Sending the Message: Using Technology to Support Judicial Reporting of Lawyer Misconduct to State Disciplinary Agencies

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Abstract

Despite the strong public interest in effectively regulating lawyers, neither state nor federal courts have developed adequate policies and practices to ensure that lawyers’ misconduct during litigation proceedings is consistently reported to state disciplinary agencies. The reasons for this inconsistency—and the extent to which it should be considered an actual inadequacy and a problem calling for a rule-based solution—have been the subject of active scholarly discussion and debate. In practical terms, however, one contributing factor may be the inherent inefficiencies involved with the current reporting system. These inefficiencies in the judicial reporting process can be substantially mitigated—and regular reporting thereby supported—through the effective use of electronic database technology. For many years now, courts throughout the United States have been using computer and electronic technology, with its continually accelerating capabilities, to improve their processes for receiving, storing and transmitting judicial filings and records. This so-far successful experience with electronic filing and records creates an opportunity for courts to extend these technological breakthroughs to provide logistical support to a much improved system for judicial reporting of lawyer misconduct.

To accomplish this objective, this Article proposes that state and federal court systems create electronic databases, accompanied and supported by uniform court procedural rules and policies, to receive and store judicial reports of litigation-related lawyer misconduct. These databases should be accessible to and searchable by state disciplinary agencies using universal licensing numbers assigned to individual lawyers. To set the stage for this proposal, Part I

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will examine the history and scope of the ethical code of conduct obligations of state and federal judges to report lawyer misconduct to an appropriate disciplinary authority, as well as reporting pursuant to procedural rules governing civil litigation. Part II will critique the adequacy of the judicial response to these existing reporting provisions, and consider the adverse potential consequences that underreporting may pose to the public interest and to the traditional judicial prerogatives in regulating the practice of law.

Turning to the specifics of the proposed reforms, Part III will recommend how state and federal electronic databases accessible to and searchable by state disciplinary agencies should be organized and structured, and explain the criteria courts should use in deciding when a report is appropriate and how it should be categorized within the databases. Finally, Part IV will offer responses to several procedural questions relating to the implementation of these new reporting systems and databases.

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Introduction

In a 2009 order imposing sanctions on a lawyer in the product liability case *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 1 a federal judge in the District of Minnesota opened with this observation: “There is no wonder why the general public has such a poor perception of attorneys when one examines the conduct of [an identified lawyer] in this litigation. [His] conduct has added to the common detriment of this [case] and sullied the legal profession for us all.” 2 Applying the Minnesota Rules of Professional Conduct (as contemplated by the court’s local rules), the court concluded the lawyer “may have violated” 3 ethical duties by failing to inform his clients about the range of potential settlement allocations within the common fund of $240 million for the multi-district litigation, and by obtaining signed releases from them.

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2. *Id.* at *1.
3. *Id.* at *9. The court stated it “[did] not reach that precise issue [of violations of Minnesota’s Rules 1.4 and 1.8(j)] because it [was] imposing sanctions . . . under its inherent authority.” *Id.* See generally Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (recognizing the existence of a federal court’s inherent power and authority “necessary to the exercise of all others,” and including the power to “control admission to its bar and to discipline attorneys who appear before it”).
without having provided them with adequate information to make an informed decision.4

Invoking its inherent powers5 to control the conduct of litigation, the court imposed a fine in the amount of $50,000 on the lawyer, who was a member of the Texas Bar admitted pro hac vice.6 But the court also took additional, affirmative action to ensure the lawyer’s conduct did not escape the evaluative notice of state disciplinary agencies in the best position to protect the public outside the courtroom. The court directed the clerk to forward a copy of its sanctions order to the Minnesota Office of Lawyers Professional Responsibility, the Office of Chief Disciplinary Counsel for the State Bar of Texas, and to “the appropriate ethics boards in all states or territories in which a multi-district litigation client of the lawyer resided.”7

The steps taken by the federal judge in Guidant to ensure state disciplinary agencies were fully notified about this lawyer’s conduct were extraordinary, but also appropriate and worthy of emulation by other courts and of facilitation through better reporting procedures and more extensive use of technology. Lawyer disciplinary agencies exist and function under the governing authority of the highest court in each jurisdiction,8 and police the geographical and legal situses in which most lawyers provide the majority of their services and potentially place their clients and others at the greatest risk of harm if their misconduct is unrestrained.9 In order to fulfill most effectively their missions of protecting the public, state disciplinary agencies need regular reporting from state and federal

4. Id. at **11-12. The court rejected the lawyer’s argument that the rules and ethical standards of his licensing jurisdiction of Texas should apply, and rejected the opinion offered by his legal expert to support the lawyer’s actions under the ethics rules of Texas, Minnesota, and California. Id. at *8.

5. See supra note 3. See generally Judith A. McMorrow & Daniel R. Coquillette, Federal Law of Attorney Conduct, Moore’s Federal Practice § 807.01[1]-[2] (Matthew Bender 3d ed. 2012) (discussing the common law doctrine of federal courts’ “inherent power” to supervise lawyers appearing before them, and which allows federal courts to supplement the rules of procedure); Judith A. McMorrow, The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice, 58 SMU L. REV. 3, 21 (2005) (“The breadth and flexibility of the inherent powers doctrine is an acknowledgment that not all aspects of litigation misconduct can be accurately identified in advance through rule making.”).

6. Id. at *13.

7. Id. The court also required the lawyer to provide a list of the names and state of residence of each of his clients in the litigation. Id.


9. See generally Leis v. Flynt, 439 U.S. 438, 442 (1979) (observing that “[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the states and district courts within their respective jurisdictions. The states prescribe the qualifications for admission to practice and the standards of professional conduct. They are also responsible for the discipline of lawyers.”); Amy R. Mashburn, A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts, 8 GEO. J. LEGAL ETHICS 473, 552 (1995) (noting that “[r]egulation of the conduct of lawyers who appear in federal courts has been a matter left almost exclusively to the states”).
courts around the country where lawyers within the agencies’ authority appear and practice law.  

Despite the strong public interest in effectively regulating lawyers, neither state nor federal courts have developed adequate policies and practices to ensure that lawyers’ misconduct during litigation proceedings is consistently reported to state disciplinary agencies. The reasons for this inconsistency—and the extent to which it should be considered an actual inadequacy and a problem calling for a rule-based solution—have been the subject of active scholarly discussion and debate.  

In practical terms, however, one contributing factor may be the inherent inefficiencies involved with the current reporting system. Presently, for example, a court making a report of lawyer misconduct in a specific matter must devote scarce judicial resources to (1) deciding whether criteria for reporting have been satisfied; (2) researching and identifying the proper recipients (e.g., disciplinary authorities in one or more jurisdictions where the lawyer is licensed to practice) for the report about the particular lawyer; and (3) assembling and shipping to those recipients the necessary documents relating to the lawyer’s conduct.  

Moreover, in recent decades, not only has the United States experienced enormous growth in the population of lawyers, but it has also become increasingly common for lawyers to practice law in multiple jurisdictions. As more and more lawyers, who are less and less familiar to the judges, pass through courtrooms spread across the United States, the risk escalates that there will be serious gaps in the consistency and completeness of judicial reporting of lawyer misconduct. The existence of these gaps—and the prospect that their growth will accelerate in the years to come—raises substantial concerns about increased risks of harm to the public from lawyer misconduct. And as these reporting gaps and accompanying risks to the public continue to grow in an expanding multijurisdic-

10. See, e.g., United States v. Dominguez, 810 F.2d 128, 129 (7th Cir. 1987) (directing the clerk of the court to send copies of the opinion, which fined a lawyer $1000 for failure to file a timely notice of appeal in a criminal matter, to “the appropriate state disciplinary authorities,” and observing “state bar officials have great responsibilities in this area and have a right to expect our cooperation. Often, they are in a far better position to assess the overall professional performance of the attorney.”).  

11. See infra Part II.  


13. See Michael S. McGinniss, Five Years Later: The Delaware Experience With Multi-Jurisdictional Practice, 10 Del. L. Rev. 125, 125 (2008) (“Cross-border law practice has grown in response to demands created by national and international forces affecting client interests, and has been facilitated by technological advances in information access and communication.”).
tional practice environment, the challenges to our traditional systems for state-based judicial regulation of lawyers will escalate as well.14

These problems, however, can be substantially addressed—and regular and comprehensive reporting thereby supported—through the effective use of electronic database technology. For many years now, courts throughout the United States have been using computer and electronic technology, with its continually accelerating capabilities, to improve their processes for receiving, storing, and transmitting judicial filings and records.15 This so-far successful experience with electronic filing and records creates an opportunity for courts to extend these technological breakthroughs to provide logistical support to a much improved system for judicial reporting of lawyer misconduct.

To accomplish this objective, this Article proposes that state and federal court systems create electronic databases, accompanied and supported by uniform court procedural rules and policies, to receive and store judicial reports of litigation-related lawyer misconduct. These databases should be accessible to and searchable by state disciplinary agencies using universal licensing numbers assigned to individual lawyers.16 To set the stage for this proposal, Part I will examine the history and scope of the ethical code of conduct obligations of state and federal judges to report lawyer misconduct to an appropriate disciplinary authority, as well as reporting pursuant to procedural rules governing civil litigation. Part II will critique the adequacy of the judicial response to these existing reporting provisions, and consider the adverse potential consequences that underreporting may pose to the public interest and to the traditional judicial prerogatives in regulating the practice of law.

Turning to the specifics of the proposed reforms, Part III will recommend how state and federal electronic databases accessible to and searchable by state disciplinary agencies should be organized and structured, and explain the criteria courts should use in deciding when a report is appropriate and how it should be categorized within the databases. Part IV will then offer responses to three procedural questions relating to the implementation of these new reporting systems and databases. First, what procedural steps, if any, is a court constitutionally required to take before sending a report to a lawyer misconduct database? Second,
what rights of appeal, if any, does a lawyer have to prevent judicial reporting of information to a lawyer misconduct database? Finally, should the general public have direct access to the lawyer misconduct databases?

I. Ethical Codes and Procedural Rules on Judicial Reporting of Lawyer Misconduct: Broad Discretion, Limited Obligations

As courts have developed and refined their ethical codes of conduct and procedural rules relating to the reporting of lawyer misconduct over the past several decades, two dominant characteristics of the codes and rules have been apparent: (1) the courts have retained broad discretion over their reporting decisions; and (2) the courts have imposed on themselves only very limited obligations to share information with disciplinary agencies charged to act in the public interest. As context for understanding this Article’s proposals for using database technology to make this flow of information more consistent and effective, it is instructive first to review the history (and shortcomings) of prior rule-based efforts to define the proper role of the judiciary in reporting lawyer misconduct. For this purpose, I will focus on relevant provisions found in the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges, as well as the sanctions available to courts under Rule 11 of the Federal Rules of Civil Procedure.

A. ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges

1. ABA Model Codes of Judicial Conduct (1972 and 1990)

The first ABA Model Code of Judicial Conduct (“Model Code”), published in 1972, encouraged but did not impose any obligations on a judge to “report out” information about lawyer misconduct, regardless of the certainty as to its occurrence or the severity of its nature. Instead, the 1972 Model Code provided only that “[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware,” which, its commentary states, “may include reporting a lawyer’s misconduct to an appropriate disciplinary body.” Although the 1972 Model Code provision was widely adopted (with variations) by the states, in the years that followed a consensus formed that this exhortation for judges to report lawyer misconduct had not resulted in the anticipated increase in referrals to state disci-

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17. See Arthur F. Greenbaum, The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap, 73 Ohio St. L.J. 437, 440 (2012) [hereinafter Greenbaum, Filling the Reporting Gap] (observing that “[w]hile some reporting is mandatory in most systems for both judges and lawyers, the standards imposing the reporting duty are themselves filled with discretionary calls which may, as a practical matter, obviate the duty to report”).

18. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(3) (1972).

19. Id. (emphases added).
plinary agencies.20 In 1984, the ABA Standing Committee on Professional Discipline published an extensive report strongly criticizing the observed tendency on the part of the judiciary to fail to report lawyer misconduct to disciplinary agencies, whose primary task and focus is to take action to protect the public.21 The 1984 report also included a detailed review of seven categories of litigation-related lawyer misconduct the ABA Committee identified as deserving more regular reporting from the courts: (1) prosecutorial misconduct, (2) incompetence and negligence, (3) deception of tribunals, (4) frivolous lawsuits and discovery abuse, (5) in-court misconduct, (6) contemptuous behavior, and (7) conflicts of interest.22

To create at least some judicial obligation for reporting23 and to provide more specificity about the manner in which courts should exercise their discretion,24 in 1990 the ABA revised the judicial reporting provisions to read as follows:

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21. “Unquestionably, because of their legal training and their work, judges observe a great deal of misconduct and are able to identify it as such. Yet as research in the following memoranda demonstrates, judges represent a minority of the complainants even against easily detected serious misconduct directly affecting the administration of justice.” AM. BAR ASS’N, STANDING COMM. ON PROF. DISCIPLINE, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT, Introduction, iii (1984)[hereinafter THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT (1984)]. A revised and updated version of this work was published in 1995 under the same title, as a Handbook for judicial training with an accompanying Discussion Guide. AM. BAR ASS’N, CENTER FOR PROF. RESPONSIBILITY, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT (1995) [hereinafter THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT (1995)].

22. Greenbaum, Judicial Reporting, supra note 20, at 538; THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT, Contents, i (1984), supra note 21.

23. The consensus about deficiencies in the reporting standards of the 1972 Code also included significant concerns about judges’ underreporting of ethical misconduct by other judges. See Leslie W. Abramson, The Judge’s Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence, 25 Hofstra L. Rev. 751, 757 (1997) (discussing the ABA’s concerns about underreporting of judicial misconduct in the wake of corruption scandals in the court system in Cook County, Illinois). Nevertheless, in proposing amendments in 1989, the ABA Standing Committee on Ethics and Professional Responsibility placed special emphasis on the need for improved judicial reporting of lawyer misconduct: “The rule was changed to specifically require judges to report significant misconduct of lawyers and other judges to a disciplinary authority, thereby diminishing the number of instances in which judges take it on themselves to impose sanctions for professional misconduct without such reporting.” Id. at 757 n.12 (quoting LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 25 (1992)).

