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The Hypocrisy of Attorney Licensing

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The attorney licensing system poorly serves those most in need of legal help. Some dimensions of this problem are relatively well-understood. Access-to-justice scholarship about professional licensing has revealed that state bars[1] create high entry barriers and perpetuate a monolithic definition of the practice of law, both of which contribute to a shortage of lawyers in America.[2] Attorney scarcity has, in turn, increased the cost of professional services, leaving out of the market the clients most desperately in need of a lawyer – the rural poor, indigent defendants, accident victims, children, older adults, and immigrants.[3] The Sixth Amendment right to criminal defense counsel and the court appointment process have tempered this effect for some clients. But for other clients – like immigrants and accident victims – there is no safety net at all. Yet in the face of these shortages, state bars have done little to reform licensure with an eye toward access.[4]

This conventional account of how the attorney licensing system fails needy clients is accurate but incomplete. In fact, the state of attorney licensure and access to justice is

[1] While in every state the supreme court holds the ultimate authority over the licensing and professional discipline of lawyers, the entities to which courts delegate the day-to-day regulation of the profession vary. In most states, the supreme court uses a nominally governmental agency (or agencies) – dominated by lawyers and heavily influenced by the private bar association – to review applications, administer the bar, and decide disciplinary matters. In a few states, some or all of these tasks are delegated directly to the state bar association. In this chapter, I use the terms "licensing authority" and "disciplinary authority" to refer to the bodies delegated the supreme court's authority to regulate the profession. Sometimes, as a shorthand, I refer to the regulator as the "state bar"; when I do this, I do not mean to invoke the state bar association in its capacity as a private membership association of the state's lawyers.

[2] For a discussion of how the bar exam contributes to lawyer scarcity and access-to-justice problems, see, for example, Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163 (2022). For a discussion of how a vague and monolithic definition of the unlicensed practice of law does the same thing, see, for example, Ralph Baxter, *Dereliction of Duty: State-bar Inaction in Response to America's Access to Justice Crisis*, 132 YALE L.J. FORUM 228 (2022).

[3] *See generally* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1228 (2014).

[4] *See, for example*, Baxter, *supra* note 2.

even worse than many scholars recognize because lawyer licensing is not only *over*-regulatory but *under*-regulatory in ways that also harm low-income clients. As strict as state bars are when it comes to entry requirements and ethics rules, they are lax when it comes to professional discipline. In this sense, the lawyer licensing system is hypocritical. In rulemaking, it appears to place attorney quality and public protection above all else, including access to justice. Yet when it comes to discipline, the system puts public protection in the back seat, content to leave unethical and incompetent lawyers in the profession and allow market forces to push them toward the neediest clients.

Every year, thousands of lawyers temporarily lose their ability to practice law or have it significantly curtailed because they have engaged in the unethical or incompetent practice of law.[5] This roster of problematic lawyers is underinclusive; professional discipline as meted out by licensing agencies is notoriously lax, slow, and opaque, and it likely only catches the worst of the worst in its net.[6] Thus, the records of public discipline reflect some of the most serious sins a lawyer can commit: conversion of client funds, exchanging sex for services, and severe client neglect. Yet only a fraction of these attorneys lose their ability to practice law.[7] Far more common are reprimands, probation, and suspensions that allow an attorney to return to practice, even for offenses that suggest that the offending lawyer's judgment or competency remains in serious doubt.

Where do those attorneys turn for work after having gotten in trouble for serious professional misconduct? The short answer is it's a mystery. Scholars have for years lamented the lack of data about which lawyers are disciplined and why.[8] This chapter, however, draws on the limited data available to assert the hypothesis that the disciplinary process drives the profession's most problematic providers into solo and court-appointed practice, where they are likely to serve the underserved. This chapter further argues that using the profession's bad apples to bridge the access-to-justice gap is problematic not only because it matches the unethical and incompetent with those least able to protect themselves or change attorneys, but also because solo and small-firm work – where supervision is virtually nonexistent – presents unique incentives and opportunities to behave unethically.

If, indeed, the most unethical and incompetent lawyers are being pushed by market forces toward the neediest of clients, the solution cannot be merely to tighten

[5] Am. Bar Ass'n, ABA Profile of the Legal Profession 2022 (2022) ("In 2019, 2,308 lawyers were publicly disciplined for misconduct in 43 states and the District of Columbia, according to the 2019 ABA Survey on Lawyer Discipline Systems."). This figure is notably underinclusive; it does not include disciplinary actions from California, Massachusetts, New Jersey, South Carolina, South Dakota, Vermont, West Virginia, and part of New York.

[6] *See generally* Leslie C. Levin, *The Emperor's Clothes and Other Tales about the Standards for Imposing Lawyer Discipline Sanctions*, 48 Am. U. L. Rev. 1 (1998).

[7] *See* ABA Profile, *supra* note 5 (reporting that only 21 percent of public discipline against lawyers resulted in disbarment).

[8] *See, for example*, Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 Geo. J. Legal Ethics 1 (2007).

up attorney discipline. This will further contribute to the attorney shortage problem for which indigent clients suffer the worst consequences. Rather, if the licensing system is to be reformed in a way that meaningfully improves access to justice in America, both problems – the ways in which it is over-regulatory and under-regulatory – need to be addressed simultaneously. Arguments for how to increase the supply of lawyers have been made elsewhere. This chapter concludes by sketching some reforms that would meaningfully ensure that supply remains free from providers who have shown themselves to be unfit.

3.1 TOO FEW LAWYERS

It is by now well-documented that the United States has a severe access-to-justice problem.[9] A 2022 report from the Legal Services Corporation found that low-income Americans do not get enough legal help for 92 percent of the civil justice issues that affect them.[10] In most civil cases in state court, at least one party has no lawyer;[11] in cases involving debt collection, family law, and landlord–tenant cases, well over 90 percent of cases involve at least one pro se litigant.[12] The rural poor are especially bad off. For example, in Georgia, where 70 percent of lawyers work in or near Atlanta, nearly half the state's counties have fewer than ten active lawyers. Five counties have none at all.[13]

Part of the problem lies with inadequate governmental assistance. The constitutional right to an attorney paid by the government only exists in the criminal context; federal and state funding for legal aid in civil matters is woefully inadequate,[14] and out of step with other developed countries.[15] Lack of free and reduced-fee services, however, is only half of the story. The other half of the problem lies with a regulatory

[9] *See* Legal Services Corporation, *The Justice Gap: Executive Summary*, LSC (2022).

[10] *Id.*; *see also* Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 5, 14 (Michael Trebilcock et al. eds., 2012).

[11] Paula Hannaford-Agor et al., *The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR STATE CTS. at iv (2015). *See also* Rhode, *supra* note 3, at 1231 n.23 (citing Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41–43 (2010)).

[12] *See, for example*, Tyler Hubbard et al., *Getting to the Bottom of the Access-to-Justice Gap*, 33 UTAH B.J. 15, 18 (2020) (discussing the low rate of representation in family law and debt collection cases); Report to the Chief Judge of the State of New York, *Task Force to Expand Access to Civ. Legal Servs. in N.Y.* 1 (Nov. 2010) (same).

[13] *See* Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 69 (2018).

[14] The federal government spends a little over one dollar per person per year on providing legal help in civil cases, where free counsel is not guaranteed by the Constitution. Rhode, *supra* note 3, at 1229 n.7.

[15] *See* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 148 (2010); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 7 (2000).

structure that creates a scarcity of legal services – and, in turn, increases the cost of services beyond reach of low- and middle-income clients. There are many jokes about America having too many lawyers, but in fact it would seem we have too few.

