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# WHAT WE'VE GOT HERE . . . IS A FAILURE . . . TO COMMUNICATE: A STATISTICAL ANALYSIS OF THE NATION'S MOST COMMON ETHICAL COMPLAINT

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**WHAT WE'VE GOT HERE . . . IS A FAILURE . . . TO  
COMMUNICATE:<sup>1</sup> A STATISTICAL ANALYSIS OF THE  
NATION'S MOST COMMON ETHICAL COMPLAINT**

*Stephen E. Schemenauer<sup>2</sup>*

**I. INTRODUCTION**

"A good and decent profession has a headache that cries out for fast relief. We have been put on notice repeatedly. We will compound our own cure or someone will mix up a dose which will curl our hair."<sup>3</sup>

Very little in life is as disconcerting as being involved in a lawsuit, and a wise person consults local resources when choosing an attorney to resolve a legal dispute. Once an attorney has been retained, the client expects that the lawyer will take care of things, keep the client up-to-date on developments in the case, and look out for the client's best interests. But what happens if it turns out that the client made a bad choice and the attorney fails to communicate, resulting in unfavorable results for the client?

A very similar scenario actually played out in Colorado in 2002, where an attorney so utterly failed to perform that he or she received 256 separate complaints from 256 individual complainants in one case.<sup>4</sup> The specific details of this case are unknown, however, because Colorado does not make complaints a matter of public information unless the attorney is sanctioned.<sup>5</sup> In this particular case, even though the attorney received 256 individual complaints, he or she was never sanctioned.<sup>6</sup> Thus, citizens of Colorado will never know if the next attorney that they hire is the same one

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<sup>1</sup> COOL HAND LUKE (Warner Bros. 1967); GUNS N' ROSES, *Civil War*, Use Your Illusion II (Geffen Records 1991).

<sup>2</sup> Candidate for Juris Doctor, Hamline University School of Law, December 2007. The author would like to thank his wife Jennifer, his daughter Savannah, and his parents William and Audrey for their generous patience, encouragement, love, and support that has made the pursuit of a career in law possible. In addition, the author would like to thank the staff of Hamline Law Review and the students of Hamline Law School for their advice, assistance, and humor along the way.

<sup>3</sup> AMERICAN BAR ASS'N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 9 (1970), available at [http://www.abanet.org/cpr/reports/Clark\\_Report.pdf](http://www.abanet.org/cpr/reports/Clark_Report.pdf) [hereinafter CLARK REPORT] (quoting a portion of an annual report from a state bar association ethics committee regarding the need for reform of the attorney discipline system).

<sup>4</sup> COLO. SUP. CT. OFFICE OF ATTORNEY REGULATION COUNSEL 2006 ANNUAL REPORT 6 (2007), available at <http://www.coloradosupremecourt.com/pdfs/Regulation/2006%20ANNUAL%20REPORT.pdf>.

<sup>5</sup> Telephone Interview with an unnamed employee of the Colorado Office of Attorney Regulation (Jan. 2, 2007). This attorney was footnoted in the 2006 report, but when contacted, the Office of Attorney Regulation had no records related to such a case, leading them to conclude that the individual was never sanctioned.

<sup>6</sup> *Id.*; see *infra* note 235 and accompanying text.

who single-handedly accounted for nearly 1% of the total complaints lodged against attorneys in Colorado in 2002.

This failure to communicate at both the individual attorney level, and the systemic level, is one of the greatest causes of popular dissatisfaction with the legal profession today, and this problem is not new.<sup>7</sup> It was identified over 100 years ago and continues yet today, despite numerous warnings to fix the problem.<sup>8</sup> The first step in resolving popular dissatisfaction with the administration of justice is diagnosis.<sup>9</sup> This Comment not only diagnoses the failure to communicate, but it also recommends various ways to remedy that failure at both the individual and systemic levels.<sup>10</sup>

Part II of this Comment begins with a discussion of the evolution of the ABA's Model Rules of Professional Conduct and its push for the enhancement of professional responsibility throughout the nation.<sup>11</sup> It then examines the historical development of the American attorney discipline system, examining the criticisms of that system and the recommendations that have been made to fix it.<sup>12</sup> Part III provides a general overview of the disciplinary structure and process.<sup>13</sup> Part IV reveals the results of the survey, identifying the number one cause of complaints throughout the nation.<sup>14</sup> Part V argues that much of the reason that the American public is disgruntled with the current state of the profession is due to attorneys and state disciplinary systems failure to communicate.<sup>15</sup> It also examines recommendations for how both entities can resolve this issue.<sup>16</sup> Part VI

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<sup>7</sup> See *infra* notes 94-99 (stating that the number one ethical complaint lodged against attorneys is a failure to communicate and that attorney disciplinary systems suffer from it as well).

<sup>8</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, REPORTS OF THE AMERICAN BAR ASS'N, Vol. XXIX, Part 1, 395 (1906) (stating that the causes of dissatisfaction with the administration of justice may be grouped under four main headings: (1) causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration); see also *infra* notes 18-76 (outlining the various criticisms of attorney discipline systems throughout the 1960's).

<sup>9</sup> *Id.* at 395.

<sup>10</sup> See *infra* notes 131-215 and accompanying text (proposing that the remedy lies in addressing the failure to communicate at the systemic and individual levels).

<sup>11</sup> See *infra* notes 18-24 and accompanying text (tracing the evolution of the ABA's Model Rules of Professional Conduct).

<sup>12</sup> See *infra* notes 18-76 (tracing the development of the American disciplinary system and examining criticisms of that system).

<sup>13</sup> See *infra* notes 77-93 (providing a general overview of the disciplinary systems structure and outlining the process of filing a complaint).

<sup>14</sup> See *infra* notes 94-156 and accompanying text (proving that a failure to communicate is the number one cause of complaints lodged against attorneys).

<sup>15</sup> See *infra* notes 131-217 (arguing that the failure to communicate is the source of much of the American public's dissatisfaction).

<sup>16</sup> See *infra* notes 132-217 and accompanying text (offering recommendations to attorneys and state disciplinary systems).

concludes that without following the recommendations outlined in Part V, the American public will continue to be dissatisfied with the profession.<sup>17</sup>

## II. BACKGROUND

### *A. ABA Model Rules – The Development of Professional Responsibility*

In 1903, the ABA began promulgating model professional ethics rules for lawyers.<sup>18</sup> On August 27, 1908, the Preamble and Canons 1 through 32 of the Canons of Professional Ethics were first adopted, stating that “[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life,” and that these canons were to serve as a “general guide.”<sup>19</sup> The ABA Canons governed until the Model Code of Professional Responsibility was adopted by the House of Delegates on August 12, 1969.<sup>20</sup> The Model Code went through multiple amendments until the current ABA Model Rules of Professional Conduct were adopted in 1983.<sup>21</sup> Together, with some variations, these ethical canons, codes, and rules serve as models for the ethics rules of most states.<sup>22</sup> Currently, every state in the country tests prospective attorneys on their knowledge of professional responsibility.<sup>23</sup> In

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<sup>17</sup> See *infra* notes 131-217 and accompanying text (concluding that steps must be taken immediately to remedy this failure to communicate).

<sup>18</sup> Fifty State Survey, [www.westlaw.com](http://www.westlaw.com) (search for “professional responsibility” in the Fifty State Survey database) (encompassing a complete list of ABA adopted state rules).

<sup>19</sup> AMERICAN BAR ASS’N, ABA CANONS OF PROFESSIONAL ETHICS, *available at* [http://www.abanet.org/cpr/mrpc/Canons\\_Ethics.pdf](http://www.abanet.org/cpr/mrpc/Canons_Ethics.pdf) [hereinafter ABA CANONS]. “These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as *Professional Ethics*, and from the fifty resolutions included in David Hoffman’s *A Course of Legal Study . . .*” American Bar Association, Model Rules of Professional Conduct Preface, <http://www.abanet.org/cpr/mrpc/preface.html> (last visited May 22, 2007).

<sup>20</sup> HOUSE OF DELEGATES OF THE AMERICAN BAR ASS’N, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *available at* <http://www.abanet.org/cpr/mrpc/mcpr.pdf> [hereinafter MODEL CODE]. The new Model Code revised the previous Canons for four reasons: (1) there were important areas involving the conduct of lawyers that were either only partially covered in or totally omitted from the Canons; (2) many Canons that were sound in substance were in need of editorial revision; (3) most of the Canons did not lend themselves to practical sanctions for violations; and (4) changed and changing conditions in the legal system and urbanized society required new statements of professional principles. *Id.* at Preface.

<sup>21</sup> Center for Prof’l Responsibility, ABA Model Rules of Professional Conduct, [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (last visited April 20, 2007) [hereinafter Model Rules].

<sup>22</sup> *Id.* To date, California, Maine, and New York are the only states that do not have professional conduct rules that follow the format of the Model Rules. *Id.* New York follows the predecessor Model Code, and California and Maine have developed their own rules. *Id.*

<sup>23</sup> National Conference of Bar Examiners, Multistate Professional Responsibility Exam (MPRE), <http://www.ncbex.org/multistate-tests/mpre/> (last visited April 20, 2007).

addition to the promulgation of the Model Rules for the enhancement of professional responsibility, the ABA also mandated that all American law schools incorporate a required course on the topic.<sup>24</sup>

While these efforts established an ethical framework to guide attorneys, the ABA was still struggling with how to address violations of these ethical codes, particularly since it had little control over the self-regulated systems of attorney discipline that were, and still are, currently in place throughout the United States.

### ***B. Attorney Discipline Systems – The Enforcement Arm of Professional Responsibility***

In an effort to address the perceived decline of professionalism in the bar, and the discontinuity of judicial regulation of the legal profession throughout the country, various organizations, including the ABA, the Conference of Chief Justices, and HALT, conducted surveys and offered recommendations for reforming attorney discipline systems to achieve the highest possible standard of conduct and professional responsibility.

#### ***1. Criticisms of U.S. Attorney Discipline Systems – A Call to Action***

##### ***a. The Clark Report***

The ABA's first call to action occurred in February 1967 when it established the Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Supreme Court Justice Tom C. Clark.<sup>25</sup> The Clark Committee's goal was:

[t]o assemble and study information relevant to all aspects of professional discipline, including the effectiveness of present enforcement procedures and practices and to make such recommendations as the Committee may deem necessary and appropriate to achieve the highest possible standards of professional conduct and responsibility, and . . . that the

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Forty-seven states and the District of Columbia require bar applicants to pass an exam called the Multi-State Professional Responsibility Exam, or MPRE. *Id.* Conversely, Maryland, Washington, and Wisconsin test professional responsibility on their local bar examinations. *Id.*

<sup>24</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, std. 302(a)(iv) (1993) [hereinafter *ABA Standards*]. The Standards mandate that accredited law schools "require of all candidates . . . instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure, and responsibilities of the legal profession and its members, including the ABA Model Rules of Professional Conduct, are all covered." *Id.*

<sup>25</sup> CLARK REPORT, *supra* note 3, at xiii.

study be carried out in cooperation with state and local bar associations.<sup>26</sup>

In June 1970, after three years of examining the system of lawyer discipline throughout the country, the Clark Committee released its final report.<sup>27</sup> The Committee concluded that the present status of disciplinary enforcement in the country was a "scandalous situation" that required "the immediate attention of the profession."<sup>28</sup> It pointed out that a panel of lawyers, rather than judges or lay persons, were running the disciplinary system and charged that this institutional bias rendered the system ineffective.<sup>29</sup> It also found that public dissatisfaction with the bar and the courts was much more intense than was generally believed and warned that unless concrete action was taken to remedy the defects, the public would soon "insist on taking matters into its own hands."<sup>30</sup>

The Committee blamed much of the inadequacy of the country's disciplinary practices on the general inability to obtain the needed relevant statistical information, such as the number of complaints received by disciplinary agencies and the types of discipline imposed.<sup>31</sup> The Committee found that these types of statistics were unavailable because many agencies kept no such records at all, a substantial proportion of those that did were inconsistent, and the quality and extent of which depended largely upon the conscientiousness of the chairman in a given year.<sup>32</sup>

The Clark Committee ultimately concluded that reformation of the attorney discipline system was sorely needed, calling for "more centralization, greater power and swifter action."<sup>33</sup>

This scathing indictment of the lawyer discipline system is widely credited with moving state courts and the organized bar to action.<sup>34</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1. The Clark Report has been hailed by the ABA's Center for Professional Responsibility as potentially the most widely quoted and influential document in the field of professional discipline and deserving of much of the credit for the interest in discipline and its evolution as a legal specialty. It is also significant to note that some of the policy recommendations in the Clark Report have been superseded by the McKay Report and the current ABA Model Rules for Lawyer Disciplinary Enforcement.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 1-2.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3.

<sup>34</sup> Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 3 (1998) (noting that a few years after the Clark Report, the ABA adopted the Standards for Lawyer Discipline and Disability Proceedings, streamlining the disciplinary process, including members of the public on disciplinary boards, and making the disciplinary system more public).



*b. The McKay Report*

Following publication of the Clark Report in 1970, the ABA increased its emphasis on professional regulation by establishing the Standing Committee on Professional Discipline in 1973 to assist the judiciary and the bar in the development, coordination, and strengthening of disciplinary enforcement throughout the United States.<sup>35</sup> In 1987, the National Organization of Bar Counsel urged the Standing Committee on Professional Discipline to initiate a nationwide study to evaluate developments in professional discipline which had taken place since the Clark Report was issued two decades earlier, and to provide a model for responsible regulation of the legal profession into the twenty-first century.<sup>36</sup> In February 1989, then ABA President Robert D. Raven appointed the Commission on Evaluation of Disciplinary Enforcement, commonly known as the McKay Commission.<sup>37</sup> The Commission's charge was to: (1) study the functioning of professional discipline systems; (2) examine the recommendations of the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) and the results of later reforms; (3) conduct original research, surveys and regional hearings; (4)

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<sup>35</sup> Center for Prof'l Responsibility, Standing Committee on Professional Discipline, <http://www.abanet.org/cpr/regulation/scpd/home.html> (last visited May 22, 2007). The Discipline Committee promotes improved lawyer and judicial disciplinary systems throughout the United States in a variety of ways. *Id.* One of the primary ways they accomplish this is through a program of lawyer discipline system consultations. *Id.* The ABA Standing Committee on Professional Discipline has developed criteria adapted from the Model Rules and from the 1992 *McKay Report*. *Id.* Upon invitation from a jurisdiction's highest court, the Standing Committee sends a team of individuals experienced in the field of lawyer discipline to consult regarding the structure, operation, practice and procedures of the disciplinary system. *Id.* The team utilizes the Model Rules and *McKay Report* as diagnostic tools in reviewing a lawyer disciplinary system. *Id.* Since 1980, more than forty jurisdictions have been reviewed; five of these for the second time. *Id.* The consultations involve a review of the entire lawyer discipline system in a jurisdiction, and as part of the process, the team conducts extensive interviews with lawyers and non-lawyers responsible for, and affected by, the discipline system. *Id.* This includes members of the disciplinary board and hearing committees, disciplinary counsel and staff, members of the court with disciplinary jurisdiction, former respondents, counsel for respondents, complainants, independent lawyers, and representatives of the bar associations. *Id.* Interviews are conducted for the purpose of providing the team with an understanding and broad cross-section of views about the disciplinary process, including areas that need improvement and those that are functioning well. *Id.* The Standing Committee issues its report and recommendations and files it on a confidential basis with the highest court; the court then determines whether to make it public. *Id.* The report is designed to assist those responsible for the administration of the disciplinary process to improve their system by providing constructive suggestions and recommendations based upon the team's investigation, its collective knowledge and experience, and consideration of the Model Rules for Lawyer Disciplinary Enforcement. *Id.*

<sup>36</sup> ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992), [http://www.abanet.org/cpr/reports/mckay\\_report.html](http://www.abanet.org/cpr/reports/mckay_report.html) [hereinafter MCKAY REPORT] (preface).