24. See Abramson, supra note 23, at 766-68 (discussing the ambiguity of the mental state language “may become aware,” and other concerns arising from the “vague language of Canon 3B(3)” of the 1972 Model Code). See also Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions, 32 Hofstra L. Rev. 1425, 1431 (2004) (“Some states edited the language to expand on the obligation, but the language obviously leaves ample room for interpretation. The 1972 version did not distinguish between degrees of misconduct and did not expressly address what constitutes ‘appropriate disciplinary measures’ and when disciplinary action would be appropriate.”).
A judge who receives information indicating a *substantial likelihood* that a lawyer has committed a violation of the Rules of Professional Conduct . . . *should take appropriate action*. A judge having *knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct . . . that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects *shall inform the appropriate authority*.  

Unlike the 1972 Model Code, the 1990 provision (1) expressly created a mandatory ethical duty for a judge to report lawyer misconduct based on thresholds of judicial “knowledge” and the seriousness of the lawyer’s conduct; (2) specified that the ethical obligations are triggered by a lawyer’s violations of the applicable professional conduct rules, rather than a vague standard of “unprofessional conduct”; and (3) provided additional commentary explaining the meaning of the terms “appropriate action” and “appropriate authority.” On the third point, the 1990 Code commentary specified that “[a]ppropriate action may include direct communication with the . . . lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.”

Thus, even under the somewhat stricter 1990 Model Code, judicial discretion remained abundant. If (1) the judge found a “substantial likelihood” of a rules violation but nevertheless lacked “knowledge”—defined in the Model Code Terminology as “actual knowledge of the fact in question [which may be] inferred from circumstances”—or if (2) the judge decided the violation did not raise “a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” (paralleling the lawyer reporting obligation under Rule 8.3 of the ABA Model Rules of Professional Conduct), the judge was not *required* to take any action at all. Rather, the 1990 Model Code merely stated the judge “*should* take appropriate action,” with no mandated response of any kind but instead a discretionary menu of options.

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27. *Model Code of Judicial Conduct* Canon 3D(2) cmt. (1990) (emphasis added). The Terminology section of the 1990 Code defines “appropriate authority” as the “authority with the responsibility for initiation of disciplinary process with respect to the violation to be reported.” *Id.* Terminology.
28. *Model Rules of Professional Conduct* R. 8.3(a) (1983) (providing a lawyer “having knowledge” that another lawyer has committed an ethical violation that “raises a substantial question” as to the lawyer or judge’s honesty, trustworthiness or fitness as a lawyer in other respects” has a duty to report). In 2002, Model Rule 8.3(a) was revised to replace the term “having knowledge” to “who knows,” but it is otherwise identical to the 1983 version.
29. See McMorrow et al., *supra* note 24, at 1432 (“This language essentially punts to judicial discretion. The option to act (‘should’) and the flexible response (‘appropriate action’) are so open-ended as to offer no meaningful guidance to judges as to the judge’s ethical obligation.”).
2. 2007 ABA Model Code of Judicial Conduct

When it undertook the updating and revision process leading to the 2007 ABA Model Code of Judicial Conduct, the ABA Commission on Evaluation of the Model Code of Judicial Conduct had an ideal opportunity to expand and strengthen the mandatory reporting standards—but it chose not to do so.\(^{30}\) Instead, although there were modest stylistic and substantive changes to the text, the basic character of the Model Code as it relates to judicial reporting of lawyer misconduct—allowing broad discretion with only limited mandates—was retained.\(^{31}\)

The ABA made no changes to the core obligation of a judge to report known misconduct by a lawyer raising a substantial question as to the lawyer’s honesty, trustworthiness or fitness; this reporting is mandatory, as it was under the 1990 Model Code.\(^{32}\) If, on the other hand, the judge receives information indicating a substantial likelihood that a lawyer has violated an applicable rule of professional conduct, the 2007 Model Code now mandates (“shall”) rather than exhorts (“should”) the judge to take “appropriate action.”\(^{33}\) Significantly, this “appropriate action” may—but need not—include judicial reporting of the misconduct-related information to an “appropriate authority,” such as a state disciplinary agency.\(^{34}\) In a nod toward the importance of public interest concerns beyond the walls of the courtroom, the ABA did revise the comments in the 2007 Model Code to emphasize more specifically that responding to judicial and lawyer misconduct is important to promoting public respect for the judicial system.\(^{35}\)

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30. See Greenbaum, Judicial Reporting, supra note 20, at 551-58 (providing several possible explanations for the limited revisions to the reporting standard in the 2007 Model Code, including “general satisfaction with the status quo,” a sense of futility in light of the long history of under-reporting, the positive impact of reporting rules even when underenforced, the existence of other priorities in the revision process, and the desire to maintain parallel lawyer and judicial reporting standards).

31. Rule 2.15, entitled “Responding to Judicial and Lawyer Misconduct,” sets out the misconduct-related reporting requirements. MODEL CODE OF JUDICIAL CONDUCT R. 2.15 (2007). A new provision, Rule 2.14 (Disability and Impairment), also addresses the responsibilities of a judge who has a reasonable belief that a lawyer’s or other judge’s performance is impaired by a mental, emotional or physical condition or substance abuse. Id. R. 2.14.

32. Id. R. 2.15(B) (“A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.”).

33. Id. R. 2.15(D) (“A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.”).

34. Id. R. 2.15(D), cmt. [2] (stating that “appropriate action” relating to lawyer misconduct “may include but [is] not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body”).

35. Id. R. 2.15 cmt. [1] (“Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in
over, the ABA added a new Rule 2.16 to the 2007 Model Code, entitled “Cooperation with Disciplinary Authorities,” directing judges in general terms to “cooperate and be candid and honest with judicial and lawyer disciplinary agencies.”

Implementation of the misconduct reporting standards in the 2007 Model Code by the state courts has been quite gradual and pervasively variant. As of May 2012, only seven states had adopted identical language to the new Model Code Rule 2.15 on “Responding to Judicial and Lawyer Misconduct”; sixteen states have adopted similar language; and three states have adopted substantially different language.

3. Code of Conduct for United States Judges

In 1973, the Judicial Conference of the United States adopted the Code of Conduct for United States Judges to provide ethical guidance to judicial officers in the federal courts. For many years, the federal Code contained a reporting standard tracking the 1972 version of the ABA Model Code of Judicial Conduct. In 2009, however, the Judicial Conference adopted a modest revision to the federal Code provision, so that it now states “[a] judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct contravened this Code or a lawyer violated applicable rules of professional conduct.” The Commentary was more substantially revised, but

 efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.”.

36. Id. R. 2.16.


38. Id. at 1. According to the Comparison Chart published by ABA Center for Professional Responsibility Policy Implementation Committee, as of March 20, 2012, Colorado, Montana, Nevada, New Hampshire, Oklahoma, Wyoming and the District of Columbia had adopted Model Code language identical to Rule 2.15. Id. The three states adopting the Model Code language most variant from Rule 2.15 are Delaware, Ohio and Washington. Id.


40. See McMorrow et al., supra note 24, at 1432 n.31 (noting that as of 2004, the federal Code followed “the older [Canon] 3B(3) formulation that ‘[a] judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer’” (quoting CODE OF CONDUCT FOR UNITED STATES JUDGES (as of Aug. 28, 2009)).

41. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3B(5).
nevertheless identifies judicial reporting to disciplinary authorities as simply being one among several viable options available to the judge who receives information about lawyer misconduct. The court’s abundant discretion in responding to lawyer misconduct exists regardless of the quantum of proof for the conduct’s occurrence or the severity of its nature. On the other hand, the Commentary to the 2009 federal Code does at least suggest “responding to a subpoena to testify or otherwise participating in judicial or disciplinary proceedings” as examples of “appropriate action” in response to lawyer misconduct, and echoes the 2007 Model Code by exhorting judges to be “candid and honest with disciplinary authorities.”

B. Rule 11 of the Federal Rules of Civil Procedure

As codes of judicial conduct over the past several decades have incorporated incremental improvements to their lawyer misconduct reporting standards, the rules governing civil litigation have also increasingly emphasized disciplinary consequences—including referrals—as an appropriate judicial response to lawyers’ violations. Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) provides the clearest and most influential example of this development in judicial regulation of litigation-related misconduct committed by lawyers.

As originally adopted in 1938, FRCP 11 authorized “appropriate disciplinary action” by a federal court against a lawyer who engaged in “willful” violations involving frivolous litigation. The 1938 version of FRCP 11 did not specify or provide any examples of what might constitute “appropriate disciplinary action.” In 1983, the United States Supreme Court extensively amended FRCP 11. As to sanctions, the 1983 amendments required that judges “shall impose” sanctions for violations, and removed the requirement that the violation be “willful” on the part of the lawyer. But the amended FRCP 11 in 1983 also seemed to narrow the range of “appropriate” sanctions by providing examples consisting

42. See id. Canon 3B(5), Commentary.
43. See id.
44. Id.
45. See Jeffrey A. Parness, Disciplinary Referrals Under New Federal Civil Rule 11, 61 TENN. L. REV. 37 (1993) (providing an overview of the history and rationale for disciplinary referrals under Federal Rule of Civil Procedure 11). A court may also make a disciplinary referral when imposing a procedural sanction on a lawyer in the context of a criminal proceeding, and there are provisions in law specifically stating this option is available to the judge in an appropriate case. See, e.g., The Speedy Trial Act of 1974, 18 U.S.C. § 3162(b)(E) (West, Westlaw through July 9, 2012) (stating a judge may sanction a lawyer violating its provisions “by filing a report with an appropriate disciplinary committee”).
46. See Parness, supra note 45.
47. Id. at 43; Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 197 (1983).
48. Parness, supra note 45, at 40.
49. Id.
only of those that were compensatory and monetary in nature, such as awards of attorneys’ fees.50

In 1993, the United States Supreme Court again approved substantial changes to FRCP 11, including the sanctions provisions, and these changes remain intact today.51 Now, after providing “notice and a reasonable opportunity to respond,” the court may, in its discretion, impose sanctions upon a lawyer, law firm, or party for violating or being responsible for a violation of FRCP 11(b).52 The court may do so either upon consideration of an opposing party’s motion or on its own initiative, by entering an order describing the specific conduct that appears to violate FRCP 11(b) and directing the lawyer, law firm, or party to show cause why this is not so.53 The rule limits these sanctions to those necessary “to deter repetition of such conduct or comparable conduct by others similarly situated.” 54 The rule now expressly designates as appropriate sanctions “directives of a nonmonetary nature, an order to pay a penalty into court, or . . . an order directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.” 55 The Advisory Committee Note to FRCP 11 also specifically identifies “referring the matter to disciplinary authorities” as an example of an authorized nonmonetary sanction against a lawyer violating the rule.56

Among the more controversial aspects of the 1993 amendments to FRCP 11 was the adoption of a “safe harbor” provision.57 The “safe harbor” permits a party

50. *Id.* at 43.
52. *Id.* at 421-22 (FRCP 11(c)). FRCP 11(b) describes the variety of conduct subjecting a lawyer or an unrepresented party to possible sanctions under the rule:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

53. *Id.* at 420-21 (FRCP 11(c)(1)(B)).
54. *Id.* at 422-23.
55. 1993 Amendments, *supra* note 51, at 423 (FRCP 11(c)(2)) (emphasis added).
56. *Id.* at 587 (Advisory Committee Note).
57. 1993 Amendments, *supra* note 51, at 422 (FRCP 11(c)(1)(A)).
and counsel to avoid or lessen monetary sanctions (and many nonmonetary ones) by correcting or withdrawing the offending pleading or other paper within 21 days after service of the opposing party’s FRCP 11 motion.\textsuperscript{58} It is worth noting, however, that even if the violating counsel has taken advantage of the “safe harbor” process in order to mitigate the conduct in question, a court retains authority under FRCP 11 to order a disciplinary referral.\textsuperscript{59}

Judicial discretion in all aspects of sanctions analysis, including whether to impose any sanctions at all for a violation of the rule, is a paramount value of FRCP 11 that is prominently reflected in the 1993 amendments.\textsuperscript{60} This discretion is sufficiently broad to allow a court that has decided not to take remedial steps intrinsic to the litigation to nevertheless “sanction” the violating lawyer by reporting the conduct to one or more state disciplinary agencies for any action those agencies deem appropriate.\textsuperscript{61} Nevertheless, in the absence of a specific rule requirement, it should by no means be assumed that a court reviewing a lawyer’s conduct and deciding to impose no direct monetary or nonmonetary sanctions will take the step of making a report to an outside authority.\textsuperscript{62} The next Part of this Article will explain why this is so, by exploring the factors that may con-
tribute to judicial underreporting of lawyer misconduct, and the consequences of these omissions.