3.1.1 *The Bar Exam*

Scarcity of legal help is perpetuated by a regulatory system that erects high barriers to entry. For decades, the legal profession has controlled entry by requiring an extensive education – about two years longer than in similar countries – that can cost over $100,000. The bar has also held firm to a requirement that lawyers pass an exam that is so difficult that, in some states, passage rates do not rise above 50 percent. For many access-to-justice advocates, it is this examination requirement that represents the most serious and least justifiable barrier to entry into a profession that cannot keep up with demand.[16]

Bar exams restrict entry into the profession in obvious ways – by excluding from practice the 40 percent who fail any given administration.[17] But bar exams also restrict professional entry in a less observable way by acting as a deterrent to would-be lawyers who are risk averse and would prefer not to invest in an expensive legal education without knowing that they will ever be able to practice. It also acts as a deterrent to people who cannot afford the several thousands of dollars of test prep classes and to candidates who know they perform badly on tests but would otherwise make good lawyers. A disproportionate number of candidates failing the bar are non-white applicants and those from underprivileged backgrounds.[18] The possibility that the bar exam is racially exclusive is problematic in itself, but its effect on access to justice is particularly troubling because non-white lawyers and those from low- and middle-income backgrounds are especially likely to serve the underserved.[19]

For all these reasons, some access-to-justice advocates have been beating the drum for the elimination of the bar exam as a way of both increasing the supply of lawyers and diversifying that supply. These scholars point to evidence in Wisconsin, where graduates of in-state law schools can become licensed without taking an exam, showing that disciplinary rates between lawyers who entered the

[16] *Cf.* Kyle Rozema, *How Do Occupational Licensing Requirements Affect the Size of the U.S. Legal Profession?* (June 10, 2023), SSRN: https://ssrn.com/abstract=4475434 (last accessed Feb. 24, 2025) (finding that lenient exam standards create an 8 percent increase in labor supply and the strictest exam decreases labor supply by 14 percent).

[17] Many, however, go on to retake the exam and eventually pass. *See* Markovic, *supra* note 2, at 177 (observing that "nearly ninety percent [of law school graduates] passed a bar exam within two years of graduation").

[18] *See id.* at 166.

[19] *Cf.* Am. Bar Ass'n, ABA Profile of the Legal Profession 44 (2020). For a discussion about the need for more data about the racial makeup of the pro bono bar, public defenders, and legal aid attorneys, see Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 12 Calif. L. Rev. Online 1 (2021).

profession with and without taking the bar are nearly identical.[20] Bar exam results are closely correlated with performance in law school, suggesting that the exam, as a predictor of future performance as a lawyer, offers no additional information beyond what is already known about the applicant.

3.1.2 *Unlicensed Practice of Law*

Another feature of legal professional regulation that contributes to the shortage of services is the capacious and vague definition of the "practice of law." The unauthorized practice of law (UPL) is a crime in most states,[21] yet licensing authorities do little to define it other than circularly, as "what lawyers do."[22] A definition must therefore be gleaned from cases finding nonlawyers-lia-ble for performing various tasks – such as telling someone the appropriate form to file or describing the current state of the law. The lack of clarity on what is and is not the practice of law has had a chilling effect on nonlawyers wanting to help someone with a legal issue. One scholar writes, "[a]t a time when we desperately need more people to deliver legal services to individuals and small businesses, the foundational rule of our legal system tells anyone who is not a lawyer: 'Don't you dare lend a hand.'"[23] The prohibition on UPL also deters members of related professions, like accountants and real estate professionals, from walking close to the line of legal practice in ways that make their services less efficient and effective. And sometimes these professionals are far more expert about the legal questions than a general practice lawyer would be.[24]

For low- and middle-income clients, the prohibition on UPL, vaguely defined, is especially unfortunate. Hybrid service models providing one-stop shops for clients seeking help with issues that cut across professional boundaries – like housing, immigration, debt, and personal injury (PI) – are innovative ways to reach clients who are otherwise forced to go without representation. Requiring advisors to have separate licenses in law, medicine, and accounting makes these models more expensive if not impossible. Even other legal professionals such as judges and court

[20] *See, for example*, Markovic, *supra* note 2.

[21] *See* Bruce A. Green, *Why State Courts Should Authorize Nonlawyers to Practice Law*, 91 Fordham L. Rev. 1249, 1251 (2023) (citing Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 8–9 (1981)).

[22] *See* Deborah L. Rhode, The Trouble with Lawyers 41 (2015) ("Others take a circular approach: the practice of law is what lawyers do."); Baxter, *supra* note 2, at 243 ("The UPL statutes effectively treat all elements of service that implicate the law as the '*practice of law*.'").

[23] Baxter, *supra* note 2, at 242.

[24] A study from the United Kingdom showed that some paraprofessionals in certain contexts outperformed lawyers results and client satisfaction. *See* Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 Law & Soc'y Rev. 765, 795 (2003) ("[I]t is specialization, not professional status, which appears to be the best predictor of quality.")

personnel, who may be especially well-positioned to help low-income clients, are forbidden from providing legal advice.[25] And a capacious definition of the practice of law is bad for low-income clients because it would seem to preclude online products that help pro se litigants represent themselves. For example, LegalZoom, a repository of forms and basic advice for clients representing themselves, has been sued in several states as violating UPL statutes. A similar problem is posed by rules that prohibit lawyers from working for nonlawyers and also allowing nonlawyers to share in the profits of their enterprise. Critics say this rule, ABA Model Rule 5.4, hinders promising new models for delivering legal services to needy clients.[26]

3.1.3 *Self-Regulation and the Scarcity of Legal Services*

For access-to-justice advocates, the cause behind these overly strict regulations that limit legal services is clear: state bars acting as self-regulators of the profession.[27] State supreme courts hold the authority to license lawyers, which they delegate either to the state bar association or to a nominal state agency that is, for all intents and purposes, an arm of the state bar association. These regulators sometimes include nonlawyer individuals on the panels, but they are never in the majority. Practice rules, canons of ethics, and entry criteria are promulgated by the state supreme court – in other words, by more lawyers. This regulatory structure has led critics to observe that law is the most intensely self-regulatory of all the professions.[28]

What do lawyers want for their own profession? They want rules that protect the public, both because they care about clients intrinsically and because bad lawyers erode public trust in the profession.[29] High entry barriers and restrictive practice rules protect the public by ensuring that lawyers are qualified and act in their clients' interests. But regulatory red tape is also good for the legal profession for reasons that have nothing to do with public protection. Strict rules protect incumbent lawyers from competition and contribute to the profession's prestige by ensuring that "not just anyone" can provide legal help. The downsides of too much regulation – attorney shortages and high prices for services – are less salient to incumbent professionals who *want* their profession to be exclusive and remunerative. Thus, attorneys picking their own entry barriers and ethics rules have an inherent conflict of interest between what's good for the public and what's good for the profession. In particular, we might expect lawyers regulating themselves to go too far in building

[25] *See* Lauren Sudeall, *The Overreach of Limits on "Legal Advice"*, 131 Yale L.J. Forum 637, 646–47 (2022).
[26] *See* Baxter, *supra* note 2, at 235.
[27] *See id.* at 235.
[28] *See, for example*, Richard Susskind & Daniel Susskind, The Future of the Professions: How Technology Will Transform the Work of Human Experts (2015); Rhode, *supra* note 15, at 145–46.
[29] *See* Green, *supra* note 21, at 164.

barriers to entry and restricting competition. And that, it would seem, is exactly what has happened over more than a century of self-regulation.[30]

Antitrust law, because it prohibits competitors from colluding to suppress competition, theoretically presents a way to curb the regulatory excesses of professional self-regulation.[31] This idea was put on the table by the US Supreme Court in 2015, when it held in *FTC v. North Carolina Board of Dental Examiners*[32] that professional licensing boards must be "actively supervised" by the state to enjoy immunity from antitrust suits. In practice, however, *North Carolina Dental* has not led to widespread antitrust liability for professional boards, primarily because courts have been less-than-exacting in their tests for what qualifies as active supervision. And in law, antitrust liability is an even less useful tool to use against licensing authorities, where courts view bar regulatory activity as *per se* immune from suit. In *Hoover v. Ronwin*, for example, the Supreme Court held that law licensing decisions by state bars, agencies, and disciplinary authorities are actually, at bottom, decisions by that state's supreme court.[33] As such, they are acts of the sovereign and enjoy full antitrust immunity, even if they are created by a self-regulating board or bar that isn't supervised by the supreme court in any meaningful way.

