyer grievances in Wisconsin yielded some useful information related to diversion. In 2016, the Wisconsin Office of Lawyer Regulation ("OLR") sought to learn more about the lawyers who received grievances in family and criminal law matters and asked us to analyze their discipline data and prepare a report.[79] In our study, we looked exclusively at lawyers who received grievances for issues arising from family law or criminal law matters from 2013–2016.[80]

During this period, there were 4,898 grievances in criminal law and family law matters involving 2,123 different lawyers.[81] Complainants filed substantially more grievances against men (68.4%) than women (31.6%), although this would be expected, given the demographics of the legal profession in Wisconsin.[82] Of the 4,898 grievances reviewed, 64% involved criminal law matters, and 36% involved family law matters. The median age of lawyers who received grievances in these matters from 2013–2016 was forty-seven years old.[83] Almost 20% of the

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75. *See id.* at 14, App. D; *see also* Julie Kay, *Lawyers Should Report Misbehavior, Problems; Group to Discuss Study Friday*, MIA. DAILY BUS. REV., May 16, 2012, at A1.

76. HAWKINS COMM'N REPORT, *supra* note 26, at 14.

77. *Id.* at App. D.

78. *See id.*

79. LEVIN & FORTNEY, *supra* note 27, at 1, 1 n.1. The OLR had noted that in recent years, over 30% of lawyer grievances in Wisconsin involved criminal or traffic matters and almost 20% related to family and juvenile matters. *Id.* (citing WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2015-2016, at 46) (reporting that 38.1% of all disciplinary grievances were filed in criminal law matters and 19.76% were filed in family law matters).

80. LEVIN & FORTNEY, *supra* note 27, at 1. Individuals hired and supervised by the OLR coded and anonymized data related to the grievances. For each of these grievances, they coded demographic information and information about the nature of the grievance, the type of matter, its disposition, and the lawyer's prior diversion and discipline history.

81. *Id.* at 2.

82. During this time period, approximately two-thirds of all Wisconsin lawyers were male while one-third were female. *Id.* at 2–3. The Wisconsin OLR and State Bar of Wisconsin do not maintain records reflecting the total number or gender of Wisconsin lawyers who practice in the areas of criminal or family law.

83. Where lawyers received more than one grievance during 2013–2016, we used the age at which they received their first grievance during that period. *Id.* at 3.

grievances filed in family and criminal law matters were filed against lawyers who had previously received discipline,[84] representing 284 individual lawyers.[85]

In Wisconsin, the OLR Director may determine that a matter should be diverted at intake, during an investigation, or at the conclusion of an investigation.[86] Diversion is available "when there is little likelihood that the attorney will harm the public during the period of participation, when the director can adequately supervise the conditions of the program, and when participation in the program is likely to benefit the attorney and accomplish the goals of the program."[87] Unless good cause is shown, the Wisconsin rule states that diversion is not available when the discipline likely to be imposed is greater than a private reprimand, the misconduct resulted in or is likely to result in actual injury to a client, the attorney has been publicly disciplined within the preceding five years, or the misconduct is the same as that for which the attorney previously has participated in diversion.[88]

From 2013–2016, 239 of the grievances (4.9%) resulted in diversion, involving a total of 232 lawyers.[89] A substantial number of those lawyers (103) had previously received diversion, a disciplinary sanction, or both. This included four lawyers who had been publicly disciplined in the preceding five years. More than 25% of those grievances leading to diversion were due to a failure to provide clients with a written fee agreement, a properly worded fee agreement, or fee arbitration information.[90] More than 12.5% of those grievances arose out of violation of the rules governing trust accounts.[91] Table 1 shows the number of years between the lawyer's graduation and the date when the grievance leading to diversion was filed.

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84. *Id.* at 4. Some of the lawyers may have received a sanction during 2013–2016 and then received a subsequent grievance during that period. In some of those cases, it is possible that the sanction was not imposed before a later grievance was filed.

85. *Id.* The OLR only maintains discipline records since 1978, so it is possible that the number of previously disciplined lawyers is somewhat higher. *Id.* at 4 n.10.

86. WIS. SUP. CT. RULES R. 22.10(1).

87. WIS. SUP. CT. RULES R. 22.10(3).

88. WIS. SUP. CT. RULES R. 22.10(3).

89. LEVIN & FORTNEY, *supra* note 27, at 15.

90. *Id.* at 18. Wisconsin requires lawyers to provide new clients with written fee agreements in most cases. WIS. SUP. CT. RULES R. 20:1.5(b). Starting in July 2016—toward the end of the study period—lawyers were also required to give clients notice of the availability of dispute resolution through arbitration if they chose to put advance fees in their business accounts. *See* WIS. SUP. CT. RULES R. 20:1.5(g).

91. LEVIN & FORTNEY, *supra* note 27, at 18.

TABLE 1
LAWYERS RECEIVING DIVERSION, 2013–2016: YEARS SINCE GRADUATING LAW SCHOOL[92]

Years From Graduation Until Grievance Leading to Diversion	Number of Lawyers	Percentage
0-5 Years	18	7.8%
5-10 Years	27	11.7%
10-20 Years	68	29.6%
20-30 Years	65	28.3%
30-40 Years	45	19.6%
Over 40 Years[93]	8	3.5%
Total	231[94]	100%

More than one condition was sometimes utilized in connection with diversion of a single lawyer. The diversion terms are shown below.

TABLE 2
DIVERSION CONDITIONS UTILIZED IN CONNECTION WITH GRIEVANCES, 2013–2016

Diversion Condition	Number
Affidavit of Compliance	5
CLE	120
Ethics School[95]	11
Fee Arbitration	91
Law Office Management Program	2
Monitoring	1
Other	7
Restitution	1
Trust Account Management Program	20
Trust Account Monitoring	1

92. The OLR provided the year of graduation. We assumed that May was the month of graduation.

93. None of the lawyers who received diversion had been in practice for more than forty-five years at the time that the grievance was received.

94. The year of graduation was not provided for one of the lawyers who received diversion.

95. Ethics School, which was run by the OLR, was discontinued during the study period. In subsequent years, some lawyers received conditions requiring them to complete ethics CLE.

The most common diversion condition was attending Continuing Legal Education ("CLE") classes, which included ethics CLE, practice area CLE, and wellness CLE. The next most common was fee arbitration, followed by participation in a Trust Account Management Program.

A grievance may simply reflect client unhappiness with an outcome rather than lawyer wrongdoing. Nevertheless, it seems noteworthy that 443 lawyers—or almost 20.9% of all lawyers who received grievances from 2013–16—had received diversion one or more times before 2013. The breakdown was as follows:

TABLE 3
NUMBER OF LAWYERS WHO RECEIVED GRIEVANCES DURING 2013–2016 AND HAD PREVIOUSLY RECEIVED DIVERSIONS (PRE-2013)

Number of Prior Diversions	Number of Lawyers
1	325
2	83
3	23
4	10
5	2

While family and criminal law are areas that attract a large number of grievances, these figures suggest that some lawyers are not learning the intended lessons from their experiences with diversion. This concern is reinforced by the fact that a number of lawyers received diversion on multiple occasions.

Subsequent analysis of the data provided by the Wisconsin OLR revealed that 254 lawyers were disciplined from 2013–2016 and that 40% of those lawyers had previously received diversion at least one or more times before.[96] These figures are substantially higher than those previously reported by other jurisdictions.[97] Since 2016, Wisconsin has reduced and reoriented its use of diversion.[98]

III. REGULATOR INTERVIEWS

A. METHODOLOGY

The findings from our Wisconsin study inspired us to conduct a national study on diversion. In order to learn more about how—and how well—diversion in lieu

96. Thompson, *supra* note 27, at 2–3.

97. *See supra* notes 59–63 and accompanying text.

98. During fiscal year 2019–2020, the Wisconsin OLR reported that thirty-one attorneys were diverted to alternative programs. WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2019-2020, at 6 (2020). More recently, the OLR reported diversions increased to fifty-four, with the most common term being completion of the State Bar's Law Firm Self-Assessment. *See* WIS. OFF. OF LAW. REGUL., REGULATION OF THE LEGAL PROFESSION IN WISCONSIN, FISCAL YEAR 2021–2022, at 5.

of lawyer discipline is working in the United States, we interviewed disciplinary authorities in twenty-nine of the thirty-five jurisdictions that offer diversion.[99] We used email to contact the person who we believed was the head disciplinary authority in the jurisdiction, explained the focus of our study, and asked to speak with that person or someone else in that office about the jurisdiction's diversion program.[100] We separately conducted semi-structured telephone interviews, which lasted from thirty to sixty minutes. The interview topics included the jurisdiction's diversion procedures, the conditions available for diversion, and the regulators' views about diversion. We assured the regulators that their identities would be treated as confidential and that the information they provided would not be connected to their jurisdictions.

B. THE STUDY DATA

This Part examines findings from the national study, starting with the regulators' observations about the purpose and value of diversion. It then discusses how regulators make decisions to offer diversion, followed by a description of the conditions offered in diversion and communications that benefit complainants. We then outline regulators' approaches to confidentiality of diversion information and their consideration of diversion in subsequent discipline matters. This Part wraps up with an examination of the regulators' concerns related to diversion and their thoughts about improving diversion.

1. THE PURPOSE AND VALUE OF DIVERSION

As previously noted, in 1992, the ABA's McKay Commission recommended that "minor misconduct, minor incompetence or minor neglect" should be handled through non-disciplinary proceedings.[101] In 1993, the ABA amended its *Model Rules for Lawyer Disciplinary Enforcement* so that those rules provided that where "lesser misconduct" was involved, disciplinary counsel could enter into an agreement with the lawyer to comply with certain conditions in lieu of discipline.[102] The *MRLDE* commentary noted that the "overwhelming majority" of complaints against lawyers were for lesser misconduct and that summary dismissal of these complaints "is one of the chief reasons for public dissatisfaction with the system."[103] The commentary further observed that these cases "seldom justify the resources needed to conduct formal disciplinary proceedings" and that what

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99. *See supra* note 18 and accompanying text.

100. In three of the interviews, two regulators from the same jurisdiction participated in the call. For two jurisdictions, there were separate interviews with a second person to learn additional details about their jurisdictions' diversion programs.

101. MCKAY COMM'N REPORT, *supra* note 15, at Recommendation 9.1.

102. MRLDE R. 21(F). Rule 9(b) defines "lesser misconduct" to mean "conduct that does not warrant a sanction restricting the respondent's license to practice law" and provides examples of conduct that is not considered lesser misconduct.