II. Judicial Underreporting of Lawyer Misconduct: Reasons and Consequences

The normative standards for judges, such as the ABA Model Code of Judicial Conduct and the Federal Rules of Civil Procedure, have increasingly encouraged and, in some cases, required disciplinary referrals as a response to lawyer misconduct. As this evolution in the rules has taken place, legal ethics scholars have studied court opinions and other sources in order to make empirical assessments of the frequency and consistency of such judicial reporting. Empirical study in this area has proved challenging for a variety of reasons, including the often inconspicuous means used by courts for making reports (e.g., unpublished letters attaching relevant records) and the confidential nature of many records in the possession of disciplinary agencies relating to referrals from courts. That being said, the consensus of current studies is it remains quite common for courts to respond to lawyer misconduct occurring in the context of litigation without making reports to state disciplinary agencies. Reporting is primarily focused

63. See supra notes 18-62 and accompanying text.
64. See McMorrow et al., supra note 24, at 1426, 1433-39 (analyzing reported decisions from state and federal courts to study “the more specific role of individual trial and appellate court judges in addressing and establishing norms of conduct for lawyers in litigation,” including “how judges reach the decision to report a lawyer to the bar”).
65. See Peter A. Joy, The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers, 37 Loy. L. Rev. 765, 796-97 (2004) (empirically correlating lawyers sanctioned in reported FRCP 11 cases and public discipline of those lawyers, but also, as a limitation of the study, noting that “[b]ecause approximately 40% of all lawyer discipline cases involve private unreported sanctions, it is not possible to determine whether [FRCP] 11 sanctions result in private [disciplinary] sanctions”).
66. See Greenbaum, Judicial Reporting, supra note 20, at 558 (“The facts strongly suggest that substantial under-reporting occurs, and the argument that other judicial controls obviate the need to report has long been rejected.”). In his 2009 article on judicial reporting, Greenbaum cited annual reports from the 2005 to 2007 range from several jurisdictions (Arizona, Oregon, Utah, Washington, and Wisconsin) and noted the very low percentages of cases (ranging from 0.5% to 4.2% of the totals) in those jurisdictions in which reports from judges were the source for disciplinary evaluations. Id. at 540 n.9. See also McMorrow et al., supra note 24, at 1435 (“Judges are not a significant source of reporting misconduct to the bar disciplinary apparatus.”); Ellen Yaroshesky, Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously, 8 UDC/DCSL L. Rev. 275, 292 (2004) (critiquing the irregularity of judicial referrals of instances of prosecutorial misconduct to state disciplinary agencies). But cf. McMorrow et al., supra note 24, at 1438 (acknowledging that because “there is no logical or structural reason why referrals to the appropriate disciplinary body must occur in a reported decision[,] []errals might be taking place far more often than the reported decisions indicate”); Joy, supra note 65, at 795 (examining empirical correlations between FRCP 11 sanctions and subsequent disciplinary action, and observing that “judges could be making private disciplinary referrals, and such referrals would not appear in current case databases”).
on only the most egregious and obvious forms of misconduct, while many other ethical violations—whether known by the judge to have occurred or thought to be substantially likely to have occurred—\textsuperscript{67} are either formally or informally addressed by the court, without any concurrent or subsequent communication to outside authorities for further action in the public interest.\textsuperscript{68}

**A. What Are the Reasons for Judicial Underreporting of Lawyer Misconduct?**

In a growing body of academic literature, legal ethics scholars have suggested a variety of explanations for this persistent history of judicial underreporting of lawyer misconduct. These have included (1) the reluctance of some judges, particularly in the case of less egregious violations, to be a source of information leading to potentially adverse consequences to the practice and reputation of a member of the bar;\textsuperscript{69} (2) a perception—one that is arguably well-justified—that state disciplinary sanctions for litigation-related misconduct are not consistently imposed or are inadequate when they are imposed;\textsuperscript{70} and (3) a concern that the reporting process—which may include not only documenting and sending a record, but also making findings of fact—may be neither an efficient nor an effective use of already scarce judicial resources.\textsuperscript{71} In a corollary to the latter

\textsuperscript{67.} See supra notes 30-38 and accompanying text (discussing Rule 2.15 of the 2007 ABA Model Code of Judicial Conduct).

\textsuperscript{68.} See Joy, supra note 65, at 815 (concluding “public discipline of lawyers in addition to [FRCP] 11 sanctions is rare, and the limited data available suggest that professional discipline for [FRCP] 11 violations is reserved for the worst offenders or those involved in other ethics violations”). See also Stephen R. Ripps & John N. Drowatzky, Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?, 32 Val. U. L. Rev. 67, 88 (1997) (concluding, based on a 1996 survey of federal courts and state disciplinary agencies, “[j]udges reported violations [of FRCP 11] a small percent of the time” and that the courts responding to the survey have no local rules mandating the reporting of “at least substantial [FRCP 11] violations” to these agencies).

\textsuperscript{69.} See Greenbaum, Judicial Reporting, supra note 20, at 545 (“As members of the bar, and often quite active members, judges may be hesitant to report their fellow lawyers.”); McMorrow et al., supra note 24, at 1435 (“As with lawyers, the human connection makes it ‘difficult’ for trial judges to report ‘lawyers with whom they have to work on a day to day basis.’”) (quoting State v. Wade, 839 A.2d 559, 565 (Vt. 2003) (Johnson, J., concurring)).

\textsuperscript{70.} See Joy, supra note 65, at 807-08 (pointing to ABA statistical surveys in 2000 reflecting “only a small fraction of complaints ever result in lawyer discipline, and a large percentage of the discipline meted out is in the form of private sanctions”). In an influential 2004 analysis of judicial attitudes toward confronting lawyer misconduct, Judith A. McMorrow, Jackie A. Gardina, and Salvatore Ricciardone derived from reported court decisions “a lurking sense that futility plays a role for some judges.” McMorrow et al., supra note 24, at 1435. As an example of this judicial frustration with state disciplinary agencies, the authors cited a 2001 opinion from the Florida Court of Appeals: “While in light of [the lawyer’s] egregious conduct, we feel duty bound by Canon 3D(2) . . . hereby to report him to the Florida Bar, we have no illusions that this will have any practical effect.” Id. (quoting Johnnides v. Amoco Oil Co., 778 So. 2d 443, 445 n.2 (Fla. Dist. Ct. App. 2001)).

\textsuperscript{71.} See Greenbaum, Judicial Reporting, supra note 20, at 546 (“One oft-expressed concern is that reporting will take substantial judicial resources better spent in moving along the docket.”).
point, judges often bring a distinctly immediate and pragmatic focus to their decision making when they confront either known or likely instances of lawyer misconduct:

The picture that emerges from the reported decisions in both state and federal courts is a desire to maintain the integrity of the judicial process and a concern for the efficiency and fairness in the proceeding before the court. Concern for the integrity of the legal profession as an independent concern appears to play a lesser role in judges’ attitudes, at least as reflected in the reported decisions. There is an obvious connection between the legal profession and the judicial system, but regulating attorney conduct is derivative or secondary to the larger goals of a fair and efficient legal proceeding.72

Peter A. Joy has discerned a similar strain of pragmatism in federal courts’ tendency to impose FRCP 11 sanctions without making a disciplinary referral.73 However, instead of calling for increased reporting of lawyer misconduct, he has commended the courts’ unilateral approach as a “wise choice,” reflecting an appropriate “institutional division of authority” between courts and state disciplinary agencies.74 Joy has correctly noted that FRCP 11 sanctions enable judges “to control lawyers’ litigation conduct directly, to fashion appropriate remedies, and to impose remedies close in time to the offense.”75 Direct imposition of judicial sanctions on lawyers violating court rules—whether to compensate injured parties or to protect the integrity of the court proceeding itself, or both—is indisputably valuable.76 That being said, the micro-value of these internally imposed sanctions does not detract from the macro-value of courts sharing with state disciplinary agencies complete information about lawyers’ known or substantially

72. McMorrow et al., supra note 24, at 1429. See also Eli Wald, Should Judges Regulate Lawyers?, 42 McGeorge L. Rev. 149, 168 (2010) (“Even when attorney misconduct is likely to impact the case, a judge must balance the costs and benefits of enforcing rules of conduct. Not only is judicial regulation time consuming and costly, it also distracts the judge from the case at hand. A judge may therefore tend to focus only on egregious misconduct, tolerating other misconduct in the name of conserving judicial resources.”).

73. See Joy, supra note 65, at 814 (“Judges possess . . . [‘]a strong interest in protecting the integrity of proceedings in their own courtrooms, and power to dispose of the issue without initiating an entirely new proceeding.’”) (quoting Ted Schneyer, A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms, 39 S. Tex. L. Rev. 245, 256 (1998)).

74. Id. Joy has pointed to a “disjunction between the federal judiciary imposing [FRCP] 11 sanctions and lawyer disciplinary agencies,” along with trial judges’ superior effectiveness “at controlling litigation conduct,” as key reasons why the status quo of usual non-referral is not only acceptable but a sound allocation of resources. Id. at 810, 814.

75. Id. at 814.

likely violations of ethical rules. Stated another way, a direct response by the court in the form of a litigation sanction is often necessary but usually not sufficient.

B. What Are the Consequences of Judicial Underreporting of Lawyer Misconduct?

Whatever its causes may be and however some have sought to justify it, judicial underreporting of litigation-related lawyer misconduct to state disciplinary agencies adversely impacts the effective administration of lawyer regulation systems. Several reasons support the soundness of this conclusion. The first is that judges have distinct institutional advantages as sources for identifying and reporting lawyer misconduct to state disciplinary agencies. The next is that state disciplinary agencies function most effectively when they have access to reliable and complete information about a lawyer’s conduct. Lastly, in a legal world increasingly critical of the courts’ traditional prerogatives in lawyer regulation, more predictable and consistent judicial reporting of lawyer misconduct fortifies the courts against future efforts to intrude upon the well-justified primacy of judicial authority in governing the practice of law.

1. Judges have distinct institutional advantages as sources for identifying and reporting lawyer misconduct to state disciplinary agencies.

Judges occupy a distinct role in the legal system that makes them especially well-suited to identify and report lawyer misconduct for subsequent disciplinary evaluation. As Arthur F. Greenbaum has observed, in their role as the “true gatekeepers” of the legal profession, judges should reasonably expect to bear a special burden to preserve the integrity of the legal system by taking their report-

77. See Greenbaum, Judicial Reporting, supra note 20, at 552 (noting that “reporting and court-imposed sanctions serve different purposes and are meant to complement rather than supplant each other”); Harlan v. Lewis, 982 F.2d 1255, 1260-61 (8th Cir. 1993) (rejecting a lawyer’s argument the trial court abused its discretion by imposing a monetary sanction for his litigation misconduct because disciplinary referral was an option also available to the court). See also Randall T. Shepard, What Judges Can Do About Legal Professionalism, 32 Wake Forest L. Rev. 621, 630 (1997) (discussing judicial reporting of lawyer misconduct and noting that “because private warnings and trial sanctions do not provide sufficient incentives for some attorneys to improve their behavior[,] [s]ometimes only a threat to revoke an attorney’s license to practice sends an adequate message”).

78. See Greenbaum, Filling the Reporting Gap, supra note 17, at 471 n.152 (“[T]he lawyer discipline system is in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.”) (quoting STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface (2005)).

79. See Greenbaum, Judicial Reporting, supra note 20, at 560-63. See also The Judicial Response to Lawyer Misconduct, supra note 21, at iii (“Unquestionably, because of their legal training and their work, judges observe a great deal of misconduct and are able to identify it as such.”).
ing obligations seriously.80 In addition, Greenbaum notes that “[j]udges, unlike lawyers, are already in the sanctioning business,” and reporting is less onerous for them because they are “merely reporting observed misconduct to another trier of fact which will make the final evaluation and recommend the punishment warranted.”81 Moreover, judges do not represent clients. Unlike lawyers, judges are not constrained by the need to obtain client consent in order to share confidential information with disciplinary agencies, and are therefore not hindered in most cases from providing a complete report.82 Finally, the “negative impacts of reporting on the reporter are likely less severe for judges” than for lawyers, because reporting “is just part of their role which commonly involves sanctioning misbehavior by counsel.”83 Based on such considerations, it is not only most reasonable but also most effective to enhance the reporting rules applicable to courts, rather than relying upon or enhancing the ethical rules requiring lawyers to report litigation misconduct.84

2. State disciplinary agencies function most effectively when they have access to reliable and complete information about a lawyer’s conduct.

Judicial underreporting of lawyer misconduct to state disciplinary agencies is also detrimental to the public interest because it reduces opportunities for disciplinary evaluations of the conduct of lawyers for possible prosecution and sanc-

80. Greenbaum, Judicial Reporting, supra note 20, at 560.
81. Id. at 560-61. See also Wald, supra note 72, at 149-50 (noting that judicial regulation of lawyers “appears desirable because the judiciary has both a functional advantage in regulating lawyers (judges are ideally positioned to observe lawyer misconduct) and a comparative advantage in regulating lawyers (judges are experts in fact finding and adjudication and therefore can relatively easily respond to attorney misconduct”).
82. Greenbaum, Judicial Reporting, supra note 20, at 561-62 (quoting and discussing ABA Model Rule of Professional Conduct 8.3(c), which provides the reporting rule “does not require disclosure of information otherwise protected by Rule 1.6 [the rule protecting from disclosure “information relating to the representation of a client . . . ”]”). Although certain records from judicial proceedings may be under seal or subject to a protective order, such limitations are within the exclusive control of the court itself and can be excepted for good cause, which would include judicial reporting of lawyer misconduct. See, e.g., Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 15 (Ill. 2000) (holding the trial court did not reasonably exercise its discretion when it refused to modify a protective order sealing discovery materials on request of lawyer as necessary to fulfill her obligation to report misconduct to state disciplinary authorities; noting that while the trial court bore an “independent responsibility” to report lawyer misconduct, “only this court may discipline an attorney found guilty of ethical misbehavior”).
83. Greenbaum, Judicial Reporting, supra note 20, at 562-63.
84. Cf. Lonnie T. Brown, Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 OHIO ST. L.J. 1555, 1606-16 (2001) (proposing an enhancement to ABA Model Rule of Professional Conduct 8.3 by requiring a lawyer seeking sanctions or other relief for litigation misconduct committed by another lawyer to report that lawyer’s name and provide copies of the pleadings and/or motions to an appropriate disciplinary body for entry into a “litigation misconduct database”).
tions (including public orders such as reprimands, suspensions or disbarments). By failing to report known or substantially likely ethics violations, courts deprive disciplinary agencies of the opportunity to assess the lawyer’s conduct in the particular litigation overseen by the judge in the context of other records the agencies may possess concerning the lawyer’s past misconduct or other pending charges. Thus, state disciplinary agencies may be able to “detect patterns that may not be discernible to an individual judge” or a particular judicial body. This information gap has been heightened in recent years as it has become more common for lawyers to practice law in multiple jurisdictions. Moreover, if the court does not wish to make findings of fact or impose its own sanctions, but nevertheless recognizes that the lawyer’s conduct warrants further evaluation,

85. The primary purposes of state lawyer disciplinary systems, and the sanctions imposed in them, are to protect the public, protect the administration of justice, preserve confidence in the legal profession, and deter other lawyers from engaging in similar misconduct. See, e.g., In re Katz, 981 A.2d 1133, 1149 (Del. 2009).

86. See generally Greenbaum, Filling the Reporting Gap, supra note 17, at 441 (“[L]awyer misconduct often is seen in isolation,” and “[a]ny particular actor [, including a judge,] witnesses only a limited amount of [a] lawyer’s behavior.”). Over the past twenty years, scholars have made similar recommendations for courts to make reports when they impose sanctions on lawyers:

Once a court has imposed a sanction on an attorney, it is difficult to justify not reporting the violation to the disciplinary body of the jurisdiction which has authorized the sanctioned attorney to engage in the practice of law. Reporting of [FRCP] 11 sanctions will give state disciplinary authorities an opportunity to review the records of attorneys who previously had violated the state’s code of professional responsibility in light of their [FRCP] 11 violations. Regular reporting of all [FRCP] 11 sanctions to state disciplinary authorities also would disclose multiple [FRCP] 11 sanctions against the same lawyer. To effectively use this information, state disciplinary bodies should investigate every lawyer who has received more than one [FRCP] 11 sanction. Reporting by federal district clerks to state authorities would make this salutary practice possible.

Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 MINN. L. REV. 793, 808-09 (1991). This Article proposes the development and use of electronic database technology to facilitate an even more ambitious “salutary practice”: transmitting referrals for evaluation and incident reports relating not only to sanctions imposed for misconduct after judicial findings, but also for information raising a substantial likelihood a lawyer has violated an applicable ethical rule (and without necessitating a specific finding). See infra Part III.

87. McMorrow et al., supra note 24, at 1472. See Greenbaum, Filling the Reporting Gap, supra note 17, at 441 (“To the extent a lawyer engages in a number of small missteps that standing alone would not warrant discipline but in the aggregate might, this ‘pattern’ evidence is often lost.”); Wald, supra note 72, at 164-65 (noting that “judges only observe ‘the tip of the iceberg’ when it comes to attorney misconduct,” and that “attorney conduct directly observable by judges constitutes but a small part of a much larger pattern of conduct not directly observed by the judiciary”). A related and important consideration from the perspective of state disciplinary agencies is that “[p]attern evidence can also influence the level of sanction to seek” for pending or future charges of lawyer misconduct. Greenbaum, Filling the Reporting Gap, supra note 17, at 441.

88. See supra note 13 and accompanying text.
state disciplinary agencies provide an outlet to relieve the court of this burden on its time and resources. 89

Federal district and appellate courts have adopted rules establishing their own disciplinary processes for investigating members of their bar and, where appropriate, pursuing disciplinary sanctions impacting their privileges to practice in those courts. 90 Even so, in the interest of promoting “cooperative federalism” in lawyer regulation, federal courts should also send information concerning misconduct by lawyers to the agencies responsible for discipline in the jurisdictions where they are licensed. 91

3. Consistent judicial reporting of lawyer misconduct fortifies the courts’ traditional prerogatives to regulate the legal profession.

In over a dozen jurisdictions, state constitutions expressly grant the judicial branch the exclusive authority to regulate lawyers. 92 In others, state supreme courts have unanimously affirmed that the regulation of the legal profession is an “inherent judicial function,” 93 which includes the authority to establish and en-

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89. See McMorrow et al., supra note 24, at 1472 (“Formal disciplinary systems, such as the state disciplinary body and federal court committees, have the ability to provide the requisite due process and fact finding that might otherwise consume significant judicial resources.”).

90. See Parness, supra note 45, at 51 (noting that recipients of disciplinary referrals under FRCP 11 may include “not only outside bar disciplinary agencies under state authority, but also the federal courts’ own internal disciplinary mechanisms”); McMorrow et al., supra note 24, at 1437 (“Federal courts have the ability to refer serious misconduct to their own disciplinary apparatus or to the state body.”).

91. See Jeffrey A. Parness, Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation, 60 ALB. L. REV. 303, 309 (1996) (“Techniques for coordinating enforcement efforts when state-licensed lawyers misbehave in federal court are important.”); id. at 331 (suggesting methods for enhancing “cooperative federalism” between federal courts and state disciplinary agencies). See generally In re Cook, 49 F.3d 263, 265 (7th Cir. 1995) (explaining the three main reasons it usually refers federal litigation misconduct to state disciplinary agencies as being (1) the superior means those agencies have available to “investigate charges and resolve factual disputes”; (2) those agencies have a “superior perspective” on a lawyer’s pattern of conduct; and (3) “principles of cooperative federalism” favor deference to state judgments on lawyer competence).


93. McKay Report, Recommendation 1, supra note 92. See, e.g., Randy J. Holland, The Delaware State Constitution: A Reference Guide 142 (2002) (stating that in Delaware, as a “venerable common law tenet,” the exclusive authority and responsibility for “maintaining the profession and its standards has always remained with the judiciary, without any attempt on the part of the General Assembly to control it”).
force standards for admission to practice, lawyer discipline, and the unauthorized practice of law. 94 Although, like the courts in many states, federal courts must follow some statutory directives specifically pertaining to the regulation of lawyers, 95 in most respects the federal courts also exercise plenary authority in this area. 96

In 1992, the ABA Commission on Evaluation of Disciplinary Enforcement (commonly known as the “McKay Commission” 97) issued a comprehensive overview and assessment based on its study of lawyer discipline systems throughout the United States. 98 In its first of numerous specific recommendations for maintaining and improving the effectiveness of lawyer discipline, the McKay Commission concluded that “judicial regulation of lawyers is essential to both the courts and the profession.” 99 The consensus reflected in the McKay Commission’s Report has found consistent support in subsequent policy statements from the ABA 100 and other organizations influential in the field of lawyer regulation. 101

94. McKay Report, Recommendation 1, supra note 92.
97. Robert McKay served as the Commission’s Chair until his death in July 1990. The Commission’s report was dedicated to McKay, and included the following quotation from him:
   No lawyer, and no client, can be indifferent to the disciplinary enforcement system. If the process is performed sensibly and quickly it will provide for lawyers and clients alike a needed service to assure honorable and effective delivery of legal services. If the disciplinary process does not meet that standard, a disaffected public is likely to impose limits upon the process . . . . Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.
   McKay Report, Dedication, supra note 92 (emphasis added).
98. McKay Report, Recommendation 1, supra note 92.
99. Id.
100. See, e.g., Model Rules for Lawyer Disciplinary Enforcement, Preamble: Authority of the Court (1993) (“This court declares that it has exclusive responsibility within this state for the structure and administration of the lawyer discipline and disability system and that it has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability. . . .”).
Nevertheless, over the past several decades, a growing number of legal ethics scholars and legislative policymakers have closely scrutinized and critically questioned the traditional prerogatives of the judicial branch of government in regulating the practice of law in the United States. The reasons given for diminishing the institutional authority of courts in this area have largely focused on concerns about judges’ incentives and interests relative to the legal profession, and the alleged superiority of legislatures as institutions able to act independently for the public interest concerning lawyers. State and federal courts have generally failed to adopt rules, or even informal but reliable policies and practices, to ensure that lawyers’ ethical violations are consistently reported to disciplinary agencies in the lawyers’ jurisdictions of licensure. This deficiency needlessly feeds the perception that courts are unwilling to take the steps necessary to secure full accountability of lawyers for their misconduct and thereby protect the public. Continued judicial underreporting of lawyer misconduct therefore amplifies the risk that the courts’ primacy and authority in the regulation of lawyers will be diluted by more frequent and more intrusive legislative interventions.

III. Creating Databases for Judicial Reports of Lawyer Misconduct: Sending, Receiving, Storing, and Accessing the Information

The status quo, then, is this: courts have not adopted rules and practices for reporting information about lawyer misconduct to state disciplinary agencies ad-

2001) (“The court of highest jurisdiction in each state has the ultimate authority and responsibility for regulating the legal profession.”).

102. See, e.g., Wald, supra note 72, at 175 (concluding “[h]istory and tradition notwithstanding, there is simply little support, analytical or empirical, to the assertion that judges effectively regulate and thus should regulate the legal profession”); Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?, 37 GA. L. REV. 1167, 1246 (2003) (concluding “[a]n institutional analysis of the policymakers for lawyer regulation leads inexorably to the conclusion that state supreme courts should not be in charge”). See also Rigertas, supra note 92, at 135 (concluding the inherent power of the courts “to define the practice of law merits reexamination”).

103. See, e.g., John Leubsdorf, Legal Ethics Falls Apart, 57 BUFF. L. REV. 959, 961 (2009) (observing “legislators and administrators have become increasingly unwilling to defer to either bar associations or courts”) (citing Susan P. Koniak, When the Hurlyburly’s Done: The Bar’s Struggle with the SEC, 103 COLUM. L. REV. 1236, 1248-56 (2003)); James M. Fischer, External Control over the American Bar, 19 GEO. J. LEGAL ETHICS 59, 97 (2006) (noting “the increasing tendency of legislators to enact laws that govern lawyer behavior”).

104. “Supporters of legislative regulation argue that the practice of law affects the public more than it affects the courts . . . that judges are lawyers . . . and it is a conflict of interest for lawyers to regulate themselves because their own economic interests and social status are at stake . . . [and] deny that legislative regulation would impair the independence of lawyers.” MCKAY REPORT, Recommendation 1, supra note 92. See also Barton, supra note 102, at 1239 (asserting “[l]egislatures, while typically criticized for their accessibility to organized special interests, would fare better with lawyer regulation than judiciaries”).
equate to address public policy and protection concerns, especially in an increasingly multijurisdictional law practice environment. The remainder of this Article will be devoted to proposing how electronic database technology can help in this situation, and to addressing potential questions about how the databases would work in practice.

The essence of this Article’s proposed reform is this: by consortium, state supreme courts in each United States jurisdiction should establish and administer a centralized electronic database to which individual trial and appellate courts will send information and documents relating to lawyer misconduct occurring in the course of litigation. The federal courts should establish and administer their own centralized electronic database for the same purpose. State disciplinary agencies in each United States jurisdiction should have secure online access both to the state consortium database and to the federal electronic database. To support the consistent transfer of information by the courts and the efficiency of access and identification of lawyers by state disciplinary agencies, courts should also require each lawyer entering an appearance to provide a unique, universal licensing number. Courts should then use this universal licensing number when sending to the electronic databases information concerning lawyer misconduct. Finally, state and federal courts should adopt uniform rules of procedure stating the standards for judges to employ when deciding (1) whether information about lawyer misconduct must or should be submitted to the state or federal electronic databases and (2) how the information being sent to the databases should be categorized for review when accessed by state disciplinary agencies.

In exploring the details of this proposal, this Article will examine first the concept of adopting universal licensing numbers for lawyers. This is particularly appropriate because the historical development of this concept has followed a path parallel to the development of the ABA National Lawyer Regulatory Data Bank—the only now-existing database for records of public lawyer regulatory actions (i.e. disciplinary sanctions as well as reinstatements and readmissions) that is national in its scope and has secure online accessibility to state disciplinary agencies, federal courts and agencies, and bar admissions authorities.

105. Currently, California has “the most extensive set of requirements” for reporting “the occurrence of particular acts to disciplinary authorities.” Greenbaum, Filling the Reporting Gap, supra note 17, at 467. See infra note 144 (discussing California’s mandatory reporting system).

106. American Bar Ass’n, National Lawyer Regulatory Data Bank, http://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited Sept. 29, 2012) (“The Data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere.”). The primary purpose of the Data Bank, which was created in 1968, is to enhance reciprocal disciplinary enforcement. The Data Bank has been not only “particularly useful,” but crucial to ensuring that reciprocal disciplinary enforcement occurs effectively and efficiently. In the medical profession, the National Practitioner Data Bank serves as a repository of information concerning adverse malpractice judgments and settlements, and statutes at the federal and, in some cases, state level specify require-
A. Universal Lawyer Numbers: A Short History

In 1992, as the last of its twenty-one specific recommendations for promoting effective lawyer regulation in the United States, the McKay Commission advised that “[t]he American Bar Association and the officials in each jurisdiction should establish a system of assigning a universal identification number to each lawyer licensed to practice law.”107 The primary goal of the universal lawyer numbering project was to enhance the effectiveness of the ABA National Discipline Data Bank108 (now known as the ABA National Lawyer Regulatory Data Bank).109 As explained by Raymond Trombadore, who was then chair of the ABA Standing Committee on Professional Discipline, it was “time to number this herd. . . . The hope is that by numbering, we can cull the herd and get out the bad ones.”110 Along with other proposals relating to the Data Bank, the McKay Commission sought, through its Recommendation 21, to (1) promote the consistent and timely imposition of reciprocal discipline on lawyers licensed to practice in multiple jurisdictions111 and (2) deter lawyers suspended or disbarred from practice in one jurisdiction from practicing in another.112 The Commission pointed out that “[t]he medical profession has successfully used a universal identification system for years.”113

As of 1992, the lawyers included in the ABA National Lawyer Regulatory Data Bank were identified only by “name, state imposing discipline, address, and date of birth.”114 There was no universal lawyer identification number used in all jurisdictions.115 Thus, when state disciplinary agencies received the


108. “The ABA National Discipline Data Bank . . . is the only national clearinghouse for information about lawyers disciplined for misconduct.” Id.


112. Id. In addition to its recommendation of universal identification numbers for lawyers, the McKay Commission advised “[t]he highest court in each jurisdiction should require all lawyers licensed in the jurisdiction to (a) register annually with the agency designated by the Court stating all other jurisdictions in which they are licensed to practice law, and (b) immediately report to the agency designated by the Court changes of law license status in other jurisdictions such as admission to practice, discipline imposed, or resignation.” Id.


114. Id.

115. Id.
ABA’s annually published lists of disciplined lawyers, they not only had to manually compare them with their own registration records, but also take additional steps to verify that both names referred to the same lawyer.\(^{116}\) Furthermore, the Commission cited a survey from the National Organization of Bar Counsel reflecting that reciprocal discipline was almost always initiated on an \textit{ad hoc} basis of communication between state disciplinary agencies, rather than based on the slow and cumbersome process of manually reviewing the ABA’s annual lists.\(^{117}\)

After the McKay Commission made its recommendation, the legal publisher Martindale-Hubbell\(^{118}\) offered to create a “universal” numerical lawyer identification system and share its data with the ABA.\(^{119}\) By 1995, Martindale-Hubbell had developed the International Standard Lawyer Numbering System\(^{®}\) (“ISLN”) and assembled a database consisting of more than 850,000 lawyers, each of whom was assigned a unique nine-digit number.\(^{120}\) It then began a process of matching the names of publicly disciplined lawyers in the ABA’s database with the ISLN numbers of the lawyers in the Martindale-Hubbell database.\(^{121}\) The project, however, was only a partial success. Although the ABA now had access to the ISLNs assigned to the vast majority of lawyers throughout the United States, there was still no coordinated system of identification because state licensing authorities had not taken the necessary steps to identify and register their own

\(^{116}\) Id. “The process of manually comparing hundreds of names on the Data Bank’s annual list to the roster of lawyers in a jurisdiction is too time-consuming. Even when a name on the Data Bank list matches that of a lawyer licensed in a jurisdiction, there is no guarantee the names refer to the same individual.” McKay Report, supra note 92, Recommendation 21: Coordinating Interstate Identification. See also Greenbaum, Filling the Reporting Gap, supra note 17, at 493 n.277 (noting that “because [the Data Bank] does not employ a universal identification number system, it is sometimes hard to identify whether a particular lawyer, particularly one with a common name, has been reported”).

\(^{117}\) See McKay Report, supra note 92, Recommendation 21: Coordinating Interstate Identification.