Although antitrust law would see lawyers' interests in public and professional protection as conflicting, attorneys tend to emphasize the ways in which they are aligned. Specifically, they argue that strict entry requirements, strong UPL statutes, and the prohibition on revenue sharing protect the public.[34] In at least one of these categories, they have some evidence to point to: A study has shown that poor performance on the bar exam is correlated with subsequent professional discipline.[35] For the others, defenders of the strict regulation of lawyers make theoretical arguments. They say that only lawyers are qualified to give legal advice, and so strongly enforcing UPL statutes protects the public from uninformed and dangerous advisors. They also argue that bans on revenue sharing between lawyers and nonlawyers improve service quality by preserving attorneys' independent judgment.[36]

But critics of the excesses of self-regulation among lawyers point out that the empirical correlation between bar performance and future discipline is minimal,[37] and that the benefits of strong UPL statutes and prohibitions on revenue sharing

[30] *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation-Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1189 (2003).

[31] *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. PA. L. REV. 1093 (2014).

[32] N. Carolina State Bd. of Dental Examiners v. F.T.C., 574 U.S. 494 (2015).

[33] 466 U.S. 558 (1984). *See also* Bates v. State Bar of Ariz., 433 U.S. 350, 350 (1977) (holding that the "Supreme Court of Arizona wielding the power of the State over the practice of law is not subject to attack under the Sherman Act").

[34] *Cf.* RHODE, *supra* note 15, at 136.

[35] Kyle Rozema, *Does the Bar Exam Protect the Public?* 18 J. EMPIRICAL LEGAL STUD. 801 (2021).

[36] *See, for example*, Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J. FORUM 259, 261 (2022).

[37] *See* Markovic, *supra* note 2, at 202.

may theoretically benefit those who can afford lawyers, but they more concretely and demonstrably harm those who can't.[38] To these critics, attorney self-regulation has resulted in a balance of regulation that can only be justified as protecting the public if we define the public as those with financial means.

3.2 TOO LITTLE DISCIPLINE, TOO LIGHT

The professional regulatory system for lawyers also fails low-income clients in a way that is less familiar than these arguments about regulation gone too far. State licensing authorities justify the heavy hand they take in restricting entry to the profession as protecting the public from lawyers who are either incompetent or unethical, or as is all too common, both. Yet for all the measures these regulators take to prevent *theoretically* bad providers from practicing law, they do very little to remove *actually* bad providers from the profession.

3.2.1 *Procedural Defects of the Disciplinary System*

The disciplinary process goes wrong right from the beginning. The system relies entirely on complaints to initiate an investigation into attorney misconduct. Such a reactive system has serious drawbacks. Clients are unlikely to complain about lawyer misconduct for the simple reason that they do not know misconduct when they see it;[39] indeed the difficulty of knowing whether you are receiving good or bad legal advice is one of the justifications for licensing lawyers in the first place. Even clients who know their lawyer has engaged in misconduct have to feel unhappy about it to complain, leaving out clients whose lawyers have helped them commit fraud or lied to a court on their behalf.[40] Next, a client must know where to go to complain.[41] Not all licensing authorities make this transparent, and some actively discourage the filing of complaints by providing ominous warnings on the online complaint form, such as warning that clients often misunderstand what constitutes acceptable practice of law. Others go further by saying that filing a complaint may expose the complainant to a lawsuit.[42] Finally, complainants must be willing to confront a professional system that is elite, hierarchical, and inherently litigious.

[38] *Cf.* Baxter, *supra* note 2, at 248–50; RHODE, *supra* note 22, at 42.

[39] *See* David Adam Friedman, *Do We Need a Bar Exam . . . for Experienced Lawyers?*, 12 U.C. IRVINE L. REV. 1161, 1173 (2022).

[40] *See* David B. Wilkins, *Who Should Regulate Lawyers?* 105 HARV. L. REV. 799, 823 (1992).

[41] *Cf.* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 856 (2011) (explaining the defects in a complaint-based disciplinary system and observing that personal injury clients, for example, are unlikely to complain about unethical practice).

[42] *See, for example*, *Misconduct Complaints*, VA. ST. BAR ASS'N, https://www.vsb.org/Site/03_Legal-Help/misconduct-claim.aspx (last accessed Feb. 18, 2025) ("The confidentiality requirement will not protect you from a civil lawsuit by a lawyer who believes he or she has been wrongly accused.").

Relying on other lawyers to file complaints against their colleagues is a more promising avenue for catching bad practice in the sense that lawyers are better positioned to know malpractice when they see it and to know that the state bar exists and disciplines lawyers. But relying on tattling within a professional culture of closed ranks has not proved an effective way to detect misconduct, even with a bar-imposed ethical obligation to speak out against offending colleagues.[43]

The complaints a licensing board receives are therefore likely to understate the number of problematic providers and the depth of their misconduct. Yet even on the complaints the boards do receive, they are reluctant to take public disciplinary action. Only about 3 percent of complaints result in any disciplinary action whatsoever.[44] About two-thirds of these actions are private warnings to the attorney with no public record.[45]

Legal discipline, when it does happen, is slow. It is not uncommon for a licensing authority to take years between learning of misconduct and taking action against the attorney's license to practice.[46] This delay is in part because of the extraordinary legal protections that lawyers have built for themselves into the disciplinary process. A license to practice law is a property right, and it cannot be taken away without due process. But in the context of lawyers, the process "due" has come to mean protections beyond those typical in an administrative hearing and approaching (if not exceeding) those afforded criminal defendants.[47]

3.2.2 *Too Many Second Chances*

Thus, the lawyer disciplinary system takes action against too few lawyers, and too late. But when it comes to assuring access to quality lawyering for low-income clients, perhaps the most problematic feature of the legal disciplinary system is that it is too lenient, if inconsistently so,[48] even on providers it does manage to identify for professional discipline. Hard empirical data on the leniency of the legal disciplinary system is difficult to come by, but adding up the information we

[43] *See* Richard L. Abel, Lawyers in the Dock 501 (2008) (observing that some lawyers "remain silent by reason of collegiality").

[44] *See* Am. Bar Ass'n, Survey on Lawyer Discipline Systems 2019 (2019) (finding that in 2019, 2,308 disciplinary actions resulted from 69,716 complaints received).

[45] Levin, *supra* note 6, at 9 ("Private sanctions – the lightest form of discipline – are imposed almost twice as often as any other type of sanction."). *Cf.* Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. Legis. & Pub. Pol'y 485, 541 (2014) (presenting a qualitative empirical study of New York state attorney discipline and lamenting the private nature of board action).

[46] Gillers, *supra* note 45, at 496.

[47] *See* Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia*, 18 Geo. J. Legal Ethics 325, 331 (2005).

[48] For discussions of the inconsistency of discipline, see Rhode, *supra* note 15, at 160 and Levin, *supra* note 6, at 80.

have paints a picture of a system that is driven by attorney rehabilitation, generous with second chances, and more focused on attorney welfare than public protection.