103. MRLDE R. 21 commentary.

most cases call for is "a remedy for the client and a way to improve the lawyer's skills."[104]

Many interviewees said that the primary purpose of diversion is to help the lawyer or improve the lawyer's practice.[105] "The primary purpose is to allow the lawyer to move on from a bad patch in their life . . . to get back on their feet and to keep their license. There is no point in shunting them off to the side."[106] The potential for rehabilitation to get lawyers back on track seemed to be foremost in many of their minds.[107] When describing the primary purpose as "[p]rofessional enhancement," one explained that it was "[t]aking a lawyer who is not a lost cause and enhancing what they do. Building them up to make them better . . . [like] the Bionic man."[108] This highlighted a striking aspect of the interviews: the extent to which the regulators appeared to want to help these lawyers.[109]

Some regulators stressed the importance of being able to address the underlying problem rather than simply impose a sanction.[110] When describing the primary purpose of diversion, one stated it was "[f]ixing the problem—[you] can't discipline the dumbness out of someone." Another noted that diversions are "less reactive and more proactive. It doesn't do any good to give a lawyer a private sanction or a public reprimand and not fix the problem so that the lawyers do not reoffend."[111] "Fixing the problem" seemed very important in some jurisdictions. Another regulator stated, "[w]e don't offer [diversion] unless we believe in good faith that the attorney could really benefit from it."[112]

A number of interviewees also recognized how assisting lawyers in "improving [their] skills, wellness, and practice" advances public protection.[113] Their focus on public protection reflects the mission of disciplinary regulators, which is, in large part, to protect the public.[114] Indeed, several regulators

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104. MRLDE R. 21 commentary.

105. *See, e.g.*, Telephone Interview with Regulator 14 (July 23, 2021) (noting that the primary purpose of diversion is "[t]o help the lawyer improve practice which then helps protect the public"); Telephone Interview with Regulator 15 (July 23, 2021) (stating that the purpose of diversion was "[t]o help the lawyer to be a better lawyer and make better choices").

106. Telephone Interview with Regulator E (July 6, 2021).

107. One regulator observed, "it's like going to prison for two years with no rehabilitation. . . . The idea is to provide rehabilitation." Telephone Interview with Regulator B (June 30, 2021).

108. Telephone Interview with Regulator J (July 14, 2021).

109. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021) (noting that diversion "gives guidance to attorneys who find themselves in the unfortunate position of being before disciplinary counsel and who would benefit from help due to inexperience, lack of knowledge or mental health issue[s]").

110. *E.g.*, Telephone Interview with Regulator 8 (July 8, 2021).

111. Telephone Interview with Regulator D (July 1, 2021).

112. Telephone Interview with Regulator C (July 1, 2021).

113. *See, e.g.*, Telephone Interview with Regulator 1 (June 30, 2021); *see also* Telephone Interview with Regulator 2 (June 28, 2021) (stating that diversion advances public protection by addressing the underlying conduct). In the words of one interviewee, diversion protects the "public from lawyer[s] who don't understand what they are doing." Telephone Interview with Regulator 16 (July 27, 2021).

114. *See, e.g.*, *Office of Disciplinary Counsel Purpose and Mission*, D.C. BAR (2022), https://www.dcbar.org/attorney-discipline/office-of-disciplinary-counsel/purpose-and-mission [https://perma.cc/VKH5-EHFR];

referred to "public protection" as the primary or an important purpose of diversion. When asked the primary purpose, one noted, "[w]earing my regulators' hat, it is intervention for public protection."[115] Another said, "[o]ur mission is public protection. The best protection is an attorney who has the best support. Lawyers who are stronger are going to be better lawyers and this meets our mission."[116] The purpose of diversion was "[t]o find a way to help the attorney when there is minor enough misconduct, and they think that they can help the lawyer so that they will be a better lawyer and not a risk to the public."[117] Likewise, diversion programs that address substance abuse "can prevent clients from being hurt because lawyers can better serve their clients."[118]

From the regulators' perspective, diversion also signals to respondent lawyers that their conduct was problematic. "It brings to the attorney's attention that in [the] view of [the regulator] the attorney is doing something that is 'off.'"[119] Diversion also "help[s] the attorney identify the problem behavior, accept that a problem exists, and impose[s] conditions that can correct without having to impose discipline."[120]

A few regulators described additional purposes for making diversion referrals. Echoing the concerns expressed in the McKay Report, one stated it "helps to reinforce [the] view that [the] legal profession maintains standards and is not just [a] cover-up. This helps communicate that the bar deserves the privilege of self-regulation."[121] That same regulator identified another purpose of diversion, which related to resources and docket control: "[d]isciplinary counsel is really a felony unit—they don't have time for traffic ticket[s], but prosecutors should focus on serious misconduct . . . In that sense, diversion frees prosecutors up to focus on those who pose a threat to the profession and the public."[122] Diversion had been adopted in another state to help with docket control, although the primary purpose of diversion was public protection.[123] A regulator there explained that "diversion expedites the disciplinary process."[124] Another interviewee said, "diversion can be used when there is a proof problem and deferral [may be] the best they can get.

For the Public, DISCIPLINARY BD. OF THE SUP. CT. OF PA. (2023), https://www.padisciplinaryboard.org/for-the-public [https://perma.cc/C7MB-ENHW]. Public protection includes not only protection of clients but protection of third parties. For more on the purposes of lawyer discipline, see generally Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).

115. Telephone Interview with Regulator M (July 26, 2021).

116. Telephone Interview with Regulator B (June 30, 2021). Similarly, one regulator stated simply that the purpose of diversion was "[t]o help the lawyer improve the practice which then helps protect the public." Telephone Interview with Regulator 14 (July 23, 2021).

117. Telephone Interview with Regulator 11 (July 15, 2021).

118. Telephone Interview with Regulator 10 (July 16, 2021).

119. Telephone Interview with Regulator F (July 7, 2021).

120. Telephone Interview with Regulator G (July 7, 2021).

121. Telephone Interview with Regulator 16 (July 27, 2021).

122. *Id.*

123. Telephone Interview with Regulator M (July 26, 2021).

124. Telephone Interview with Regulator A (June 30, 2021).

The process may turn [the] attorney around. If not, they have admissions for future prosecutions."[125]

Although some regulators noted that diversion that improves lawyer performance could benefit clients generally,[126] few mentioned how diversion benefited individual complainants. Only one regulator stated that a purpose of diversion was "to make sure the complainant is made whole, if possible."[127] This lack of attention to the concerns of individual complainants is not altogether surprising given the discipline system's focus on public protection rather than providing a remedy or relief to individual complainants.

Interviewees valued having the diversion option, characterizing it as an important remedial tool to help "turn attorney[s] around."[128] A number of regulators enthusiastically commented on the importance of diversion as an alternative to discipline.[129] One reported that he was not a fan of diversion when he started as a disciplinary regulator decades earlier, but his thinking "has evolved 180 degrees and [he] now believes strongly in the effectiveness of diversion for both complainants and respondents."[130] Some appreciated the fact that diversion agreements can be designed to meet the individual needs of the respondent lawyer, rather than using a "one size fits all" approach.[131]

Pointing to the remedial assistance provided to attorneys, one regulator suggested that diversion programs can help transform relationships between the bar and the regulator.[132] As he noted, diversion "gives the office an alternative to saying, '[y]ou screwed up and we are going to whack you' . . . It has made [his] office ten times more reasonable because there are alternatives to discipline."[133]

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125. Telephone Interview with Regulator 9 (July 12, 2021) (also noting that diversion is "important in giving lawyers opportunities to tell their stories and to improve their practices"). Some jurisdictions require that the lawyer admit the misconduct as a condition of diversion. *See* KAN. RULES RELATING TO DISCIPLINE OF ATT'YS R. 212(e); N.J. CT. RULES R. 1:20 (glossary of attorney discipline terms).

126. *See, e.g.*, Telephone Interview with Regulator F (July 7, 2021) (stating that diversion is "a way to assist [lawyers]. It also benefits clients.").

127. Telephone Interview with Regulator K (July 19, 2021) (also noting that the "main duty is to protect the public").

128. Telephone Interview with Regulator 9 (July 12, 2021); *see also* Telephone Interview with Regulator 5 (June 30, 2021) (stating that diversion provides a second chance for attorneys who are "not bad people"); Telephone Interview with Regulator 7 (July 8, 2021) (referring to diversion as an "opportunity to right [the] ship before something serious happens").

129. *See, e.g.*, Telephone Interview with Regulator G (July 7, 2021) (stating that diversion is "tremendously beneficial to everyone involved").

130. Telephone Interview with Regulator 16 (July 27, 2021).

131. Telephone Interview with Regulator E (July 6, 2021).

132. Telephone Interview with Regulator H (July 8, 2021) (referring to diversion's "fundamental effect" on the regulator's "relationship with the bar").

133. *Id.*

2. DECISION-MAKING ABOUT DIVERSION

The individuals who decide whether to offer lawyers diversion vary from jurisdiction to jurisdiction. Factors such as the state's disciplinary procedure rules, the size of the jurisdiction, as well as available personnel and other resources affect who makes decisions related to whether a respondent is offered diversion and the terms of the diversion agreements. In most jurisdictions, lawyers in the regulator's office will suggest diversion following investigation or after a probable cause finding.[134] Diversion typically requires approval of the chief regulator (or a supervisor) and a hearing committee or disciplinary board.[135] In some jurisdictions, however, the decision to offer diversion and the accompanying conditions is made by a hearing panel later in the process, usually with some input from lawyers in the regulator's office.[136]

A few larger jurisdictions designate one person to oversee all diversions.[137] Such diversion directors or coordinators may participate in decisions on offering diversion alternatives and the proposed diversion conditions.[138] Regulators from smaller jurisdictions reported that lawyers in their offices informally consult one another on a regular basis about diversion decisions and the conditions to be negotiated or required and that the chief regulator is involved in all diversion decisions.[139] In a small number of jurisdictions, the conditions are determined by the state's lawyer assistance program or its law office management program.[140]

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134. *E.g.*, Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 4 (June 29, 2021).

135. *E.g.*, Telephone Interview with Regulator G (July 7, 2021) (reporting that the office director approves all diversion agreements in conversation with the chair of the ethics committee or the lawyers in his office proposing diversion); Telephone Interview with Regulator 4 (June 29, 2021) (indicating that the director of the office has the "sole discretion to make diversion referrals"); Telephone Interview with Regulator 10 (July 16, 2021) (stating the diversion recommendations must be accepted by the commission).

136. *See* Telephone Interview with Regulator 1 (June 28, 2021) (stating that in some cases, the Investigatory Panel may recommend the conditions); Telephone Interview with Regulator J (July 14, 2021) (reporting that if the referee believes diversion is appropriate, staff counsel will provide input). *But see* Telephone Interview with Regulator C (July 1, 2021) (noting that on some occasions the committee finalizes diversion agreements without consulting with disciplinary counsel's office).

137. *E.g.*, Telephone Interview with Regulator 1 (June 28, 2021); Telephone Interview with Regulator K (July 19, 2021).

138. *See, e.g.*, Telephone Interview with Regulator 3 (June 28, 2021) (describing collaborative process in which the designated person works with the respondent lawyer and disciplinary counsel in designing conditions); Telephone Interview with Regulator C (July 1, 2021) (referring to monitors who assist in finalizing diversion agreements and making "sure the terms are consistent in the agreement").

139. *See, e.g.*, Telephone Interview with Regulator D (July 1, 2021) (noting that attorneys in the very small office work in close proximity and talk to the chief regulator about conditions to be imposed); Telephone Interview with Regulator L (July 21, 2021) (explaining that they will "roundtable it within their group" if they think diversion is appropriate).