\(^{118}\) In 1868, lawyer and businessman James B. Martindale first published The Martindale Directory, with the stated purpose “to furnish lawyers, bankers, wholesale merchants, manufacturers, real estate agents, and all others . . . the address of one reliable law firm, one reliable bank, and one reliable real estate office in every city of the United States.” About Martindale-Hubbell®, http://www.martindale.com/About_Martindale-Hubbell/index.aspx (last visited Sept. 29, 2012). In 1930, the Martindale Company purchased the publishing rights to Hubbell’s Legal Directory. Id. Beginning the following year and annually thereafter, Martindale-Hubbell has published directories of American and foreign lawyers, including biographical information and quality ratings. See Kent C. Olson, Legal Information: How to Find It, How to Use It 99-101 (1998).

\(^{119}\) See Torry, supra note 110, at F7.


\(^{121}\) Torry, supra note 110, at F7.
lawyers by ISLN number. 122 As the McKay Commission had observed, “[t]he ability to automate the comparison of a state’s roster of lawyers to the Data Bank list . . . depends on the use of a uniform registration number.” 123

In 2002, the ABA Commission on Multijurisdictional Practice ("MJP Commission") issued a detailed report with specific proposals for changes to the ABA Model Rules having implications for the effective regulation of cross-border practice. 124 When it did so, it took the opportunity to revisit, reinforce, and augment the McKay Commission’s proposals on universal identification and registration numbers for lawyers, recommending that “the ABA urge jurisdictions to adopt the Martindale-Hubbell International Standard Lawyer Numbering System® and to universally use [] the National Lawyer Regulatory Data Bank.” 125 The MJP Commission emphasized that “the growth in the lawyer population and advances in technology and communications have fostered a significant increase in the interstate practice of law,” and, “[a]s a result, the need and the demand for the information in the Data Bank as a vehicle to improve interstate enforcement has grown.” 126

Despite the repeated urging of these prominent ABA Commissions for almost 20 years, no jurisdiction in the United States—state or federal—has adopted the ISLN or any other universal numbering system for lawyer licensing. 127 Implementation of this change should begin as soon as possible, as an important intermediate step toward improving lawyer regulation on both the local and national levels. 128 These numbers would also be a critical component for an effective


123. MCKAY REPORT, supra note 92, Recommendation 21: Coordinating Interstate Identification, Comments.


125. Id.

126. Id.


128. It is highly probable state budget constraints in recent years have contributed to the lack of progress in developing and coordinating universal lawyer licensing numbers among United
system for receiving, organizing, storing, and accessing judicially-reported information about lawyer misconduct for *prospective* state disciplinary action.

**B. Building the Storehouses: How Should the Lawyer Misconduct Databases Be Organized and Structured?**

Using the Martindale-Hubbell ISLN System\(^\textsuperscript{129}\) as a starting point, state supreme courts in each jurisdiction should work together, through the auspices of the Conference of Chief Justices and with the assistance of the National Center for State Courts, to ensure that each lawyer practicing in the United States is identified by a unique and universal licensing number.\(^\textsuperscript{129}\) Alongside this project, state supreme courts and federal courts should work cooperatively—but, in light of justified federalism concerns, separately\(^\textsuperscript{130}\)—to build their own electronic database systems for receiving and storing judicial reports of lawyer misconduct. At the federal level, the Judicial Conference of the United States,\(^\textsuperscript{131}\) which has statutory authority and responsibility for making policy regarding the administration of the federal courts,\(^\textsuperscript{132}\) would be the most appropriate body for creating and maintaining the lawyer misconduct databases, developing uniform court proce-

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129. These lawyers should include lawyers admitted to the bar in each state, lawyers admitted to practice in federal courts, and foreign lawyers authorized to practice in the United States pursuant to court rules. See generally Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729, 768 n.13 (2010) (noting “[n]o fewer than thirty states have adopted some version” of the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants (2006), “while at least six states have adopted” a rule based on the ABA Model Rule for Temporary Practice by Foreign Lawyers (2002)).

130. This Article’s proposals rely upon “cooperative federalism” to the extent they depend on federal courts adopting rules requiring reporting to a lawyer misconduct database accessible to state disciplinary agencies. See infra notes 131-33, 137, and 223 and accompanying text. Nevertheless, in the interest of taking even modest steps to fortify the long eroding primacy of the states in the regulation of lawyers, I recommend that the state and federal databases be created and operated separately. Cf. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (seminal article urging the adoption of nationally applicable rules of professional conduct adopted by the federal government and binding on the states). See generally Daniel R. Coquillette & Judith A. McMorrow, *Zacharias’s Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 124 (2011) (“Federalization of legal ethics is occurring not through a tectonic shift but through a more stealth, incremental approach.”). But cf. Michael J. Churgin, *Our Federalism: The United States and the Regulation of Lawyers*, 48 SAN DIEGO L. REV. 111, 121 (2011) (considering “whether and under what circumstances the states could be forced to admit foreign lawyers” based on the federal government’s international trade agreements; reviewing United States Supreme Court decisions, as recent as 2008, that suggest the states’ traditional police powers to regulate the practice of law would prevent such action).


dural rules to implement the reporting requirements, and making recommendations for the adoption of these rules.\textsuperscript{133}

At the state level, the concept of creating a consortium electronic information network for collecting and monitoring information relating to lawyer regulation is not an entirely new one. In 2001, when the Conference of Chief Justices adopted a National Action Plan on Lawyer Conduct and Professionalism, its report specifically stated that the Conference, with staff assistance from the National Center for State Courts\textsuperscript{134} and the ABA Center for Professional Responsibility, should create a centralized web site linked with implementation web sites in each jurisdiction.\textsuperscript{135} With the necessary and appropriate funding, an ideal cooperative effort would involve both the National Center for State Courts and the ABA (which already has experience and administrative capacities for maintaining the National Lawyer Regulatory Data Bank) in creating and maintaining the state consortium electronic database.

\textbf{C. What Information Relating to Lawyer Misconduct Should Be Sent to the Databases, and How Should It Be Categorized by the Reporting Court?}

State courts should adopt uniform rules requiring judicial reports to the state consortium database of notice-level\textsuperscript{136} information about lawyer misconduct relating to litigation. Federal courts should adopt the same uniform rules for this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134} The National Center for State Courts is an independent, non-profit court improvement organization located in Williamsburg, Virginia. Natl. Ctr. for State Cts., http://www.ncsc.org/About-us.aspx (last visited Sept. 29, 2012). It was founded in 1971 at the urging of United States Chief Justice Warren E. Burger, who envisioned it “as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts.” \textit{Id}.
\item \textsuperscript{135} Conf. of Chief Justices, \textit{Implementation Plan for the Conference of Chief Justices’ National Action Plan on Lawyer Conduct and Professionalism} 14 (Aug. 2, 2001) (recommending the creation and maintenance of an “Electronic Information Network” to coordinate the Conference of Chief Justices’ and individual states’ implementation efforts). The Conference also recommended the “central and state databases should be structured so that parts are viewable by the public and other parts are only viewable by designated users.” \textit{Id}.
\item \textsuperscript{136} The standard requiring a court to send “notice-level” information could be satisfied in most cases simply by attaching to the transmission to the database electronic copies of one or more documents from the court’s docket sufficient to apprise state disciplinary agencies of the nature of the lawyer’s conduct, such as copies of one or more relevant opinions, orders, transcripts, or pleadings. \textit{Cf.}, \textit{e.g.}, \textit{Teaford v. Ford Motor Co.}, 338 F.3d 1179, 1182 (10th Cir. 2003) (recounting the district court’s letter referring lawyer’s conduct to a state disciplinary agency “simply state[d] that the judge is enclosing the transcript, that [the lawyer] is licensed in Oklahoma, and that therefore the judge is ‘submitting the matter for [the board’s] consideration and appropriate action’”). Although the court could also decide to include with its report a cover letter or other form of direct statement or explanation, the proposed standards would not require the court to provide them.
\end{itemize}
\end{footnotesize}
purpose, applicable to federal district and appellate courts. In each system, the required reports would identify the lawyer (or lawyers) involved by name and universal licensing number, and should be categorized (and coded for electronic transmission) as either (1) “referrals for evaluation” or as (2) “incident reports.” The standards to be applied by courts in making this categorization of reports should be designed to retain some degree of judicial discretion, but also provide guidance sufficient to encourage courts to make the necessary category distinctions based on the nature of the lawyer misconduct involved.

1. Referrals for Evaluation

Courts should send to the applicable database, categorized as a “referral for evaluation” (“RFE”), (1) notice-level information relating to the court’s knowledge that a lawyer has violated a rule of professional conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (2) notice-level information relating to a lawyer’s conduct raising a substantial likelihood the lawyer has violated an applicable rule of professional conduct, if such conduct includes elements of criminality, dishonesty, willfulness or bad faith, or gross neglect or incompetence in a client matter, and (3) notice-level information about other misconduct that the court concludes, in the exercise of its discretion, is appropriate for

137. See supra notes 130-33 and accompanying text.
138. See Model Code of Judicial Conduct R. 2.15(B) (2007) (“A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.”). See Joy, supra note 65, at 802-03 (discussing problems with interpreting the “substantial question” language for mandatory reporting by lawyers or judges; “The terminology section of the Model Rules [of Professional Conduct] defines ‘substantial’ as ‘a material matter of clear and weighty importance.’ A comment . . . provides no more guidance. It states ‘[s]ubstantial’ ‘refers to the seriousness of the possible offense and not to the quantum of evidence. . . .’”) (footnotes omitted).
140. See Model Rules of Prof’l Conduct R. 8.4(b) (2012) (providing it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).
141. See, e.g., id. R. 3.3(a) (providing, in part, a lawyer “shall not knowingly . . . make a false statement of fact or law to a tribunal”); id. R. 3.4(c) (providing it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).
142. See, e.g., id. R. 3.1 (providing, in part, a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue there, unless there is a basis in law and fact for doing so that is not frivolous”); R. 3.2 (providing a lawyer “shall make reasonable efforts to expedite litigation consistent with the interests of the client”). Compare 1993 Amendments, supra note 51, at 419-20 (FRCP 11(b)); supra note 52 and accompanying text.
prompt and focused evaluation by state disciplinary agencies where the lawyer is licensed to practice. 144 For example, a court should categorize as RFE information about frivolous pleadings that have been withdrawn by a lawyer under the “safe harbor” provision of FRCP 11 but that nevertheless raise serious professional conduct concerns under the circumstances. 145 A court should also categorize as RFE information about a lawyer who has engaged in repeated incidents of litigation misconduct, even though individually the incidents are minor in nature. 146 The court’s report would identify the lawyer by name and by the lawyer’s universal licensing number. 147

The advantages of using a database for RFEs, as opposed to the traditional mailing-based referral, include (1) facilitating prompt and efficient notice to multiple jurisdictions where the lawyer may be admitted to practice and (2) permitting disciplinary authorities to expedite the initial evaluation of the lawyer’s conduct by using secure online access to download and review any documents attached to the RFE by the reporting court. When a new RFE is received in the state or federal database, one or more designated reporting agents for the disciplinary agencies in each state in which the lawyer is licensed to practice law would receive an electronic notification that the information about that lawyer (by name and universal licensing number) is available for access on the database. Ideally, if there are multiple jurisdictions of licensure, the agencies would coordinate their efforts and determine which agency will take the lead in evaluating the RFE, or decide, based on the facts of the case, to undertake parallel courses of more serious violations to traditional [state] disciplinary agencies serve to ensure that proper deference is accorded state power and that satellite litigation is reduced.”).

144. California has adopted an extensive set of systemic requirements for judicial reporting of lawyer misconduct to the State Bar, including specified categories of acts by lawyers triggering the mandates. See Greenbaum, Filling the Reporting Gap, supra note 17, at 467-71; Cal. Bus. & Prof. Code §§ 6086.7(a), 6086.8(a), 6101(c) (West, Westlaw through ch. 437 of 2012 Reg. Sess.). For example, California courts must report final contempt orders entered on grounds warranting professional discipline; modifications or reversals of judgments based on a lawyer’s misconduct, incompetence, or willful misrepresentations; and the imposition of judicial sanctions against a lawyer of $1000 or more, except for failure to provide discovery. See Greenbaum, Filling the Reporting Gap, supra note 17, at 468. For an excellent critique of the selected California automatic reporting triggers as underinclusive, see id. at 481-84.

145. Cf. Parness, supra note 45, at 61 (“[E]ven when frivolous papers are removed during the safe harbor period, their presentment by lawyers should be reported to state disciplinary agencies when substantial questions are raised about the lawyers’ honesty, trustworthiness, or fitness.”).

146. Cf. McMorrow et al., supra note 24, at 1436 (“Where the judge identifies the attorney as a repeat actor, a single act in the current litigation may reflect a pattern justifying a report to the appropriate disciplinary authority.”).

147. To make the reporting process more efficient, state and federal database administrators could provide courts with standardized forms for submitting the necessary notice-level information. To support its fairly extensive mandatory judicial reporting system, for example, the California State Bar provides its courts with a simple referral form they may use to submit the required reports. See Discipline Referral Form, State Bar of Cal., http://www.calbar.ca.gov/LinkClick.aspx?fileticket=9PqHJKRAF7M%3d&tabid=200 (last visited Sept. 29, 2012).
In making these determinations, important factors could include the location of the lawyer’s sole or primary law office or practice environment.

2. Incident Reports

Courts should also be required by procedural rules to send notice-level information relating to lawyer misconduct in litigation to the applicable database in many circumstances where the information does not satisfy the criteria for RFE. Specifically, a court may possess information about a lawyer’s conduct reflecting either a known professional conduct violation, or raising a substantial likelihood a lawyer has violated an applicable rule of professional conduct. But what if the nature and seriousness of this misconduct does not (1) trigger a mandatory reporting obligation under the applicable code of judicial conduct or an RFE categorization under the proposed reporting rule, or (2) in the discretion of the reporting judge, warrant a contemporaneous evaluation and focused review by state disciplinary agencies where the lawyer is licensed to practice?

In those circumstances, the court making the report should categorize the information as an Incident Report (“IR”) and sent notice-level information to the applicable database, identifying the lawyer or lawyers involved by name and universal licensing number. These IRs would be accessible to and searchable by state disciplinary agencies using these names and numbers.