State bars have kept in practice attorneys whose conduct has called into question their honesty and character, key issues when *applying* for a license. For example, bars have kept in practice attorneys who have cheated on their taxes,[49] lied to the government,[50] and been convicted of major federal crimes involving dishonesty.[51] Especially problematic for low-income clients, state bars take a forgiving stance toward neglect of client matters,[52] even when they have ignored repeated complaints from indigent defendants about their appointed counsel's refusal to communicate.[53]

Perhaps these are venial sins for lawyers. Yet even for one of the legal profession's cardinal sins – taking money from a client – second chances abound. For example, the state of Tennessee re-admitted Kevin Teets to the profession after he stole $5,454 from a nonprofit providing legal aid and other services to the homeless, for which he acted as treasurer. It took the disciplinary system four years to impose discipline, during which time Teets continued to practice. The Board of Professional Responsibility said his gambling addiction and remorse justified a light sanction in the form of a reprimand, but the Chancery Court imposed a brief suspension "to protect the integrity of the profession." He was allowed to return to practice in 2020.[54] Similarly, the District of Columbia allowed Harnan Arneja to return to practice after using a settlement earmarked for his client's hospital bills to pay his own bills and business operating expenses. The client, a Salvadoran refugee who spoke no English, received none of the settlement, nor did the hospital where he was treated for his injuries. The hospital later garnished the client's wages to cover the debt. The District of Columbia Court of Appeals

[49] *See* Gillers, *supra* note 45, at 524–27 (collecting cases about lawyers cheating on their taxes). For an example, see *In re* Newman, 821 S.E.2d 689, 690–91 (S.C. 2018) (Supreme Court of South Carolina imposes six-month suspension of license, to apply retroactively, for a respondent who pled guilty to two counts of failing to file tax returns).

[50] For two examples, see Gillers, *supra* note 45, at 521–24. *See also* Green, *supra* note 21, at 178 (describing a disciplinary case against a lawyer who "concealed and falsified information to extract a favorable settlement for a client" and then lied about it to a federal court investigating his misconduct).

[51] *See* Levin, *supra* note 6, at 12–13.

[52] *See, for example*, Frisch, *supra* note 47, at 325–26; ABEL, *supra* note 43 at 66. *See also* People v. Fagan, 423 P.3d 412, 417 (Office of Presiding Disciplinary Judge of the Sp. Ct. of Colo. 2018).

[53] Paul Walwyn (Tenn. Bd. of Pro. Resp., Feb. 23, 2018) (reinstating the license of a lawyer who had been censured or suspended on five previous occasions for neglecting client matters and held in criminal contempt by a judge for missing filing deadlines).

[54] Kevin Teets, BPR #029981 (Tenn. Bd. of Pro. Resp., Aug. 26, 2020), https://s3.amazonaws.com/membercentralcdn/sitedocuments/tnbar/tnbar/0448/2390448.pdf? (last accessed Feb. 13, 2025). For the Chancery Court's decision, see https://docs.tbpr.org/teets-2784-chancery-court-decision.pdf (last accessed Feb. 13, 2025).

allowed Arneja to return to practice after a year, without any showing of rehabilitation or remorse.[55]

Not even sexual abuse of a client is a guarantee of disbarment. For example, Oklahoma attorney Richard Stout was found to have asked one client for sexual photos of herself and sent sexually suggestive texts to another (and demanded that she delete them). Stout coerced a third client into having sex with him by offering her a reduced fee.[56] The client, a criminal defendant, reluctantly agreed because, as she told the board, she "was in a desperate situation." The disciplinary authorities allowed him to return to practice after a three-month suspension.[57]

The case of Ohio attorney Jason Allen Sarver presents an extreme case of licensing authority laxity in sex abuse cases. By the time Sarver's disciplinary case appeared before the licensing authority, Sarver had been criminally charged for repeatedly coercing sex from a defendant he was appointed to represent. The client had agreed to testify against him in exchange for a reduced plea offer for her own criminal charges, a fact that Sarver's disciplinary panel found mitigating. Its order stated: "[N]ot only was there no harm to the client but the client leveraged her relationship with [Sarver] to get a better plea deal." Although the Ohio Supreme Court criticized this reasoning, it adopted the panel's lenient stance by opting for a temporary suspension over disbarment.[58] A recent study of attorney discipline finds that cases like Sarver's and Stout's are not aberrations: "too many attorneys have sexually abused and harassed their clients with relative impunity and returned to the profession with little to no additional oversight, limitations, or safeguards against future abuses."[59]

There is plenty more anecdotal evidence of inappropriately lax disciplinary decisions about lawyer misconduct. And although more empirical research is badly needed, the few systematic studies that have been done on attorney discipline show the same thing. Professor Gillers' study of five years of disciplinary cases from New York revealed a system that was "deficient in design and operation."[60] He showed that its decisions were too light, often focusing on mitigating factors that might explain the behavior but not why it was unlikely to recur and harm clients. Likewise, Professor Michael Frisch studied the disciplinary decisions of the District of Columbia and found that the decisions were too light to protect the public.[61]

[55] *See* Frisch, *supra* note 47, at 345–57.
[56] Gillian R. Chadwick, *Time's Up for Attorney-Client Sexual Violence*, 22 U. Md. L.J. Race Relig. Gender & Class 76, 85 (2022).
[57] *Id.* at 85–86.
[58] *Id.* at 86–90.
[59] *Id.* at 80 ("Indeed, case after case shows that lawyers have been allowed to sexually prey upon particularly vulnerable clients, even children, and continue practicing law after a brief – if any – suspension.").
[60] Gillers, *supra* note 45, at 490.
[61] Frisch, *supra* note 47, at 331.

Gillers' and Frisch's studies use a commonsense definition of "too light" discipline,[62] but we might also want a more rigorous and objective measure of whether attorney discipline is working for the public. Here, the limited information we have about how often disciplined attorneys reappear before the disciplinary authorities suggests that recidivism after bar discipline is high.[63] Somewhere between one-third and half of publicly disciplined attorneys go on to receive a second round of board discipline, and almost a quarter are eventually disbarred.[64] Put another way, a disciplined attorney is *thirty times* more likely to get in trouble with a licensing board in the five-year period following his or her initial discipline and *one-quarter* of all lawyers with a disciplinary history are on their way to losing their license altogether.[65] (Both Teets, who embezzled from the homeless, and Sarver, whose sexual abuse was "leveraged" by his client into a plea deal, went on to reoffend.) Even "capital punishment" for lawyers – disbarment – is temporary in most states and may present an opportunity to reoffend.[66] Rates of repeat discipline

[62] For a discussion of what "too light" might mean in terms of promoting the goals of attorney discipline, see Levin, *supra* note 6.

[63] *See* Levin, *supra* note 8, at 3. To be sure, the rate at which lawyers get repeat discipline is an imperfect proxy for recidivism. An attorney disciplined once is likely to stay on a licensing authority's radar, increasing their chance of getting caught for subsequent misconduct. And when a disciplined attorney does raise a second red flag, boards are almost certainly more likely to react with public discipline.

[64] *See* Kyle Rozema, *Professional Discipline and the Labor Market: Evidence from Lawyers*, forthcoming, J. L. & Econ., at 16 ("Of lawyers who are not disbarred after a first disciplinary action, 48 percent reoffend and 24 percent are eventually disbarred."); Levin, *supra* note 8, at 3 n.10 (finding that in Michigan as much as one-third of disciplined attorneys have a history of prior trouble with the bar). *Cf.* Leslie C. Levin & Susan Saab Forney, Report to the Wisconsin Office of Lawyer Regulation: Analysis of Grievances Filed in Criminal and Family Matters from 2013–2016 (2020) (studying grievances concerning criminal and family matters finding that approximately 40 percent involved lawyers with previous "substantial interaction" with the disciplinary system).

[65] Rozema, *supra* note 64, at 16.