140. Telephone Interview with Regulator B (June 30, 2021); Telephone Interview with Regulator L (July 21, 2021). In one jurisdiction, diversion conditions are not decided by the disciplinary authority alone, but rather in conjunction with a program run by the state bar. Telephone Interview with Regulator 5 (June 30, 2021).

3. DIVERSION CONDITIONS

Some jurisdictions' rules provide for a wide range of conditions that may be included in diversion agreements,[141] but the regulators may not utilize all of them.[142] None of the jurisdictions reported having written internal guidelines for the conditions that should be negotiated or required in particular circumstances,[143] but some routinely required certain conditions for particular types of misconduct. For example, in one jurisdiction, in order to receive diversion for a Driving Under the Influence conviction, the lawyer must agree to undergo treatment.[144] Generally speaking, the regulators in most jurisdictions sought conditions that addressed the alleged misconduct, but their ability to tailor conditions depended largely on the jurisdiction's rules and resources.[145]

Several jurisdictions relied heavily on CLE courses to address lawyers' problems.[146] In some jurisdictions, CLE was mandatory for virtually everyone undergoing diversion.[147] These CLEs were sometimes the same ones that were offered broadly to the legal community. Although most regulators tried to tailor the CLE requirements, such as trust accounting CLEs for trust account problems,[148] few jurisdictions tailored the ethics instruction more specifically to address the particular ethics violation that led to diversion.

Some jurisdictions utilized special courses or workshops to help educate the lawyers.[149] One jurisdiction has "a full-day law practice management class taught by the director of the practice management program and a staff person."[150] However, only a few states' diversion programs appeared to utilize a robust Law

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141. *See, e.g.*, OR. STATE BAR RULES OF PROC. R. 2.10(d).

142. One regulator noted that although they had about twenty conditions they could utilize, they very rarely used certain options such as counseling on law practice management. Telephone Interview with Regulator G (July 7, 2021).

143. Arizona's guidelines expressly provide that "[t]he Terms and Conditions of Diversion shall be tailored to address the problem(s) underlying the particular charge and misconduct and any circumstances specific to the Respondent or the misconduct." ARIZ. ATT'Y DIVERSION GUIDELINES § VI(A). They note that the need for flexibility is "paramount." *Id.*

144. Telephone Interview with Regulator 10 (July 16, 2021).

145. *See, e.g.*, Telephone Interview with Regulator 11 (July 15, 2021).

146. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021) (reporting that they commonly required one CLE for law office management, one for ethics, and one in a practice area). Another required one hour of CLE for every month during which the diversion agreement was in effect. Telephone Interview with Regulator 2 (June 28, 2021).

147. *See, e.g.*, Telephone Interview with Regulator 11 (July 15, 2021) (noting it is "almost automatic to require attendance [at] the one-day ethics school").

148. *See, e.g.*, Telephone Interview with Regulator F (July 7, 2021) (stating that her office may require "additional CLE for trust account management" where that was the problem); *see also* Telephone Interview with Regulator J (July 14, 2021) (stating that attendance at a CLE workshop on civil practice was an "appropriate" requirement in a case where "that had been the problem").

149. For example, one regulator reported that a Certified Public Accountant in her office "ha[d] developed an attorney trust account class, which [was] a one-time session with respondent[s] on [an] individual basis about the rules for handling trust accounts." Telephone Interview with Regulator N (July 29, 2021).

150. Telephone Interview with Regulator 15 (July 23, 2021). Likewise, at least one had an "Ethics School" program that was designed for the regulator's office. Telephone Interview with Regulator M (July 26, 2021).

Office Management Program ("LOMAP").[151] In some jurisdictions, all that was seemingly required of some lawyers to satisfy diversion was attending CLE courses, a workshop, or "school."[152]

A few regulators included financial audits and financial monitoring conditions to address trust account problems.[153] Occasionally, regulators required respondents to hire a Certified Public Accountant to demonstrate compliance with trust account requirements.[154] Another jurisdiction required some lawyers to consent to random audits of trust accounts as a condition of diversion.[155]

Several jurisdictions also attempted to provide individualized counseling to at least some of the lawyers.[156] The time and effort expended on the counseling varied significantly, due in part to resource constraints.[157] For example, a regulator may "require an in-office consultation to [assess the] entire practice including office technology."[158] Regulators took a variety of approaches when determining who would perform the counseling.[159] In a few jurisdictions, the LOMAP or another program provided individual counseling.[160] In a small number of

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151. *See infra* note 160 and accompanying text. Another regulator noted that the lawyers were sometimes required as a condition of diversion to consult with practice management experts, such as bar association personnel, who provide lawyers with law office management tools including software for billing and conflict checks. Telephone Interview with Regulator 10 (July 16, 2021). The resource was not, however, a LOMAP. *See id.*

152. *E.g.*, Telephone Interview with Regulator 3 (June 28, 2021). Some regulators refer to educational programs as "schools" when the training focuses on a particular subject area, such as trust accounts, or the training occurs over an extended time period. *See, e.g.*, *id.*

153. *E.g.*, Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 11 (July 15, 2021). A few jurisdictions tracked trust account compliance by requiring lawyers to submit financial information on a monthly or quarterly basis. *E.g.*, Telephone Interview with Regulator D (July 1, 2021); Telephone Interview with Regulator I (July 9, 2021).

154. *E.g.*, Telephone Interview with Regulator J (July 14, 2021). In one jurisdiction, if the lawyer could not pay for a forensic accountant, the regulator might impose a sanction instead of diversion. Telephone Interview with Regulator N (July 29, 2021).

155. Telephone Interview with Regulator C (July 1, 2021).

156. *See, e.g.*, Telephone Interview with Regulator 5 (June 30, 2021) (estimating that 15% of lawyers in diversion received individual counseling on law practice management issues); Telephone Interview with Regulator 3 (June 28, 2021) (estimating psychological counseling in 20% of the diversion contracts); Telephone Interview with Regulator 1 (June 28, 2021) (stating that individual counseling occurred with every diversion participant, with the number of sessions depending upon the participant).

157. *See* Telephone Interview with Regulator 4 (June 29, 2021) (expressing the desire to "provide more individual counseling," but noting "it is a challenge with a small office"); Telephone Interview with Regulator L (July 21, 2021) (reporting that "they have a one-time counseling option for some lawyers as a condition of diversion," but "they realized [the need for] follow-up to ensure that the lawyer was doing what he was supposed to do").

158. *E.g.*, Telephone Interview with Regulator 15 (July 23, 2021).

159. For example, lawyers in one jurisdiction sometimes meet with a professional liability coverage provider, with many having a follow-up meeting with the provider six months later. Telephone Interview with Regulator 2 (June 28, 2021). In another jurisdiction, the counseling was a two-to-three-hour session with loss prevention counsel from an insurance company and someone from the law practice management program. Telephone Interview with Regulator 5 (June 30, 2021).

160. *E.g.*, Telephone Interview with Regulator 7 (July 8, 2021); Telephone Interview with Regulator 5 (June 30, 2021); Telephone Interview with Regulator J (July 14, 2021).

jurisdictions, disciplinary authorities themselves provided individual counseling to try to identify what went wrong and to help the lawyer fix it.[161]

A few regulators tried to get the lawyers to pay for a private consultant. This was on top of the administrative costs of diversion and the costs of CLE and other conditions.[162] As one regulator noted, however, most of the respondents are solo and small firm practitioners who cannot afford to pay for the "very expensive" consultants.[163]

A number of jurisdictions also require that some of the lawyers in diversion work with a "practice monitor," a "diversion supervisor," a "diversion monitor," or a "mentor."[164] These individuals, who typically provide the service on a volunteer basis, were often selected by the lawyer and approved by the regulator or, alternatively, were provided by a bar association.[165] Some regulators reported challenges associated with securing individuals to serve in these positions.[166] The level of training and supervision of practice monitors and mentors varied.[167] Some regulators required the mentors and monitors to provide regular reports to the regulators, sometimes on a monthly basis.[168]

Where substance abuse or other impairment was involved, the regulators often referred the lawyers to Lawyers' Assistance Programs or asked the lawyers to work with a LAP as one of the conditions of diversion.[169] This would typically be the sole response in jurisdictions that only permit diversion when lawyers are

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161. One regulator gave as an example "a problem with a [lawyer's] personal injury fee agreement." In such a case, regulators will work with the lawyer to revise the fee agreement so that it complies with the state's requirements. "[A] condition of diversion would be for the lawyer to agree to use the [revised] agreement for one year and to provide the [regulator] with copies of every fee agreement entered into . . . on a quarterly basis." Telephone Interview with Regulator I (July 9, 2021).

162. Only a few regulators specified the administrative costs of diversion, which ran from $224 to $1,250. *E.g.*, Telephone Interview with Regulator 11 (July 15, 2021); Telephone Interview with Regulator J (July 14, 2021).

163. Telephone Interview with Regulator I (July 9, 2021).

164. Telephone Interview with Regulator A (June 30, 2021); Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator E (July 6, 2021); Telephone Interview with Regulator 14 (July 23, 2021).

165. *E.g.*, Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 14 (July 23, 2021).

166. *E.g.*, Telephone Interview with Regulator 12 (July 16, 2021) (noting interest in a pool of trained practice monitors). Occasionally it is necessary to pay the monitors. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021); *see also* Telephone Interview with Attorney F (July 7, 2021) (noting that individual counseling on law practice management used to be performed by a person who charged for the service, but often respondents could not afford it). At least one jurisdiction typically uses Certified Public Accountants as financial monitors. Telephone Interview with Regulator 12 (July 16, 2021). Presumably in such cases, they are paid.

167. For example, one regulator stated that practice monitors are advised in a letter how they should work with the lawyer. Telephone Interview with Regulator A (June 30, 2021). Another regulator explained that "law practice monitor[s do] not receive a manual with instructions, but [they receive] a lot of follow up from her office about what to do." Telephone Interview with Regulator N (July 29, 2021). In a third jurisdiction, mentoring was merely suggested by the regulator and mentoring was handled entirely by one of two bar organizations. Telephone Interview with Regulator B (June 30, 2021).

168. *See, e.g.*, Telephone Interview with Regulator N (July 29, 2021).

169. *E.g.*, Telephone Interview with Regulator I (July 9, 2021).

suffering from some impairment.[170] In some jurisdictions that refer lawyers to their LAPs, "whatever [a] LAP does with the lawyer" and any agreements a lawyer makes with a LAP are "kept confidential from [the regulator's] office."[171] In others, the conditions are developed more collaboratively.[172]

The interviews revealed that some regulators were using creative approaches to diversion. One jurisdiction provided lawyers with consultants on technology and practice profitability.[173] Another jurisdiction required that lawyers in diversion agree to "carry malpractice insurance and have a death/disability/disaster plan."[174]

Increasingly, regulators are including in diversion agreements conditions that require self-assessments by respondent lawyers. Self-assessment tools enable lawyers to systematically review their office procedures and systems, identify deficiencies, consult resources, and improve their practice controls. First used by lawyer regulators in Australia,[175] self-assessments are part of an approach to lawyer regulation known as Proactive Management-Based Regulation ("PMBR").[176] Following empirical studies on lawyer use of self-assessments, a number of regulators and groups in the U.S. and Canada began examining how self-assessment could be used to assist lawyers in improving their practice management.[177] These discussions led Illinois and Colorado to implement proactive programs that involve lawyer education and self-assessment.[178]

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170. *See, e.g.*, Telephone Interview with Regulator B (June 30, 2021).