<sup>37</sup> *Id.* (introduction).

evaluate the state of disciplinary enforcement; and (5) formulate recommendations for action.<sup>38</sup> To accomplish its charge, the Commission had to examine not just complaints that disciplinary systems addressed, but all complaints, since disciplinary agencies dismissed tens of thousands of complaints annually.<sup>39</sup>

In May 1991, the Commission issued its recommendations "to meet the needs of an overburdened system of disciplinary enforcement, a changing legal profession and an increasingly involved public."<sup>40</sup> The Commission found that "revolutionary changes" had occurred in the twenty years since the Clark Report, with most states resolving many of the problems identified by the Clark Committee.<sup>41</sup> It reported that many states moved from conducting lawyer discipline at the local level with no professional staff, where lawyer discipline was deemed to be "a secretive procedural labyrinth of multiple hearings and reviews," to a point where almost all states had established a professional disciplinary staff with statewide jurisdiction, eliminating many of the duplicative procedures.<sup>42</sup> In addition, the Commission found that more than half the states made disciplinary hearings public.<sup>43</sup>

While praising the progress that the state disciplinary systems made since the Clark Report, the Commission was quick to note that there still existed a great need to expand regulation to protect the public and assist lawyers.<sup>44</sup> The Commission found that the public held a "growing mistrust of secret, self-regulated systems of lawyer discipline."<sup>45</sup> It noted that where elected bar officials controlled all or parts of a state disciplinary system, a

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Many complaints received each year are reviewed and screened out, burdening the system and often frustrating complainants. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> MCKAY REPORT, *supra* note 36 (introduction).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* The McKay Commission actually stated that it was convinced that: [S]ecrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary it is a source of great antipathy toward the profession.

*Id.* (from the Increasing Public Confidence In the Disciplinary System section)

conflict of interest was created.<sup>46</sup> Ultimately, the Commission reported that the public viewed lawyer discipline as "too slow, too secret, too soft, and too self-regulated."<sup>47</sup>

In February 1992, the Commission published a report entitled *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement*.<sup>48</sup> This report consisted of twenty-one separate recommendations, and the ABA House of Delegates considered and adopted most of these recommendations later that month.<sup>49</sup> Primary among these was the recommendation to expand the scope of public protection by establishing a system of regulation that includes a central intake office and offering methods of alternative dispute resolution, including mediation, arbitration, negotiation, and conciliation.<sup>50</sup> The Committee also recommended that state courts allocate resources and adopt rules regarding the public's access to the discipline system and sanctions imposed against lawyers in an effort to address the disciplinary systems' inability to inform the public.<sup>51</sup>

### *c. The Conference of Chief Justices and the National Action Plan*

Another national level review of lawyer conduct and professionalism occurred in August 1996, when the Conference of Chief Justices passed a resolution for a *National Study and Action Plan Regarding Lawyer Conduct and Professionalism*.<sup>52</sup> In that resolution, the Conference noted a significant

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<sup>46</sup> MCKAY REPORT, *supra* note 36 (introduction).

<sup>47</sup> *Id.*

<sup>48</sup> MCKAY REPORT, *supra* note 36.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (Recommendation 3). The Committee stated that the central intake office should serve as an initial point of contact whose functions include:

(a) providing assistance to complainants in stating their complaints; (b) making a preliminary determination as to the validity of the complaint; (c) dismissing the complaint or determining the appropriate component agency or agencies to which the complaint should be directed and forwarding the complaint; (d) providing information to complainants about available remedies, operations and procedures, and the status of their complaints; and (e) coordinating among agencies and tracking the handling and disposition of each complaint. *Id.*

The Committee felt that the implementation of alternative dispute resolution methods would be beneficial as it would show the lawyer's willingness to have a third-party assist in resolving the dispute, thus demonstrating his or her intention to act in the client's best interest. *Id.*

<sup>51</sup> *Id.* (Recommendation 12) Specifically, the Committee recommended publishing an annual report of operations of the disciplinary agency and distributing that report to bar associations, the media, and other interested organizations. This, the Committee felt, was not merely a "frill," but "essential to demonstrate the profession's commitment to protecting the public." *Id.* It was also a "fundamental component of the effort to detect lawyer misconduct." *Id.*

<sup>52</sup> IMPLEMENTATION PLAN FOR THE CONFERENCE OF CHIEF JUSTICES': NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 1, <http://www.abanet.org/cpr/>

decline in professionalism in the bar and a consequent drop in the public's confidence in the profession and in the justice system generally.<sup>53</sup> It also noted that, "there is the perception, and frequently the reality, that some members of the bar do not consistently adhere to principles of professionalism and thereby sometimes impede the effective administration of justice."<sup>54</sup> The Conference determined that a strong, coordinated effort by state supreme courts to enhance their oversight of the profession was needed to improve the public's confidence.<sup>55</sup>

Following this resolution, in 1997, the ABA Center for Professional Responsibility and the Conference of Chief Justices co-sponsored a successful two-day conference for state Supreme Court chief justices.<sup>56</sup> That unique forum, and the conference materials distributed to the participants, provided a substantive basis for the formulation of the Conference of Chief Justices' January 1999 *A National Action Plan on Lawyer Conduct and Professionalism*.<sup>57</sup> The National Action Plan, and the report of the proceedings of the Rancho Bernardo conference, were published and disseminated as a single volume in March 1999 to the chief justices, lawyer disciplinary agencies and state bar associations throughout the United States.<sup>58</sup> The National Action Plan set forth programs, initiatives, and recommendations designed to increase the efficacy of the state supreme courts' exercise of their inherent regulatory authority over the legal profession.<sup>59</sup> It also called upon the state supreme courts to "take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs."<sup>60</sup> Ultimately, the National Action Plan focused on improving oversight of attorney discipline systems, advising state supreme courts that public perception of the legal profession could be enhanced by evaluating and improving the complaints process and addressing the causes of those complaints.

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reports/impl\_plan.pdf [hereinafter NATIONAL ACTION PLAN]. The National Action Plan was adopted by the Conference of Chief Justices at the 48th Annual Meeting, August 1, 1996. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* This conference, entitled *Regulatory Authority Over the Legal Profession and the Judiciary: The Responsibility of State Supreme Courts*, was held in Rancho Bernardo, California. *Id.*

<sup>57</sup> NATIONAL ACTION PLAN, *supra* note 52, at 2.

<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Also in the spring of 1999, the ABA Center for Professional Responsibility published *The Lawyer Regulation Handbook*, designed to serve as a companion publication to the *National Action Plan*. *Id.* The *Handbook* is a reference that collects relevant ABA policy and presents samples of exemplary programs, rules and initiatives from around the country that can be employed to stimulate and generate advances in lawyer professionalism and regulation. *Id.*

Despite all of these attempts at reforming the state disciplinary systems, many states are still criticized as failing to meet the standards espoused by the Clark and McKay Commissions.<sup>61</sup>

*d. HALT – An Organization for Legal Reform*

The three previous subsections focus mainly on efforts at the national level by organizations intimately involved with the legal profession, but there are also consumer watch-dog groups that have joined the call to action for legal reform, the largest and oldest of which is HALT.<sup>62</sup>

HALT is extremely critical of the country's lawyer discipline system, stating that the system "continues to be irresponsible at best - and in some cases downright antagonistic - toward consumers."<sup>63</sup> In 2002, HALT conducted the first comprehensive evaluation of the legal establishment's system of self-regulation since the McKay Commission, producing the Lawyer Discipline Report Card to assess whether states had taken any meaningful action to ameliorate the attorney discipline system.<sup>64</sup> Of the fifty-one jurisdictions surveyed, thirty-nine states received overall grades below C, and two states, Pennsylvania and North Carolina, flunked

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<sup>61</sup> HALT, [http://www.halt.org/reform\\_projects/lawyer\\_accountability/discipline\\_system/](http://www.halt.org/reform_projects/lawyer_accountability/discipline_system/) (last visited Apr. 20, 2007) (stating that despite decades of repeated calls for reform, nothing has changed, and recent surveys reveal a system of self-regulation that is still badly broken and in need of urgent reform).

<sup>62</sup> HALT, *About HALT*, [http://www.halt.org/about\\_halt/](http://www.halt.org/about_halt/) (last visited Apr. 20, 2007). Founded in 1978, HALT bills itself as a "non-profit, non-partisan organization of Americans for legal reform." *Id.* It boasts a membership of more than 50,000 members, claiming that it is "[d]edicated to the principle that all Americans should be able to handle their legal affairs simply, affordably and equitably," and stating that it "challenge[s] the legal establishment to improve access and reduce costs in our civil justice system at both the state and federal levels." *Id.*

<sup>63</sup> HALT, [http://www.halt.org/reform\\_projects/lawyer\\_accountability/discipline\\_system/](http://www.halt.org/reform_projects/lawyer_accountability/discipline_system/) (last visited Apr. 20, 2007) (stating that if an attorney discipline agency in this country imposes any discipline, more often than not it takes the form of a slap on the wrist. *Id.* HALT maintains that while some jurisdictions are beginning to make their disciplinary services better known to the public, many states remain hopelessly stranded in the dark ages, without websites or listings in local telephone directories. *Id.* They also feel that agencies deprive consumers of basic information about their lawyer's discipline history. *Id.* HALT is also highly critical of many states that it feels holds disciplinary hearings in secret, and of a few jurisdictions who forbid the complainant from attending. *Id.* HALT also believes that many consumers fear that if they submit grievances, their lawyers may sue them, and when individuals do have the courage to file a complaint, state "gag rules" punish them with fines and imprisonment if they speak about the grievance. *Id.* Finally, HALT maintains that many state agencies delay filing formal charges against attorneys, and if a hearing regarding a lawyer's ethical violations does occur, the judge and jury consists of fellow lawyers. *Id.*

<sup>64</sup> Press Release, HALT, Lawyers' System of Self-Regulation a "National Disgrace" (Oct. 17, 2002), *available at* [http://www.halt.org/about\\_halt/press\\_releases/attorney\\_discipline.php](http://www.halt.org/about_halt/press_releases/attorney_discipline.php). HALT's Report Card grades all fifty states and the District of Columbia in six categories: (1) adequacy of discipline imposed, (2) publicity and responsiveness, (3) openness of the process, (4) fairness of disciplinary procedures, (5) public participation, and (6) promptness. *Id.*

outright.<sup>65</sup> No state earned an A.<sup>66</sup> HALT's Executive Director, James C. Turner, concluded that the "Lawyer Discipline Report Card found a wide pattern of delay, secrecy and toothless sanctions that amount to a national disgrace."<sup>67</sup> He also stated that:

[d]espite decades of calls for reform, the attorney discipline system is still badly broken. Our Lawyer Discipline Report Card found in state after state, the vast majority of consumer complaints are not even investigated or are dismissed on technicalities, while only a handful lead to more than a slap on the wrist. Unscrupulous or incompetent lawyers should be held accountable to the clients they victimize, but the current system fails to do so.<sup>68</sup>

HALT recommended that each state's rules of professional conduct be broadened to ensure that more consumer grievances are reviewed.<sup>69</sup> It also called for the replacement of private reprimands with meaningful public discipline, the abolishment of "gag rules," the establishment of a "non-lawyer majority voice" on disciplinary hearing panels, and the disclosure of the number and basis of grievances filed against a lawyer, as well as the resolution of closed complaints and a summary of all discipline imposed.<sup>70</sup>

On March 8, 2006, HALT issued another Lawyer Discipline Report Card with more than half the states receiving grades below C and no state earning an A.<sup>71</sup> Utah flunked outright and although Connecticut took top honors, it received only a meager B-minus.<sup>72</sup> In the four years that passed

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<sup>65</sup> *Id.* HALT's Report Card showed dismal results in all six categories; among the worst states were Pennsylvania (F), North Carolina (F), Montana (D), Kentucky (D), Alaska (D), Georgia (D), Nevada (D), New York (D) and Virginia (D). *Id.* HALT's Report Card also revealed other practices it felt made the current system irresponsible, including the fact that nine states still had "gag rules" that prohibited legal consumers from speaking about their grievances, that in all states except Iowa, attorneys make up at least two-thirds of the members serving on disciplinary hearing panels, and that many states ban the public from attending hearings. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* HALT reported that according to the ABA's most recent statistics, consumers filed more than 114,000 complaints against lawyers during 2000. *Id.* Attorney discipline agencies imposed public sanctions (i.e., disbarment, suspension, probation or public censure) in only 3,614 cases, or less than 3.5% of all complaints filed, and states like Nevada, New Hampshire, and Wyoming did not disbar a single attorney. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Press Releases, HALT, 2006 Report Card Finds Lawyers Still Not Making the Grade (March 8, 2006), available at [http://www.halt.org/about\\_halt/press\\_releases/2006/report\\_card.php](http://www.halt.org/about_halt/press_releases/2006/report_card.php) (last visited Jan. 11, 2007).

<sup>72</sup> *Id.* The top ten in rank order include Connecticut, Colorado, Arizona, Tennessee, Pennsylvania, Vermont, New Jersey, District of Columbia, Georgia, and

since the 2002 Report Card, twenty-two states deteriorated even further.<sup>73</sup> HALT's Associate Counsel, Suzanne Blonder, stated that:

[a]fter 35 years of ignored calls for reform by our organization, the American Bar Association and ethics scholars across the country, the situation is not getting any better. Consumers today are still not adequately protected by state systems that investigate only a fraction of cases, almost never impose sanctions, attempt to intimidate and silence victims, hide misconduct behind a veil of secrecy, and often take years to process cases.<sup>74</sup>

With respect to communication, HALT found that nine states continue to prohibit the public from attending disciplinary hearings because of rules requiring them to keep the process secret and not allowing the release of information about attorney's disciplinary histories.<sup>75</sup> Furthermore, a handful of states still prohibit consumers from disclosing information until the disciplinary body imposes public discipline in the case.<sup>76</sup>

Despite having a framework for ethical decision-making and a mechanism for enforcing the standards, it appears that the U.S. attorney discipline system continues to suffer from some of the same issues that have plagued it since the early twentieth century.

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Mississippi. *Id.* The worst ten in rank order include Utah, North Carolina, Montana, Hawaii, Alabama, Arkansas, California, South Carolina, Alaska, and Iowa. *Id.*

<sup>73</sup> *Id.* This included Alabama, Alaska, Arkansas, California, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah and Wisconsin. *Id.*

<sup>74</sup> *Id.* The Report Card reveals that only six states—Maine, Massachusetts, Nevada, New Hampshire, West Virginia and Wisconsin—review every grievance, while the average state investigates only fifty-eight percent of the complaints it receives, and investigations rarely result in discipline. *Lawyers Still Not Making the Grade*, THE LEGAL REFORMER (HALT, Washington, D.C.), Jan.-Mar. 2006, at 1, available at [http://www.halt.org/the\\_legal\\_reformer/2006/pdf/TLR-Winter06.pdf#Lawyers\\_Still\\_Not\\_Making\\_the\\_Grade](http://www.halt.org/the_legal_reformer/2006/pdf/TLR-Winter06.pdf#Lawyers_Still_Not_Making_the_Grade). In fact, only twenty-four states impose formal public sanctions—disbarments, suspensions and public reprimands—in just five percent of investigated cases. *Id.* In the average jurisdiction, only 7.8% of investigations yield public discipline, and almost half of the sanctions take the form of private discipline. *Id.*; see *supra* notes 27-60 and accompanying text (explaining the ABA's repeated calls for action in the Clark and McKay Reports).

<sup>75</sup> *Id.* at 4. HALT states that attorney discipline continues to be "shrouded in secrecy" in Alabama, Delaware, Hawaii, Idaho, Iowa, Maryland, Nevada, Utah and Wyoming. *Id.* It does note, however, that Oregon and Arizona have always been the exceptions to the rule, providing consumers with complete records, including whether a grievance was ever filed against a lawyer. *Id.* It also notes that New Hampshire adopted new rules in 2004 allowing disciplinary officials to release complete disciplinary histories. *Id.*

<sup>76</sup> *Id.* (declaring that the Alabama, Arkansas, Delaware, Iowa, Mississippi, South Dakota, Texas and Utah disciplinary systems still utilize biased procedures.) HALT also notes that New Jersey and Tennessee are the only two states that significantly improved in this area, striking down their gag rules as unconstitutional. *Id.*

## 2. *The Disciplinary System Today: Structure and Process*

In order to fully comprehend the survey's results, it is beneficial to have a basic understanding of the structure and process of attorney disciplinary systems throughout the United States.