[66] Indeed, Professor Frisch calls disbarment in the District of Columbia "a five-year suspension" with a requirement to prove fitness. Frisch, *supra* note 47, at 344. For more information on the temporary nature of disbarment, see Ronald D. Rotunda & Mary M. Devlin, *Permanent Disbarment: A Market-Oriented Proposal*, 9(1) Prof. Law. 2 (1997). There is widely varying data about how often attorneys attempt and succeed in getting their license back after disbarment. For example, Professor Deborah Rhode notes that half of disbarred attorneys are reinstated. Rhode, *supra* note 15, at 161. And an old study of relicensure in Louisiana found that most lawyers who attempt to get their license back succeed, but of course not everyone tries. *See* Terry Carter, *Bounced from the Bar: Lawyers Who Lose Their Licenses for Fraud or Other Misconduct Can Win Reinstatement, if They Practice in the Right State*, 89 A.B.A. J. 56, 60 (2003) ("The [Louisiana] bar looked at disbarments over a 25-year period, 1975 to 2000, and found that 85 percent of the lawyers who applied for readmission succeeded and that 44 percent of them were disciplined again."). More recently, Kyle Rozema found that the vast majority of lawyers who are disbarred stay out of the profession. Rozema, *supra* note 64, at 19. This finding is consistent with an investigation of the Florida bar. *See* Gary Blankenship, *Few Disbarred Lawyers Ever Seek Readmission*, Fla. Bar News (June 15, 2009) (finding that from 1992 to 2008 only 2 percent successfully reapplied).

are so high that several states have had to implement a "three strikes" rule for its frequent flyers.[67]

3.2.3 *Self-Regulation and a Forgiving System of Discipline*

Again, self-regulation may be to blame for too-light discipline, as has been suggested by many scholars.[68] Why, exactly, might lawyers go easy on their peers? First, and most obviously, lawyers regulating themselves may identify with the accused. Lawyers, knowing that their own practice is far from perfect, may feel a bit of "there-but-for-the-grace-of-God-go-I" in making disciplinary decisions.[69] Here, self-regulating lawyers may apply a sort of "golden rule" and treat their peers as they would want to be treated when facing a wrongful accusation.

Second, lawyers may feel the need to protect their profession, as a general matter, from second-guessing by outside voices, even (or especially) if those voices are clients. Professor Frisch concluded that the disciplinary system evinced an "institutional hostility to both [the lawyers prosecuting disciplinary cases] and victims of lawyer misconduct."[70] Sociologists emphasize the importance of autonomy in establishing professional identity,[71] and governmental incursions on that, in the form of a licensure action, may be viewed as encroachments on the professional domain.

Finally, lawyers regulating themselves may be especially receptive to narratives about their peers' addiction and mental health struggles.[72] Indeed, self-regulating

[67] Levin, *supra* note 8, at 3 ("Indeed, in apparent recognition of this problem, some jurisdictions have instituted a 'three strikes' rule, which provides that if a lawyer receives three reprimands within five years, he will be presented to the court for more serious discipline."); *Rules for Enf't of Law. Conduct r.* 13.6 (Wash. State Ct. Rules 2002) ("A lawyer may be subject to sanction or other remedy under rule 13.1 if the lawyer receives three admonitions within a five year period."); Lisa Siegel, *Lawyer Reprimand Not a Wrist Slap Anymore*, Conn. L. Trib. (Feb. 13, 2006, 12:00 AM) ("The new rule, Practice Book § 2-47(d), requires an attorney who has been disciplined three times within the previous five years to be automatically presented to the Superior Court for discipline.").

[68] *See, for example*, Chadwick, *supra* note 56, at 108 (attributing the bar's reluctance to discipline sexually predatory lawyers to "the self-regulating nature of the legal profession"); Barton, *supra* note 30, at 1208–09 (arguing that, "[f]or obvious reasons, regulation of attorney discipline is a low priority for bar associations" and that "the regulatory preferences of lawyers are well-reflected in the actual processes"); Frisch, *supra* note 47, at 331 (concluding that the New York law disciplinary board "has reached interpretations of the rules of conduct that too often further the parochial and self-interested concerns of the legal profession").

[69] *See* Chadwick, *supra* note 56, at 108 (identifying "overidentification" between lawyers sitting on a disciplinary panel and the accused as a reason for leniency, noting that they likely "relate to attorney-respondents more than victimized clients").

[70] Frisch, *supra* note 47, at 331.

[71] Eliot Freidson, Profession of Medicine: A Study of the Sociology of Applied Knowledge 368 (1970) (observing that in their quest for professional status, "[a]utonomy is the prize sought by virtually all occupational groups").

[72] *See, for example*, Abel, *supra* note 43 at 202–03 (recounting of the case of Lawrence M. Furtzaig who blamed misconduct on mental health); Gillers, *supra* note 45, at 526–28 (describing the case of *In re Levitt*, where a court accepted a lawyer's argument that "two

boards and bars rely heavily on lawyer assistance programs in the disciplinary process, and many states exempt lawyers from the requirement that they report a colleague's misconduct if that colleague is already involved in a state assistance program.[73] Lawyers regulating themselves usually view addiction as a mitigating fact, and addiction was argued by the defense in both the Teets and Stout cases (Teets used the money he stole from the nonprofit to feed his gambling addiction; Stout was evidently addicted to sex). It is unclear, however, that an attorney who has stolen from or sexually abused his clients is a safer lawyer because he did so in the grips of addiction.[74] Disciplinary orders inspired by the idea that an attorney is sick, not unfit, sometimes miss larger issues of ethics and competence. For example, Oklahoma's condition that Stout not accept female clients overlooks the broader – and profound – lack of judgment it takes to trade your services for sex.

Ading it up, scholars of the profession are essentially unanimous in finding the self-regulatory legal disciplinary system lacking.[75] It doesnot detect or punish most wrongdoing at all, and when it does act, it is too little, too late. The system is set up to re-admit dangerous, unethical, and incompetent providers in the profession – the likes of which would probably never clear the bar for admission in the first place.

3.3 THE FALLEN LAWYER

What happens when an inadequate supply of professionals, containing a significant number of providers known to be incompetent or unethical, encounters a market for services where some clients are well-heeled, savvy, and able to choose – and others demonstrably aren't? Little is known for sure about how this labor market works, but all signs point to the conclusion that the profession's most problematic providers end up serving the country's neediest clients.

3.3.1 *Discipline and Small Practice Settings*

Public discipline can have severe consequences for an attorney's career. States vary in their systems of disclosure, but often disciplinary authorities publish their

mental disorders, obsessive-compulsive disorder and obsessive-compulsive personality disorder" caused him to commit a tax crime and then censured the attorney rather than suspending his license); Chadwick, *supra* note 56, at 85–86. ("The court seemed to weigh heavily Stout's claim that sex addiction caused him to harm his clients, even though Stout did not seek help for his alleged addiction until he was facing disciplinary consequences.")

[73] *See* Levin, *supra* note 8, at 5 ("Diversion may include law office management assistance, lawyer assistance programs, counseling, monitoring, and legal education. . . . It appears that as many as 20%–35% of the cases that might otherwise result in discipline are being sent to diversion programs."); Nicholas D. Lawson, *To Be a Good Lawyer, One Has to Be a Healthy Lawyer: Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65 (2021).

[74] Professor Gillers argues that mental health issues, to the extent that they are likely to persist through and after the disciplinary process, may be better thought of as aggravating, not mitigating factors. *See* Gillers, *supra* note 45, at 523, 528.