171. Telephone Interview with Regulator F (July 7, 2021). As a consequence, in at least one jurisdiction, outside consultants provide the mental health and substance abuse counseling that is paid for by respondents. Telephone Regulator N (July 29, 2021).

172. One regulator explained, "[i]f a substance abuse or mental health issue is involved . . . the diversion agreement [would be] a three-way agreement with her office, [the] LAP and the lawyer. But [the] LAP [would] monitor compliance and report to her office." Telephone Interview with Regulator I (July 9, 2021). The regulator noted these referrals were rare for diversion because usually if mental health or substance abuse was involved, "whatever the lawyer did was not 'a small boo boo.'" *Id.*

173. Telephone Interview with Regulator 3 (June 28, 2021).

174. Telephone Interview with Regulator C (July 1, 2021).

175. For background information on the use of self-assessments in Australia, see Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 ST. THOMAS L.J. 152 (2012).

176. Professor Theodore Schneyer first used the term "proactive, management-based regulation" to refer to a regulatory effort to encourage firms to develop their ethical infrastructure. Professor Schneyer suggested that PMBR has two essential features: (1) designation of a firm lawyer responsible for managing the firm's ethical infrastructure; and (2) proactive collaboration between firms and regulators. Theodore Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 584 (2011).

177. Susan Saab Fortney, *Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 900–09 (2020).

178. For an overview of the voluntary Colorado program, the mandatory Illinois program for uninsured lawyers, and other PMBR developments in the United States, see *id.* at 905–08.

The regulator interviews revealed different approaches to using self-assessments.[179] Close to half of the interviewees reported that they currently may require completion of a self-assessment related to office practice controls, such as docket management and conflict systems.[180] A few interviewees explained that the use of self-assessment depends on the respondent's circumstances and the alleged misconduct. One interviewee stated that if there appears to be a systemic problem with how a lawyer's office affairs are being handled, the regulator may require that the respondent complete a "law practice audit" (checklist) with another lawyer who makes recommendations.[181] In some cases, the self-assessment is used not only to educate respondent lawyers but also to help regulators as a diagnostic tool.[182] In other circumstances, the regulator may require respondent lawyers to complete the self-assessment form without review by anyone else.[183]

Various interview responses suggest that PMBR developments are affecting regulators' interest in including self-assessment conditions in diversion agreements. One interviewee reported that her jurisdiction now requires completion of a self-assessment form in all diversions.[184] The regulator explained that many respondents need someone to guide them on running a law office and that "the self-assessment is a success if 25% do something different to improve their practices."[185]

4. CONDITIONS AND COMMUNICATIONS THAT BENEFIT COMPLAINANTS

As noted, diversion in most jurisdictions focuses on public protection and lawyer rehabilitation rather than the complainant's concerns. Regulators seldom seek to include conditions that directly benefit complainants in diversion agreements. Nor do regulators in most jurisdictions provide complainants with much information when grievances result in diversion.

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179. Three regulators indicated that they were unfamiliar with self-assessments. Telephone Interview with Regulator I (July 9, 2021); Telephone Interview with Regulator J (July 14, 2021); Telephone Interview with Regulator 17 (July 6, 2022).

180. *E.g.*, Telephone Interview with Regulator 12 (July 16, 2021). In addition, a few regulators reported diversion conditions that required respondent lawyers to reflect on their office practices. For example, one regulator's office does not require completion of a specific form but requires respondents to affirm that they have management systems in place. Telephone Interview with Regulator 2 (June 28, 2021). Another reported that respondents are asked to describe their trust accounting processes when they complete their quarterly reports. Telephone Interview with Regulator C (July 1, 2021).

181. Telephone Interview with Regulator 11 (July 15, 2021).

182. A number of regulators also described how self-assessments may be used by someone in the jurisdiction's LOMAP or by other individuals designated to work with attorneys completing diversion agreements. *E.g.*, Telephone Interview with Regulator L (July 21, 2021).

183. *Id.* Although the respondents do not disclose the contents of the completed self-assessment, the respondents must self-report their completion of the form. Telephone Interview with Regulator 11 (July 15, 2021).

184. Telephone Interview with Regulator 9 (July 12, 2021).

185. *Id.*

The failure to consider complainants' interests can be seen in regulators' approach to restitution. In a discipline case, a regulator may be able to seek restitution when lawyers have wrongfully withheld or misused funds and property or when lawyers have not earned their fees.[186] Due to the fact that diversion is not available where misappropriation or serious misconduct occurred,[187] restitution in the diversion context would generally be limited to the return of fees.

Even though the *MRLDE*, when discussing alternatives to discipline, state that "[i]t may be appropriate to compensate the client for the lawyer's substandard performance by a fee adjustment or other arbitrated or mediated settlement,"[188] only two regulators reported that restitution must be included as a condition of diversion if the conduct resulted in an actual loss by a client or other person.[189] By contrast, most interviewees reported that restitution was not used as a condition in diversions or infrequently used.[190] Some of these regulators indicated that their state rules do not provide authority for including restitution as a condition of diversion or a discipline sanction.[191]

Regulators described different approaches to including restitution as a diversion condition where there were unearned or excessive fees. For example, one regulator indicated that restitution may occasionally be a condition of diversion where a lawyer charged excessive fees.[192] A few regulators suggested that they are reluctant to use restitution for fee disputes[193] but may include restitution as a diversion condition when a portion of the fee was "unearned"[194] or "no work was done and it's truly minor."[195] Another stated "[t]hey don't want to get in the business of determining how much work was done by the lawyer" and would "instead require fee arbitration as a condition of diversion."[196] Only a few other regulators

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186. Fortney, *supra* note 177, at 892 n.129 (citing a survey on use of restitution in disciplinary proceedings).

187. *See supra* note 45 and accompanying text. One regulator stated that restitution would "never" be part of a diversion contract "when there has been a misappropriation." Telephone Interview with Regulator 15 (July 23, 2021). Another noted that diversion would be inappropriate in matters involving "theft." Telephone Interview with Regulator D (July 1, 2021).

188. MRLDE R. 11 commentary.

189. Telephone Interview with Regulator K (July 19, 2021); Telephone Interview with Regulator 9 (July 12, 2021).

190. *E.g.*, Telephone Interview with Regulator 7 (July 8, 2021); Telephone Interview with Regulator B (June 30, 2021).

191. *See, e.g.*, Telephone Interview with Regulator 13 (July 20, 2021); Telephone Interview with Regulator I (July 9, 2021). One regulator stated that while restitution would only "very rarely" be a condition of diversion, disciplinary counsel might say in advance that a respondent is more likely to be able to get diversion if the lawyer provides restitution. Telephone Interview with Regulator A (June 30, 2021).

192. Telephone Interview with Regulator 11 (July 15, 2021).

193. One regulator noted that "'the bar does not want to be a debt collector' and that the Supreme Court has said that 'fee disputes are not within [the regulator's] jurisdiction.'" Telephone Interview with Regulator J (July 14, 2021).

194. Telephone Interview with Regulator 1 (June 28, 2021).

195. Telephone Interview with Regulator L (July 21, 2021).

196. *Id.*; *see also* Telephone Interview with Regulator N (July 29, 2021) (noting that "[t]hey don't want to get involved in fees and collections" and are "more likely to send [a matter] to fee arbitration").

reported seeking fee arbitration as a diversion condition even though separate entities, such as a bar association committee, would handle the fee arbitration process.[197]

Like restitution, apologies to the complainant and others are not commonly a part of diversion.[198] In some jurisdictions, the diversion rules expressly provide for the use of apologies or permit regulators to propose conditions not otherwise enumerated.[199] Yet even where apologies are permitted under the governing rules, interviewees indicated that apologies are rarely used.[200]

One of these regulators believed apologies were "valuable" the few times that they were utilized.[201] Another said, "[i]t may just be a three sentence apology. It can mean a lot to the offended party."[202] A small number of regulators reported that their offices occasionally sought apologies for rude, offensive, or uncivil conduct by lawyers.[203]

Some other interviewees appeared to question the value of seeking an apology as a condition of diversion.[204] As one stated, "[a]ttorneys don't want to apologize."[205] Another noted "that a bad apology is . . . bad. Lawyers sometimes realize an apology would be a good idea on their own."[206] A small number of interviewees indicated that lawyer apologies or demonstrations of

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197. *See, e.g.*, Telephone Interview with Regulator 12 (July 16, 2021) (stating that regulator's office would sometimes refer lawyers to fee arbitration); Telephone Interview with Regulator 10 (July 16, 2021) (same); Telephone Interview with Regulator H (July 8, 2021) (noting that in some diversion cases, fee arbitration may be the only condition).

198. *See* Interview with Regulator N (July 29, 2021) (stating that restitution and apologies are "not on [their] radar"). A number of regulators simply stated "no" when asked whether their offices seek an apology to the complainant or a client as a condition of diversion. *E.g.*, Telephone Interview with Regulator C (July 1, 2021); Telephone Interview with Regulator 13 (July 20, 2021).

199. *See, e.g.*, MD. RULES, ATT'YS § 19-716(c)(3)(iii) (2021) (permitting the use of a public apology); ILL. RULES OF THE ATT'Y REGIS. & DISCIPLINARY COMM'N R. 56(b)(7) (providing for "any other requirement agreeable to the Administrator and the respondent").

200. Telephone Interview with Regulator L (July 21, 2021); *see also* Telephone Interview with Regulator 7 (July 8, 2021) (stating that it would be "very rare to require, but at time[s] an apology may be strongly encouraged"); Telephone Interview with Regulator 3 (June 28, 2021) (recalling it had occurred "a couple times").

201. Telephone Interview with Regulator 3 (June 28, 2021).

202. Telephone Interview with Regulator I (July 9, 2021).

203. Telephone Interview with Regulator G (July 7, 2021); Telephone Interview with Regulator H (July 8, 2021); Telephone Interview with Regulator K (July 19, 2021). In one jurisdiction, apologies had been sought twice for "outbursts." Telephone Interview with Regulator I (July 9, 2021).

204. One regulator laughed at the prospect of including apologies in diversion agreements, stating that she "can't imagine doing that." Telephone Interview with Regulator F (July 7, 2021). However, the interviewee recognized that "[c]ertainly there are times when clients would want it and an apology would be appropriate." *Id.* Another explained that his office had "[g]one back and forth on this. There has been some concern because the apology may be used in a malpractice case as an admission." Telephone Interview with Regulator 16 (July 27, 2021).