### *a. Structure*

Every state has an attorney discipline system, but not every system is structured or operates in the same manner.<sup>77</sup> The court of highest jurisdiction in each state has the ultimate authority and responsibility for regulating the legal profession.<sup>78</sup> Authority and responsibility include 1) oversight of the creation, evaluation and maintenance of standards of conduct and professionalism for the legal community, and 2) development and implementation of effective enforcement and public protection mechanisms.<sup>79</sup> In states like Minnesota that have a unified bar,<sup>80</sup> the discipline system is operated by the bar association.<sup>81</sup> In other states, the system is administered by a separate entity appointed by the state's highest court.<sup>82</sup> Regardless of the structure, most lawyer disciplinary agencies perform similar prosecutorial and adjudicative functions and usually consist of statewide boards, hearing committees, disciplinary counsel, and staff and investigators.<sup>83</sup> Although variances in structure exist, the core element of attorney discipline systems remains the same; specifically that the ultimate authority and responsibility for regulation is vested in each state's court of highest jurisdiction.

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<sup>77</sup> See Betty M. Shaw, *Who's Watching the Lawyers?*, MINNESOTA LAWYER, June 05, 2006, at 1, available at <http://www.courts.state.mn.us/lprb/fc06/fc060506.html>; see also Levin, *supra* note 34, at 4 (noting that in at least thirteen states, the responsibility is delegated to a "unified" or mandatory state bar).

<sup>78</sup> NATIONAL ACTION PLAN, *supra* note 52, at 1.

<sup>79</sup> *Id.*

<sup>80</sup> BLACK'S LAW DICTIONARY 61 (2d. Pocket ed. 2001) (defining a unified or integrated bar association as one in "which membership is a statutory requirement for the practice of law").

<sup>81</sup> Minnesota Lawyers Professional Responsibility Board & Office of Lawyers Professional Responsibility, About the Lawyers Professional Responsibility Board, <http://www.courts.state.mn.us/lprb/index.asp?content=aboutLPRB> (last visited May 22, 2007).

<sup>82</sup> See Levin, *supra* note 34, at 10 n. 41 (noting that disciplinary counsel in more than twenty states are affiliated with the state bar).

<sup>83</sup> *Id.* at 10 (citing the 1996 ABA Compilation of Lawyer Disciplinary Proceedings [hereinafter *COLD*] (unpublished compilation on file with the ABA)). In a few jurisdictions, the prosecutorial and adjudicative functions are not housed within the same agency. *Id.*



*b. Process*

Generally speaking, disciplinary proceedings against a lawyer begin when a complaint is filed with the state disciplinary authority.<sup>84</sup> Complaints are often brought by aggrieved clients, but may also be brought by anyone with knowledge of the misconduct.<sup>85</sup> Once a complaint is filed, it proceeds through a three-step process: (1) a merit assessment; (2) investigation of the complaint; and (3) a hearing.<sup>86</sup>

If the complaint is without merit, it might be dismissed by the grievance committee without ever involving the lawyer, but if the complaint appears to have merit, the lawyer will be asked to respond to the charges.<sup>87</sup> The grievance committee will then investigate the charges and will either dismiss the complaint or schedule a hearing on the matter.<sup>88</sup> If the committee dismisses the complaint, the complainant has no right to appeal; the decision is final.<sup>89</sup> If there is a hearing on the complaint, the accused lawyer is entitled to procedural due process, meaning the accused has the right to counsel, to proper notice, to be heard and introduce evidence, and to cross-examine adverse witnesses.<sup>90</sup> In addition, the hearing is limited to the charges made in the complaint.<sup>91</sup> After the hearing, the grievance committee will either dismiss the charges or recommend sanctions.<sup>92</sup> If sanctions are

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<sup>84</sup> RICHARD C. WYDICK, PROFESSIONAL RESPONSIBILITY 8 (Thomson West 2007) (noting that the disciplinary authority is usually the state bar).

<sup>85</sup> *Id.* It is significant to note that under Model R. 8.3(a), a lawyer is subject to discipline for failing to report a disciplinary violation committed by another lawyer if the lawyer *knows* that another lawyer has violated the Rules of Professional Conduct in such a way that it raises a *substantial* question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer (emphasis added). *Id.*; see also ABA MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (1983) (noting that the legal profession prides itself on self-policing, and one element of self-policing is that each member of the group must be obligated to report misconduct by other members); e.g., STATE OF CONNECTICUT JUDICIAL BRANCH, ATTORNEY GRIEVANCE PROCEDURES IN CONNECTICUT 3 (2007), available at <http://www.jud2.ct.gov/webforms/forms/gc008.pdf> (stating that any person may file a complaint).

<sup>86</sup> See generally Wydick, *supra* note 84, at 8; e.g., State Bar of Arizona, What Happens After a Bar Charge is Filed, <http://www.azbar.org/WorkingWithLawyers/discproc.cfm> (last visited Apr. 20, 2007).

<sup>87</sup> See Wydick, *supra* note 84, at 8 (describing the grievance process).

<sup>88</sup> *Id.*; see, e.g., Ohio Office of Disciplinary Council, Grievance Process, <http://www.sconet.state.oh.us/odc/complaint.asp> (last visited Apr. 20, 2007); Alabama Office of General Counsel, Complaint Brochure, [http://www.alabar.org/ogc/complaint\\_brochure.pdf](http://www.alabar.org/ogc/complaint_brochure.pdf) (last visited Apr. 20, 2007).

<sup>89</sup> Wydick, *supra* note 84, at 8; see, e.g., New Jersey Attorney Discipline, Investigation, [http://www.judiciary.state.nj.us/oe/atty\\_disc/atty\\_disc.htm#investigation](http://www.judiciary.state.nj.us/oe/atty_disc/atty_disc.htm#investigation) (last visited Apr. 20, 2007) (stating that there is no appeal if dismissed by committee).

<sup>90</sup> Wydick, *supra* note 84, at 8; see, e.g., Office of Disciplinary Counsel of the Supreme Court of Delaware, The Delaware Lawyers' Rules of Disciplinary Procedure, <http://courts.delaware.gov/odc/dlrpd.htm> (last visited Apr. 20, 2007).

<sup>91</sup> See Wydick, *supra* note 84, at 8; see also *In re Ruffalo*, 390 U.S. 544, 551 (1968).

<sup>92</sup> Wydick, *supra* note 84, at 9.

recommended or disciplinary action is taken, the lawyer is entitled to review of the decision by the state's highest court.<sup>93</sup>

In order to ensure public satisfaction with the attorney disciplinary system, it is imperative that the public understand the structure and process of that system, thus enabling them to file a complaint when necessary. Although not every state attorney discipline system is identical with respect to the structure or processes they follow, the states do have one very important thing in common; the inability of their licensed attorneys, and disciplinary systems, to communicate effectively. By simply following the advice of organizations such as the ABA, HALT, and the Conference of Chief Justices, the states can remedy this issue and enhance the public's perception of the profession.

### III. SURVEY RESULTS

#### A. Introduction

This survey's results do not constitute a comprehensive overview of each jurisdiction's lawyer discipline system, but rather it serves as a snapshot of data determining the number one ethical complaint lodged against lawyers throughout the fifty states and the District of Columbia.<sup>94</sup>

#### B. Methodology

The results of this survey are based on data gathered from state disciplinary agency websites, brochures and annual reports, personal contacts and the 2005 ABA Survey on Lawyer Discipline (SOLD).<sup>95</sup> Some states do

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<sup>93</sup> *Id.* The issue of attorney sanctions transcends the scope of this article; see ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10A (2002) (explaining that which sanction is imposed generally depends on the severity of the misconduct and the presence or absence of mitigating or aggravating circumstances); ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10C (2002) (stating that when imposing sanctions, the court or board shall consider the following factors: (1) whether the lawyer violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the act was intentional, knowing, or negligent; (3) the amount of the actual or potential injury caused; and (4) the existence of any aggravating or mitigating circumstances).

<sup>94</sup> See *infra* notes 218-372 (surveying data from the fifty states and the District of Columbia regarding the most common attorney discipline complaints).

<sup>95</sup> *Id.*; see also Center for Professional Responsibility, 2005 Survey on Lawyer Discipline, <http://www.abanet.org/cpr/discipline/sold/home.html> (last visited Apr. 20, 2007) [hereinafter SOLD]. The Center for Professional Responsibility sends out an annual SOLD questionnaire, which is the only national compilation of statistics about lawyer regulatory systems in the nation. *Id.* The data educates the public, the profession, the news media, and disciplinary agencies about enforcement, caseload and budgetary activity in each jurisdiction. *Id.* It has also been used by disciplinary agencies to effect changes in caseload management, staffing and funding of their lawyer disciplinary systems. *Id.* The 2005 survey was sent to fifty-six lawyer disciplinary agencies and encountered similar difficulties obtaining statistical data that the Clark and McKay Commissions experienced. *Id.*

not maintain statistics or produce any reports; others track every imaginable statistic and posted detailed reports on the internet for public review, including information on the number, types, and practice areas in which complaints were received.<sup>96</sup> Of the states that do not maintain statistical reports of complaints received each year, the majority were willing to discuss the topic, but one state was wholly uncooperative, and refused to provide any information.<sup>97</sup> Of the fifty-one jurisdictions contacted, eight states failed to respond after repeated requests for information.<sup>98</sup>

### *C. Categorizing the Misconduct*

#### *1. Failure to Communicate as Defined by the Courts*

The most common complaint nationwide is a “failure to communicate.”<sup>99</sup> Attorneys must communicate with their clients, and a

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<sup>96</sup> See generally *infra* Table 1 (noting that some states do not maintain annual reports on-line, but were extremely cooperative, sending hard copies upon request).

<sup>97</sup> See *infra* note 242 (describing how one official from the Delaware Office of Disciplinary Counsel stated that they do not maintain any statistics, nor were they willing to discuss anything related to the number or types of complaints that the office received).

<sup>98</sup> See *infra* text accompanying notes 242, 259, 276, 312, 321, 340, 341, and 344 (detailing that Delaware, Idaho, Kentucky, Nebraska, New Mexico, Pennsylvania, Rhode Island, and South Dakota failed to respond to repeated requests for information).

<sup>99</sup> See *infra* notes 218-372 (summarizing the most common complaint by attorneys’ clients); BLACK’S LAW DICTIONARY 115, (2d. Pocket ed. 2001) (defining communication as “the expression or exchange of information by speech, writing, or gestures”). See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16-33 (2000) (stating that when a lawyer establishes an attorney-client relationship, he or she becomes subject to the duties of care, loyalty, confidentiality, and communication; duties for which the failure to discharge has been recognized by all the cases as proper grounds for discipline of the offending attorney as a violation of the oath and duties of an attorney, as violative of the Canons of Professional Ethics, and as being in contravention of the rules of the state bar and the Code of Professional Responsibility); MODEL RULES OF PROF’L CONDUCT R. 8.4(a) (1983) (stating that once the attorney-client relationship has been established, it is professional misconduct for a lawyer to: (1) violate or attempt to violate any of the rules of professional conduct; (2) knowingly assist or induce another person to violate the rules; or (3) use the acts of another person to commit a violation); see also MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 9A (2002) (stating in relevant part that “[i]t shall be a ground for discipline for a lawyer to violate or attempt to violate the [State Rules of Professional Conduct], or any other rules of this jurisdiction regarding professional conduct of lawyers.”)

*In re Seck*, 840 P.2d 516, 518 (Kan. 1992) (handing down a public censure to an attorney for violation of Rule 1.4, stating that “[t]he single most frequently heard complaint against members of the bar is the failure to communicate and keep clients informed of the status and progress of the client’s business,” and that “[e]very client deserves to be kept informed of the status of his affairs being handled by the attorney.”); see also Dustin A. Cole, Attorneys Master Class, Letter to the Editor of the ABA Journal’s E-News, *re: Dare to Care... The Paradigm for the Successful Defense Firm of the 21st Century*, <http://www.abanet.org/media/youraba/200612/article02.html> (last visited Feb. 8, 2007) (stating that the number one client complaint in survey after survey is a failure to communicate, which is a direct result of an overwhelmed, disorganized attorney or

failure to communicate, or at least discharge this duty to others, subjects the attorney to discipline.<sup>100</sup> A failure to communicate subjecting the lawyer to discipline typically arises in one of two instances: (1) where the lawyer fails to inform the client of relevant considerations and factors in the decision-making process and of their rights and interests in the subject matter, thereby denying the client the opportunity to make decisions; or (2) where the lawyer fails to promptly notify his or her client of the receipt of funds, securities, or other properties of the client, thereby denying the client their right to property.<sup>101</sup>

Disciplinary boards are typically not prone to punishing lawyers for minor ethical violations, but are instead, looking for patterns of misconduct or egregious instances of a failure to communicate.<sup>102</sup> In some instances, the failure to communicate with the client is merely one factor the court considers in disciplining the attorney.<sup>103</sup> In other cases, the failure to communicate was the sole cause of the discipline imposed.<sup>104</sup> A review of case precedent evinces that the failure to communicate occurs in many

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incompetent or irresponsible staff); *see also* Law Practice Today, *Communicate with Status Reports*, 1, [http://www.lawbiz.com/lpt\\_1-04.html](http://www.lawbiz.com/lpt_1-04.html) (last visited Jan. 15, 2007) (stating that according to current lawyer complaint studies, the failure to communicate is the most common cause of clients' complaints about attorneys; specifically that lawyers' failure to respond to telephone calls, faxes, and letters).

<sup>100</sup> 7 AM. JUR. 2d *Attorneys At Law* § 60 (2006).

<sup>101</sup> *See e.g., In re Martinez*, 848 P.2d 282, 284 (Ariz. 1993) (holding that failure to keep clients informed about status of cases and retainers, to return documents to clients, and to respond to State Bar's repeated inquiries warrants censure, restitution, probationary terms, and costs); *In re Sullivan*, 422 N.W.2d 724, 725 (Minn. 1988) (holding that dilatory actions in personal injury suit, failing to keep client informed, and failure to cooperate with counsel or court warrants public reprimand and two-year prohibition against acceptance of personal injury cases without co-counsel); *see also* 7 AM. JUR. 2d *Attorneys At Law* § 60 (2006) (including cases in which it was alleged that an attorney made himself or herself unavailable to the clients, for example, by failing to visit the office).

<sup>102</sup> *See* MCKAY REPORT, *supra* note 36 (introduction) (stating that the system does not usually address complaints except where the conduct was egregious or repeated); *see also* CAL. RULES OF PROF'L CONDUCT R. 3-500 Discussion [1] (1997) (stating that while a client must be informed of significant developments in a matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information).

<sup>103</sup> *See, e.g., In re Secrist*, 881 P.2d 1155, 1157 (Ariz. 1994) (holding that attorney's failure to respond to client requests and repeated lack of response to state bar in its investigation warrants disbarment); *Bach v. State Bar*, 805 P.2d 325, 326 (Cal. 1991) (suspending attorney for failure to communicate with client and other ethical violations); *In re Kinnunen*, 502 N.W.2d 773, 774 (Minn. 1993) (stating that failure to pursue clients' claims and return clients' phone calls could warrant indefinite suspension for practice of law); *State Bar v. Schreiber*, 653 P.2d 151, 152 (Nev. 1982) (holding that failure to keep clients advised of progress of their case and to make timely replies to their inquiries and failure to cooperate in investigation warrants public reprimand).

<sup>104</sup> *State v. Martin*, 646 P.2d 459, 463 (Kan. 1982) (stating that failure to communicate with and inattention to needs of a client, standing alone, constitute proper grounds for discipline); *In re Seck*, 840 P.2d 516, 518 (Kan. 1992) (imposing public censure and stating that "[t]he failure to keep a client informed may cause extreme concern and worry to the client and is not a minor infraction of the disciplinary rules.").

different situations and under various circumstances, but the end result is the same; attorneys failing to communicate will be sanctioned.

## ***2. Failure to Communicate as Defined by Each States' Governing Rules***

As previously discussed, not all states have adopted the ABA Model Rules of Professional Conduct, so it is necessary to briefly review how each state defines an attorney's duty to communicate, beginning with the majority approach, and ending with the three states in the minority of jurisdictions.<sup>105</sup>

### ***a. Majority Approach to Defining the Duty to Communicate***

Under the ABA Model Rules of Professional Conduct, a failure to communicate constitutes a violation of Model Rule 1.4 Communication.<sup>106</sup> Rule 1.4(a) states that:

A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.<sup>107</sup>

Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>108</sup> Standing alone, these rules provide the basic guidance that an attorney needs to adequately communicate with a client; however, the comments that follow the ABA Model Rules also serve as a useful resource in interpreting their intent.<sup>109</sup> For instance, the comments emphasize that reasonable communication is necessary to ensure that the client is effectively participating in the representation, which is the underlying rationale of Rule 1.4.<sup>110</sup> They also serve as useful examples to guide attorneys around common pit-falls.<sup>111</sup> Attorneys are directed to consult with the client and secure the client's consent prior to taking any action with respect to a particular decision regarding the representation unless prior authorization has been granted.<sup>112</sup> An example of this is where a

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<sup>105</sup> See *supra* note 22 and accompanying text (listing those states that do not follow the Model Rules).