Each state disciplinary agency would have an opportunity to develop its own policies and standards for initiating evaluations of the professional conduct of lawyers licensed in their jurisdictions, using the IRs as the triggering mechanism. For example, based on policy considerations appropriate to its state—including availability and prioritization of resources within its disciplinary system—one jurisdiction might establish a protocol requiring evaluators in its agency to access the databases and search for IRs about a lawyer only when a complaint or other disciplinary evaluation has already been docketed concerning the lawyer’s conduct in another matter. Another state, on the other hand, might request the databases be programmed to provide electronic notice to its disciplinary

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148. This process already takes place in many jurisdictions when a complainant, such as a client, files disciplinary complaints with multiple disciplinary agencies when a lawyer is licensed in multiple jurisdictions.

149. See supra note 32 and accompanying text.

150. See supra note 33 and accompanying text.

151. Cf. Greenbaum, Filling the Reporting Gap, supra note 17, at 505 (acknowledging that in an automatic reporting system, “given resource limitations” faced by state disciplinary agencies, “some shortcuts might be used” for screening information received through judicial reporting).

152. Cf. id. (“[T]he data [from automatic reporting] might just reside in an attorney’s records until a particular triggering act occurred, such as a colorable claim of misconduct warranting further investigation, but then would be there as background information in assessing the lawyer’s conduct more broadly.”). See also McKay Report, Recommendation 20: National Discipline Data Bank (1992) (“Linking the Data Bank through a computer telecommunications network, such as the existing ABAnet, will permit disciplinary counsel to query the Data Bank immediately upon the receipt of a complaint against a lawyer.”) (emphasis added).
agency when the number of IRs about a lawyer licensed in that jurisdiction has reached a designated total (such as two or more). Whatever approach each state adopts for when it should access the IR information in the databases and how it should be used, there is significant potential value for public protection because it will be reliably stored, efficiently organized not only by name but also by universal licensing number, and readily available when needed by the agencies. Moreover, judicial transmittal of IRs reflecting less serious misconduct would serve the public interest by providing state disciplinary agencies with better opportunities to prevent more serious misconduct before it occurs, including through the use of diversion programs, remedial training, and other alternatives to discipline.

State disciplinary agencies already exercise significant prosecutorial discretion in deciding which matters they will pursue at various stages of the disciplinary process. As Arthur F. Greenbaum has noted in support of his proposals for instituting automatic reporting measures from a variety of sources, including courts, “[a] reporting scheme that is not automatic puts some of that discretion

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153. Cf. Kramer, supra note 86, at 808-09 (proposing regular reporting of all FRCP 11 violations to state disciplinary agencies, and suggesting these agencies “should investigate every lawyer who has received more than one [FRCP] 11 sanction”) (emphasis added).

154. Cf. Greenbaum, Filling the Reporting Gap, supra note 17, at 505 (“One might set up a system that sets off a red flag when a certain amount of reportable conduct is in an attorney’s file in a specified time span.”). For assistance in developing these protocols for IR screening by disciplinary agencies, state supreme courts could also seek guidance from proposals other legal ethics scholars have made in recent years for enhanced reporting requirements for lawyers. In a 2001 article, Lonnie T. Brown, Jr. proposed that each state should amend its version of ABA Model Rule of Professional Conduct 8.3 to require a lawyer having knowledge of another lawyer’s “litigation misconduct” to make a report by “informing the appropriate disciplinary authority of the name of the alleged offender, and supplying copies of relevant pleadings and/or motions served or filed that relate to the alleged litigation misconduct” (e.g., violations of FRCP 11, which implicate the offending lawyer’s obligations under ABA Model Rule 3.1). Brown, supra note 84, at 1607-09. He also suggested that “a nationwide network should be established to allow jurisdictions to access and exchange information about attorneys.” Id. at 1608. Finally, he offered recommendations for how the information in the database would be processed, including, for example, (1) an automatic deletion system for an “Alleged Offender” whose name does not appear more than once in a four-year period and (2) a trigger of disciplinary “investigation” if the name appears more than three (3) times within a four-year period. Id. at 1611.

155. Cf. Greenbaum, Filling the Reporting Gap, supra note 17, at 505 (in the context of an automatic reporting system where disciplinary authorities’ funding is not adequate to evaluate each report, “disciplinary counsel may decide to simply put the information in a lawyer’s file, where it will reside until some other action triggers an investigation or the number of filed entries on a lawyer is sufficient to red flag the file for further investigation”).

156. “[O]ur disciplinary system has, for too long, focused principally on disciplining lawyers after substantial misconduct has occurred. If the system could better identify patterns of behavior that warrant intervention before serious misconduct occurs, and offer remedial training to help solve incipient problems, that would significantly benefit lawyers, clients and the profession.” Id. at 506.

157. See id. at 505.
into the hands of others by their choices as to whether to report. Arguably, the
discretion to act should reside with disciplinary counsel who can better exercise
that discretion with fuller information. 158 By making such information accessible
to state disciplinary counsel in accordance with triggers designed by each jur-
isdiction to suit their specific priorities and available resources, the lawyer mis-
conduct databases would promote better informed prosecutorial discretion and,
thus, more effective disciplinary enforcement. 159

IV. Some Procedural Questions about Judicial Reporting to the
Lawyer Misconduct Databases (and Proposed Responses)

Having outlined the organization and structure of the proposed lawyer mis-
conduct databases, the standards courts should adopt and apply for sending informa-
tion to these databases, and the benefits to the public interest available through the
effective use by state disciplinary agencies of this database information, this Part
will consider and respond to several potential questions regarding the imple-
mentation of these reporting procedures.

A. What Procedural Steps, If Any, Would Courts Be
Constitutionally Required to Take Before Sending
a Report to a Lawyer Misconduct Database?

Historically, a judicial referral of information about a lawyer’s conduct to a
state disciplinary agency has not been regarded as a “sanction” imposed on a law-
ner, 160 invoking procedural due process protections under the Fifth and Four-
teenth Amendments of the United States Constitution. 161 Exceptions to this stan-
dard approach exist when either (1) a court procedural rule designates a judicial
referral as a form of “sanction” 162 or (2) the referral is accompanied by specific
“findings” of rule violations or by legal actions imposing adverse consequences
on the lawyer, whether pursuant to a specific court procedural rule 163 or under the

158. Id.
159. Cf. id. (noting that although “[i]n a time of fiscal restraint, a question arises as to how
disciplinary authorities can handle these additional costs,” automatic reporting could help “uncover
a significant number of cases for which remediation or disciplinary action is warranted,” such that
“funding authorities may conclude that such additional money would be well spent”).
160. See, e.g., Gwynn v. Walker (In re Walker), 532 F.3d 1304, 1311 (11th Cir. 2008) (stating that “referral to a state bar disciplinary board for investigation is not considered a sanction or
disciplinary measure”) (citing United States v. McCorkle, 321 F.3d 1292, 1298 (11th Cir. 2003)).
161. “The Due Process Clause protects an individual’s right to be deprived of life, liberty, or
property only by the exercise of lawful power.” McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct.
2780, 2786 (2011). The Due Process of the Fifth Amendment applies to federal action, and the Due
Process Clause of the Fourteenth Amendment applies to state action.
162. See, e.g., FRCP 11 and discussion supra notes 45-61 and accompanying text.
163. See, e.g., 1993 Amendments, supra note 51, at 467-73 (FRCP 37) (addressing proce-
dures and consequences, including sanctions, for failure to make disclosures or cooperate in
discovery).
inherent powers doctrine. When procedural due process rights are activated by a court’s response to a lawyer’s conduct in litigation, the usual standard to be applied—as it is in disciplinary prosecutions implicating a lawyer’s privilege to engage in the practice of law—is that the lawyer must be given fair notice and an opportunity to be heard.

Shortly after the adoption of the 1993 amendments to FRCP 11, Jeffrey A. Parness published an in-depth analysis of federal courts’ referrals of FRCP 11 violations to state disciplinary agencies, including the process for making referrals under the amended rule. His procedural analysis operated from the premise that “[r]eferrals under the codes [of judicial] conduct are authorized regardless of any rule of procedure on frivolous papers and can occur without notice to those whose questionable conduct is reported.” It is nevertheless most often the case that judicial referrals to state disciplinary agencies will be preceded by the judge giving the lawyer an opportunity to explain and defend the conduct in question. Even more often, the judge will give the lawyer contemporaneous notice that the referral is being or has been made. But, properly understood, in the absence of an actual deprivation of liberty or property accompanying a judi-

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164. See, e.g., Adkins v. Christie, 227 Fed. Appx. 804, 806 (11th Cir. 2007) (“[W]hen an attorney acts in bad faith, a federal court possesses the inherent power to impose sanctions. However, the court must afford the sanctioned party due process,” which “mandates that an attorney be given fair notice that his conduct may warrant sanctions and the reasons why” and “a chance to respond to the allegations and justify his or her actions.”) (citations omitted).

165. See generally In re Ruffalo, 390 U.S. 544, 550-52 (1968) (concluding a lawyer in state disciplinary proceeding seeking disbarment was entitled to fair notice of the charge and an opportunity to explain and defend the conduct at issue).

166. See, e.g., United States v. Shaygan, 652 F.3d 1297, 1318 (11th Cir. 2011) (“Due process requires that the attorney . . . be given fair notice that his conduct may warrant sanctions and the reasons why. . . . In addition, the accused must be given an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify his actions.”). But cf. Adams v. Ford Motor Co., 653 F.3d 299, 308-09 (3d Cir. 2011) (articulating a standard requiring “particularized notice” of the specific sanctions the court is considering).

167. Parness, supra note 45, at 61, 64-66.

168. Id. at 64-65 (emphasis added).

169. See, e.g., Goldstein v. Rosario (In re Goldstein), 430 F.3d 106, 109 (2d Cir. 2005) (noting the magistrate judge had “issued an order requiring plaintiff’s counsel to show cause in person why he should not be denied fees in the matter and why his conduct should not be reported to the appropriate disciplinary bodies”).

170. It is not uncommon for this notice to be provided to the lawyer by copy of a public order or opinion. See, e.g., In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2009 WL 5195841, at *13 (D. Minn. Dec. 15, 2009). The judge, however, may instead opt to provide written notice to the lawyer using means that are publicly available in the docket but less conspicuous, such as a letter. See, e.g., Teaford, 338 F.3d at 1180 (district judge referred lawyer’s conduct to state disciplinary agency by letter enclosing a transcript, copied to counsel of record including the referred lawyer). See generally McMorrow et al., supra note 24, at 1438 (“While sending a copy of the court’s opinion to the bar disciplinary apparatus appears to be the most common method of public referral, there is no logical or structural reason why referrals to the appropriate disciplinary body must occur in a reported decision.”).
cial referral, the Constitution does not require any notice to the lawyer—whether prior or contemporaneous—and does not mandate that a lawyer have an opportunity, in advance of a judicial referral, for a hearing or similar opportunity to prevent the sending of information.\textsuperscript{171}

That being said, even when a “pure” referral of information is attempted, the applicable court rules might be construed as creating certain procedural requirements that must precede the referral. As Parness has observed, the 1993 advisory committee note to FRCP 11 describes a disciplinary referral as one of “a variety of possible sanctions.”\textsuperscript{172} The 1993 version of FRCP 11\textsuperscript{173} itself states that any “sanction” under the rule may be imposed only “after notice and an opportunity to respond”;\textsuperscript{174} must be “limited to what is sufficient to deter repetition” of the violation by the lawyer and “others similarly situated”;\textsuperscript{175} and should be accompanied by a description of “the conduct determined to constitute a violation” and an explanation of “the basis for the sanction imposed.”\textsuperscript{176} Parness therefore has advised that any disciplinary referrals made by a federal court to a state disciplinary agency under FRCP 11 “should be preceded by a court ‘initiative,’” which should include “an order describing the specific conduct that appears to violate”

\textsuperscript{171}. \textit{See}, e.g., Baker Group, L.C. v. Burlington Northern and Santa Fe Ry. Co., 451 F.3d 484 (8th Cir. 2006). Reviewing actions taken by the federal district court under the “inherent powers” doctrine, the Eighth Circuit rejected the lawyers’ contention that the court’s referral to a state disciplinary agency was a “sanction”:

Though [the district court judge] expressly stated that ethical violations may have occurred, he left resolution of that issue to the state disciplinary authorities. [The lawyers] argue that the order was nonetheless a sanction that deprived them of liberty and property interests without due process of law because they were afforded no prior notice and opportunity to respond. . . . [T]he due process contention is frivolous. A judge’s referral of possible ethical violations to an attorney discipline authority “is analogous not to a censure or reprimand but to an order to show cause why sanctions should not be imposed,” following which the attorney will receive all process due.

\textit{Id.} at 492 (quoting Teaford v. Ford Motor Co., 338 F.3d 1179, 1181 (10th Cir. 2003)).

\textsuperscript{172}. 1993 Amendments, \textit{supra} note 51, at 587.

\textsuperscript{173}. In 2007, the language of FRCP 11 was “amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes [were] intended to be stylistic only.” FRCP 11 (2007 Advisory Committee Note).

\textsuperscript{174}. 1993 Amendments, \textit{supra} note 51, at 580 (FRCP 11(c)). \textit{See} FRCP 11(c)(1) (current version) (any “sanction” under the rule may be imposed only “after notice and a reasonable opportunity to respond”).

\textsuperscript{175}. 1993 Amendments, \textit{supra} note 51, at 582 (FRCP 11(c)(2)). \textit{See} FRCP 11(c)(4) (current version) (any sanction must be “limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated”).