205. Telephone Interview with Regulator 5 (June 30, 2021).

206. Telephone Interview with Regulator L (July 21, 2021). Another regulator explained that often, "when they are negotiating [diversion conditions] the respondent has acknowledged he made a mistake, and complainant knows through responses that are forwarded to [the] complainant that [the] lawyer acknowledged mistakes." Telephone Interview with Regulator N (July 29, 2021). A different regulator indicated that her office does not mandate apologies, but lawyers may offer them. Telephone Interview with Regulator 12 (July 16, 2021) (explaining that the regulators "don't want a forced, insincere apology").

remorse would been taken into account as mitigating factors in the diversion decisions.[207]

Another way in which complainants' interests are sometimes inadequately considered in diversion programs can be seen in the communication with complainants about diversion. Only a few interviewees described opportunities for complainants to provide input concerning diversion decisions.[208] One interviewee reported that before she enters diversion agreements, she communicates with complainants to get their input about conditions.[209] In one small jurisdiction, the regulator typically arranges a meeting between the complainant and the lawyer, with a three-person panel present, and asks both the lawyer and complainant to suggest conditions.[210] Another regulator sends complaining parties a letter advising them that they have ten days to object to a diversion referral under consideration.[211]

For the most part, however, procedures relating to the handling of diversion referrals create a tension between providing complainants information on the one hand and preserving confidentiality of the diversion referral on the other. The majority of regulators use a middle ground approach, informing the complainant that the matter will be handled under a diversion agreement in which the lawyer must complete conditions but not disclosing the actual conditions that the attorney must satisfy.[212] One regulator described the information provided to the complainant as "bare bones."[213] A few regulators indicated that they provide complaining parties with more information, such as general descriptions of the conditions,[214] while others do not, apparently due to concerns about the

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207. Telephone Interview with Regulator 2 (June 28, 2021); Telephone Interview with Regulator 10 (July 16, 2021); Telephone Interview with Regulator B (June 30, 2021).

208. *See* Telephone Interview with Regulator 16 (July 27, 2021) (reporting that a letter is sent to complainants explaining that a diversion referral has been made and that a panel of volunteers considering the diversion hopes to hear from them).

209. Telephone Interview with Regulator E (July 6, 2021) (noting that complainants sometimes have "good ideas"). This regulator suggested that a complainant who was really incensed about the referral "might" affect the regulator's assessment of whether the lawyer was offered the diversion option. *Id.*

210. Telephone Interview with Regulator 16 (July 27, 2021).

211. Telephone Interview with Regulator G (July 7, 2021). The "agreement in lieu of discipline is conditional until the grievant has an opportunity to object and those objections are considered." *Id.*

212. *See, e.g.*, Telephone Interview with Regulator A (June 30, 2021) (explaining that the conditions are sometimes not disclosed, even if the complainant asks); Telephone Interview with Regulator H (July 8, 2021) (noting that the complainant is only told that the lawyer agreed to diversion and that the regulator will monitor compliance with the conditions); Telephone Interview with Regulator K (July 19, 2021) (stating that the regulator only informs the complainant "that the matter has been referred to diversion"); Telephone Interview with Regulator 7 (July 8, 2021) (indicating that the regulator only advises complainants that the office has entered into a diversion agreement with the lawyer, without providing copies of the diversion agreement).

213. Telephone Interview with Regulator 13 (July 20, 2021).

214. Telephone Interview with Regulator 11 (July 15, 2021) (noting, however, that special care is exercised not to disclose specific information when dealing with impairments); Telephone Interview with Regulator 12 (July 16, 2021) (explaining that the letter to the complainant may describe a specific diversion condition but may also state there may be additional terms in the agreement). Another regulator indicated that the amount of information disclosed will depend on the circumstances and his assessment of the complainant. Telephone Interview with Regulator 14 (July 23, 2021).

confidential nature of the diversion referral.[215] A number of regulators indicated that they also write to the complainants when diversion is complete.[216]

In jurisdictions where regulatory counsel simply tells the complaining party that the complaint was dismissed,[217] complainants are left in the dark.[218] They may see the diversion referral as a "cover-up" or "wrist slap."[219] But one regulator noted that when she explains to complainants that a regulator "will be watching [the] lawyer for a year to be sure the lawyer doesn't reoffend, that seems to quell some of the unhappiness."[220]

5. ACCESS TO AND USE OF DIVERSION INFORMATION

As noted, diversion is not considered to be discipline and issues arise as to whether diversion records can be accessed and considered in any subsequent disciplinary proceedings. Although the majority of jurisdictions treat diversion information as confidential,[221] most interviewees reported that information related to completed diversions remained available to disciplinary counsel.[222] In a small number of jurisdictions, however, the information is "expunged" after a few years. In some of those states, the information is not subsequently available at all, and regulators can only rely on their memories as to which lawyers previously participated in diversion.[223]

How should jurisdictions treat the fact that a lawyer has previously completed a diversion agreement? A few regulators noted that the completed diversions

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215. *See, e.g.*, Telephone Interview with Regulator 4 (June 29, 2021) (noting that the complainant is told nothing after receiving acknowledgement of the complaint).

216. *E.g.*, Telephone Interview with Regulator C (July 1, 2021). *But see* Telephone Interview with Regulator L (July 21, 2021) (noting that the regulator does not routinely tell complainants that diversion has been completed).

217. *See* Telephone Interview with Regulator M (July 26, 2021) (reporting that the complainant is told nothing other than that the complaint was dismissed).

218. As one regulator explained, "[t]hey are entitled to know the disposition of the matter. Otherwise, they are left in limbo." Telephone Interview with Regulator 15 (July 23, 2021).

219. *See* Telephone Interview with Regulator 2 (June 28, 2021) (describing a post in which a complainant blogged about a diversion referral as a "slap on the wrist"); Telephone Interview with Regulator I (July 9, 2021) (referring to complaining parties' views of diversion as a "'slap on the wrist'"); Telephone Interview with Regulator 16 (July 27, 2021) (stating that diversion "may be viewed as another way of lawyers covering up their problems").

220. Telephone Interview with Regulator I (July 9, 2021).

221. *See, e.g.*, RULES GOVERNING THE MO. BAR & THE JUDICIARY R. 5.105(j); WASH. STATE CT. RULES FOR ENF'T OF LAW. CONDUCT R. 6.6.

222. *E.g.*, Telephone Interview with Regulator 6 (July 7, 2021); Telephone Interview with Regulator E (July 6, 2021).

223. Telephone Interview with Regulator 14 (July 23, 2021) (explaining that "[t]he office and bar are small[,] so bar counsel knows who has [completed] diversion"); Telephone Interview with Regulator K (July 19, 2021) (stating that the regulator's office views the lack of records as "one of [the] incentives of diversion"). In another jurisdiction that expunges diversion files, the office still keeps some record of the fact that a lawyer has previously completed diversion. Telephone Interview with Regulator 11 (July 15, 2021).

would not be used against a lawyer in a subsequent discipline matter.[224] As one interviewee explained, "diversion would fail if lawyers see the diversion as a Scarlet A. Rather[,] it is important that it continue to be treated as 'not discipline.'"[225] In a small number of jurisdictions, however, diversion can be considered as an aggravating factor if there is subsequent discipline.[226] Another regulator explained that they "favor progressive action," and keeping records on every disposition allows them to pull the records and see conditions previously imposed.[227]

6. INTERVIEWEES' CONCERNS AND SUGGESTIONS RELATING TO DIVERSION PROGRAMS

Many interviewees stated that they had no concerns with the use of diversion.[228] Some qualified their answers by indicating that they had no concerns when diversion was used *appropriately*.[229] As one regulator stated: "[d]iversion, when properly applied, is a good tool. If the attorney is truly ignorant and has no malice, diversion is a great way to move forward and preserve reputation and help the attorney be more mindful of professional obligations."[230] Although a number of regulators were very positive, and even enthusiastic, in describing their opinions of diversion,[231] a few described reservations when we asked about concerns. A couple of interviewees commented on concerns related to complainant satisfaction with the process.[232] Another regulator explained that the diversion terms should "have an impact" on lawyers and that "diversion should [not] be reduced to making people jump through hoops."[233] A third indicated that he did not really have concerns but noted, "you can become cynical, wondering whether this guy really wants to work on the problem or just wants to get diversion."[234]

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224. *See, e.g.*, Telephone Interview with Regulator 7 (July 8, 2021) (noting that diversion agreement is not treated as disciplinary history or an aggravating circumstance); Telephone Interview with Regulator C (July 1, 2021) (explaining that disciplinary counsel "can't use [the information] as a strike against the lawyer").

225. Telephone Interview with Regulator 12 (July 16, 2021).

226. *See, e.g.*, KAN. RULES RELATING TO DISCIPLINE OF ATT'YS R. 212(h)(2) (diversion treated as an aggravating factor and facts admitted can be considered conclusive evidence of the facts in a later proceeding); *see also* IOWA SUP. CT. ATT'Y DISCIPLINARY BD. RULES OF PROC. R. 35.14(5) (stating that the attorney's admission of misconduct may be considered in imposing sanctions in a subsequent disciplinary matter not arising out of the same conduct).

227. Telephone Interview with Regulator 10 (July 16, 2021).

228. *E.g.*, Telephone Interview with Regulator B (June 30, 2021); Telephone Interview with Regulator 5 (June 30, 2021).

229. *E.g.*, Telephone Interview with Regulator 7 (July 8, 2021); *see also* Telephone Interview with Regulator 2 (June 28, 2021) (noting that diversion "[s]hould not be used for serious misconduct").

230. Telephone Interview with Regulator 6 (July 7, 2021).

231. After describing diversion as "fantastic," one regulator stated that she would like to offer the option to more lawyers. Telephone Interview with Regulator 5 (June 30, 2021).

232. More generally, one regulator noted that the diversion alternative is "not satisfying to complainants." Telephone Interview with Regulator 12 (July 16, 2021).

233. Telephone Interview with Regulator 3 (June 28, 2021).

234. Telephone Interview with Regulator D (July 1, 2021). One regulator stated that he hoped that "they don't make a chump out of [the regulators]." Telephone Interview with Regulator 4 (June 29, 2021).

One regulator expressed frustration, noting "that the same misconduct may be reoccurring."[235] The regulator went on to explain that he does not have a "good sense on how effective are we being . . . in making attorneys better lawyers."[236] Most regulators reported that they did not have recidivism data or reports.[237] A number of regulators expressed interest in collecting data on recidivism following completed diversions,[238] including one who explained that if regulators "can have more information/data to capture, more people could study [the] structure, approach[es,] and effectiveness" of diversion.[239]

The most common suggestion for improving diversion related to the need for additional resources and support for initiatives, such as more practice management assistance,[240] trust account training,[241] and CLE programs.[242] In the words of one regulator, "[w]e are always trying to improve[,] but it is hard without more resources."[243]

Other suggestions for improving diversion related to the rules governing the timing and eligibility for diversion.[244] A couple of interviewees stated that diversion should be pursued earlier in the disciplinary process in their jurisdictions.[245] Some others suggested that diversion be used more often.[246] Yet another recommended broadening contractual diversion in that jurisdiction to be available to lawyers not suffering from impairments.[247]

A few suggestions for improving diversion related to how diversion programs are administered and conducted.[248] For example, one regulator wanted more

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235. Telephone Interview with Regulator 11 (July 15, 2021).

236. *Id.*

237. *E.g.*, Telephone Interview with Regulator 4 (June 29, 2021); Telephone Interview with Regulator G (July 7, 2021). Two regulators reported that they were uncertain about their ability to run recidivism reports or unable to do so with their current case management systems. Telephone Interview with Regulator 13 (July 20, 2021); Telephone Interview with Regulator 15 (July 23, 2021).