<sup>106</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2007) [hereinafter R. 1.4].

<sup>107</sup> R. 1.4(a).

<sup>108</sup> R. 1.4(b).

<sup>109</sup> See MODEL RULES OF PROF'L CONDUCT Preamble & Scope [14] (2007)..

<sup>110</sup> R. 1.4 cmt. 1.

<sup>111</sup> *Id.* at cmts. 2-7.

<sup>112</sup> See *id.* at cmt. 2.

lawyer receives an offer of settlement or a proffered plea bargain, and is then directed to “promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable, or has authorized the lawyer to accept or to reject the offer.”<sup>113</sup>

Some of the comments further clarify the rule by explaining that although a lawyer normally needs to consult with the client prior to taking action, exigent circumstances may arise requiring the lawyer to forgo that consultation, such as in a trial, where an immediate decision is required.<sup>114</sup>

Other comments offer tips for avoiding future non-communication complaints, explaining that a lawyer can minimize the occasion on which a client will need to request information simply by regularly communicating with them.<sup>115</sup> They also advise attorneys who are unable to respond promptly to a request for information to direct a member of their staff to acknowledge receipt of the request and advise the client when a response may be expected.<sup>116</sup> Finally, lawyers are encouraged to promptly acknowledge and return client phone calls.<sup>117</sup>

In addition to providing clarification and offering tips, the comments also discuss how to strike the delicate balance between defining the appropriate level of information to be provided, while at the same time fully explaining matters to clients, including circumstances in which the lawyer is justified in delaying the transmission of information.<sup>118</sup>

Together, Rule 1.4 and the comments that follow emphasize the attorney’s multi-faceted role as advisor, consultant, and agent of the client, providing guidelines for ensuring good attorney-client communications.

#### *b. Minority Approach to Defining the Duty to Communicate*

Although the Model Rules have been adopted by a majority of states, New York, Maine, and California have created their own ethical rules.<sup>119</sup> For example, in New York, a failure to communicate would primarily constitute a violation of either Ethical Consideration (EC) 7-8 or 9-2, or Disciplinary Rule (DR) 6-101(A)(3) Failing to Act Competently.<sup>120</sup> EC 7-8 stresses the importance of fully informing the client of all relevant considerations, and encourages the lawyer to discuss all relevant factors and consequences with the client.<sup>121</sup> EC 9-8 states that in order to avoid

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at cmt. 3 (clarifying R. 1.4(a)(2)).

<sup>115</sup> *Id.* at cmt. 4.

<sup>116</sup> Rule 1.4 cmt. 4.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at cmts. 5-7.

<sup>119</sup> *See supra* note 22 and accompanying text.

<sup>120</sup> THE LAW GOVERNING LAWYERS, 102 (Susan R. Martyn et al. eds., Aspen Publishers, Inc. 2006) (providing correlation tables between the Model Rules and the Model Code Related Provisions).

<sup>121</sup> N.Y. ETHICAL CONSIDERATION 7-8 (2006).

misunderstandings and maintain public confidence in the profession, “a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client.”<sup>122</sup> Finally, DR 6-101(A)(3) provides that “[a] lawyer shall not neglect a matter entrusted to the lawyer.”<sup>123</sup>

In Maine, the rule most akin to ABA Model Rule 1.4 is Rule 3.6(a) Conduct During Representation, which states in relevant part that “[a] lawyer shall be punctual in all professional commitments” and “shall take reasonable measures to keep the client informed on the status of the client’s affairs.”<sup>124</sup>

Finally, in California, the failure to communicate is defined in Rule 3-500 Communication, stating that “[a] member [of the bar] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.”<sup>125</sup>

Although there are subtle variations between ABA Model Rule 1.4 and the minority states’ rules of professional conduct, they all share a core element; the imposition of a duty on attorneys to communicate with their clients.

#### ***D. Table 1: State-by-State Survey Results***<sup>126</sup>

This table portrays a graphical representation of the survey’s results, including: whether the source of complaints are combined for reporting purposes;<sup>127</sup> whether the state produces an annual report;<sup>128</sup> whether the state tracks total complaints;<sup>129</sup> and what the top complaint is in each state.<sup>130</sup> A more detailed explanation of each can be found in the Appendix.

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<sup>122</sup> N.Y. ETHICAL CONSIDERATION 9-8 (2006).

<sup>123</sup> N.Y. DISCIPLINARY R. 9-8 (2006).

<sup>124</sup> ME. CODE OF PROF. RESP. 3.6(a) (2006).

<sup>125</sup> CAL. R. PROF. CONDUCT 3-500 (2007).

<sup>126</sup> See *infra* Appendix (providing a detailed explanation of each category by state in Table 1).

<sup>127</sup> See sources cited *infra* Table 1 (noting that states have varying approaches to categorizing complaints for reporting purposes; some track them individually by rule violated, whereas others combine multiple rules into one category or grievance code).

<sup>128</sup> See Levin, *supra* note 34, at 6 n.24 (citing Steele and Nimmer and noting that the methods of reporting data vary significantly from jurisdiction to jurisdiction and from year to year, making the gathering of data and subsequent analysis extremely difficult).

<sup>129</sup> See *infra* Table 1 (noting that some states track all complaints, while some states only track those opened for investigation or resulting in discipline).

<sup>130</sup> See *infra* Table 1.

State	Combine Sources	Annual Report	Track Total Complaints	Top Complaint
AL	NA	No	NA	Willful Neglect
AK	Yes	Yes	Yes	Neglect
AZ	No	Yes	Yes	Communication
AR	No	Yes	Yes	Diligence/Prejudicial Conduct
CA	Yes	Yes	Yes	Performance
CO	Yes	Yes	Yes	Action on the Case
CT	NA	No	NA	Communication
DE	NA	No	NA	UNK
DC	Yes	No	NA	Neglect
FL	Yes	No	NA	Neglect
GA	NA	No	NA	Communication
HA	Yes	Yes	No	Neglect
ID	UNK	UNK	UNK	UNK
IL	No	Yes	Yes	Neglect
IN	Yes	Yes	Yes	Communications/Non-Diligence
IA	Yes	Yes	Yes	Neglect/Incompetence
KA	No	Yes	No	Communication
KY	UNK	UNK	UNK	UNK
LA	NA	No	NA	Communication
ME	No	Yes	No	Interference with Justice & Neglect
MD	Yes	Yes	No	Communication/Lack of Diligence
MA	NA	No	NA	Communication
MI	Yes	Yes	No	Neglect
MN	Yes	Yes	No	Communication
MS	No	Yes	Yes	Communication
MO	No	Yes	No	Communication
MT	Yes	Yes	No	Communication/Performance
NE	UNK	UNK	UNK	UNK
NV	NA	No	NA	Communication
NH	No	Yes	No	Communication
NJ	Yes	Yes	No	Communication
NM	UNK	UNK	UNK	UNK
NY	No	Yes	UNK	UNK
NC	UNK	No	No	Communication
ND	Yes	Yes	No	Improper Conduct
OH	Yes	Yes	No	Communication
OK	Yes	Yes	Yes	Neglect



OR	No	Yes	No	Neglect
PA	UNK	UNK	UNK	UNK
RI	UNK	UNK	UNK	UNK
SC	NA	No	NA	Communication
SD	UNK	UNK	UNK	UNK
TN	Yes	Yes	Yes	Neglect
TX	No	Yes	No	Communication
UT	No	Yes	Yes	Communication
VT	Yes	Yes	No	Neglect/Communication
VA	No	Yes	Yes	Communication
WA	Yes	Yes	No	Communication/Diligence/Competence
WV	No	Yes	Yes	Communication
WI	No	Yes	Yes	Diligence
WY	NA	No	NA	UNK

#### IV. ANALYSIS

##### *A. Diagnosis is the First Step*

It should be noted at the outset that even after the Clark Commission's warning that the status of disciplinary enforcement in the country was a "scandalous situation," gathering the statistics needed for analysis in 2007 was no easier than in 1970.<sup>131</sup>

##### *1. Difficulties with Diagnosis*

In order to resolve a problem, it must first be diagnosed, but given the current state of attorney disciplinary systems, diagnosis is made extremely difficult due to a variety of factors, including: complications in gathering data caused by various states' failure to respond or produce annual reports, discrepancies in tracking complaint statistics, and issues caused by adherence to different Model Rules.<sup>132</sup>

##### *a. Complications Associated with Gathering Pertinent Data*

First of all, many states either voluntarily chose not to provide information,<sup>133</sup> or failed to respond for reasons unknown.<sup>134</sup> Of the fifty-one

<sup>131</sup> See *supra* notes 28 and 30-31 and accompanying text (explaining the status of disciplinary enforcement in 1970 and the Clark Commission's difficulty in gathering meaningful statistics).

<sup>132</sup> See *supra* note 9 and accompanying text (noting Roscoe Pound's statement that the first step in resolving dissatisfaction with the administration of justice is diagnosis).

<sup>133</sup> See *supra* notes 75 and 97 and accompanying text (giving examples of states choosing to be non-responsive).

jurisdictions surveyed, only forty-three responded.<sup>135</sup> For the eight states that did not respond, it can only be assumed that they either do not produce an annual report, or that they do produce a report, but it is not for public dissemination or is only available upon request.<sup>136</sup> Regardless of the reasoning, these states' failure to communicate only further inflames the public's dissatisfaction.<sup>137</sup>

Another major complicating factor is the complete failure of many jurisdictions to produce an annual report of complaint statistics.<sup>138</sup> This survey shows that of the forty-three states responding, thirteen did not produce any type of report containing the number or source of complaints.<sup>139</sup> Part of this is attributable to the fact that some of these states do not have the capability to produce a report,<sup>140</sup> and part of it is due to the failure of the state high courts to place an emphasis on gathering data and communicating with the public.<sup>141</sup>

#### *b. Complications Caused by Idiosyncrasies within Systems*

Even among states that produce reports, gathering data and conducting analysis is extremely difficult because the methods of reporting data vary significantly from jurisdiction to jurisdiction and from year to year.<sup>142</sup> Many states' tracking statistics combine multiple violations into one complaint, but record only one rule violation.<sup>143</sup> In addition, complications are caused by states operating under different Model Rules and within

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<sup>134</sup> See *supra* note 98 and accompanying text (identifying the eight states that failed to respond to repeated requests for information).

<sup>135</sup> See *supra* Table 1 (showing that the following states provided information: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

<sup>136</sup> See *supra* notes 132-159 and accompanying text.

<sup>137</sup> See *supra* notes 30, 99 and accompanying text (finding a lack of communication as the greatest source of popular dissatisfaction).

<sup>138</sup> See *supra* Table 1.

<sup>139</sup> See *supra* Table 1 (reflecting that New York produces a report but does not track the nature of the violation, and noting that the following states do not produce any reports: Alabama, Connecticut, District of Columbia, Florida, Georgia, Louisiana, Massachusetts, Nevada, New York, North Carolina, South Carolina, Vermont, and Wyoming).

<sup>140</sup> See *infra* notes 325 and 372 and accompanying text (explaining that they do not possess the requisite resources to conduct statistical analysis and reporting).

<sup>141</sup> See *supra* notes 74-75 and accompanying text (noting that many states remain "shrouded in secrecy").

<sup>142</sup> See *supra* note 128 and accompanying text.

<sup>143</sup> See sources cited *infra* Appendix (noting in most instances, a complaint generally alleges multiple allegations of professional misconduct); *but see infra* note 235 (citing an instance in Colorado where one attorney received 256 separate complaints that were combined into one investigation and closed as one matter).

different disciplinary systems,<sup>144</sup> making the ascertaining of the top complaint even more difficult because they utilize different methods for defining violations for reporting purposes.<sup>145</sup> For example, many states simply track the violation as it corresponds to the applicable rule, thus a failure to communicate would be tracked as a violation of Rule 1.4 in states adopting the Model Rules.<sup>146</sup> Some states, however, utilize special “grievance codes” in which multiple rules of professional conduct are comprised of one code, making it more difficult to sort out the actual gravamen of the complaint.<sup>147</sup> For example, Alaska utilizes a series of fifteen grievance codes, of which a failure to communicate results in a violation of Rule 1.4 and is encompassed in grievance code 03 Neglect.<sup>148</sup> Similarly, California combines allegations of professional misconduct into one of eight categories, and a failure to communicate is included in the performance category.<sup>149</sup> Another issue that exacerbates the aforementioned problems is that oftentimes complaints recorded under other rules are a direct result of a failure to communicate; thus although Rule 1.4 does not receive “credit” for the complaint, it is so inextricably intertwined that it is truly the sole cause of the complaint.<sup>150</sup>

Finally, gathering data was also complicated by the fact that eighteen states only report data regarding complaints opened for investigation or resulting in discipline, and do not report total complaints received.<sup>151</sup> This is a significant problem, especially considering that disciplinary agencies dismiss tens of thousands of complaints annually.<sup>152</sup>

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<sup>144</sup> See *supra* notes 22 and 77-82 respectively, and accompanying text (stating that not every disciplinary system operates or is administered, in the same manner).

<sup>145</sup> See sources cited *infra* Appendix (giving various examples of state approaches to defining a violation of a failure to communicate for reporting purposes).

<sup>146</sup> See *infra* Appendix (listing those states that record complaints in accordance with the Model Rules, including: Arizona, Arkansas, Illinois, Missouri, New Hampshire, Texas, Utah, and West Virginia).

<sup>147</sup> See *supra* Table 1 (listing the states that combine rule violations or complaints into one category as follows: Alaska, California, Colorado, District of Columbia, Florida, Hawaii, Indiana, Iowa, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Vermont, and Washington).

<sup>148</sup> See *infra* notes 223-225 and accompanying text (explaining the grievance code system in Alaska).

<sup>149</sup> See *infra* notes 232-233 and accompanying text (explaining the system of categorization in California).

<sup>150</sup> See *infra* note 275 and accompanying text (recognizing the ties that communication has to many other rule violations, including scope of representation, fee disputes, accounting issues, negligence, diligence, and procrastination).

<sup>151</sup> See *supra* Table 1 (listing the states that track data only as it relates to investigations opened, docketed, or resulting in sanctions, and not reporting data regarding total complaints received, including: Hawaii, Maine, Maryland, Kansas, Massachusetts, Minnesota, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Texas, and Washington).

<sup>152</sup> See *supra* note 39 and accompanying text; see also *supra* note 95 (showing that SOLD reports that 111,885 complaints were dismissed in 2005; 65,481 of which were summarily dismissed for lack of jurisdiction, and 46,404 were dismissed after investigation).

## 2. Totals Reported

Even after recognizing all of the difficulties associated with gathering the data, the final tally shows that twenty-two states reported a failure to communicate as the number one complaint.<sup>153</sup> Ten states could not be definitively determined because their reports combine multiple complaints into one category, making it impossible to say whether a failure to communicate was the number one complaint barring confirmation from the respective disciplinary agency.<sup>154</sup> However, the failure to communicate was included as a subset of the recorded category in all ten of these states.<sup>155</sup> The eight states reporting that a failure to communicate was not the number one source of complaints did not track total complaints, but based their findings on the number one complaint for which discipline was imposed.<sup>156</sup> Despite these problems of interpretation, it is obvious that the failure to communicate is, either explicitly or implicitly, the number one problem facing attorneys today.

While this article diagnoses the failure to communicate at the individual level, it also exposes a major subset of that issue, which is the lack of a national standard for recording and reporting statistics within the various attorney discipline systems.<sup>157</sup> Without this capability, state attorney discipline systems cannot adequately diagnose issues within their systems, making it even more difficult to fix the problems at either the individual attorney's level, or at the systemic level.<sup>158</sup> The next section of this article offers recommendations that the legal profession as a whole can follow to improve communications at all levels.<sup>159</sup>

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<sup>153</sup> See *supra* Table 1; see also *infra* Appendix (listing the states that definitively reported that communication was the number one source of all complaints, including: Alabama, Alaska, Arizona, California, Connecticut, Georgia, Hawaii, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, South Carolina, Texas, Utah, Virginia, Washington, and West Virginia).