[75] *See*, *for example*, *id.* at 490; Frisch, *supra* note 47, at 331; Levin, *supra* note 6, at 80.

decisions in some form. The transparency of this system could be better – there is no easy-to-use, reliable, national repository of lawyer information, so employers and clients have to search state-by-state. Some states do not offer searchable databases where one might look up a lawyer's disciplinary history by name or bar number, rather one must sift through years of newsletters and press releases to find an attorney of interest. And public descriptions of the facts underlying discipline can be elliptical, to say the least.[76]

The transparency, such as it is, does seem to have an effect on an attorney's professional prospects, at least with employers like law firms. In a forthcoming study, economist and law professor Kyle Rozema studied the effect of public discipline on the likelihood that a lawyer would separate from his or her law firm.[77] He found that the rate of separation from law firms during an eight-year period was significantly higher for attorneys who received public discipline during that time. The effect was particularly strong for mid-career lawyers at mid-size and large firms, where disciplined lawyers left their firms at rates 81 percent and 76 percent higher than their non-disciplined peers. Relatedly, his study found that firms of more than one lawyer were net exporters of disciplined attorneys. Yet the study also found that discipline does not decrease the likelihood that lawyers are reemployed after separation. While public discipline changes your professional prospects, it does not end them.

Where do these lawyers go? The rest of Professor Rozema's analysis completes the picture of a disciplined lawyer's professional trajectory: Discipline makes it more likely that a lawyer will go on to start a solo practice. In fact, he found that 12 percent of solo practice lawyers with a disciplinary record moved into solo practice *after* discipline. He also found support for the idea that discipline makes it hard to get out of solo practice and join a firm. As for small firms (defined as fewer than ten lawyers), Rozema found that disciplined attorneys tended to cluster together in a subset of firms with a high tolerance for disciplinary records.

These new data enrich the existing statistics showing high rates of discipline among solo and small-firm practitioners (and correspondingly low numbers of disciplined attorneys at large firms). In the years 2000 and 2001, 78 percent of disciplinary decisions against attorneys in California were against solo practitioners, even though they accounted for only 23 percent of the state's attorneys. Similarly, in Texas, lawyers working alone or in firms with fewer than five partners accounted for 59 percent of all lawyers but made up 98 percent of disciplinary cases.[78] Data from the last decades show the same thing.[79]

[76] *See* Mary Pat Gunderson, *Gender and the Language of Judicial Opinion Writing*, 21 Geo. J. Gender & L. 1 (2019).

[77] Rozema, *supra* note 64.

[78] *See, for example*, Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 Hous. L. Rev. 309, 312–14 (2004).

[79] Rozema, *supra* note 64, at 7 ("Solo practitioners make up 30 percent of the legal profession but receive 56 percent of disciplinary measures, and lawyers at large law firms make up 10 percent

How to interpret these statistics has long been disputed, because some of the reasons for high rates of discipline against solo and small-firm attorneys probably have nothing to do with attorney competence.[80] Licensing authorities may hold solo-practice bias, or, relatedly, large firms may have more leverage with the disciplinary authorities in disciplinary investigations. Additionally, clients of large law firms may be less likely to complain about their lawyers because they have the luxury of choice and may decide that firing their incompetent lawyer is punishment enough.[81] On the flip side of this argument, scholars have noted that the clients of solo practitioners, who tend to work in matters of great emotional importance, may be especially likely to complain to the bar.[82]

Of course, the possibility that firm lawyers actually are more competent and ethical cannot be ruled out as a factor contributing to the disparity. By showing that discipline pushes firm lawyers into small-practice settings and locks them in, Professor Rozema's study provides at least modest support for the idea that the bar's

of the profession but receive only 2 percent of disciplinary measures"). For recent data on individual states, see State Bar of California, Report on Disparities in the Discipline System 4–6 (Nov. 14, 2019) (describing lower proportions of complaints against firm-affiliated attorneys, and lower rates of disbarment against firm-affiliated attorneys when complaints were brought); Trisha Rich, *ARCD's Annual Report Sheds Light on Illinois Legal Industry*, CBA Rec. (July/Aug. 2022), at 50 (reporting that 70 percent of disciplined Illinois attorneys were solo practitioners); Karen L. Valihura et al., *Delaware's Access to Justice Commission: Progress of the Civil Committees*, 17 Del. L. Rev. 71, 86 (2018) (reporting that from 2013–15, the "majority" of disciplinary actions in Delaware were against solo practitioners).

[80] There is significant controversy about whether solo and small-firm practitioners actually are less competent and ethical, and, if they are, about whether the economic realities of that practice setting are to blame. Some commentators say that because of high caseloads, solo practitioners must cut ethical corners. *Cf.* Emily Couric, *What Goes Wrong?*, 72 ABA J. 65, 67 (1986) (asserting that "[i]t is the solo and small-firm practitioner who is boxed in by the lethal combination of case overload, insufficient office support, financial pressure, and emotional isolation" and that this leads to unethical practice); Jennifer Gerarda Brown & Liana G. T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 Nev. L.J. 254–55, 282 (2012) (arguing that solo practitioners face economic pressure to maintain high client loads with minimal infrastructural support, causing unintentional harm especially as relates to the duty of communication); *but see* Levin, *supra* note 78, at 312–16 (challenging the assertion that overwork leads to unethical practice for solo practitioners). Others, however, attribute higher rates of discipline in solo and small-firm practice to large firms' enhanced resources, structural advantages, and client sophistication, which prevent complaints from being brought and discipline from being doled out against affiliated attorneys. *See also*, Couric, *supra* note 80, at 68 (arguing that large firms are more likely to handle misconduct internally and that firm clients are unlikely to complain).

[81] *Cf.* Wilkins, *supra* note 40, at 824–29 (describing why corporate clients are unlikely to complain to disciplinary authorities); Nicole Leeper Piquero et al., *Exploring Lawyer Misconduct: An Examination of the Self-Regulation Process*, 37(5) Deviant Behav. 573 (2016).

[82] *See* Levin, *supra* note 78 ([P]ractice specialties commonly found in small law offices produce the most complaints about lawyer conduct because they produce the most acrimonious disputes and charges generally.").

disciplinary focus on small-practice attorneys is rational – it's where the disciplinary system itself puts lawyers more likely to break the rules.[83]

3.3.2 *Solo Practitioners and the Underserved*

The mechanics of this sorting process by which disciplined providers are pushed into solo practice are not hard to imagine, although little is known empirically. Firms making employment decisions are likely to be savvier about researching an attorney's disciplinary history than an individual client hiring a solo practitioner. Indeed, most individual clients probably believe the fact of licensure is enough to ensure a lawyer's minimum competence and ethicality; law firms know better. There is another reason – one perhaps more troubling from an access-to-justice perspective – why the labor market may be tilted toward solo practice for disciplined attorneys. Solo practitioners tend to represent clients and work in areas of legal practice for which there is great unmet demand.

The idea that solo practitioners serve the underserved has been recited at least as far back as 1970, when a student note in the *Yale Law Journal* made the following observation after remarking that the income of a solo practitioner is less than half of that of firm lawyers: "It is this large group of solo practitioners that serves the poor and much of the middle class, and its failure to perform this function effectively has led to renewed interest in the problems of 'marginal practice.'"[84] Today, we know that solo practitioners are a diverse group, and some serve very sophisticated, high-paying clientele. But we also have data that suggest this kind of lawyer is not the modal solo or small-firm practitioner. When the practice of law is subdivided into twenty-three areas of practice, the four with the smallest average-sized firms are criminal, property, PI, and family law, all practice areas with limited access-to-justice and low-income clients. And there is evidence that a significant proportion of disciplined attorneys in these areas moved into them *after* receiving discipline. In contrast, some of the largest firms are those that handle intellectual property and antitrust matters, and these are among the biggest exporters of attorneys with professional discipline on their records.[85] These data are consistent with qualitative empirical work by Leslie Levin, who interviewed forty solo practitioners in the New York City area. She found that the most common areas of practice in her sample

[83] Whether that can account for the full disparity of discipline between solos and large firms is another question altogether. Many forces, including bias and clout, are likely in play. And although Rozema's data support the idea that a disciplined lawyer is thirty times more likely to get discipline within five years than someone without discipline, it is probably not fair to say that disciplined lawyers are thirty times more likely to offend than their counterparts with clean licenses. As discussed above, being "on the radar" of a law licensing board probably makes you more likely to be caught, not just more likely to reoffend.