238. *E.g.*, Telephone Interview with Regulator 1 (June 28, 2021); Telephone Interview with Regulator 7 (July 8, 2021).

239. Telephone Interview with Regulator 11 (July 15, 2021).

240. *See* Telephone Interview with Regulator L (July 21, 2021) (suggesting that they could use more resources to hire someone else to assist with a LOMAP). Another regulator noted, "[i]t would be awesome if we had someone to counsel on law practice management." Telephone Interview with Regulator C (July 1, 2021).

241. Telephone Interview with Regulator E (July 6, 2021) (indicating interest in a "trust account school option"). A second regulator would like to have a pool of trained auditors. *See* Telephone Interview with Regulator 12 (July 16, 2021).

242. Telephone Interview with Regulator 7 (July 8, 2021).

243. Telephone Interview with Regulator C (July 1, 2021).

244. *E.g.*, Telephone Interview with Regulator 5 (June 30, 2021).

245. Telephone Interview with Regulator I (July 9, 2021); *see also* Telephone Interview with Regulator 16 (July 27, 2021) ("Get matters to diversion quicker.").

246. *E.g.*, Telephone Interview with Regulator K (July 19, 2021). When suggesting that diversion be "utilized more by the lawyers on staff," this regulator noted that "diversion is more work" and that there is an "incentive to close cases" instead, "because those are reported." *Id.*

247. Telephone Interview with Regulator 8 (July 9, 2021).

248. *See, e.g.*, Telephone Interview with Regulator J (July 14, 2021) (identifying the use of online workshops as an improvement); Telephone Interview with Regulator 9 (July 12, 2021) (suggesting more coordination with the LAP).

autonomy to terminate lawyers from participating in the program.[249] Another regulator suggested that one improvement would be more consistency among the staff regarding the "cases appropriate for diversion."[250]

IV. PROBLEMS AND RECOMMENDATIONS

The interviewees uniformly described diversion as a useful opportunity to help lawyers remedy certain problems they encounter in practice and to better protect the public. Anecdotally, the regulators reported that diversion helps some lawyers improve their conduct.[251] Diversion programs can educate lawyers about the rules and identify impediments in their practices that may interfere with their ability to comply with those rules. This is vitally important: professionals must know the rules they are supposed to follow and be able to follow them.[252] Education and other measures that assist lawyers in addressing problems may protect the public more than discipline, especially because the effects of punishment are often unclear.[253] Questions remain, however, about the best ways in which to help these lawyers achieve durable changes in their conduct. Interviewees suggested various steps that could be taken to empower lawyers to achieve lasting change. Drawing on the interviews, as well as other research on professional discipline and rehabilitation, the following recommendations discuss how diversion alternatives can be improved to both assist lawyers and advance public protection.

A. ADDRESSING OVERUSE AND UNDERUSE

The regulator interviews revealed that diversion may be underutilized in some jurisdictions and possibly overused in others. Sixteen jurisdictions do not offer diversion as an alternative to discipline. A small number limit diversion to situations involving lawyer impairment.[254] Assuming, as the interviewees suggest, that diversion is a useful tool for addressing low-level lawyer misconduct, jurisdictions that do not offer diversion to deal with minor misconduct should consider revising their rules to allow for diversion, even when the lawyer is not impaired. While some jurisdictions that do not offer diversion can require CLE as a sanction,[255] it seems unlikely that approach will be effective without a more tailored program that can be offered through diversion. Moreover, diversion provides an additional incentive for the lawyer to work on the problem because successful

249. Telephone Interview with Regulator 1 (June 28, 2021).

250. Telephone Interview with Regulator 2 (June 28, 2021).

251. *See, e.g.*, Telephone Interview with Regulator 17 (July 6, 2022) (referring to the "many lawyers [who] have benefitted" from diversion and thanked the regulator because diversion was a "career saver").

252. *See* BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE 137 (2021).

253. While punishment can sometimes have specific and general deterrent effects, it operates in enormously complicated ways with uncertain and unpredictable results. *See, e.g.*, *id.* at 20–24, 30–32.

254. *See supra* note 50 and accompanying text.

255. *E.g.*, CONN. PRAC. BOOK § 2-37(a)(5) (2023).

completion of the diversion agreement enables the lawyer to avoid an outcome that results in a disciplinary sanction.

At the same time, a few jurisdictions may overuse diversion. The large number of diversion cases in some jurisdictions raises questions about whether diversion is sometimes used as a means of quickly disposing of complaints that should be more appropriately subject to sanctions. This possibility of overuse is especially concerning in jurisdictions that do not provide individualized remedial approaches for the lawyers who participate in diversion.

There is also a potential for overuse when diversion is repeatedly offered to a respondent lawyer.[256] Diversion is occasionally afforded to lawyers on three or more occasions.[257] Jurisdictions should assess whether lawyers who receive diversion more than once avoid further misconduct or whether a different approach (e.g., sanctions plus educational requirements) would be more appropriate when recidivism occurs.[258] An individualized approach to diversion on the first occasion and other steps discussed below may limit the likelihood of repeated misconduct.

B. IMPROVING THE REGULATION AND ADMINISTRATION OF DIVERSION

As noted, regulators use different approaches to offering and handling diversion alternatives. In some jurisdictions, the procedural rules do not articulate clear standards for when diversion can be utilized.[259] Other states' rules expressly prohibit the use of diversion where certain types of misconduct occurred.[260] Even in jurisdictions where the rules limit eligibility, regulators have a good deal of latitude in offering diversion to respondents who qualify. Although this flexibility enables regulators to offer diversion programs to respondent lawyers who regulators believe are most likely to benefit from diversion, the flexibility presents a risk of inconsistent treatment of respondents.

Regulators should consider steps to promote consistent treatment of respondent lawyers. This is particularly important because of data suggesting racial disparities in the imposition of lawyer discipline sanctions.[261] In jurisdictions where

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256. The *MRLDE* permit the diversion option to be offered to a respondent lawyer on more than one occasion. *See supra* note 47 and accompanying text.

257. LEVIN & FORTNEY, *supra* note 27, at 19. This is probably not the case in most jurisdictions. *See, e.g.*, Telephone Interview with Regulator 3 (June 28, 2021) (reporting that regulator "has only had a couple of lawyers repeat diversion").

258. For some lawyers, repeated diversion may not yield positive results. In the medical field, researchers found that success with severely incompetent physicians is uncertain even with prolonged continuing medical education that incorporates modalities thought to be effective in changing physician behaviors. *See* Eileen Hanna, John Premi & John Turnbull, *Results of Remedial Continuing Medical Education in Dyscompetent Physicians*, 75 ACAD. MED. 174, 175 (2000).

259. *See, e.g.*, TENN. SUP. CT. RULES R. 9 § 13.2; VT. SUP. CT. ADMIN. ORD. NO. 9, R. 6(B).

260. *E.g.*, N.M. RULES GOVERNING DISCIPLINE R. 17-206(H)(3) (identifying circumstances under which participation in diversion is "prohibited").

261. *See* DAG MACLEOD, REPORT ON DISPARITIES IN THE DISCIPLINE SYSTEM (2019), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf [https://perma.cc/XGH4-9GT9] (revealing

eligibility for diversion is not well-defined, regulators should develop written internal guidelines for evaluating whether matters are appropriate for diversion. Regulators should also develop a review and consultation process to systematically evaluate whether diversion is being offered to lawyers on a consistent basis. While there are inevitably hard-to-quantify elements involved in the diversion decision—such as the respondent attorney's apparent willingness to learn from mistakes—there are other elements of the decision, including the nature of the misconduct, which should be treated comparably. Some of the interviewees described processes that could help with consistency, such as an office practice of circulating proposed diversions to all disciplinary counsel in writing and discussing the proposed diversion conditions in meetings attended by all regulatory counsel.[262] One regulator described using a spreadsheet to track information about the lawyers who received diversion, enabling the regulator to better discern whether a proposed diversion falls within the range of other diversions for particular rule violations.[263] Disciplinary panels and boards that offer diversion should also be advised of the importance of consulting closely with disciplinary counsel to ensure that diversion is being offered in a consistent fashion. At a minimum, a written record of all diversions should be maintained, and systems should be implemented to ensure that all individuals who play a role in offering diversions are doing so in a consistent manner.

Another way to promote consistency would be for regulators to make diversion more accessible to less affluent attorneys. Respondents who are able to hire lawyers to represent them in disciplinary matters may be more likely to secure diversion agreements rather than face discipline sanctions.[264] Less affluent lawyers often self-represent when they face a grievance[265] and may not know enough about the process to advocate for diversion in lieu of discipline. Regulators can help address this knowledge gap for unrepresented lawyers by providing clear information about diversion alternatives on the regulators' websites.[266] They should also devise payment plans or other financial solutions—as a few jurisdictions

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statistically significant disparities with respect to disbarment rates when comparing Black to white male attorneys with a "disbarment/resignation rate for Black, male attorneys [of] 3.9 percent compared to 1.0 percent for White males").

262. Telephone Interview with Regulator 17 (July 6, 2022); *see also supra* note 139 and accompanying text (describing office meetings at which diversion decisions are discussed).

263. Telephone Interview with Regulator 17 (July 6, 2022).

264. At least in the context of discipline probation and disbarment, representation by an attorney—as opposed to self-representation—helps account for disparities in the imposition of discipline. MACLEOD, *supra* note 261, at 4.

265. *See* RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 508 (2008).

266. For an example, see *Alternative Discipline Program*, STATE BAR CT. OF CAL. (2022), https://www.statebarcourt.ca.gov/Procedures-Programs-and-Rules/Alternative-Discipline-Program [https://perma.cc/K339-JNRZ].

have done—to enable respondent lawyers who would benefit from diversion to participate, even if they cannot afford it.[267]

Regulators can also do more to learn which types of conditions are most likely to achieve diversion's goals of education and rehabilitation. Rather than rely on intuition to identify conditions to address the respondents' problems and assist them in improving their practices, disciplinary counsel should consider research on diversion programs in other fields, including studies of diversion and remedial programs for medical professionals. The legal profession is far behind the medical profession in attempting to evaluate which types of interventions help professionals address impairment issues and otherwise improve their performance. Lessons from the research in the medical field point to the importance of individualized help for respondents, as opposed to trainings that are more general in nature.

A recent review of the medical literature noted that "[l]ittle evidence exists for the efficacy of disciplinary penalties,"[268] although efficacy is admittedly hard to assess. Substance abuse diversion programs for health professionals have had some success.[269] A "lengthy period of intense monitoring . . . under the scrutiny of [an] alternative program" appears to be important for recovery.[270] When it comes to competence issues, peer assessments and practice-based assessments are most effective in ensuring competence, while it is less clear that more traditional continuing education requirements lead to improvements.[271] Research reveals the importance of providing health care providers individualized assessments of practices and feedback.[272] Professionals who received an individualized

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267. *See, e.g.*, Telephone Interview with Regulator J (July 14, 2021) (describing handling of payment plans). Another approach was to spread out the time for completion of conditions so the lawyer could pay for them over time. *See* Telephone Interview with Regulator N (July 29, 2021).