<sup>154</sup> See *supra* Table 1 (showing states maintaining statistics but combining multiple violations into one category including: District of Columbia, Indiana, Iowa, Maryland, Michigan, Montana, North Dakota, Oklahoma, Tennessee, and Vermont).

<sup>155</sup> See *infra* Appendix.

<sup>156</sup> See *supra* Table 1 (listing those states reporting that a failure to communicate was not the number one complaint, including: Arkansas, Colorado, Florida, Illinois, Maine, North Dakota, Oregon, and Wisconsin).

<sup>157</sup> See *supra* notes 99 and 31-32 and accompanying text (noting that a failure to communicate is the number one source of complaints, but ascertaining that source is extremely difficult due to the fact that there is no standard for tracking or reporting statistics).

<sup>158</sup> See *supra* notes 9, 31-32 and accompanying text (stressing the importance of diagnosis the importance of implementing a system for conducting statistical analysis).

<sup>159</sup> See *infra* notes 161-216 and accompanying text (discussing systemic and individual recommendations for improving communication).

## **B. Recommendations for a Systemic Cure to the Failure to Communicate**

Fixing the failure to communicate at the systemic level is long overdue, and although not an easy task, it is one that is critical to regaining the public's confidence.<sup>160</sup> Fixing the systemic issues can be accomplished by taking three steps: developing and implementing a national standard for statistical analysis and reporting, incorporating lessons learned from successful alternative dispute resolution programs, and ensuring continued support from the national level organizations charged with overseeing ethics and professionalism within the legal profession.

### ***1. Develop and Implement a National Standard for Statistical Analysis and Reporting***

#### ***a. Emphasis by the State High Courts***

Since the court of highest jurisdiction in each state has the ultimate authority and responsibility for regulating the legal profession, the impetus lies on them to develop a state standard for recording and reporting grievance statistics.<sup>161</sup> This is not to say that the state high courts have to do it alone; rather, they should engage national level organizations, such as the ABA's Center for Professional Responsibility, the Conference of Chief Justices, and HALT, to develop a national standard for recording and reporting statistics.<sup>162</sup> Currently, the lack of a national standard results in the states having either no reporting system in place, or having a system that tracks statistics in an incomplete or confusing manner.<sup>163</sup> As a result, in many instances, the states themselves cannot adequately diagnose their own problems, nor can outside entities assist them in these efforts.<sup>164</sup> Ultimately, the inability to diagnose the problem results in an inability to fix the problem, and this circularity lends to the public's distrust of the system as a whole.

While groups like the ABA, the Conference of Chief Justices, and HALT should be commended for their efforts aimed at reforming the system, it is painfully evident that many states have failed to adopt the

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<sup>160</sup> See *supra* note 3 and accompanying text (inferring that the failure to fix the problems with the attorney discipline system could lead to undesirable results).

<sup>161</sup> See *supra* notes 78-79 and accompanying text (describing the state courts of highest jurisdiction as the ultimate authority for regulation of the legal profession).

<sup>162</sup> See *supra* notes 25-93 and accompanying text.

<sup>163</sup> See *supra* note 151 and accompanying text (describing the various approaches states take in maintaining complaint statistics).

<sup>164</sup> See *supra* notes 30-31 and 95 and accompanying text (describing the difficulties that the Clark Commission and the ABA encountered gathering complaint statistics).

recommendations of these groups.<sup>165</sup> The development and implementation of a national standard for tracking and reporting statistics can only be accomplished if the state high courts adhere to the admonishment of the Conference of Chief Justices, and assume the leadership role necessary to ensure that a standard is developed and enforced within their jurisdictions.<sup>166</sup>

*b. Development of a Joint National Commission*

Once the state courts agree to the development and implementation of a national standard, the question then becomes what that standard will be.<sup>167</sup> The development of such a standard should be accomplished through the concerted efforts of the aforementioned groups via a joint commission, thus lending legitimacy to the endeavor and ensuring ownership by the state and national level bar associations, as well as legal reform agencies throughout the country.<sup>168</sup>

For instance, a model system could be based on a state already ranking high on HALT's report card.<sup>169</sup> Connecticut received the highest overall ranking in 2006, but since there is still room for improvement, this model could be enhanced by incorporating best practices from other states ranking high on the report card.<sup>170</sup> For example, Illinois has an extremely detailed tracking and reporting system that could serve as a model for the national standard and be incorporated into the overall model from Connecticut to maximize the best practices of both systems.<sup>171</sup> The Illinois system is extremely detailed, tracking the total number of docketed investigations, the total number forwarded to a hearing board, and the total number resulting in sanctioning.<sup>172</sup> This is important because it presents a total picture, as opposed to those states that ignore the total number of complaints received and merely track data based solely on complaints

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<sup>165</sup> See *supra* notes 44-47, 60, and 63 and accompanying text (highlighting the findings of the Clark and McKay Commissions, as well as the recent criticisms of HALT).

<sup>166</sup> See *supra* note 60 and accompanying text (calling for the state high courts to take a leadership role in meeting the needs of lawyer professionalism in their jurisdictions).

<sup>167</sup> See *supra* notes 31-32 and accompanying text (discussing the varying standards throughout the country).

<sup>168</sup> See *supra* notes 25-93 and accompanying text (discussing the efforts of various organizations to reform the attorney discipline systems).

<sup>169</sup> See *supra* note 71 and accompanying text (providing a link to the HALT Report Card listing each state's individual and overall grades).

<sup>170</sup> See *supra* note 72 and accompanying text (noting that Connecticut took top honors and listing the top ten states on the HALT Report Card); see also *infra* note 238 (showing that Connecticut received a B-, the highest grade on the report card).

<sup>171</sup> See *infra* note 261 and accompanying text (noting that Illinois' annual report is one of the most detailed of all those surveyed).

<sup>172</sup> See *infra* notes 261-264 and accompanying text (listing the totals for each category).

"docketed" for investigation or resulting in sanctions.<sup>173</sup> Maintaining statistics on total complaints received, regardless of their dispensation, also acknowledges the importance of each individual complainant and communicates a message to the public that the system is looking out for their interests, thereby removing the "shroud of secrecy."<sup>174</sup>

In addition to being extremely thorough and maintaining statistics on complaints from the date of receipt throughout the entire process, Illinois also defines rule violations individually, choosing not to combine multiple rules of professional responsibility into one category, as many states do.<sup>175</sup> This process of categorizing complaints based on individual rule violations is important because it makes gathering data and reporting statistics on specific rules much easier, creating a more accurate picture of what the complaints are, and aiding in the diagnosis of the true source of attorney misconduct.<sup>176</sup>

Finally, Illinois' system of tracking and reporting data is a good model because it specifies which rule violation is receiving credit in instances where multiple rules are inextricably intertwined.<sup>177</sup> In Illinois' annual report, a failure to communicate includes the failure to communicate the basis of a fee, which could be recorded as a violation of Rule 1.5, but is truly a subset of communication, thus giving a more accurate picture of the true complaint.<sup>178</sup>

Based on the strengths of the Illinois and Connecticut models, a national standard for state disciplinary systems could incorporate the best practices of these two states and improve upon their noted weaknesses.

### *c. Publication of Annual Reports*

Once the standard has been determined, and the data has been gathered, an annual report should be distributed to the various state and national bar associations, the media, and other interested organizations.<sup>179</sup> It should also be made available to the public by posting it to the state's

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<sup>173</sup> See *supra* Table 1; see also sources cited *infra* Appendix (explaining that gathering statistics was complicated by the fact that many states only compile data for complaints that were investigated or resulted in sanctioning).

<sup>174</sup> See *supra* note 45 and accompanying text (quoting the McKay Commission's finding that secrecy in discipline proceedings is the greatest source of public distrust of attorney discipline systems).

<sup>175</sup> See *supra* notes 145-149 and accompanying text (describing the difficulties encountered due to states' varying approaches of defining violations for reporting purposes).

<sup>176</sup> See *supra* notes 31-32 and accompanying text (discussing the importance of gathering statistics nationwide).

<sup>177</sup> See *supra* note 150 and accompanying text (explaining that some rules are so intertwined that it is difficult to ascertain which rule is receiving the "credit" for the complaint).

<sup>178</sup> See *infra* note 262 and accompanying text (noting that in Illinois, a violation of a failure to communicate includes a failure to communicate the basis of a fee).

<sup>179</sup> See *supra* note 51 and accompanying text (calling for this exact course of action).

disciplinary agency or high court's website.<sup>180</sup> Posting this information online would not only alleviate any claims that attorney discipline systems are "shrouded in secrecy," but it would also demonstrate that the profession is committed to protecting the public.<sup>181</sup>

Should the development of a national standard prove too difficult for the states to agree upon, the aforementioned recommendations for a statistical analysis and reporting system should be implemented at the state level regardless of the format, as all states have room for improvement, and the American public demands it.<sup>182</sup>

## **2. Incorporate Lessons Learned from Alternative Dispute Resolution Programs**

Even without the adoption of a national standard for tracking statistics, many states can improve communication at both levels by developing a central intake office that solely fields non-communication complaints.<sup>183</sup> This office could serve multiple purposes for the number one source of complaints by: (1) quickly fielding the complaint and serving as an immediate point of contact for the public; (2) screening the complaint for future action; (3) serving as a mediator between the complainant and the attorney in an effort to resolve the issue before a formal complaint is filed; and (4) guiding the complainant through the process or directing them on to alternative means of dispute resolution should their attempts at mediation fail.<sup>184</sup> Once again, states would not have to develop an alternative dispute resolution program in a void, but could adopt the successful approaches currently being used in other states, such as Texas and Washington.<sup>185</sup>

For example, if Utah would have had a system in place in 2005 similar to Texas' Client Attorney Assistance Program (CAAP), it could have potentially decreased total complaints by 1,131 cases.<sup>186</sup> This would have

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<sup>180</sup> See sources cited *infra* Appendix (showing that the majority of states producing a report post it on the web).

<sup>181</sup> See *supra* note 51 and accompanying text (stating that publishing an annual report is not a "frill").

<sup>182</sup> See *supra* note 61 and accompanying text (noting that HALT surveys reveal that the American public views the system as badly broken and desires urgent reform).

<sup>183</sup> See *supra* notes 49-50 and accompanying text (describing the McKay Commission's recommendation that attorney discipline systems implement methods of alternative dispute resolution in an effort to resolve complaints before they reach the formal grievance process).

<sup>184</sup> See *supra* notes 49-50 and accompanying text (describing the McKay Commission's recommendation that states incorporate a central intake office into the current disciplinary system).

<sup>185</sup> See *infra* notes 350-351 and 362-364 and accompanying text (explaining the success of alternative dispute resolution programs in Texas and Washington).

<sup>186</sup> See *supra* note 95 and *infra* notes 350-351 and accompanying text (comparing SOLD's results of Utah's total number of complaints to Texas' CAAP program to show the impact that such an alternative could have on other states).



alleviated a large amount of the work-load as communication accounted for 72.2% of all complaints, translating into more time for the Utah Office of Professional Conduct to investigate much more serious complaints regarding diligence, bar admission, and disciplinary matters.<sup>187</sup>

By establishing a central intake office, states can improve communication both systemically and at the individual attorney level.<sup>188</sup> Systemically, it resolves matters at the lowest level, streamlining the process and freeing up the agency to address more serious issues.<sup>189</sup> It also increases the flow of communication with individual complainants and increases their confidence and satisfaction with the system.<sup>190</sup> Individually, these programs can force attorneys and clients to communicate, thereby negating the need to move forward with a formal complaint.<sup>191</sup> Regardless of what form of alternative dispute resolution a state chooses, the system, attorneys, and clients can only stand to gain from the benefits that such programs bring to bear.

### *3. Continued Support from the National Level*

Although the bulk of the work will occur at the state and local levels, a necessary component of success will be the continued support and involvement of national level organizations, including the ABA and the Center for Professional Responsibility, as well as groups like the Conference of Chief Justices.<sup>192</sup> These organizations can contribute to the improvement of state attorney discipline systems by conducting yearly surveys, commissioning committees like the McKay and Clark Commissions, conducting evaluations and reviews of the state systems, and by providing technical and research assistance to states desiring to improve their analysis and reporting systems.<sup>193</sup>

First, groups like the ABA can support the states by continuing yearly surveys, thereby assisting those states that do not have the capability to compile complaint statistics or produce reports, and maintaining visibility

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<sup>187</sup> See *infra* notes 354-355 and accompanying text (discussing the second and third highest ranking complaints in Utah).

<sup>188</sup> See *supra* notes 49-50 and accompanying text (recommending the establishment of central intake offices).

<sup>189</sup> See *supra* notes 34, 49-50 and accompanying text (discussing how the process is streamlined).

<sup>190</sup> See *supra* notes 49-50 and accompanying text (describing how a central intake office can increase communications).

<sup>191</sup> See *supra* notes 49-50, 350-351, 362-364 and accompanying text (discussing how alternative dispute resolution programs can prevent formal grievances from being filed).

<sup>192</sup> See *supra* notes 25-93 and accompanying text (discussing attorney discipline systems).

<sup>193</sup> See *supra* note 35 and accompanying text (stating that there are a variety of ways the Standing Committee can assist state disciplinary systems).

on these issues for those states that do.<sup>194</sup> These groups can also lend support by conducting another nationwide survey of the attorney discipline system to determine whether the recommendations of the McKay Commission and the Conference of Chief Justices were implemented or ignored.<sup>195</sup> This is crucial as no similar studies have been conducted in well over a decade.<sup>196</sup> Furthermore, the Standing Committee on Professional Discipline must continue to conduct evaluations and reviews of state disciplinary agencies and make recommendations for improvement.<sup>197</sup> It must also continue to provide technical and research assistance in drafting disciplinary rules and in the development of systems capable of producing the type of statistical analysis called for in this article.<sup>198</sup> Even though the attorney discipline system prides itself on being autonomous and self-policing, there is no reason for any state to decline the assistance of national level organizations, nor is there any reason for these groups to cease in their efforts to better the profession.

The development of a standardized format for statistical analysis and reporting, and the implementation of an alternative dispute resolution program, will contribute greatly to fixing many of the systemic problems within the state disciplinary systems, but that is only one part of the solution; the other part lies in addressing the failure to communicate at the individual attorney level.<sup>199</sup>

### *C. Recommendations for a Cure to the Individual Failure to Communicate*

While most lawyers are honest, skillful, and respected by their clients, there is a small minority of attorneys who deserve the complaints and criticism they receive.<sup>200</sup> Fortunately, these attorneys can avoid future complaints of a failure to communicate by simply recognizing that communication is the number one source of client complaints, and by

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<sup>194</sup> See *supra* note 35 and accompanying text (describing the Standing Committee's review process).

<sup>195</sup> See *supra* note 36 and accompanying text (urging the importance of a nationwide study).

<sup>196</sup> See *supra* note 48 and accompanying text (noting that the McKay Report was released in February 1992; more than fifteen years ago).

<sup>197</sup> See *supra* note 35 and accompanying text (discussing the Standing Committee's ability to aid in conducting evaluations and reviews).

<sup>198</sup> See *supra* note 51 and accompanying text (recommending methods for enhancing the states' ability to record and report statistics).

<sup>199</sup> See *supra* note 100 and accompanying text (determining that failing to communicate subjects an attorney to discipline).