[84] Note, Legal Ethics and Professionalism, 79 Yale L. J. 1179, 1181 (1970) (citing Jerome E. Carlin, Lawyers on Their Own: The Solo Practitioner in an Urban Setting (1962)).

[85] Rozema, *supra* noted 16, at 44, 52, 64.

were "personal plight" legal needs, including family law, PI, workers' compensation, and trusts and estates,[86] all areas lacking in adequate legal help.

Immigration law – where access to justice is particularly dire – has an extremely high proportion of solo- and small-firm practitioners. A study of immigration courts in New York state revealed that only 37 percent of immigrants secured representation in their removal proceedings, and 90 percent of those clients were represented by a solo or small-firm practitioner.[87] Immigration law may be an especially attractive practice area for attorneys with a disciplinary record not only because of the large unmet demand but also because foreign-born and non-English-speaking clients are especially unlikely to learn about their attorney's past bar discipline. Moreover, the overall quality of the immigration bar, as revealed by a survey of immigration judges, is deplorable.[88] The prevalence of attorneys with disciplinary histories, though still likely to be only a fraction of immigration attorneys, may contribute to this state of affairs.

Another area of practice that may be attractive to disciplined practitioners is PI. Like immigration lawyers, PI attorneys tend to serve unsophisticated, low-income clients who are not repeat players. We have only anecdotal evidence about the rate of discipline among PI lawyers[89] (and even that evidence concerns lawyers who received discipline because of their work in PI, not lawyers who turned to PI after discipline), but we do know they tend to work in solo or small-firm settings.[90] And PI law would seem to represent a financial opportunity to disciplined lawyers looking for clients who won't learn about their history, don't care, or don't feel they have a meaningful choice of attorney.[91]

Some clients literally have no choice at all. Courts will often appoint an attorney to represent a client unable to afford a private lawyer. Courts must do this for indigent criminal defendants in cases where there is no public defender's office, or where an existing public defender's office has a conflict of interest. Courts will also appoint lawyers for children, the mentally ill and incompetent, and respondents facing termination of parental rights. We know very little about the proportion of disciplined attorneys taking court appointments, but even without systematic data about appointed attorneys, we can make an educated guess about whether disciplined lawyers gravitate toward this work.

First, court-appointed lawyers are probably drawn disproportionately from solo and small-firm practice, a group especially likely to contain disciplined providers. Second, we know that courts have difficulty – sometimes extreme difficulty – finding attorneys who will take appointed cases because of the abysmally low

[86] Levin, *supra* note 78, at 312–14.
[87] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1 (2015).
[88] *Id.*
[89] *See* Nora Freeman Engstrom, *Run of the Mill Justice*, 22 Geo. J. Legal Ethics 1485 (2009).
[90] Rozema, *supra* note 16, at 52.
[91] *Cf.* Engstrom, *supra* note 89.

reimbursement rates,[92] implying that courts may need to scrape the bottom of the barrel. We also know that appointed criminal defense attorneys underperform salaried public defenders and private counsel.[93] The difference is particularly stark in capital defense, where defendants represented by an appointed attorney are twice as likely to be sentenced to death than those with private counsel.[94] Perhaps relatedly, several studies have shown that among lawyers whose clients were sent to death row, professional disciplinary rates are extremely high – in Texas, one in four.[95]

3.3.3 *Why It Matters*

If indeed lawyers with a disciplinary record gravitate toward the populations of clients who typically can't afford legal services, is that a problem? After all, the market for legal services is just that, and sorting providers and clients according to professional strength on the one hand, and ability to pay on the other, is inevitable in any market. According to Adam Smith's "invisible hand" theory, it's also efficient. As the saying goes, "you get what you pay for," in legal services and in everything else.[96]

It is true that any market will feature a sorting mechanism by which the most desirable providers go to the highest-paying clients. But professional licensure is supposed to blunt these forces of capitalism by creating a floor below which providers cannot pass, to assure any client, low-income or otherwise, that their lawyer meets a minimum standard. Incompetent lawyers can create significant harm, both to their clients and society at large.[97] The licensure system cannot have

[92] *See generally* Hannah Haksgaard, *Court Appointment Compensation and Rural Access to Justice*, 14 U. St. Thomas J.L. & Pub. Pol'y 88 (2020).

[93] *See* Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 Iowa L. Rev. 2273, 2293–97 (2014).

[94] See Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. Rev. L. & Soc. Change 425, 432, 431 (2004) (finding that "three-quarters of those convicted of capital murder while represented by court-appointed lawyers were sentenced to death, while only about one-third of those represented by private attorneys received the death penalty").

[95] See *id.* at 432 n.35 (collecting studies showing elevated rates of discipline among appointed capital defenders); Diane Jennings et al., *Defense Called Lacking for Death Row Indigents: But System Supporters Say Most Attorneys Effective*, Dallas Morning News (Sept. 10, 2000), at 1A. *But see* Justin A. Hinkley & Matt Mencarini, *Court-Appointed Attorneys Do Little Work, Records Show*, Detroit Free Press (Nov. 3, 2016).

[96] An exception to idea that you get what you pay for is the quality of pro bono, nonprofit, and law school clinic representation, which tends to be higher quality than private representation in at least some contexts. *See* Stacy Caplow et al., *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings*, New York Immigration Representation Study Report 357, 364, 401–02 (2011).

[97] *See* Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 Wash. & Lee L. Rev. 1457, 1474–75 (2017). ("Markets that sustain substandard professionals may drive public costs. Consider the social costs created by incompetent

it both ways. State bars should not be allowed to use ethics and entry rules to fetter the market for legal services in the name of minimum competency, and then abandon their obligation to hold the line against unethical and incompetent providers and allow market forces to shunt these providers toward the clients most harmed by the very scarcity they created in the first place.

There are other reasons to condemn a system that pushes bad apples toward solo and appointed practice. First, the economics of solo practice may contribute to unethical practice, creating a vicious cycle.[98] Serving the underserved, especially as an appointed lawyer, means accepting relatively little money for each case. The most efficient way to make ends meet, therefore, is to run volume through your practice.

The most notable example of high-volume practice serving low-income clients can be found in PI,[99] but the phenomenon of the legal mill is not unique to PI. Similar incentives can be found wherever lawyers are effectively paid by the case, rather than an hourly rate. Many attorneys serving low-income clients price their services by the piece – $1,000 for a driving under the influence (DUI) defense; $595 for a divorce.[100] The same incentives may be present in appointed work, where caps on fees turn nominally hourly rates into a pay-by-the-case arrangement. For example, Tennessee caps the total an attorney appointed in a murder case can bill at $3,000.[101] The most lucrative way to make a living as a court-appointed lawyer is to run it like a settlement mill – to take on as many cases as possible, without performing extensive investigation or investing in much client interaction.[102] The twenty busiest court-appointed lawyers in Nashville, Tennessee, handle nearly 50 percent of the appointed work, each billing the courts, on average, for over two hundred matters a year. And at 10 percent, their rate of public discipline is several multiples of the average.[103] Putting attorneys who have shown themselves willing to

attorneys. Judges and attorneys may spend excessive amounts of time addressing frivolous or plainly meritless arguments, generating crowded dockets, and slowing the delivery of justice generally.")

98 *See* Couric, *supra* note 80.

99 *See* Engstrom, *supra* note 89.