\textsuperscript{176}. 1993 Amendments, \textit{supra} note 51, at 583 (FRCP 11(c)(3)). \textit{See} FRCP 11(c)(6) (current version) (“An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.”)
FRCP 11, and direct the alleged violator “to show cause” why the rule has not been violated.177

Subsequent to Parness’ 1993 article, at least one federal court of appeals—the Tenth Circuit in Teaford v. Ford Motor Co.178—has concluded that a pure “referral” to a state disciplinary agency does not constitute a FRCP 11 “sanction,” absent other adverse action or a “specific finding of misconduct” on the part of the lawyer.179 The Tenth Circuit decided the judge’s referral letter to the state disciplinary agency amounted merely to “a suggestion that a violation of rules of conduct may have occurred, leaving further consideration, investigation, and judgment to the disciplinary board.”180 Although its decision that it lacked appellate jurisdiction to review the referral avoided the need to resolve the lawyer’s due process argument directly,181 the opinion strongly suggested that the court’s referral without prior notice and a hearing was not only not reviewable, but also did not violate the due process rights of the lawyer.182 Nevertheless, before relying on FRCP 11, or one of its state counterparts, as the basis for sending information about a lawyer’s conduct to the appropriate state or federal lawyer misconduct database, the most prudent course is for the court to follow the notice and hearing provisions specified in any potentially applicable rule of civil procedure. If the court’s particular litigation rules do not specify a particular method for providing this notice and hearing, the court should follow a process compa-

177. Parness, supra note 45, at 65 (citing 1993 Amendments, supra note 51, at 582 (FRCP 11(c)(1)(B)). Parness has further recommended that the court’s show cause order “should also provide guidance on the standards and processes applicable at the show cause hearing, including whether and how oral or written testimony will be entertained, whether discovery will be allowed prior to the hearing, whether other public interest sanctions might also be considered, and whether some special public representative (or an amicus) will participate as quasi-prosecutor at the hearing.” Id. (footnotes omitted).
178. 338 F.3d 1179 (10th Cir. 2003).
179. Id. at 1181-82. The court recognized “the Advisory Committee Notes to the 1993 amendments to Rule 11 provide that ‘referring the matter to disciplinary authorities’ is one among a ‘variety of possible sanctions’ that may be imposed. But it does not follow that all such referrals are automatically ‘sanctions.’ ” Id. at 118. It should be noted, however, that no party filed a FRCP 11 motion in Teaford. Id. Instead, after conducting a hearing on the lawyer’s motion to set aside a settlement for reasons of alleged fraud, the court “concluded that there was no evidence to support [the lawyer’s] fraud allegations”—a decision implicating FRCP 11 concerns about signing and filing a frivolous pleading—and then sent a letter to the disciplinary agency in the state where the lawyer was licensed, enclosing a copy of the hearing transcript. Id. at 1180-81. Cf. FRCP 11(c)(3) (“On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).”)
180. Id.
181. Id. See also infra Part IV(B).
182. See Teaford, 338 F.3d at 1181 (“The district court’s reference of this matter to the disciplinary committee of the bar was not tantamount to a finding of misconduct, let alone imposition of a sanction. . . . Presumably, [the lawyer] will receive all the due process to which she is entitled [before the disciplinary committee], before there is either a finding of misconduct or the imposition of sanctions.”).
able to that which Parness recommends for courts making FRCP 11 referrals to state disciplinary agencies.\textsuperscript{183}

On the other hand, what if (1) the court imposes no actual deprivation of liberty or property in connection with the referral, and (2) there is no court procedural rule that arguably creates notice and hearing rights for the lawyer (e.g., the referral is based on the exercise of the court’s “inherent powers” as in \textit{Guidant})\textsuperscript{184} Although no procedural due process rights should attach in such a case and thereby impede or delay a referral of information about the lawyer’s conduct to a state disciplinary agency, at least one federal circuit court of appeals would likely disagree. In \textit{Adams v. Ford Motor Company},\textsuperscript{185} the Third Circuit concluded that a federal magistrate judge violated a lawyer’s due process rights (1) by referring information about the lawyer’s conduct to the Virgin Islands Bar Association for a “formal investigation and disciplinary proceedings” rather than utilizing the federal disciplinary processes for the imposition of “sanctions” set forth in the district court’s local rules\textsuperscript{186} and (2) by failing to provide the lawyer with notice and an opportunity to be heard before these “sanctions” were imposed.\textsuperscript{187} Prior to making the referral to the Virgin Islands territorial disciplinary authorities, the magistrate judge entered an order making a “factual finding” the lawyer violated ABA Model Rule 3.5(c) in connection with post-trial communication with a juror.\textsuperscript{188} In the opinion of the Third Circuit panel, even though the district court expressly stated that it did not seek to “disbar, suspend, or reprimand counsel,”\textsuperscript{189} this “factual finding” in the court’s order was “equivalent to a sanction”\textsuperscript{190} imposed on the lawyer because of the “reputational harm” involved.\textsuperscript{191} According to the court, “the magistrate judge’s conclusion that [the lawyer] violated ABA Model Rule 3.5 carries consequences that are similar to those that flow from a reprimand,” particularly because the lawyer “could face disciplinary action from the Virgin Islands Bar Association if the order is affirmed and formal sanctions could be imposed.”\textsuperscript{192}

\begin{itemize}
\item \textsuperscript{183} See supra note 177 and accompanying text.
\item \textsuperscript{184} See supra notes 1-7 and accompanying text (discussing \textit{Guidant}).
\item \textsuperscript{185} 653 F.3d 299 (3d Cir. 2011).
\item \textsuperscript{186} \textit{Id.} at 307-08. Local Rule 83.2(b) of the District Court of the Virgin Islands provided that “when misconduct or allegations of misconduct . . . would warrant discipline of an attorney admitted to practice before the court shall come to the attention of a judge of this court . . . the Chief Judge . . . shall refer the matter to the clerk of court, who shall refer it to counsel for investigation and the prosecution of a formal disciplinary proceeding.” \textit{Id.} at 308. The rule also stated that an order following a disciplinary proceeding “shall be placed under seal until further order of the court.” \textit{Id.}
\item \textsuperscript{187} \textit{Id.} at 308-09.
\item \textsuperscript{188} \textit{Id.} at 305.
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{Id.} at 308.
\item \textsuperscript{191} \textit{Id.} at 306.
\item \textsuperscript{192} \textit{Id.}
\end{itemize}
In essence, the Third Circuit in *Adams* interpreted the Due Process Clause as creating constitutional rights allowing lawyers to impede and delay referrals of information about their conduct to state disciplinary agencies whenever a court order preceding a judicial referral includes a “factual finding” of a rule violation. This interpretation—though questionable on the merits—may be considered a further step down the path already taken by other courts in decisions that have also favored the interests and concerns of lawyers in the context of judicial referrals.\(^{193}\) Thus, before sending information about lawyer misconduct to the state or federal database after entry of an order including a specific “finding” the lawyer has actually violated a rule of professional conduct, the court should provide the lawyer with advance notice and an opportunity to be heard.

On the other hand, if the reporting court sends the information to the database applying the “substantial likelihood” standard that a lawyer has violated a professional conduct rule, it could then reasonably be argued (looking to precedent such as the Tenth Circuit opinion in *Teaford*) that no “specific finding of misconduct” triggering pre-report notice and hearing rights has been made.\(^{194}\) As an additional alternative, to distinguish *Adams*, the court could enter a public order directing the report of information to the database, but omitting its “finding” of an actual rule violation (thereby avoiding or minimizing any “reputational harm” to the lawyer triggering due process rights).\(^{195}\) Or the court could enter an order making a “factual finding” of an actual rule violation, but place the order under seal, for the same reason.\(^{196}\) In each alternative scenario, *Adams* should be properly regarded as distinguishable (even for federal courts inclined to agree with the Third Circuit approach to due process), and the reporting of infor-

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\(^{193}\) See also infra Part V(B) (addressing lawyers’ rights of appeal concerning judicial reports to the misconduct databases).

\(^{194}\) See supra notes 139, 150, and accompanying text (discussing the proposed “substantial likelihood” standard as applied to RFEs and IRs under the proposed lawyer misconduct database reporting system). See also *Teaford*, 338 F.3d at 1181-82 (explaining the district court’s referral letter enclosing transcript amounted merely to “a suggestion that a violation of rules of conduct may have occurred, leaving further consideration, investigation and judgment to the disciplinary board”). In essence, the argument would state, the “may” in *Teaford* is sufficiently similar to the “substantial likelihood” standard to support a similar outcome on the due process analysis. Cf. United States v. Barnett (*In re Harris*), 51 Fed. Appx. 952, 957 (6th Cir. 2002) (concluding a letter from the district court referring a lawyer’s trial conduct to United States Department of Justice Office of Professional Responsibility and “appraising that office of the ‘likelihood of unprofessional conduct’” by the lawyer was not a “particularized finding of misconduct,” and the court’s referral was not an appealable “sanction,” even if the court adopted this finding-based approach to reviewability). \(^{195}\) Cf. *Adams*, 653 F.3d at 306.

\(^{196}\) Id. at 308-09 (“An opportunity to be heard is ‘especially important’ where a lawyer or firm’s reputation is at stake because sanctions ‘act as a symbolic statement about the quality and integrity of an attorney’s work—a statement which may have a tangible effect upon the attorney[‘]s career.’”) (quoting Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc., 57 F.3d 1215, 1225 (3d Cir. 1995)).
mation to the state or federal electronic database should be permitted without prior notice and an opportunity to be heard under the Due Process Clauses of the Fifth and Fourteenth Amendments.\textsuperscript{197}

**B. What Rights of Appeal, If Any, Should a Lawyer Have to Prevent Judicial Reporting of Information to a Lawyer Misconduct Database?**

Closely related to the due process concerns relating to the proposed lawyer misconduct databases are questions about appeals filed by lawyers objecting to the court’s actions. Should a lawyer have standing to appeal a state or federal court’s decision to send information to the electronic databases and, if so, would the court’s decision to send the information be properly considered as reviewable on appeal?\textsuperscript{198}

As to the threshold issue of standing, a lawyer seeking to appeal a court’s report of information about his conduct to the state or federal electronic database would need to establish (1) the lawyer has suffered a cognizable injury-in-fact from the court’s official action and (2) the likelihood that a favorable decision will redress the alleged injury suffered by the lawyer.\textsuperscript{199} As an exception to the general rule that only a party to an adverse judgment may appeal,\textsuperscript{200} courts have generally held a lawyer has standing to appeal a final order imposing a fixed monetary sanction,\textsuperscript{201} a final order of contempt, or a final order imposing various kinds of non-monetary sanctions.\textsuperscript{202} In similar fashion to their resolution

\textsuperscript{197.} Cf. Teaford, 338 F.3d at 1181-82 (deciding because the disciplinary referral letter amounted only to “a suggestion that a violation of the rules of conduct may have occurred,” the district court was not required to provide the lawyer with any due process notice or hearing before making the referral).


\textsuperscript{199.} See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quoting federal cases on elements of standing to appeal); Cities Serv. Co. v. Gulf Oil Corp., 976 P.2d 545, 547 (Okla. 1999) (exemplifying state court approach to the elements of standing to appeal). See also Richmond, supra note 198, at 746 (“[S]tanding is a prerequisite to a court’s exercise of subject matter jurisdiction.”).

\textsuperscript{200.} Richmond, supra note 198, at 747 (citing Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1319 (Fed. Cir. 2007)).

\textsuperscript{201.} Id. (citing GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 2-372 to -373 (4th ed. 2008) (discussing federal court approach)).

\textsuperscript{202.} Id. (citing Cunningham v. Hamilton Cnty., 527 U.S. 198, 207-08 (1999)).
of due process questions in the context of judicial referrals, federal appellate courts would likely conclude a lawyer has suffered a cognizable injury-in-fact when a judge has made a specific finding of rules-violating misconduct in a public order making a referral to a state disciplinary agency.203 As the Third Circuit stated in Adams, this combination of judicial actions would cause “reputational harm” to the lawyer204 and, as the Second Circuit has observed,205 may indirectly cause financial harm in the form of the “potential costs in responding to the referral.”206 As for the required likelihood that a favorable decision will redress the alleged injury, if the appellate court has granted a stay of the reporting of information to the lawyer misconduct database pending its review of the appeal, this element of standing would likely be satisfied because the appellate court can remedy the injury by ordering that the report must not be made.207

A finding that the lawyer has standing to appeal the report of information to the lawyer misconduct database does not entirely conclude the analysis.208 In order to support an argument for review on appeal, the lawyer must be able to show that all other required elements for subject matter jurisdiction are satisfied.209 In analyzing such jurisdiction, the appellate court should apply (1) the fundamental principle that courts review “decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations”;210 (2) the jurisdictional doctrine that “only a party that is aggrieved by a judgment may

203. See Butler v. Biocore Med. Tech., Inc., 348 F.3d 1163, 1167-68 (10th Cir. 2003) (concluding a lawyer was “directly aggrieve[d]” by an order that found he had committed “ethical violations” and was “mailed to every court in which [he] had been admitted to practice,” causing “damage widely done to his professional reputation”).
204. Adams, 653 F.3d at 308-09.
205. Goldstein v. Rosario (In re Goldstein), 430 F.3d 106 (2d Cir. 2005).
206. Id. at 111. Some language in Goldstein seems to suggest that the referral itself is a “sanction” that may be appealed by the lawyer. See id. (“The referral was included in the court’s judgment and was to be implemented by the Clerk of Court. It was in the nature of a sanction.”). The Second Circuit, however, has subsequently made it clear that “specific findings of misconduct” included in the referring court’s order are necessary to support an appeal. See Keach v. Cnty. of Schenectady, 593 F.3d 218, 224 (2d Cir. 2010) (“We have held that a district court’s referral of specific findings of misconduct to a disciplinary committee, even absent a monetary sanction, is appealable.”).
207. Cf. Cities Service, 976 P.2d at 548 (concluding two lawyers whose behavior the court had described as “contemptuous” lacked standing to appeal, even assuming the court’s words had injured their professional reputations, because those injuries could not be remedied under the circumstances “other than [with] a meaningless declaration” concerning their conduct).
208. Some courts, however, have incorrectly stopped their analysis of subject matter jurisdiction once they have decided the lawyer has “standing to appeal” under Article III of the United States Constitution. See, e.g., Adams, 653 F.3d at 304-06 (focusing exclusively on the standing issue in concluding the court had jurisdiction to hear the appeal). Other federal statutory requirements relating to appellate jurisdiction, discussed infra, impose additional requirements.
209. See Richmond, supra note 198, at 750.
210. Id. (quoting Williams v. United States (In re Williams), 156 F.3d 86, 90 (1st Cir. 1998)).
appeal from it”; \textsuperscript{211} and (3) the final judgment rule, “which generally confines appellate courts’ jurisdiction to the review of lower courts’ final decisions.” \textsuperscript{212}