<sup>200</sup> See *supra* notes 39, 74 and accompanying text (explaining that disciplinary agencies nationwide dismiss tens of thousands of complaints annually, and few result in discipline); see also *supra* note 95 (showing that SOLD reports of the total number of complaints received nationwide, only an average of 7.2% result in attorneys being charged with an ethical violation).

adhering to the recommendations of the Model Rules and attorneys who have gone before them.<sup>201</sup>

The first step for any attorney is to acknowledge that communication is the number one problem in an attorney-client relationship and to recognize that this facet can be improved by simply following the guidelines given in the comments to the Model Rules.<sup>202</sup> The most obvious step is to communicate regularly with clients.<sup>203</sup> This means returning phone calls, letters, and e-mails in a timely manner.<sup>204</sup> If the attorney is too busy to respond within a reasonable time, he or she should delegate that task to another lawyer or staff member within the firm who can acknowledge receipt of the request and advise the client as to when a response may be expected.<sup>205</sup>

In keeping with the theory of delegating communication responsibilities, attorneys can also develop a "tickler system," in which paralegals or legal assistants maintain a system of reminders, serving to jog the attorney's memory that communication with a client is due and alleviating the attorney from having to remember themselves.<sup>206</sup> A tickler system would not have to be overly elaborate, and could simply consist of reminders placed into the staff member's calendar.<sup>207</sup> It could also be expanded upon by incorporating monthly "status reports."<sup>208</sup> Once again, the "status report" would not have to be overly elaborate, and could consist of a simple one-page form indicating the current status of the client's case or matter.<sup>209</sup> The basic format could be open-ended, but at a minimum, the report should contain the following: (1) the type of case or matter being handled and the general progress to date; (2) the current status of the matter; (3) the account status, indicating whether the account is current or behind schedule; and (4) an area to notate any miscellaneous comments to the client.<sup>210</sup> By providing the client with a monthly status report, attorneys can directly communicate with the client in an efficient and meaningful way,

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<sup>201</sup> See sources cited *infra* Appendix (recommending various means of avoiding client complaints of non-communication).

<sup>202</sup> See *supra* notes 109-118 and accompanying text (providing an overview of the comments to Model Rule 1.4).

<sup>203</sup> See *supra* notes 110-117 and accompanying text (stating that by regularly communicating with clients, a lawyer can minimize the likelihood of receiving a complaint).

<sup>204</sup> See *infra* note 254 and accompanying text (specifically explaining that the crux of failure to communicate complaints in Georgia are due to attorneys' failure to return phone calls); see also *supra* note 111 and accompanying text (stating that "[c]lient telephone calls should be promptly returned or acknowledged").

<sup>205</sup> See *supra* note 116 and accompanying text.

<sup>206</sup> See *infra* note 275 and accompanying text (recommending the use of a "tickler system" to remind attorneys when communication is due).

<sup>207</sup> See *infra* note 275 and accompanying text.

<sup>208</sup> See *infra* note 326 and accompanying text (extolling the virtues of a monthly status report).

<sup>209</sup> See *supra* note 99 and accompanying text (discussing generally how to communicate with status reports).

<sup>210</sup> See *supra* note 99 and accompanying text.

thus preempting any claims of a failure to communicate.<sup>211</sup> It also acts as a marketing tool because it keeps the attorney's name in front of the client. A monthly status report serves to remind the client that the attorney has looked at their file recently, given thought to their case or matter, and that they are working towards their objectives.<sup>212</sup>

Communication can also be enhanced by ensuring that copies of all documents related to a case or matter are sent to the client at the same time that they are filed or mailed, ensuring that the exact terms are included and explained.<sup>213</sup> This holds true for fee agreements and billing statements as well.<sup>214</sup>

Finally, attorneys can preempt many of these complaints by simply exercising common sense and recognizing that there is no such thing as over-communication; in the client's eyes, their case is the most important one, regardless of where it stands in the hierarchy.<sup>215</sup> With that in mind, the attorney should be truthful and timely in all communications, and be careful not to create expectations that simply cannot be fulfilled.<sup>216</sup>

Following these simple steps can assist attorneys in avoiding the most common ethical complaint, resulting in a happier client, and a much more prosperous attorney.<sup>217</sup>

## V. CONCLUSION

It is clear that a solution to the century-long problem associated with attorneys' and state disciplinary systems' failure to communicate is long overdue. It is also evident that devising a remedy will require a concerted effort, with any change to the status quo being difficult to achieve, but the alternative is unwanted interference from outside the profession. In order to avoid this intrusion, the legal profession must address the failure to communicate simultaneously at three different levels.

First, states must heed the call for reform, and take it upon themselves to either implement a system of recording and reporting

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<sup>211</sup> Cf. *supra* note 115-117 and accompanying text (providing guidance with respect to requests for information from clients).

<sup>212</sup> See generally *supra* notes 109-117 and accompanying text (discussing the comments to Model Rule 1.4).

<sup>213</sup> See *infra* note 326 and accompanying text (recommending that copies of all pleadings, motions, letters, and settlement offers or plea bargains, be provided to the client).

<sup>214</sup> See *infra* notes 275 and 326 and accompanying text (recognizing that fee complaints are often generated by a lack of communication regarding the fee arrangement or the lack of details in the billing statements).

<sup>215</sup> See *supra* note 104 and accompanying text (noting that failing to keep a client informed causes extreme concern and worry to the client and is not a minor infraction).

<sup>216</sup> See *supra* note 124 and accompanying text (stressing that a lawyer should be punctual in all professional commitments and take reasonable measures to ensure the client is kept informed).

<sup>217</sup> See *supra* note 99 and accompanying text (inferring that good communication leads to a better attorney-client relationship).

complaint statistics, or fix the problems associated with the current systems. In doing so, states should incorporate lessons learned from successful models, especially those utilizing alternative dispute resolution procedures. In addition, states must make the disciplinary process more transparent to the public by producing annual reports and making them accessible for review. Until these changes occur, states will continue to be unable to diagnose the true cause of complaints or adequately address them, and the public will continue to be suspect of these self-policing systems.

Secondly, at the national level, a standardized system for recording and reporting complaint statistics should be implemented, ensuring uniformity and clearing up much of the confusion caused by each state's idiosyncrasies. This would also aid in the diagnosis of the true cause of complaints nationwide. In addition, national level organizations must continue to provide oversight and technical expertise to aid the states in reforming their systems.

Finally, the simplest solution lies within attorneys themselves. As with the systemic issues, diagnosis is the key. Once attorneys recognize that the failure to communicate is the greatest cause of client complaints throughout the nation, they will be well on their way to avoiding any future complaints. Attorneys can also ensure their success by adhering to the admonitions in the Model Rules and by following the recommendations outlined in this article.

By addressing the failure to communicate at all three levels, the legal profession can give the American public the tools they need to make the right choice when retaining an attorney, and it can regain the stature it once enjoyed as a highly respected profession.

APPENDIX<sup>218</sup>

## Detailed State-by-State Survey Results

**Alabama**<sup>219</sup>

Alabama does not create an annual report, thus it is unknown whether it combines sources or tracks total complaints.<sup>220</sup> However, based on a telephone interview with an employee from the Office of General Counsel, the top three most violated rules were Rule 1.4 Communication, Rule 1.3 Willful Neglect, and Rule 8.4(g) Conduct and Fitness to Practice.<sup>221</sup>

**Alaska**<sup>222</sup>

Alaska produces an annual report, assigning complaints to one of fifteen grievance codes, and the number one complaint is Neglect, accounting for thirty-five of sixty-one complaints received at the end of the third quarter of 2006, or fifty-seven percent of the total complaints received.<sup>223</sup> During a telephone interview, Ms. Welt explained that Neglect is comprised of three categories of violations, including lack of communication, delay, and failure to perform.<sup>224</sup> She also confirmed that of the three categories, lack of communication was the number one complaint.<sup>225</sup>

**Arizona**<sup>226</sup>

Arizona produces an annual report that characterizes complaints by types of alleged conduct and shows that Rule 1.4 Communication (13.37%), Rule 1.3 Diligence (13.21%), and Rule 8.4 Misconduct (12.04%) remain the top three areas of alleged misconduct.<sup>227</sup>

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<sup>218</sup> This appendix includes an alphabetical listing of the fifty states and the District of Columbia and provides a detailed account of the results shown in Table 1.

<sup>219</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Alabama received a D+).

<sup>220</sup> Telephone Interview with Ms. Vivian Freeman, Alabama State Bar Association, Office of General Counsel (Jan. 4, 2007).

<sup>221</sup> *Id.*

<sup>222</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Alaska received a D+).

<sup>223</sup> ALASKA THIRD QUARTER REPORT, CASES BY NATURE OF GRIEVANCE 1 (2006).

<sup>224</sup> Telephone Interview with Ms. Gail Welt, Executive Assistant, Discipline Section, Alaska Bar Association (Jan. 2, 2007).

<sup>225</sup> *Id.*

<sup>226</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Arizona received a B-).

<sup>227</sup> STATE BAR OF ARIZONA, 2005 ANNUAL REPORT - OFFICE OF LAWYER REGULATION iii (2006), available at <http://azbar.org/Discipline/Reports/2005LawyerRegReport.pdf> (noting that Misconduct includes conduct that constitutes a crime, conduct involving dishonesty, fraud or misrepresentation and conduct prejudicial to the administration of justice).

**Arkansas**<sup>228</sup>

In the 2005 findings of the Committee on Professional Conduct Panels, the most common rule violations involved Arkansas Model Rules 1.3 Diligence and 8.4(d) Conduct Prejudicial to the Administration of Justice, accounting for ninety-eight alleged complaints.<sup>229</sup> Rule 1.4 Communication was a close third, accounting for sixty-nine alleged complaints.<sup>230</sup>

**California**<sup>231</sup>

California produces an annual report and utilizes eight categories to evaluate complaints.<sup>232</sup> According to the 2005 Report, violations of Performance, including failure to communicate and failure to perform, accounted for thirty-seven percent of all complaints.<sup>233</sup>

**Colorado**<sup>234</sup>

Colorado produces an annual report that utilizes a grievance code system, but the report does not clarify or define what type of misconduct the categories include.<sup>235</sup> The following were the top four complaints in rank order: (1) Action on the Case at thirty percent (1,019 complaints),

<sup>228</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Arkansas received a D+).

<sup>229</sup> ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT & OFFICE OF PROFESSIONAL CONDUCT, 2005 ANNUAL REPORT 9-11, available at [http://www.courts.state.ar.us/opc/annual\\_report/2005.pdf](http://www.courts.state.ar.us/opc/annual_report/2005.pdf) (last visited Jan. 13, 2007).

<sup>230</sup> *Id.* (combining 1.4(a) and 1.4(b) complaints to arrive at the total lack of communication complaints).

<sup>231</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that California received a D+).

<sup>232</sup> THE STATE BAR OF CALIFORNIA, 2005 REPORT ON THE STATE BAR OF CALIFORNIA DISCIPLINE SYSTEM 3 (2006), available at [http://calbar.ca.gov/calbar/pdfs/reports/2005\\_Annual-Discipline-Report.pdf](http://calbar.ca.gov/calbar/pdfs/reports/2005_Annual-Discipline-Report.pdf) (noting that each of the allegations of professional misconduct contained in the inquiries received in 2005 fell into one of the following eight areas: performance (e.g., failure to perform, failure to communicate); duties to clients (e.g., misrepresentations to client, representation of interests adverse to client's interests); handling of funds (e.g., commingling, misappropriation, failure to properly maintain client trust account records); personal behavior (e.g., commission of a crime, moral turpitude, practice of law while suspended); interference with justice (e.g., advising a client to violate the law, disobedience with a court order); fees (e.g., exorbitant or unconscionable fees, division of fees with non-attorneys); duties to the State Bar (e.g., failure to cooperate in State Bar investigation, failure to comply with discipline); or professional employment (e.g., improper solicitation, improper advertisements)).

<sup>233</sup> *Id.*

<sup>234</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Colorado received a B-).

<sup>235</sup> COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNSEL, 2005 ANNUAL REPORT 34 (2006). There was one instance in Colorado where an attorney received 256 separate requests for investigation for his conduct in one case, and the requests for investigation were filed by 256 different individuals; ultimately the 256 separate requests for investigation were initiated as one investigation and closed as one matter, without imposing discipline. *Id.* at 6.

Mishandling of Funds at twelve percent (385 complaints), Fee Issues at nine percent (324 complaints), and Unprofessional Conduct at nine percent (307 complaints).<sup>236</sup> Lack of Communication only accounted for 291 inquiries, or eight percent of all complaints received by the central intake office, ranking only fifth with respect to total complaints received.<sup>237</sup>

### **Connecticut**<sup>238</sup>

Connecticut does not produce an annual report,<sup>239</sup> but Mr. Mark Dubois, Chief Disciplinary Counsel for the Statewide Grievance Committee, stated that the most common complaint is a violation of Rule 1.4 Communication, which he approximates to constitute between 40-60% of all complaints received.<sup>240</sup>

### **Delaware**<sup>241</sup>

Delaware does not produce an annual report, and when contacted, an employee from the Chief Counsel's office refused to answer any questions or provide any assistance.<sup>242</sup>

### **District of Columbia**<sup>243</sup>

The District of Columbia does not produce an annual report, but upon request, the Office of Bar Counsel (OBC) provided some statistical charts outlining the number of complaints received based on the type of misconduct.<sup>244</sup> Like many other states, the OBC combines violations of the failure to communicate and diligence into the category of neglect.<sup>245</sup> Neglect accounted for 113 complaints, or thirty-three percent of the total, ranking

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Connecticut received a B-).

<sup>239</sup> E-mail from Mr. Michael P. Bowler, Statewide Bar Counsel for the Statewide Bar Grievance Committee, to Stephen E. Schemenauer, Author (Jan. 2, 2007) (on file with author) (explaining that no annual report is produced because Connecticut is not a mandatory bar, and the disciplinary system is overseen by the Judicial Branch of government).

<sup>240</sup> Telephone Interview with Mr. Mark Dubois, Chief Disciplinary Counsel, Statewide Grievance Committee (Jan. 5, 2007); see also E-mail from Michael P. Bowler, *supra* note 239 (confirming that the number one complaint is a lack of communication).

<sup>241</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Delaware received a D+).

<sup>242</sup> Telephone Interview with unnamed employee of the Chief Counsel's Office, Delaware Office of Disciplinary Counsel (Jan. 2, 2007).

<sup>243</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that the District of Columbia received a C+).

<sup>244</sup> DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL, CHART II – MISCONDUCT 1 (available upon request from the District of Columbia Bar, 1250 H Street NW, Sixth Floor, Washington D.C. 20005-5937).

<sup>245</sup> *Id.*



first of the twenty categories.<sup>246</sup> Dishonesty and Prejudicial Conduct ranked second and third respectively.<sup>247</sup>

### Florida<sup>248</sup>

Florida does not produce an annual report, but Ms. Rosalyn Scott did fax a report from the Florida Bar Grievance System showing the discipline statistics for the period 7/01/05-6/30/06.<sup>249</sup> According to that report, Inadequate Communications ranked fifth with a total of fifty-two complaints.<sup>250</sup> The top four complaints in rank order were: (1) Neglect; (2) Interference with the Administration of Justice and Criminal Charges, both tied for second; (3) Personal Behavior; and (4) Contempt.<sup>251</sup>

### Georgia<sup>252</sup>

Georgia does not produce an annual report, but a telephone conversation with Mr. Bill Smith revealed that a lack of communication was the number one complaint in Georgia.<sup>253</sup> Mr. Smith further explained that a failure to return telephone calls was the most common cause of these complaints.<sup>254</sup>

### Hawaii<sup>255</sup>

Hawaii's Office of Disciplinary Counsel's (ODC) 2005 annual report shows that of the 188 docketed complaints, 41 complaints or twenty-two percent, involved alleged neglect of client matters.<sup>256</sup> The ODC primarily defines neglect as a failure to return phone calls or letters, thus confirming that the main issue is a lack of communication from the

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Florida received a C+).

<sup>249</sup> Telephone Interview with Ms. Rosalyn Scott, Executive Assistant to Director of Lawyer Regulation (Jan. 2, 2007).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Georgia received a C+).

<sup>253</sup> Telephone Interview with Mr. William P. Smith, III, General Counsel, State Bar of Georgia (Jan. 2, 2007).

<sup>254</sup> *Id.*

<sup>255</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Hawaii received a D+).

<sup>256</sup> CAROLE R. RICHELIEU, CHIEF DISCIPLINARY COUNSEL, HAWAII DISCIPLINARY COUNSEL'S 2005 REPORT 1 (available upon request from the Hawaii Office of Disciplinary Counsel, 1132 Bishop Street, Suite 300, Honolulu, Hawaii 96813). This area was followed by Incompetence (twelve percent), Failure to Account (six percent), Misrepresentations to Others (five percent), and Conflict of Interest (five percent).

attorney.<sup>257</sup> Neglect was followed by Incompetence (twelve percent), Failure to Account (six percent), Misrepresentation to Others (five percent), and Conflict of Interest (five percent).<sup>258</sup>

#### **Idaho**<sup>259</sup>

Idaho failed to respond to multiple requests for information.