268. Ai-Leng Foong-Reichert, Ariane Fung, Caitlin A. Carter, Kelly A. Grindrod & Sherilyn K.D. Houle, *Characteristics, Predictors and Reasons for Regulatory Body Disciplinary Action in Health Care: A Scoping Review*, 107 J. MED. REG. 17, 25 (2021).

269. *See, e.g.*, Heather Hamza & Todd Monroe, *Reentry and Recidivism for Certified Registered Nurse Anesthetists*, 2 J. NURSING REGUL. 17 (2011).

270. Nancy Darbro, *Overview of Issues Related to Coercion and Monitoring in Alternative Diversion Programs for Nurses: A Comparison to Drug Courts: Part 2*, 20 J. ADDICTIONS NURSING 24, 25 (2009).

271. Peter G. Norton, Liane Soberman Ginsburg, Earl Dunn, Roy Beckett & Daniel Faulkner, *Educational Interventions to Improve Practice of Nonspecialty Physicians Who Are Identified in Need by Peer Review*, 24 J. CONTINUING EDUC. IN HEALTH PROS. 244, 251 (2004); *see also* Foong-Reichert, Fung, Carter, Grindrod & Houle, *supra* note 268, at 26. The use of traditional continuing medical education may be insufficient for a variety of reasons. Betsy W. Williams, *The Prevalence and Special Educational Requirements of Dyscompetent Physicians*, 26 J. CONTINUING EDUC. IN HEALTH PROS. 173, 186–87 (2006).

272. Norton, Soberman Ginsburg, Dunn, Beckett & Faulkner, *supra* note 271. Physician participation in a remedial professional development program involving weekly meetings for three to six months can result in improved clinical performance for some period after the intervention. Francois Goulet, Robert Gagnon & Marie-Eve Gingras, *Influence of Remedial Professional Development Programs for Poorly Performing Physicians*, 42 J. CONTINUING EDUC. IN HEALTH PROS. 42, 44, 47 (2007).

assessment and a targeted educational intervention did better than those who were simply monitored.[273]

The research from the medical field suggests that diversion that only requires lecture-type CLE may not be enough to address some respondent lawyers' problems.[274] As Deborah Rhode and Lucy Ricca noted, "The format of most CLE courses is inconsistent with adult learning principles. 'What is heard in the classroom, without advance preparation, classroom participation, review, and application is unlikely to be retained.'"[275] By contrast, the medical field has incorporated adult learning principles into continuing medical education ("CME") and concluded that interactive education is much more effective than lectures.[276] Drawing on the research and experience in the medical field, legal profession regulators should include more targeted and interactive CLEs in diversion terms and incorporate adult learning principles.

Diversion, properly done, cannot only educate lawyers but can also provide opportunities to assist lawyers in improving the overall ethical infrastructure of their practices. Rather than limiting the conditions to those related to the misconduct that triggered the complaint, regulators should consider the feasibility of more holistic approaches that assist lawyers in evaluating and improving their office practices and the manner in which they deliver legal services.[277]

Requiring respondents to complete self-assessments is a relatively low-cost measure to help respondents systematically identify deficiencies, consult resources, and improve their office practice controls, such as conflicts checking procedures. By doing so, lawyers may be able to prevent practice management problems before they occur. In this sense, the self-assessment process is a proactive approach to regulation designed to avoid future discipline and malpractice,

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273. *See* Elizabeth J. Korinek, Alisa R. Johnson, Sindy Michelle Paul, Elizabeth S. Grace, William T. O'Neill & Meredith I. Borine, *Competence Assessment and Structured Educational Remediation: Long-Term Impact on the Quality of Care Provided by Disciplined Physicians*, 108 J. MED. REGUL. 7, 11–14 (2022).

274. *See, e.g.*, Williams, *supra* note 271, at 184. Williams notes that continuing medical education is designed for the average physician and "likely will not meet the needs of a dyscompetent physician." The study finds "[f]irst, many dyscompetent physicians are found to have specific areas of deficits. Second, a dyscompetent physician's initial education and training may have been inadequate, resulting in a lack of fundamental medical knowledge." In addition, "many dyscompetent physicians have special needs that provide a partial basis for their dyscompetence." Finally, "[p]ersonal characteristics, abilities, traits, goals, motivations, and situational factors clearly contribute to an individual's ability to participate in and benefit from an educational endeavor." *Id.*

275. Deborah L. Rhode & Lucy Buford Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?*, PRO. LAW, Spring 2014, at 2, 8 (quoting Paul A. Wolkin, *On Improving the Quality of Lawyering*, 50 ST. JOHN'S L. REV. 523, 529 (1976)).

276. Some CME providers now use a host of approaches, including simulations, reflection-based exercises, case-based assessments, and in situ learning experiences to promote learning that will have an enduring effect. Rima Sirota, *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 17–18 (2022).

277. Resource constraints in some states may appear to be an insurmountable obstacle to tailoring and improving diversion alternatives. Some jurisdictions are already sharing ideas and resources in ways that assist other states as they seek to implement the best possible programs.

as opposed to a reactive system of disciplining lawyers after the misconduct occurs.

As noted, some regulators are already making self-assessments part of diversion programs.[278] Regulators incorporating self-assessments into diversion programs should recognize the limitations of self-assessments and take steps to enhance their effectiveness. Specifically, simply asking lawyers to report their completion of self-assessments may have limited impact if respondent lawyers approach the self-assessment process as a "check-the-box" exercise.[279] To address this concern and provide more individualized feedback on the results of the self-assessment, regulators should require that the results of the self-assessment be reviewed by a regulator, monitor, or approved mentor.[280] This would help ensure completion of the instrument.[281] It also provides an opportunity for discussion of tools and approaches that respondent lawyers could use to improve their practices.

C. RESPONDING TO COMPLAINANTS' CONCERNS

One noteworthy aspect of the interviews was that the regulators appeared to sincerely want to help respondent lawyers but were much less focused on complainants' feelings and concerns. Admittedly, the regulators' priority is public protection, and diversion is only supposed to be used where serious harm did not occur. Nevertheless, part of the reason for creating alternatives to discipline was to let the public—including complainants—know that even "minor" misconduct

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278. *See supra* notes 179–85 and accompanying text. There has been increasing national interest in proactive regulation and the use of self-assessments. In 2019, the ABA House of Delegates adopted a resolution urging state supreme courts to study and adopt jurisdictionally appropriate PMBR programs to "enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms." ABA House of Delegates, Resol. 107, Aug. 12–13, 2019, at 1. Shortly thereafter, the U.S. Conference of Chief Justices adopted a resolution encouraging its members to study PMBR programs to "enable lawyers and law firms to develop and maintain ethical infrastructures that help prevent violations of applicable rules of professional conduct." CONFERENCE OF CHIEF JUSTICES, RESOLUTION 4, at 1 (2019), https://ccj.ncsc.org/__data/assets/pdf_file/0020/23537/07312019-proactive-management-based-ethical-lawyer-regulation.pdf [https://perma.cc/FDT9-6T63].

279. A survey related to PMBR in Australia revealed that 66% of the respondents disagreed with the statement that the self-assessment process "amounts to meaningless box ticking." Only 12% agreed with the statement. Fortney & Gordon, *supra* note 175, at 180. Even for those lawyers who indicated that they were doing the minimum to complete the self-assessment process, the researchers concluded that the self-assessment process provided the regulatory "nudge" for lawyers to examine and revise their existing controls and then adopt new systems. *Id.* at 182.

280. Such a review could also be conducted by a lawyer working with the LOMAP. *See* Telephone Interview with Regulator H (July 8, 2021). For example, one regulator reviews a self-audit form in her initial consultation with respondent lawyers. Telephone Interview with Regulator 1 (June 28, 2021).

281. Results of the study of the Australian PMBR system suggest that another person's review of self-assessments may improve the likelihood that an attorney will not simply check boxes, but instead, will candidly complete the process. *See* Fortney & Gordon, *supra* note 175, at 180 (noting that the largest percentage of respondents (43%) agreed with the following statement: "The possibility of a Practice Audit by the [regulator] contributes to candor when [attorneys] completed the [self-assessment process]").

was being addressed.[282] Interviewees' reports about their communications with complainants indicate this message probably does not come through clearly in most jurisdictions. Nor are most complainants likely to feel satisfied with diversion decisions.

There are four steps that regulators could take to improve the ways in which complainants experience the handling of diversion matters. The first is for regulators to suggest the return of some fees by the lawyer as a condition of diversion, where appropriate. The regulators' responses revealed that they did not often seek restitution in the diversion context.[283] This reluctance to seek restitution may also be due to regulators' general unwillingness to become involved in fee disputes[284] or their concerns about the potential difficulty of obtaining a negotiated settlement. But this attitude places administrative ease above the complainants' interests. If the respondent lawyer did not fully perform the work or performed it in a substandard manner that required a complainant to expend additional funds, restitution is appropriate and should be included as a negotiated diversion condition.[285] If the return of some fees is made a condition of diversion, proof that it occurred need not be complicated: the lawyer can be required to provide evidence of repayment in order for diversion to be deemed completed.

Second, if it appears that the respondent lawyer charged an excessive fee or failed to provide a required written fee agreement and a fee dispute has arisen, regulators should address complainants' concerns in diversion. In both situations, the respondent's conduct constitutes clear professional rule violations.[286] If these fee issues cannot be readily resolved in a negotiated diversion agreement, regulators should include a diversion condition that requires lawyers to participate in fee arbitration. All United States jurisdictions have fee arbitration programs,[287] but only six interviewees indicated that they use fee arbitration in connection with diversion. This situation is problematic because in most jurisdictions, clients cannot compel lawyers to participate in fee arbitration.[288] By making fee arbitration a condition of diversion, regulators provide the complainant with some

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282. *See* MCKAY COMM'N REPORT, *supra* note 15, at xv, 47.

283. One stated that "[i]f the attorney cannot afford restitution, they would not include it as a term." Telephone Interview with Regulator N (July 29, 2021).

284. *See, e.g.*, *What to Expect When Filing a Grievance*, N.H. SUP. CT. ATTORNEY DISCIPLINE SYSTEM (2022), https://www.nhattyreg.org/filing-expect.php [https://perma.cc/4EEA-4DX5] (stating that "[f]ee disputes are not handled within the attorney discipline process"); *Complaints Against Lawyers*, VA. STATE BAR (2021), https://www.vsb.org/site/regulation/inquiry [https://perma.cc/BK8L-ZW46] (stating that Virginia State Bar will not open disciplinary cases on a complaint about a fee).

285. *See supra* notes 188–89 and accompanying text. In some jurisdictions, this may require amendments to the rules governing diversion.

286. Most jurisdictions have adopted the prohibition in the *Model Rules of Professional Conduct* against the use of unreasonable fees and require written fee agreements in contingent fee cases. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a), (c) (2020). In addition, fourteen jurisdictions require written fee agreements in most other cases. *See* Leslie C. Levin, *Ordinary Clients, Overreaching Lawyers, and the Failure to Implement Adequate Client Protection Measures*, 71 AM. U. L. REV. 447, 457 n.45 (2021).