100 "Cost Benefit of Hiring a DUI Lawyer," QuoteWizard (updated Mar. 30, 2022), https://quotewizard.com/auto-insurance/cost-benefit-of-hiring-a-dui-lawyer (last accessed Feb. 13, 2025) (reporting lawyers offering flat-fee DUI defenses for $1,000 to $5,000); "Uncontested Divorce," Tim W. Smith, Attorney at Law, https://tennesseeflatratedivorce.com/practice-areas/uncontested-flat-fee-divorce/ (offering uncontested divorces for $695 with children and $550 without) (last accessed Feb. 13, 2025).

101 Tenn. S. Ct. Rule 13 § 2(d)(5)(B). It is worth noting, however, that judges can increase this cap in extraordinary circumstances. *See id.* at § 2(e).

102 *Cf.* Haksgaard, *supra* note 92 (concluding that appointed attorneys sometimes "take on more than they can handle" and that "similar concerns arise for both prosecutors and defense attorneys hired after a competitive bidding process because the focus is on hiring the lowest bidder, not the best-qualified bidder").

103 Data from Davidson County public records request, provided to author by Dawn Deaner of The Choosing Justice Initiative, on file with author.

cut corners into a practice environment where cutting corners is virtually required by the system is a recipe for recidivism.

Second, solo and appointed practice presents sexually abusive attorneys with opportunities to take advantage of particularly vulnerable clients. Attorney sexual abuse of a client almost invariably involves a power dynamic that goes beyond the typical attorney–client relationship. In every case reviewed for this chapter where an attorney coerced a client into sex, either the attorney was appointed to represent the client (so the client could not walk away from the representation) or the victim faced dire personal consequences (like losing her children or freedom), or both.[104] In the areas of legal practice with the widest access-to-justice gap, a sexually abusive attorney will find the most vulnerable of clients.

The final reason to be worried about a system that pushes problematic providers toward solo and small-firm work is that it severs the troubled lawyer from whatever supervision and accountability he or she may have at a firm. In solo work there is no structured mentoring, case review, hours reporting, or conflict disclosures. Essentially, there is no one to regulate a lawyer's practice but the state bar itself, such as it is. Given the economic pressures, opportunities for abuse, and lack of supervision found outside of firm practice, it is not surprising that nearly half of disciplined lawyers find themselves back before the disciplinary authority that relegated them to solo practice in the first place.

3.4 CONCLUSION

In solving the problem of hypocrisy at the heart of lawyer licensing, the stakes are highest for those who have the least access to justice. As it stands, low- and middle-income clients suffer the most for a disciplinary system that keeps in practice dangerous, predatory, and incompetent lawyers. But single-minded reform aimed at cracking down on the profession's bad apples could also hurt those same clients, either through false positives or by chilling innovative ways of delivering legal services that may end up in the crosshairs of an overactive disciplinary system. Solutions, therefore, should be synthetic.

First, the fetters of legal practice need to be loosened to allow for more access to justice. State bars should promulgate a clear definition of the practice of law that allows non-licensed advisors and other professionals to walk up to the line of legal practice without fear of bar sanction or criminal prosecution. The definition should only include tasks for which an elaborate legal education is required; whatever can be handled competently by a social worker, accountant, paralegal,

[104] See the examples cited in Chadwick, *supra* note 56, at 85–86 and the case of Gerald Moothart, who was disbarred for sexually assaulting or harassing four clients, some of whom he was appointed to represent in high-stakes cases. Iowa Supreme Ct. Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 602, 615–18 (Iowa 2015).

court clerk, or administrative assistant should be excluded. State bars should get out of the business of strictly regulating the corporate form of legal practice and allow for more novel business models to reach clients in need of legal help. Self-help tools, like online forms and algorithmic legal advice, should be allowed to help pro se litigants learn their rights and make their arguments clearly and persuasively. States should build on their progress in streamlining the bar exam across states, and perhaps revisit the need for a bar exam altogether. And states and municipalities should expand access to justice by guaranteeing appointed representation in more civil matters,[105] with a rate-of-pay that would attract not only the providers at the bottom of the barrel. If we are to bridge the access gap in law, the supply of legal services needs to be expanded.

Second, the disciplinary system should be overhauled to ensure that supply is reasonably free of unfit lawyers. I have made a detailed proposal for how to fix the professional disciplinary system for other professions,[106] and its lessons can be imported here. States need to promulgate and adhere to disciplinary rules and sanction guidelines aimed at public protection. Specifically, the rules should make clear that clients cannot consent to sex with their attorneys in the course of representation, misappropriating client funds creates a presumption of disbarment, and client neglect, especially where it results in prejudice, is a serious offense. Addiction and other mental health issues, when resulting in actual client harm, should be seen as aggravating, not mitigating factors, especially in cases of misconduct like exchanging services for sex or stealing money to support an addiction.

The disciplinary system should be more transparent, investigative agencies fully funded and pro active, and complaints easy to file and immune from suit. Information about disciplined lawyers, including anonymized complaint data, should be easily accessible and centralized at the national level. At the same time, it's also important to note that transparency can help only to the degree that someone has a choice of lawyer, which is often not the case for many clients with limited access to justice.

Above all, legal disciplinary authorities need to be more clear-eyed about the likelihood of recidivism and recognize that when a disciplined attorney reoffends,

[105] The movement to secure "Civil Gideon" through an appointment process, although unlikely to succeed as a federal constitutional matter, is already underway at the state and local levels. Take, for example, the guarantee of an attorney for tenants in eviction cases – three states (Connecticut, Maryland, and Washington) have adopted a legislative right to counsel, and many large cities have done the same (New York City, San Francisco, Newark, Philadelphia, Cleveland, Boulder, Baltimore, Seattle, Louisville, Denver, Toledo, Minneapolis, Kansas City, and New Orleans). The Supreme Court of Ohio also found a right to attorney in involuntary adoption cases. *See In the Matter of* Adoption of Y.E.F., 171 N.E.3d 302 (Ohio Dec. 22, 2020). We should demand more data about the pool of lawyers tapped for appointments and their rates of professional discipline and malpractice history as we expand these programs.

[106] Rebecca Haw Allensworth & Cathal T. Gallagher, *Doctors Playing Lawyers*, manuscript on file with the author. *See also* Rebecca Haw Allensworth, The Licensing Racket: How We Decide Who Is Allowed to Work, and Why It Goes Wrong (2025).

his victims are likely to be the rural poor, the mentally ill or incompetent, immigrants, and indigent defendants. To this end, the monopoly of lawyers over the disciplinary process should end, as self-regulation seems a likely contributor to lax professional discipline. Cases should be decided by panels that are not dominated by lawyers – other professionals and members of the community should have a say in defining competence and ethicality in the provision of legal services. This could be achieved by using a pool of hearing officers that are only one-third lawyers, who hear cases in panels reflecting that balance of expertise in law (one-third) and expertise in community and client legal needs (two-thirds). All hearing officers should be paid appropriately for their time and trained in the regulatory imperatives of the legal profession.

None of these ideas is especially radical, and most of them have been made before. Some have been on the table for many years. And yet little in the attorney disciplinary system has changed. On paper, most lawyers can agree that the system should protect the public from incompetence, abuse, and graft. Why, then, have we made little headway toward a fairer and safer system of attorney discipline? Because even the legal profession's most vocal critics – lawyers themselves – are unwilling to give up self-regulation. For the most part, reform proposals have gone to the substance of professional rules and the procedure of their enforcement. These proposals have had little impact without changes to the institutional structure of professional regulation in law. Only once we are prepared to be held accountable to someone other than another lawyer will we confront the fact that the legal licensing system is designed not to meet the country's overall demand for legal services but to meet the needs of the elite, and, above all else, the needs of the profession itself.