#### **Illinois**<sup>260</sup>

Illinois' report contained some of the most detailed statistics surveyed, showing that the Commission docketed 6,082 investigations in 2005.<sup>261</sup> Of those investigations, the most frequent areas of grievance are Neglect of the client's cause (2,670 complaints), Failure to Communicate with the client (1,463 complaints),<sup>262</sup> and Fraudulent or Deceptive Activity and Excessive Fees (960 complaints).<sup>263</sup> Although the rankings changed slightly with respect to the types of misconduct alleged in complaints that made it before a hearing board, the Failure to Communicate with the client remained in second place at forty-seven cases, constituting thirty-seven percent of all cases filed.<sup>264</sup>

#### **Indiana**<sup>265</sup>

Indiana's 2005-2006 annual report shows that Communications and Non-diligence, which are combined into one category for reporting purposes, account for over thirty percent of all grievances alleged.<sup>266</sup>

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<sup>257</sup> *Id.* at 2; *see also* telephone interview With Ms. Faye Reysnick, Executive Assistant, Office of Disciplinary Counsel (Jan. 3, 2007) (confirming that the main issue of "neglect" is a lack of communication from the Respondent).

<sup>258</sup> *Id.*

<sup>259</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Idaho received a D+).

<sup>260</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Illinois received a C).

<sup>261</sup> 2005 ANNUAL REPORT OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION 5 (2006), *available at* <http://www.iardc.org/2005AnnualReport.pdf>.

<sup>262</sup> *Id.* at 6 (noting that a failure to communicate includes failing to communicate the basis of a fee).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 9. Fraudulent or Deceptive Activity swapped places with Neglect for first place with fifty-three cases for a total of forty-one percent of all cases filed. *Id.* Of the 168 disciplinary cases decided in 2005 that resulted in sanctioning, failing to communicate with the client accounted for sixty-four different sanctions, maintaining its second place ranking behind Neglect, which resulted in sixty-seven sanctions. *Id.* at 14. This means that only four percent of complaints for failure to communicate with the client resulted in any sort of discipline, including disbarment in nine cases, suspension in forty-four cases, censure in nine cases, and reprimand in two cases. *Id.*

<sup>265</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Indiana received a C-).

<sup>266</sup> 2005-2006 Annual Report of the Disciplinary Commission of the Supreme Court of Indiana, Appendix F, <http://www.in.gov/judiciary/discipline/docs/0506-annreprt.pdf> (last visited Jan. 13, 2007).

**Iowa**<sup>267</sup>

For the second successive year, the Iowa Supreme Court Attorney Discipline Board received a record number of new complaints.<sup>268</sup> Iowa tracks complaints and assigns them to one of seventeen categories.<sup>269</sup> The top three complaints in Iowa are Neglect or Incompetence (363), Fraud/Deceit/Dishonesty/Misrepresentation (181), and Conflict of Interest (63).<sup>270</sup> A complaint regarding a failure to communicate would be included within the category of Neglect or Incompetence.<sup>271</sup>

**Kansas**<sup>272</sup>

Kansas produces an annual disciplinary report, but this report only tracks the number of grievances filed and disposed of, and does not track the specific type of complaints.<sup>273</sup> While Kansas Rule of Professional Conduct 1.4 Communication only ranks third in total violations found by the Court,<sup>274</sup> communication is the number one source of disciplinary complaints received by the state's disciplinary board.<sup>275</sup>

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<sup>267</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Iowa received a D+).

<sup>268</sup> IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD ANNUAL REPORT – JULY 1, 2005-JUNE 30, 2006 1 (available upon request from Charles Harrington, Ethics Administrator, Iowa Supreme Court Disciplinary Board, 1111 East Court Ave., Des Moines, IA, 50319).

<sup>269</sup> *Id.* at 5. Table B lists the seventeen categories as follows: Fraud/Deceit/Dishonesty/Misrepresentation, Misappropriation or Mishandling of Money or Property, Criminal Conviction, Other Misconduct, Advertising or Solicitation, Fee Matters, Aiding the Unauthorized Practice of Law, Breaches of Confidentiality, Conflict of Interest, Neglect or Incompetence, Communication with Adverse Party, Trial Publicity or Trial Conduct, Frivolous or Unwarranted Litigation, Threatening Criminal Prosecution, Disrespect of Court, Trust Account Irregularities, Prosecutorial Misconduct. *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Telephone Interview with Mr. Charles Harrington, Ethics Administrator, Iowa Supreme Court Attorney Disciplinary Board (Jan. 2, 2007).

<sup>272</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Kansas received a C-).

<sup>273</sup> STANTON E. HAZLETT, SUPREME COURT OF KANSAS DISCIPLINARY ADMINISTRATOR, ETHICS AND DISCIPLINE REPORT FOR MARCH 1, 2005 TO APRIL 1, 2006 1 (available upon request from The Disciplinary Administrator's Office, 701 SW Jackson St., 1st Floor, Topeka, KS, 66603).

<sup>274</sup> *Id.* Rule 1.4 received seven total violations, third only to Rules 1.3 and 1.1, each receiving eleven and ten total violations respectively. *Id.*

<sup>275</sup> STANTON E. HAZLETT, THE SIX MOST COMMON SOURCES OF DISCIPLINARY COMPLAINTS 1 (2006) (available upon request from the Office of the Disciplinary Administrator). This article lists the other five sources as Attorney Fees, Neglect/Diligence/Procrastination, Commingling of Funds/Conversion, Conflict of Interest/Business Dealings with Clients, and Relationships with Persons Who are Not Clients. *Id.* at 3-11. This article also notes the close relationship that Rule 1.2 Scope of Representation maintains with Rule 1.4 due to the importance of attorney-client communication. *Id.* at 1-2. In addition, it notes that most fee disputes are caused by a lack of good communication and recognizes that

**Kentucky**<sup>276</sup>

Kentucky failed to respond to repeated requests for information.

**Louisiana**<sup>277</sup>

Louisiana does not produce an official report of disciplinary proceedings, but Charles Plattsmier, Chief Disciplinary Counsel for the state, relayed that Lack of Communication is the number one complaint his office receives, followed by Neglect, Fee Disputes, allegations of Ineffective Assistance of Counsel, and Dishonesty and Misrepresentation.<sup>278</sup>

**Maine**<sup>279</sup>

Maine produces an annual report, but this report only tracks the nature of complaints based on those cases heard by the Grievance Commission, and it does not track the nature of all complaints received.<sup>280</sup> Based on the 158 complaints that were opened for investigation the Failure to Communicate only accounted for three complaints.<sup>281</sup> The most common complaints acted on by the Grievance Commission involved Interference with Justice and Neglect, each receiving twenty-nine complaints.<sup>282</sup> These were followed by Conflicts of Interest with eighteen complaints, and Disagreements over Conduct with sixteen complaints.<sup>283</sup>

**Maryland**<sup>284</sup>

Maryland produces an annual report and tracks rules of professional conduct allegedly violated by complaints docketed for further

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communication is the major problem with respect to complaints of neglect, diligence and procrastination. *Id.* at 4-6. Hazlett recommends that attorneys pretend the client is an insurance company that requires the filing of a monthly report indicating major accomplishments for the month and utilize a "tickler system" for the attorney and his secretary. *Id.*

<sup>276</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Kentucky received a C+).

<sup>277</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Louisiana received a C-).

<sup>278</sup> Telephone Interview with Charles Plattsmier, Chief Counsel, Louisiana Office of the Disciplinary Counsel (Jan. 2, 2007).

<sup>279</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Maine received a C+).

<sup>280</sup> MAINE BOARD OF OVERSEERS OF THE BAR, 2005 ANNUAL REPORT 18 (2006), available at <http://www.mebareverseers.org/Home/2005%20Annual%20Report.pdf>.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Maryland received a C-).

investigation.<sup>285</sup> This report combines violations of Rule 1.3 Lack of Diligence and Rule 1.4 Communication together for reporting purposes, making it difficult to ascertain the true cause of the complaints.<sup>286</sup> These two violations were the most common, resulting in eighty-six complaints for an overall total of twenty-two percent.<sup>287</sup>

### **Massachusetts**<sup>288</sup>

Massachusetts does not produce an annual report, but it does maintain a database of admonitions on the Board of Overseers Office of Bar Counsel's website.<sup>289</sup> Based on the Board's breakout, thirty-nine admonitions were given for a multitude of reasons.<sup>290</sup> The most common reason was a violation of Rule 1.3 Diligence with eighteen total admonitions, but this was followed closely by Rule 1.4 Failure to Communicate with sixteen total admonitions.<sup>291</sup> When combined with Rule 1.15(c) Failure to Notify Client of Receipt, an attorney's failure to communicate was the number one cause of admonitions with a total of nineteen.<sup>292</sup>

### **Michigan**<sup>293</sup>

Michigan maintains an annual report produced by the State's Attorney Discipline Board.<sup>294</sup> According to the 2005 Joint Report of the Attorney Disciplinary Board and the Attorney Grievance Committee, conduct characterized by a lack of diligence, lack of competence, and neglect of client matters was the single largest category of professional misconduct,

<sup>285</sup> ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, 31ST ANNUAL REPORT 12, available at <http://www.courts.state.md.us/attygrievance/pdfs/annualreport.pdf> (last visited Jan. 15, 2007).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* This does not include the catch-all "Other Rules," nor files opened for those seeking reinstatement. *Id.*

<sup>288</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Massachusetts received a C).

<sup>289</sup> Board of Bar Overseers Office of Bar Counsel, 2006 Admonitions, <http://www.mass.gov/obcbbbo/admon2006.htm> (last visited May 22, 2007).

<sup>290</sup> *Id.* Most admonitions included violations of more than one Rule. *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* The failure to notify client of receipt actually received credit for the admonition, but the core cause of that admonition in all three cases was the attorney's failure to communicate with the client. *Id.*

<sup>293</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Michigan received a C).

<sup>294</sup> ATTORNEY DISCIPLINE BOARD, 2005 AGC & ADB JOINT ANNUAL REPORT 13 (2006), available at [http://www.adbmich.org/download/2005\\_JOINT\\_ANNUALRPT.pdf](http://www.adbmich.org/download/2005_JOINT_ANNUALRPT.pdf). In 1978, responding to criticism of the dual prosecutorial and adjudicative functions of the State Bar Grievance Board, the Michigan Supreme Court established an entirely new, bifurcated disciplinary system consisting of an investigation and prosecution agency - the Attorney Grievance Commission - and a separate adjudicative body - the Attorney Discipline Board. Michigan Attorney Discipline System, History, 1, <http://www.adbmich.org/ADBMAIN.HTM> (last visited April 25, 2007).

accounting for forty-eight percent of the discipline orders issued in 2005.<sup>295</sup> These cases ranged from an attorney's failure to provide competent or diligent representation on behalf of a single client to, in a few cases, complete abandonment of the attorney's practice.<sup>296</sup> In some cases in this category, the attorney's neglect or mishandling of client matters was accompanied by additional misconduct including misrepresentations to the client about the status of the matter, failure to return unearned fees, and failure to answer requests for investigation.<sup>297</sup>

### Minnesota<sup>298</sup>

According to Mr. Martin Cole, the number one cause of complaints in Minnesota is attributable to a lack of communication.<sup>299</sup> This is bolstered by the Office of Lawyers Professional Responsibility's 2005 annual report, showing that of the seventy-six files opened in 2005, neglect and non-communication (violations of Rules 1.3 and 1.4 respectively) together accounted for sixty-two complaints.<sup>300</sup>

### Mississippi<sup>301</sup>

The Mississippi Bar Association produces an annual statistical complaint report, which is available upon request.<sup>302</sup> The 2005-2006 report shows that of the 454 complaints received, 123, or twenty-eight percent, were the result of a failure to communicate.<sup>303</sup>

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<sup>295</sup> *Id.* at 6. Michigan does not report violations by individual rules, choosing instead to combine them under the general heading of "neglect," which encompasses the concepts of competence, neglect, diligence, and communication found in Rules 1.1, 1.2, 1.3 and 1.4. *Id.* at 13.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Minnesota received a C-).

<sup>299</sup> Telephone Interview with Mr. Martin Cole, Director of the Office of Lawyers Professional Responsibility (Jan. 18, 2007).

<sup>300</sup> Annual Report of the Lawyers Professional Responsibility Board, <http://www.courts.state.mn.us/lprb/olpr06ar.htm> (last visited April 25, 2007) (followed closely behind by violations of Rule 1.15 (Trust and Account Book Records) with fifty-two violations and violations of Rule 8.4(d) (Conduct Prejudicial to the Administration of Justice) with thirty-five violations).

<sup>301</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Mississippi received a C+).

<sup>302</sup> OFFICE OF GENERAL COUNSEL OF THE MISSISSIPPI BAR, 2005-2006 COMPLAINT STATISTICAL REPORT 6 (available upon request from the Mississippi Bar, Post Office Box 2168, Jackson, Mississippi 39225-2168).

<sup>303</sup> *Id.* This was followed close behind by Neglect at 119 complaints, or twenty-six percent. *Id.*

**Missouri**<sup>304</sup>

Missouri produces an annual report, tracking only the top fifteen most common complaints by nature of the violation.<sup>305</sup> According to this report, the number one complaint resulting in a formal investigation was Rule 1.4 Communication, accounting for 245 complaints, or thirty percent of all complaints for 2005.<sup>306</sup> Missouri also tracks complaints that are referred to the Missouri Bar Complaint Resolution Program, and of the seventy-three cases opened in 2005, Client Communication ranked first with thirty-four total complaints.<sup>307</sup>

**Montana**<sup>308</sup>

The Montana Office of Disciplinary Counsel 2005 report shows that about forty-three percent of complaints allege that the lawyer did not act competently or did not perform promised legal services at all, delayed performance beyond what was expected, or failed to adequately communicate with the client.<sup>309</sup> Another eight percent of complaints allege interference with justice by the lawyer for failing to expedite litigation, communicating with represented adversaries, making misrepresentations to a court, disobeying court orders, or filing non-meritorious claims.<sup>310</sup> About ten percent of all cases allege failure by the lawyer to satisfy duties to the client, including disregarding conflicts of interest, improperly withdrawing from representation, failing to turn over files to the client, or settling cases without authority.<sup>311</sup>

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<sup>304</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Missouri received a C-).

<sup>305</sup> MARIDEE F. EDWARDS, CHIEF DISCIPLINARY COUNSEL, REPORT OF THE OFFICE OF THE CHIEF DISCIPLINARY COUNSEL FOR THE YEAR 2005 WITH THE FINANCIAL REPORT OF THE TREASURER OF THE ADVISORY COMMITTEE FUND FOR 2005 40 (2006) (available upon request from the Chief Disciplinary Counsel's office, 3335 American Ave., Jefferson City, MO 65109-1079).

<sup>306</sup> *Id.* Complaints relating to Rule 1.3 Diligence and Rule 8.4(c) Dishonesty, Fraud, Deceit, and Misrepresentation ranked second and third with 231 complaints and 82 complaints respectively. *Id.* The remaining twelve most common complaints and their associated numbers were: Rule 1.7 Conflicts at 51, Rule 1.15 Safekeeping of Property at 49, Rule 1.5 Excessive Fees at 30, Rule 5.5 Unauthorized Practice of Law at 29, Rule 1.16 Improper Withdrawal at 27, Rule 1.1 Competence at 24, Rule 8.4(b) Criminal Activity at 21, Rule 7.2 Advertising at 15, Rule 3.3 Truth to Tribunal at 6, Rule 1.6 Confidentiality at 5, Rule 3.5(b) Ex Parte Contacts at 5, and Rule 5.3(b) Supervisory Responsibility at 5.

<sup>307</sup> *Id.* at 21, 44-45.

<sup>308</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Montana received a D+).

<sup>309</sup> MONTANA OFFICE OF DISCIPLINARY COUNSEL, 2005 ANNUAL REPORT 5, available at [http://www.montanacourts.org/supreme/odc/reports/05\\_Annual%20Report.pdf](http://www.montanacourts.org/supreme/odc/reports/05_Annual%20Report.pdf) (last visited Jan. 18, 2007) (noting that many cases involve allegations of multiple rule violations and due to the limitations of ODC's database application, only one rule violation per case is reported in these statistics, although a lack of communication is a common theme running throughout all of these complaints).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

**Nebraska**<sup>312</sup>

Nebraska failed to respond to repeated requests for information.