The Seventh Circuit has long taken the strictest position among the federal courts on the issue of appellate jurisdiction to review district courts’ responses to lawyer misconduct. \textsuperscript{213} In order for a lawyer to pursue an appeal in the Seventh Circuit, the district court must enter an order imposing a monetary sanction on the lawyer. \textsuperscript{214} In that Circuit, the court of appeals has no jurisdiction to review any other response to a lawyer’s conduct taken by a district court, including “findings” of rule violations (with or without a disciplinary referral). \textsuperscript{215} No federal circuit other than the Seventh has imposed “final decision” standards for reviewability more stringent than requiring the district court to label its response to the lawyer’s conduct using sanction-oriented language such as “reprimand.” \textsuperscript{216} Most federal circuits will consider the district court’s decision as “final” and reviewable as long as it includes “specific findings of misconduct” made by the district court regarding the lawyer. \textsuperscript{217} These circuits have expressed the view that appellate jurisdiction is warranted in part because “specific findings” of this kind may cause “reputational harm” to the lawyer. \textsuperscript{218}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{211} Id. (citing Funk, supra note 198 at 1489-90); Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 333 (1980).
\item \textsuperscript{212} Richmond, supra note 198, at 752 (citing Commonwealth v. White, 910 A.2d 648, 653 (Pa. 2006)).
\item \textsuperscript{213} See Richmond, supra note 198, at 763 (“[T]he Seventh Circuit has long been regarded as the most conservative among the federal courts of appeals when it comes to lawyers challenging judicial criticism. . . .”).
\item \textsuperscript{214} See, e.g., Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007) (concluding an attorney can only appeal when the court has formally sanctioned the attorney by imposing a monetary sanction); Bolte v. Home Ins. Co. 744 F.2d 572, 572-73 (7th Cir. 1984) (concluding a district court’s “finding” that lawyers engaged in misconduct in litigation is not a “final decision” reviewable on appeal).
\item \textsuperscript{215} Cf. Adams, 653 F.3d at 304-06.
\item \textsuperscript{216} See Young v. City of Providence, 404 F.3d 33, 38 (1st Cir. 2005) (finding a sanction where the district court explicitly imposed “the sanction of public reprimand”); Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1352-53 (Fed. Cir. 2003) (concluding an “explicit and formal” reprimand is appealable).
\item \textsuperscript{217} See Keach v. Cnty. of Schenectady, 593 F.3d 218, 224 (2d Cir. 2010). See also Adams, 653 F.3d at 304-06 (Third Circuit; concluding a magistrate judge’s “factual finding” of a rule violation along with a referral to disciplinary authorities satisfied requirements for appealability); United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) (deciding because a district court found a violation of a specific “ethical rule,” the order contained the “requisite” formality to be an appealable sanction). Some circuits have not required even a finding of a specific rule violation, as long as the court’s finding of “misconduct” is clear based on the words used in the order. See Walker v. City of Mesquite, 129 F.3d 831, 832-33 (5th Cir. 1997) (concluding appellate jurisdiction existed where the district court stated in an order, without citing a specific rule violation, that the lawyer engaged in “blatant misconduct” and “violated his obligation of candor” to the court).
\item \textsuperscript{218} See, e.g., Adams, 653 F.3d at 306. In my view, the Seventh Circuit’s restrictive approach to lawyers’ appeals from nonmonetary judicial responses to their litigation conduct is sound as a matter of law and as a matter of public policy. See Funk, supra note 198, at 1501 (acknowledging
\end{enumerate}
\end{footnotesize}
As to the particular question of a lawyer’s ability to appeal a “disciplinary referral,” Douglas A. Richmond has expressed the following view:

A court’s referral of a lawyer to disciplinary authorities without an explicit finding of professional misconduct is not a formal judicial sanction which would support an appeal for the simple reason that all lawyers are able—and sometimes have a duty—to report other lawyers to disciplinary authorities. In fact, anyone may report a lawyer to disciplinary authorities. Although a court’s referral to disciplinary authorities may tarnish a lawyer’s reputation, that incidental harm alone does not transform the referral into a sanction. Moreover, even the most generous interpretation of what constitutes an appealable sanction requires a finding of misconduct. 219

Moreover, in the 2007 decision of Adkins v. Christie, 220 the Eleventh Circuit agreed that “[a] referral cannot be characterized as a sanction or a disciplinary measure. Through a referral, a district court simply indicates that in its view, conduct of the attorneys merits further examination by the disciplinary committee, which may or may not result in a sanction. As such, a referral is not a reviewable measure.” 221

Taking together these federal circuit precedents on standing and appellate jurisdiction, a court’s reporting of information to a lawyer misconduct database should not be appealable by the lawyer unless it is at least accompanied by a “specific finding of misconduct” by the lawyer. For instance, in circumstances where the court decides only that there is a “substantial likelihood” of misconduct in violation of an applicable rule of professional conduct, this should not be regarded as a “specific finding of misconduct” for purposes of triggering a lawyer’s right to appellate review of the judicial reporting. 222 On the other hand, if the

the Seventh Circuit’s position “fits into the exception for nonparty appeals from collateral judgments directed against them,” and that it is quite clear “[a]n appeal from a monetary sanction is an appeal from a judgment, and not from a finding within the judgment”). Unlike monetary sanctions, which cause clear injury to the lawyer, potential reputational damage from judicial words is generally speculative, contingent, and “insufficiently real and immediate to show an existing controversy.” Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992). Other commentators, however, have taken a less favorable view of the Seventh Circuit’s position. See, e.g., Richmond, supra note 198, at 786-87; Simon, supra note 198, at 202-03; Funk, supra note 198, at 1501-02; Tannenbaum, supra note 198, at 1874-76; Pasquale, supra note 198, at 249.

219. Richmond, supra note 198, at 782-83 (footnotes omitted).
220. 227 Fed. Appx. 804 (11th Cir. 2007).
221. Id. at 806. Although the appellate opinion did not make this explicit, it may properly be inferred from the Eleventh Circuit’s analysis that the district court made its disciplinary referral pursuant to its “inherent powers.” See id.
222. Cf. United States v. Barnett (In re Harris), 51 Fed. Appx. 952, 957 (6th Cir. 2002) (concluding a letter from the district court referring a lawyer’s trial conduct to United States Department of Justice Office of Professional Responsibility and “appraising that office of the ‘likelihood of unprofessional conduct’ ” by the lawyer was not a “particularized finding of misconduct,” and the
court either imposes a monetary or nonmonetary sanction along with the database report, or states in a public order that the lawyer has in fact committed a rule violation, most federal circuits (but not the Seventh) would deem the reporting of information to the database to be reviewable alongside the court’s other means of responding to the lawyer’s conduct. Finally, the reporting court’s decision to classify its database report as either an RFE or an IR should not be considered a “specific finding of misconduct” for purposes of determining standing or appellate jurisdiction; thus, a court’s reporting of information and documents concerning a lawyer without more would not provide a basis for a lawyer to obtain appellate review.

C. Should the General Public Have Direct Access to Information in the Lawyer Misconduct Databases, or Should Such Access Be Limited to Persons in Specified Entities?

The general public should not have direct access to the information in the state and federal lawyer misconduct databases. Rather, once a court has sent information to the appropriate database and it is stored there, electronic access to the reported information using the database should be limited to specified types of entities responsible for lawyer regulation, including state disciplinary agencies, federal court disciplinary committees, and state bar admissions authorities. These access limitations will properly balance the reputational and privacy interests of lawyers with the public interest in ensuring that information relating to lawyer misconduct is nevertheless disseminated for official action.

Federal and state courts have recognized a common law presumption that the general public has a right of access to judicial records and documents for inspection and copying. It applies to all “judicial decisions and the documents which...” court’s referral was not an appealable “sanction,” even if the court adopted this finding-based approach to reviewability).

223. Database access by state bar admissions authorities should be limited to those jurisdictions in which an applicant is seeking admission and is undergoing character and fitness evaluation and has been previously admitted to the bar in one or more other jurisdictions. In any bar application, the applicant should be required to disclose his or her universal licensing number and to sign an authorization and release permitting the bar admissions authorities to use the number to access information on the state and federal lawyer misconduct databases relating to the applicant’s professional conduct as a lawyer.

224. In proposing legal malpractice insurers should report to state disciplinary agencies claims made against lawyers, Arthur F. Greenbaum reviewed criticisms made by others about the reliability of malpractice information reported to and stored in the National Practitioner Data Bank. See Greenbaum, Filling the Reporting Gap, supra note 17, at 456 & n.80. He observed that “[i]n the system I propose, where the information is only used to build a file for each lawyer, to be used only by disciplinary authorities, these problems would not arise.” Id. at 456 n.80.

comprise the bases of those decisions.”

Alongside this common law right of access, however, state and federal courts have generally adopted specific confidentiality protections applicable to their lawyer disciplinary processes. Most states permit public access to information in the lawyer discipline process only after (1) a finding of probable cause that the lawyer has violated a rule of professional conduct and (2) “the filing and service of formal charges, unless the complainant or respondent obtains a protective order.” In several jurisdictions, information about complaints in the lawyer discipline process does not become public until there has been a finding of an ethical violation and public sanctions have been imposed. Consistent with the policies supporting confidentiality provisions relating to the lawyer discipline process, state and federal courts should adopt rules protecting information stored in the state and federal lawyer misconduct databases and restrict access to only specified entities acting in the public interest.

Along with the interest in maintaining consistency with existing law on lawyer discipline and confidentiality, other considerations would support limiting a state common law right of access, and observing “the availability of court files for public scrutiny is essential to ‘the public’s right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.’” (quoting In re Continental Illinois Securities Litig., 732 F.2d 1302, 1308 (7th Cir. 1984)).

226. Andrew D. Goldstein, Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation, 81 CHI.-KENT L. REV. 375, 384-85 (2006) (quoting Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994)). “Because First Amendment access rights are limited to matters invoking ‘freedom of communication,’ in most situations courts turn to the common law when determining whether to grant public access to judicial information.” Id. at 384 (quoting In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1331-32 (D.C. Cir. 1985)).

227. See, e.g., Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 GEO J. LEGAL ETHICS 1, 18-20, 44-48 & n.296 (2007) (discussing various approaches taken by states in their court rules on confidentiality in the lawyer discipline process, as well as the implications of common law right of access cases for obtaining access to documents filed with courts in lawyer disciplinary cases); DEL. DIST. CT. L.R. 83.6(e)(1) (“Complaints, and any files based on them, shall be treated as confidential unless otherwise ordered for good cause shown.”), But cf., e.g., OREGON ST. BAR R. PROC. 1.7(b) (providing “the records of the Bar relating to contested . . . disciplinary . . . proceedings are available for public inspection”); FLA. OFF. OF INS. REG. (making lawyer malpractice information reported in Florida publicly available), http://www.floir.com/Sections/PandC/ProfLiab_db/index.aspx (last visited Sept. 29, 2012).

228. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(A) (1993). The confidentiality requirements typically applicable in the lawyer discipline process have been strongly criticized in recent scholarship. See, e.g., Levin, supra note 227, at 22 (suggesting “the public’s right to information should vest once a discipline complaint is docketed and . . . the information should become available once that complaint is dismissed, resolved informally, . . . or referred for further proceedings after a probable cause determination”) (footnote omitted). Although in my view the balance struck in the ABA Model Rules between fairness/reputational interests and public protection/privacy concerns is a reasonable and defensible one, more detailed development of the respective arguments on the issue is beyond the scope of this Article.

229. Levin, supra note 227, at 19-20 & n.124.
public access to the databases, especially through the use of direct online connections. First, some amount of information in the databases will have received limited judicial review before reporting has occurred (e.g., under the proposed “substantial likelihood” standard). Restricting access to this information to entities that will either screen it for possible disciplinary action (e.g., state disciplinary agencies and federal disciplinary committees), or review and consider it in connection with an official investigation relating to lawyer regulation (i.e., bar admissions committees) could alleviate the reasonable unease about how relatively “raw” information might be misunderstood or misused to a lawyer’s detriment. In addition, consolidating large amounts of information about lawyer conduct in databases may actually change the nature of the information itself by making it searchable.230 This concern is closely related to privacy issues surrounding sensitive information about litigants and other members of the public, which courts have already been confronting as they develop and implement electronic access policies for judicial dockets more generally.231

The confidentiality of the databases, however, does not mean that information about judicial RFEs and IRs will not be accessible to the general public in other ways. In most cases, courts should apply the common law right of access to allow public access to information about lawyer misconduct to be obtained directly from the court where the litigation occurred. This access would include documents relating to the judicial decision to send the information to the appropriate database as an RFE or IR.232


231. “With rapid advances in technology and the ease of availability and dissemination of large amounts of data found in court records, and especially compiled data, traditional protections based on ‘practical obscurity’ are gone. The search for information can now be performed at a computer terminal by anyone anywhere; the information is available in a matter of minutes and in massive amounts, and the cost is minimal.” Lynn E. Sudbeck, Placing Court Records Online: Balancing Judicial Accountability With Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records, 51 S.D. L. REV. 81, 89 (2006). “The qualitative change in the method of access eradicates the naturally occurring privacy protections in place with paper records in clerks’ offices and demands reexamination of court records access policies.” Id.

232. The common law right of access, however, is by no means absolute. Nixon, 435 U.S. at 598 (“Every court has supervisory power over its own records and files, and access [may be] denied where court files might have become a vehicle for improper purposes.”). For example, at the request of a party, a court may place documents relating to a specific judicial proceeding under seal and thereby shield them from public access. Although courts differ widely as to their rules and procedures governing the sealing of judicial information, there is general agreement that (1) the decision rests within the court’s discretion and (2) the court must take into consideration the facts and circumstances particular to the case. See Id. at 599; Skolnick, 730 N.E.2d at 16. See also Goldstein,
Conclusion

Like the electronic filing and records technology that has in recent years so revolutionized litigation practices in state and federal courts, electronic databases have enormous potential to serve as instruments to be used by courts to “send the message” about litigation-related misconduct by lawyers. These technological instruments also offer a tremendous opportunity to “send the message” to courts about the important policy interests at stake when a judge possesses information about known or substantially likely instances of lawyer misconduct. To protect the public outside the courtroom walls, this information must be reported and made available to state disciplinary agencies. The proposed database reporting systems, including the adoption and use of the universal licensing numbers long recommended by ABA commissions, provide a more efficient means for accomplishing this objective.233 They also promote a more reliable and comprehensive distribution of misconduct-related information to the multiple jurisdictions in which a lawyer may be licensed to practice.

As this Article has acknowledged, there are many reasons other than inefficiencies in the reporting process that have contributed to judicial underreporting of lawyer misconduct.234 And there is no question that the resources available to courts for the upgrading of technology have become increasingly scarce. That being said, as soon as it is economically feasible to do so, state and federal courts should take the necessary actions to create these technologically enhanced and effective reporting systems, and, to accompany them, adopt procedural rules with adequate and clear reporting standards. By doing so, our state and federal courts would be “sending the message” to lawyers and the public that lawyers are fully accountable for their conduct in litigation—not just directly by means of court-imposed sanctions in the proceeding, but also through potential actions by state disciplinary agencies impacting their license to practice law.

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233. See supra Part III(A).
234. See supra Part II.