287. Levin, *supra* note 286, at 462.

288. *Id.* at 462–63 (reporting that only ten jurisdictions have mandatory fee arbitration programs).

remedy where the lawyer has violated the professional rules concerning fees. The Wisconsin data indicate several instances where fee arbitration was a condition of diversion,[289] reflecting that it is possible for regulators to include this term as part of a negotiated settlement. Because fee arbitration can be prolonged and complicated for relatively low sums of money, it is less desirable for the complainant than providing restitution as a condition of diversion. Nevertheless, determining the proper payments can sometimes be challenging and fee arbitration is preferable to leaving the complainant with no recourse at all.

Complainants would also benefit if regulators sought an apology from respondent lawyers in appropriate cases. The medical profession uses apologies more systematically when patient harm occurred.[290] They are also used to address lawyer misconduct in Canada, England, Australia and elsewhere.[291] Such apologies can benefit both complainants and respondent attorneys.[292] Apologies help advance the rehabilitative function of diversion because lawyers must recognize the errors of their ways before problems can be addressed going forward.[293] Apologies may also help decrease complainants' anger and distress.[294] Contrary to the view of one regulator about "bad" apologies,[295] the social science research indicates that even less-than-sincere or coerced apologies can have some benefits for the recipient.[296] Moreover, affirmation of violated norms can reinforce and signal the importance of these norms to victims and offenders.[297] While one regulator noted concerns that a lawyer apology could be used in a malpractice action, the very nature of diversion (i.e., requiring no serious harm to the complainant) makes it extremely unlikely that the misconduct resulting in diversion would give rise to a malpractice lawsuit or liability.[298]

Finally, regulators should give complainants more information about diversion and, when possible, communicate the outcome of their complaints.[299] Indeed,

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289. LEVIN & FORTNEY, *supra* note 27, at 18.

290. Levin & Robbennolt, *supra* note 10, at 518.

291. *See, e.g.*, LEGAL OMBUDSMAN SCHEME RULES R. 5.38 (U.K. LEGAL OMBUDSMAN 2019); Francesca Bartlett, *Summary Compensation and Apology Orders in England and Wales, Australia and New Zealand: Different Structures, Different Responses*, 24 INT'L J. LEGAL PRO. 177, 178 (2017).

292. Levin & Robbennolt, *supra* note 10, at 517.

293. *Id.* at 518.

294. *See, e.g.*, Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCH. 457, 461 (1994); Ken-ichi Ohbuchi, Masuyo Kameda & Nariyuki Agarie, *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCH. 219, 219 (1989); Bernard Weiner, Sandra Graham, Orli Peter & Mary Zmuidinas, *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 296 (1991).

295. *See supra* note 206 and accompanying text.

296. Levin & Robbennolt, *supra* note 10, at 544–46. If, however, the lawyer experiences the apology as humiliating, this can generate maladaptive responses. *Id.* at 546.

297. *Id.*

298. *See* Fortney, *supra* note 9, at 2055 (noting that pursuing a legal malpractice claim through the courts may not be feasible for many consumers with relatively small claims for damages).

299. The *MRLDE* state that complainants should be provided with more information than they currently receive in some jurisdictions. *See supra* note 52 and accompanying text.

there can be some benefits to obtaining complainants' input during the process.[300] While diversion rules in most jurisdictions require confidentiality, they do not require that diversion be a mystery. It is virtually impossible for complainants to learn about diversion from looking at regulators' websites, leaving them entirely dependent on information communicated by the regulator's office. While complainants probably appreciate a personal call from the regulator, they are more likely to be able to absorb and recall the relevant information if it is also provided in writing. Complainants should be educated about the purpose of diversion through an information sheet that explains the purpose of diversion, the potential length of regulator monitoring of the respondent lawyer, and the consequences for respondents who fail to complete diversion. The explanation should explain how diversion promotes public protection. If the jurisdiction's confidentiality rules prevent disclosure of the precise conditions contained in the diversion the agreement, the information sheet should explain the types of conditions that may be negotiated. Regulators should also advise complainants when the conditions of diversion have been fulfilled so that they are aware of the final outcome of the matter.

D. TRACKING DIVERSIONS AND THEIR EFFECTIVENESS

Even though the McKay Commission recommended the use of diversion thirty years ago, as one regulator noted, "[i]t is glaring that we don't really know how effective diversion is, although we have a gut feeling that it is worthwhile."[301] For several reasons, it is important that regulators more systematically track how they are using diversion and its effects and that they share this information with other regulators and interested parties.

First, it is important to assess whether regulators are offering diversion in appropriate cases and doing so in a consistent fashion. As previously noted, in some jurisdictions, the types of misconduct eligible for diversion is extremely broad. A few regulators observed that diversion was sometimes used in types of cases not included in their rules or guidelines.[302] One stated, "[e]veryone is sold on the idea of diversion, but many may apply [it] in an ad hoc way."[303] If regulators are going to depart from their jurisdictions' guidelines, they should be aware of how often they do so, for what reasons, and whether, with hindsight, they made the right decisions. Without reviewing the cases in which diversion has

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300. *See, e.g.*, *supra* note 209 and accompanying text; Telephone Interview with Regulator 16 (July 27, 2021) (stating that a lawyer better understands what it is like to be a client after hearing client input). Advising the complainant of the plan to offer diversion provides them an opportunity to express their views, such as their interest in an apology or restitution. While seeking complainant input would require some additional time and effort, it may increase complainant satisfaction with the process and address skepticism that diversion is a cover-up that only benefits lawyers.

301. Telephone Interview with Regulator 10 (July 16, 2021).

302. *Id.* (noting that most diversions were not done under court rules but were more "ad hoc"); Telephone Interview with Regulator 1 (June 28, 2021) (noting that because guidelines are "suggestive," the "failure to satisfy one [criterion] does not disqualify the attorney from participating in the diversion program").

303. Telephone Interview with Regulator 8 (July 9, 2021).

been utilized, it is impossible to evaluate whether diversion is being offered in a consistent and unbiased fashion.

Second, it is important to determine whether diversion is being used—or overused—with lawyers who do not seem to be learning from the diversion experience. As we also noted, lawyers in some jurisdictions who receive diversion are repeat offenders.[304] What percentage of lawyers who receive diversion subsequently reoffend? Do those who reoffend commit misconduct similar to their prior offense? Without tracking this information over an extended time period, it is impossible to know whether diversion is being used appropriately.

Third, and relatedly, it is important to track the lawyers who receive diversion to assess the efficacy of various diversion conditions. Admittedly, it can be difficult to attribute causality to any condition, especially when many factors aside from the diversion conditions may affect future rule compliance. There are, however, ways through self-reports and subsequent monitoring of office practices to assess the efficacy of certain interventions. Without evidence that any educational or rehabilitative efforts are effective in improving how lawyers provide legal services, diversion seemingly serves little purpose except for maintenance of a lawyer's reputation and docket control. Evidence of efficacy may be useful not only in crafting further educational efforts, but in attempting to persuade the public that these interventions are not mere wrist slaps and are actually worthwhile.

In order to generate this information, jurisdictions should develop strategies for data retention and analysis. If necessary, they should seek rule changes so that they can retain sufficient data to determine whether there is significant recidivism and whether their educational efforts and other interventions are effective in reducing future misconduct. The National Organization of Bar Counsel could help jurisdictions develop a uniform strategy for data collection to be used across jurisdictions. Such a national initiative could provide a basis for empirically examining the effectiveness of diversion alternatives. Comparisons can be instructive when different remedial interventions are used. Jurisdictions should also publish their findings—as Wisconsin has done—so that all jurisdictions can benefit from this information.

CONCLUSION

Thirty years ago, the McKay Commission recommended that the judiciary and the profession coordinate preventive educational, substance counseling, and other programs with the disciplinary system to address the minor misconduct that often leads to complaints.[305] Today, some regulators are taking this one step further by exploring proactive measures to help all lawyers avoid misconduct. Rather than having to react to misconduct after it has occurred, proactive efforts recognize

304. *See supra* notes 256–57 and accompanying text.

305. MCKAY COMM'N REPORT, *supra* note 15, at xv–xvi.

that clients and the public generally are more protected if misconduct never occurs.

Jurisdictions considering proactive initiatives should recognize the role that diversion alternatives can play in a comprehensive regulatory regime. Although diversion alternatives do not squarely qualify as proactive programs because some misconduct has already occurred, diversion conditions focus on dealing with the particular problem that precipitated the complaint. More generally, diversion can provide an important intervention opportunity to work with lawyers to examine their mistakes and improve their procedures, practices, and fitness when practicing law. Through these efforts, regulators may be able to better focus diversion to meet lawyers' needs and protect the public.

In the long run, well-conceived diversion programs may also positively affect regulators' relationships with lawyers.[306] Some solo and small firm lawyers view regulators with suspicion or even bitterness, fueled in part by the observation that regulators disproportionately discipline this cohort.[307] By implementing effective alternatives to discipline—and communicating that they genuinely want to help respondent lawyers—regulators may seem less like adversaries. Respondents who feel like they are being treated fairly and with dignity may feel more commitment to educational and rehabilitation efforts.[308]

It is important, however, to be clear-eyed about the limits and costs of diversion. Even with the most well-designed educational program, diversion may not be appropriate for some lawyers and may be especially inappropriate for those who reoffend. Moreover, diversion, as currently employed, has a hidden cost for the regulatory system. Because information about diverted matters is generally treated as confidential, diversion sends no signal to the public that minor misconduct is being addressed or to the larger lawyer community about the types of conduct that lead to a regulatory response. Every time diversion or a private sanction is used in lieu of public discipline, regulators potentially lose an opportunity to educate and deter other lawyers. Research shows that enforcement action must be communicated effectively to have deterrent effects.[309] One alternative to keeping all information on diversion confidential would be to regularly publish, even if in an aggregated form, information about the types of misconduct that gave rise to diversion.

One concluding caveat is in order. There are many questions that remain unanswered about lawyer diversion. As noted, the most important—and most difficult to answer—is how well it works to prevent future misconduct. Second, although the research from the medical field indicates that interactive educational efforts produce better results than lecture-style education, which combination of

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306. *See supra* note 132 and accompanying text.

307. *See* Levin, *supra* note 5, at 372.

308. The feeling that the system is fair and treats individuals with dignity enhances their willingness to accept the outcome of legal proceedings. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 273–74, 276 (2006).

309. VAN ROOIJ & FINE, *supra* note 252, at 39.

interventions is likely to have durable effects?[310] Third, is diversion being offered in a consistent manner and in appropriate cases? And finally, at what point is a sanction also an appropriate regulatory response to achieve specific or general deterrence or some other regulatory goal? These important questions can only be answered if regulators maintain data, critically assess it, and share their findings as part of their ongoing efforts to improve lawyer conduct and protect the public.

310. This question is still being debated in the medical field. *See* RONALD M. CERVERO & JULIE K. GAINES, EFFECTIVENESS OF CONTINUING MEDICAL EDUCATION: UPDATED SYNTHESIS OF SYSTEMATIC REVIEWS 8, 15 (2014), https://www.accme.org/publications/effectiveness-continuing-medical-education-updated-synthesis-systematic-reviews [https://perma.cc/G8FZ-8ABM].

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