**Nevada**<sup>313</sup>

Nevada does not track statistics or produce an annual report, but a telephone conversation with Ms. Kristina Marzec revealed that a failure to communicate was the number one cause of grievances against lawyers.<sup>314</sup>

**New Hampshire**<sup>315</sup>

The New Hampshire Supreme Court Attorney Discipline System 2005 Report shows that of the rules violated in 2005, Rule 1.4 Communication was violated the most with twelve docketed violations, followed by Competence and Safeguarding Client Funds, which tied with ten violations each.<sup>316</sup>

**New Jersey**<sup>317</sup>

In New Jersey, the types of misconduct for which attorneys were disciplined in 2005 are represented in Figure 1 of the 2005 State of the Attorney Disciplinary System Report.<sup>318</sup> Although this report shows that Gross and Patterned Neglect continues as the number one reason for attorney discipline, accounting for seventeen percent (25 of 145) of all violations, the primary source of this neglect arises from a failure to communicate.<sup>319</sup> While New Jersey does not discipline single instances of simple neglect, multiple instances of simple neglect may form a pattern that will constitute unethical conduct.<sup>320</sup>

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<sup>312</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Nebraska received a C-).

<sup>313</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Nevada received a C-).

<sup>314</sup> Telephone Interview with Ms. Kristina Marzec, Executive Assistant, Office of Bar Counsel for the Nevada Bar Association (January 2, 2007).

<sup>315</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that New Hampshire received a C).

<sup>316</sup> NEW HAMPSHIRE ATTORNEY DISCIPLINE SYSTEM, 2005 ANNUAL REPORT 7 (available upon request from the New Hampshire Supreme Court Attorney Discipline System, 4 Park St., Suite 304, Concord, N.H., 03301).

<sup>317</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that New Jersey received a C+).

<sup>318</sup> OFFICE OF ATTORNEY ETHICS, 2005 STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT 13 (2006), available at <http://www.judiciary.state.nj.us/oea/2005AnnualReportFinalCopy.pdf> (last visited April 20, 2007).

<sup>319</sup> *Id.*; see also E-mail from Tom Trethevik, Assistant Chief of Disciplinary Counsel, New Jersey Office of Attorney Ethics, to Stephen E. Schemenauer, Author (Jan. 4, 2007) (on file with author).

<sup>320</sup> See OFFICE OF ATTORNEY ETHICS, *supra* note 318, at 13 (noting that in 2004, this category accounted for twenty-four percent of all sanctions (37 of 154 cases)).



**New Mexico**<sup>321</sup>

New Mexico failed to respond to repeated requests for information.

**New York**<sup>322</sup>

New York releases a report every two years, but the state does not track complaints by nature of the violation, thus there was no data available.<sup>323</sup>

**North Carolina**<sup>324</sup>

Ms. Katherine E. Jean, Counsel for the North Carolina State Bar Association, stated that although the current computer system does not allow the generation of statistical reports outlining alleged violations or discipline imposed, the most common complaints received are: (1) alleged failure to communicate with the client, (2) alleged failure to act with reasonable diligence, and (3) alleged lack of competence.<sup>325</sup> She also stated that the chief cause of a complaint being filed is failure to keep the client fully and consistently informed.<sup>326</sup> She closed by saying that the most common rule violations for which the North Carolina Grievance Committee actually imposes discipline are a failure to communicate with the client and a lack of reasonable diligence, in about equal numbers.<sup>327</sup>

**North Dakota**<sup>328</sup>

Of the 222 complaints opened as files in 2005, only seven involved a failure to communicate, ranking it fifth among total complaints.<sup>329</sup> The top

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<sup>321</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that New Mexico received a C+).

<sup>322</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that New York received a D+).

<sup>323</sup> NEW YORK STATE BAR ASSOCIATION, COMMITTEE ON PROFESSIONAL DISCIPLINE, ANNUAL REPORT ON LAWYER DISCIPLINE IN NEW YORK STATE FOR THE YEARS 2003-2004 v (available upon request from the New York Bar Association, One Elk Street, Albany, N.Y., 12207).

<sup>324</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that North Carolina received a D).

<sup>325</sup> E-mail from Ms. Katherine E. Jean, Counsel, North Carolina State Bar Association, to Stephen E. Schemenauer, Author (Jan. 2, 2007) (on file with author).

<sup>326</sup> *Id.* Ms. Katherine E. Jean noted that even when the lawyer's communication was sufficient to satisfy the requirements of Rule 1.4, the entire matter of having a grievance filed could often have been avoided in the first place if the lawyer had kept the client informed about what was going on by having an unambiguous written fee agreement, providing copies of all pleadings and correspondence, having and communicating to the client a clear plan for completing the legal services, sending regular, periodic written status reports, and sending regular detailed bills to clients who are being billed hourly. *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that North Dakota received a C).

three complaints were Improper Conduct, Incompetent Representation, and Conflict of Interest.<sup>330</sup>

### Ohio<sup>331</sup>

Due to its bifurcated system, Ohio tracks statistics via two different offices: the Office of the Disciplinary Counsel of the Supreme Court of Ohio (DC); and the Board of Commissioners on Grievances and Discipline (CGC).<sup>332</sup> Based on a combined statistical report provided by the DC, forty-nine percent of the 2,246 grievances opened for investigation in 2004 were attributable to Neglect/Failure to Protect Interests of the Client.<sup>333</sup> An employee from the CGC confirmed that this category included allegations of a failure to communicate, which attributed for the vast majority of the forty-nine percent.<sup>334</sup>

### Oklahoma<sup>335</sup>

Oklahoma's 2005 Annual Report shows that the top three areas of misconduct resulting in formal grievances were Neglect (thirty-seven percent), Personal Behavior (fourteen percent), and Misrepresentation (thirteen percent).<sup>336</sup>

### Oregon<sup>337</sup>

According to Oregon's annual report, the following were identified as the top three categories of misconduct most often implicated in those proceedings that were concluded by decision, stipulation or resignation in 2005: Neglect of Legal Matter (thirty-five percent), Dishonesty or

<sup>329</sup> NORTH DAKOTA COURTS, ANNUAL REPORT 2005 49, available at <http://www.court.state.nd.us/court/news/annualreport2005/2005annualreport.pdf> (Improper Conduct, Incompetent Representation, and Conflict of Interest accounted for the top three).

<sup>330</sup> *Id.*

<sup>331</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Ohio received a D+).

<sup>332</sup> Telephone Interview with Mr. Joel Kent, Office of the Disciplinary Counsel of the Supreme Court of Ohio (Jan. 2, 2007) (explaining that the State of Ohio has a bifurcated system; one office maintaining the statistics for the Ohio Supreme Court, and one office maintaining the data for the other thirty-five grievance committees at the county level).

<sup>333</sup> SUPREME COURT OF OHIO BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE, 2005 STATISTICAL REPORT 4 (available upon request from the Board of Commissioners on Grievances and Discipline, 65 South Front St., 5th Floor, Columbus, OH, 43215-3431).

<sup>334</sup> Telephone Interview with Ms. Ruth Dangel, Staff Counsel, Ohio Supreme Court Board of Commissioners on Grievances and Discipline (Jan. 5, 2007).

<sup>335</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Oklahoma received a D+).

<sup>336</sup> OKLAHOMA BAR ASSOCIATION, ANNUAL REPORT OF THE PROFESSIONAL RESPONSIBILITY COMMISSION AND PROFESSIONAL RESPONSIBILITY TRIBUNAL 8 (2006), available at <http://stgwww.okbar.org/members/genccounsel/2006annualreport.pdf>.

<sup>337</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Oregon received a C).

Misrepresentation (thirty percent), and Failure to Respond (twenty-six percent).<sup>338</sup> Failure to Communicate ranked eleventh on the list.<sup>339</sup>

### **Pennsylvania**<sup>340</sup>

Pennsylvania failed to respond to repeated requests for information.

### **Rhode Island**<sup>341</sup>

Rhode Island failed to respond to repeated requests for information.

### **South Carolina**<sup>342</sup>

South Carolina does not maintain an annual report, but Ms. Barb Hinson, with the Office of Disciplinary Counsel, stated that the failure to communicate accounts for the majority of complaints lodged against attorneys in that state.<sup>343</sup>

### **South Dakota**<sup>344</sup>

South Dakota failed to respond to repeated requests for information.

### **Tennessee**<sup>345</sup>

Tennessee produces an annual report and lists the number one category of complaints as Neglect. The Board of Professional Responsibility of the Supreme Court of Tennessee defines Neglect as a failure to prepare, communicate, file appropriate documents, and appear or perform.<sup>346</sup>

### **Texas**<sup>347</sup>

During the year 2005-2006, thirty-four percent (2,552) of the grievances filed were allegations of professional misconduct.<sup>348</sup> Among the

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<sup>338</sup> OREGON STATE BAR, DISCIPLINARY COUNSEL'S OFFICE 2005 ANNUAL REPORT 11 (2006), available at [http://www.osbar.org/\\_docs/resources/DCO2005ar.pdf](http://www.osbar.org/_docs/resources/DCO2005ar.pdf).

<sup>339</sup> *Id.*

<sup>340</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Pennsylvania received a C+).

<sup>341</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Rhode Island received a C).

<sup>342</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that South Carolina received a D+).

<sup>343</sup> Telephone Interview with Ms. Barb Hinson, South Carolina Office of Disciplinary Counsel (Jan. 2, 2007).

<sup>344</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that South Dakota received a C-).

<sup>345</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Tennessee received a C+).

<sup>346</sup> BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, THIRTIETH ANNUAL REPORT 2, available at <http://www.tbpr.org/NewsAndPublications/AnnualReports/Pdfs/annualreport30th.pdf>.

<sup>347</sup> See *supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Texas received a D+).

most common allegations were a failure to communicate, neglect, and complaints about the termination or withdrawal of representation.<sup>349</sup> Although not assigning any values to those complaints, information derived from the Client Attorney Assistance Program (CAAP), shows that the top complaint is a failure to communicate.<sup>350</sup> During 2005-2006, CAAP resolved “approximately 1,131 cases between attorneys and their clients without the need for the filing of a formal grievance.”<sup>351</sup>

#### Utah<sup>352</sup>

The Office of Professional Conduct collects and categorizes statistics every fiscal year and lists the types of complaints received and the sources of those complaints.<sup>353</sup> For informal complaints reviewed in fiscal year 2005 - 2006, allegations of violations of Rule 1.4 Communication accounted for 72.2% of all complaints.<sup>354</sup> Diligence and Bar Admission/Disciplinary Matters ranked second and third respectively.<sup>355</sup>

#### Vermont<sup>356</sup>

According to the Professional Responsibility Board’s annual report, the majority of client concerns involve neglect and lack of communication, although no statistical data is maintained.<sup>357</sup>

#### Virginia<sup>358</sup>

The annual report of the Office of Bar Counsel revealed that the most common type of complaint is Failure to Communicate, followed by Failure to File and Failure to Pay Amounts Due from trust account funds.<sup>359</sup>

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<sup>348</sup> STATE BAR OF TEXAS, COMMISSION FOR LAWYER DISCIPLINE ANNUAL REPORT 10-11 (2006), *available at* [http://www.texasbar.com/Template.cfm?Section=Chief\\_Disciplinary\\_Counsel&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15959](http://www.texasbar.com/Template.cfm?Section=Chief_Disciplinary_Counsel&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15959). The year runs from June 1st through May 31st.

<sup>349</sup> *Id.* at 11.

<sup>350</sup> *Id.* at 18. “CAAP is a statewide dispute resolution program and service of the State Bar of Texas that assists clients and attorneys in resolving minor problems affecting their relationships.” *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Utah received an F).

<sup>353</sup> UTAH OFFICE OF PROFESSIONAL CONDUCT, STATISTICS ON COMPLAINTS RECEIVED 2005-2006 1, *available at* [http://www.utahbar.org/opc/Assets/statistics\\_complaints\\_received.pdf](http://www.utahbar.org/opc/Assets/statistics_complaints_received.pdf).

<sup>354</sup> *Id.* at 2.

<sup>355</sup> *Id.*

<sup>356</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Vermont received a C+).

<sup>357</sup> VERMONT PROFESSIONAL RESPONSIBILITY BOARD, ANNUAL REPORT OF THE PROFESSIONAL RESPONSIBILITY PROGRAM FOR FY 2006 4 (2006), *available at* <http://www.vermontjudiciary.org/Committes/Reports/PRBFY06.pdf>.

<sup>358</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Virginia received a C-).

**Washington**<sup>360</sup>

The Washington Lawyer Discipline System publishes reports in even years, and at the end of odd years, it publishes a statistical supplement.<sup>361</sup> The 2005 supplement shows that violations of Communication/Diligence/Competence accounted for twenty-nine percent of all types of misconduct.<sup>362</sup> Because non-communication is such a major issue in Washington, the Office of Disciplinary Counsel has established a non-communication mediation program to specifically address this issue.<sup>363</sup> According to the 2004 report, the mediation program fielded over 442 client complaints.<sup>364</sup>

**West Virginia**<sup>365</sup>

The West Virginia Office of Disciplinary Counsel (ODC) tracks statistics and of the 653 complaints received in 2006, 402 were due to a failure to communicate.<sup>366</sup> Thirty-five of the complaints resulted in discipline by the West Virginia Supreme Court of Appeals, thirty-two percent of which were due to a failure to communicate.<sup>367</sup> In addition, thirty complaints led to lawyers being issued Investigative Panel Admonishments, twenty seven percent of which were attributable to a failure to communicate.<sup>368</sup>

**Wisconsin**<sup>369</sup>

According to the Office of Lawyer Regulation and Board of Administrative Oversight, the grievances most commonly alleged were a

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<sup>359</sup> VIRGINIA STATE BAR, 67TH ANNUAL REPORT 11, *available at* <http://www.vsb.org/anreport/04-05/67thAnnReport.pdf>; *see also* STANDING COMMITTEE ON LAWYER DISCIPLINE, COMMITTEE REPORT 1, *available at* <http://www.vsb.org/anreport/04-05/LawyerDisc.pdf> (stating that “neglect and failure to communicate remained the most common complaints in fiscal year 2005”).

<sup>360</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Washington received a C).

<sup>361</sup> 2005 STATISTICAL SUPPLEMENT, LAWYER DISCIPLINE IN WASHINGTON 1, *available at* <http://www.wsba.org/info/operations/odc/2005statisticalsupplement060806.doc>.

<sup>362</sup> *Id.*

<sup>363</sup> *See* WASHINGTON OFFICE OF DISCIPLINARY COUNSEL, 2004 ANNUAL REPORT 14, *available at* <http://www.wsba.org/public/complaints/odc2004annualreportpdf.pdf>.

<sup>364</sup> *Id.*

<sup>365</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that West Virginia received a C).

<sup>366</sup> WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, STATISTICS FOR LAWYER DISCIPLINE AND COMPLAINTS: 2006 3-4 (available upon request from the Lawyer Disciplinary Board, 2008 Kanawha Blvd. East, Charleston, W.V., 25311) (noting that complaints usually have more than one violation alleged).

<sup>367</sup> *Id.* at 1.

<sup>368</sup> *Id.* at 2.

<sup>369</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Wisconsin received a C).

lack of diligence (19.3%), a lack of communication (15.5%), and improper advocacy (11.5%).<sup>370</sup>

### Wyoming<sup>371</sup>

The Wyoming Bar Counsel, Ms. Trish Becklinger, stated that her office does not maintain any reports, nor does it track statistics regarding the nature of complaints, and since she was new to the position, she was unable to provide any specifics regarding the number one complaint.<sup>372</sup>

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<sup>370</sup> OFFICE OF LAWYER REGULATION, REPORT OF THE LAWYER REGULATION SYSTEM FOR FY 2005-2006 34, *available at* <http://www.wicourts.gov/about/organization/offices/docs/olr0506fiscal.pdf>.

<sup>371</sup> *See supra* note 71 and accompanying text (noting the web address for the 2006 HALT Report Card which reflects overall grades and shows that Wyoming received a C).

<sup>372</sup> Telephone Interview with Ms. Trish Becklinger, Bar Counsel (Jan. 4, 2007).

